

# LANGABEER & TULL, P.S.

*Attorneys at Law*

EMAIL: [info@langabeertull.com](mailto:info@langabeertull.com)

September 17, 2009

Whatcom County Council  
311 Grand Avenue  
Bellingham, WA 98225

Whatcom County Planning Commission  
5280 Northwest Drive  
Bellingham, Washington 98226

**Re: Problems Presented by the County Executive's Recommendation  
Submitted on behalf of Caitac USA Corp.**

Dear Whatcom County Planning Commissioners and Councilmembers:

The Executive's recommendation will increase rural land consumption, commute miles, greenhouse gas emissions, and loss of neighborhood character.

Even a hurried review of the recommendation shows that the Executive's seriously flawed and unrealistic population projection, combined with flawed information and analysis, has produced a severely flawed recommendation.

Consider the following flaws:

1. Reliance on un-supported, and completely unrealistic population projection and allocations;
2. Ensured continued, excessive development in rural and resource areas;
3. Reliance on a DEIS in which there is no consideration of the environmental impacts of the County's certain, continued failure to adequately capture new growth in urban areas;
4. Reliance on continued use of planning strategies that have already been shown to not achieve the purpose and goals of the GMA;
5. Failure to consider fundamental city planning policies;
6. Failure to include any discussion or weighing of GMA goals;

Richard J. Langabeer  
Robert M. Tull  
Dominique Y. Zervas  
Dannon C. Traxler  
Christina A. Farnham

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WHATCOM COUNTY COUNCIL

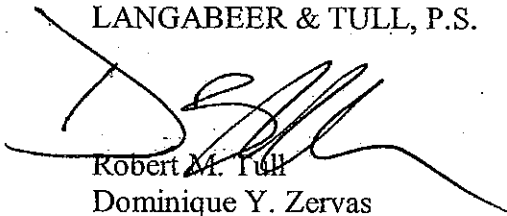
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7. Use of fictional "reserve" population and lands;
8. Continued delay of necessary planning;
9. A grossly inadequate capital facilities plan;
10. Violation of GMA Goal 7's 'predictability' standard;
11. Reliance on the County's underlying land-capacity analysis (LCA), which, erroneously:
  - a. treats aggregated parcel remnants as developable;
  - b. assigns urban densities for the cities;
  - c. does not include consideration of annexability of UGA lands;
  - d. fails to include any consideration of vested rights; and
  - e. is based on different UGA boundaries than those addressed by the respective cities in connection with their proposals.

A more detailed discussion of these clear errors is set out in the attached memorandum.

Very truly yours,

LANGABEER & TULL, P.S.



Robert M. Tull  
Dominique Y. Zervas


DYZ: ao  
Enclosure

# LANGABEER & TULL, P.S.

*Attorneys at Law*

Richard J. Langabeer  
Robert M. Tull  
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## MEMORANDUM

TO: Whatcom County Council, Whatcom County Planning Commission  
FROM: Bob Tull and Dominique Zervas   
DATE: September 17, 2009  
RE: Problems Presented by the County Executive's Recommendation  
Submitted on behalf of Caitac USA Corp.

Adequate urban land supply is a critical tool for reducing rural sprawl and crowding of commuter arterials.

By accurately projecting population, our community can plan and channel growth. Deliberately "under planning" is a guarantee for more dispersion and sprawl.

The following memorandum is a distillation of some of the issues confronting growth management for Whatcom County. It is gratifying to see that the importance of Bellingham accommodating population growth is being recognized. Now is the time for Caitac's land to be finally added to the Bellingham and Whatcom County growth management toolkit. We stand willing and able to help demonstrate the long-term value of using smart growth principles to shape new urban neighborhoods.

### **1. Un-supported population projection and allocations**

According to the record, from the beginning of the UGA-update process the County articulated its express intent to reduce most UGAs.<sup>1</sup> Now, with a simple touch of the Executive's pen to paper, months of fact-accumulation, analysis, and planning by the participants in the process is magically 'disappeared,' and, voilà, reduction of UGAs. How could this be so easily accomplished when all the facts point to a contrary result? All it took is an effortless reduction (calculated to 'prove' no UGA growth is necessary) of the population growth projection.

Some simplified history is helpful.

First, the record shows that there is substantial variation between the population projection and allocations set out by the various contributing entities, which include the following:

- the OFM population projection range;

<sup>1</sup> From very early on we articulated our concern the County's entire focus seemed be on minimizing the UGAs. See, e.g., Caitac's, Petree's and Wiesen's responses to the County's first and second progress reports, dated September 15, 2008, and November 20, 2008, respectively, which are incorporated *in toto* by this reference.

- the population recommendation of Berk & Assoc., the consultant hired by the County (a costly recommendation based on significant research and analysis);
- the recommendation of the Technical Advisory Group (TAG – comprised of the very experienced planners of the various jurisdictions who have a close-up view of their respective population growth and accommodation patterns), which is comparable to that of the County’s consultant;
- the significantly lower “Pike number” of the Growth Management Coordinating Council (comprised of city and County elected officials); and finally
- the Executive’s recommended population projection.

The record also makes clear that some of the population projections and allocations have some basis in investigation, analysis or history. However, the record also shows that the “Pike number”<sup>2</sup> and now, clearly, the Executive projection, were plucked from thin air.

In any event, during this time, the County was also preparing the Draft EIS. The purpose of the resulting EIS is to determine the potential environmental impacts of planning actions, and so must be based on an analysis of the County’s land capacity,, including the cities and UGAs. Despite the fact that there was no completed actual land capacity analysis on which to base the DEIS, the County forged ahead, demanding the cities’ and public’s responses to the Draft EIS, despite the lack of an underlying land-capacity analysis. (The DEIS has other, significant errors, more of which are discussed below.)

Even as the County presented the Draft EIS, County staff continued to work on its Land Capacity Analysis (LCA), which was to determine the capacity of the various UGAs to capture the next twenty years of population growth. The first iteration of this analysis was provided in limited form to the cities and public in spring this year – “in limited form” because the LCA submitted by the County allowed a view of the methodology used, but barred examination of the data input into that methodology. Despite these limitations, the County invited the cities to ‘ground-truth’ the LCA using their own data, and to respond with their results along with their own population allocation and UGA proposals.

After receiving responses (that is, significant objections) from the cities and members of the public, the County made some important adjustments to the LCA, and provided the cities and public with this second iteration of the LCA (LCA II) (which also prevented review of the data inputs). LCA II made clear that most UGAs needed to either remain the same or be expanded.

At this point, the County deferred to the Executive to make a recommendation as to the population projection and allocations to be considered in the context of LCA II. Because all the facts in hand made clear that UGA expansion was necessary, the facts had to be changed. And the only fact that could be changed without constituting a prima facie GMA violation was the population number. Accordingly, without analysis or other apparent basis, the Executive now recommends a change to the population number. In light of all the work that was done, facts reviewed and analyzed, which all resulted in an outcome contrary to the County’s clearly

<sup>2</sup> See record of October 2008 GMCC meeting.

articulated, initial intent—to reduce the size of most UGAs—it is clear that this population projection is based on nothing but that initially-articulated goal. This will harm Whatcom County and its citizens.

In addition to being a completely fictional number, apparently selected only to achieve a politically-based,<sup>3</sup> no-UGA-expansion outcome, there has been absolutely no analysis of the potential environmental impacts of planning only for such a small growth projection. (This lack of analysis may be due to the fact that neither the County staff nor the County's consultants had any inkling at the time they were working on the Draft EIS that such a low population projection would be required to achieve the County's desired outcome.)

SEPA requires that a Draft EIS include at least one no-action alternative, and then one or more additional alternatives to allow comparison between the no-action alternative and other possible planning strategies. In the present situation, however the Draft EIS actually examines only one population- projection alternative. Thus, and by definition, because there is only one projection alternative, there can be no comparison between alternatives.

By way of explanation, and as explained in detail in our letter dated June 22, 2009, submitted as a comment on the Draft EIS, the County's Draft EIS purports to include consideration of the four alternatives:

1. the No Action Current Comprehensive Plan Alternative, which assumes that the overall growth projection through 2029 will be the same as the overall growth projection through 2022, thus reducing the *rate of growth* by extending the growth period for an additional seven years.
2. No Action Trends Alternative, which assumes that the historic growth rate will continue, but then greatly reduces *overall growth* by placing an artificial cap (that does not appear to reflect any "historic pattern") on the growth number.
3. Alternatives X and Y are purportedly devised to measure the differences between impacts if growth is Bellingham-centric, or if population growth is spread out between the smaller cities. However, both the X and Y scenarios examine the same growth number: the first assumes that *planned* (hoped for) densities will be achieved, while the latter assumes that *historic* (actual) densities will be achieved.

As explained, however, because the DEIS' purported '*no action alternatives*' require the action of either (a) changing the rate of growth, or (b) artificially capping growth, and, again by definition, they are not 'no action' alternatives, and so one of central mandatory elements of the DEIS is missing.

(Furthermore, these purported 'no action' alternatives cannot possibly be deemed true 'action' alternatives, because the population projections on which they rely have no hope of passing the

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<sup>3</sup> See, e.g., City of Bellingham Power Point, presented to the joint Whatcom County Planning Commission and Council, June 16, 2009, at 5 (stating: "The County's latest LCA numbers do not support reducing the UGA and our Mayor and City Council are on record as being opposed to adding land to the UGA at this time.").

'giggle test', in that one would have to assume all future growth would occur at a rate less than 1% per year.)

In addition to failing to include a 'no-action' alternative to which planning scenarios can be compared, because both X and Y examine the same population number (258,448), without providing another bookend that would allow consideration of other population growth numbers between, there is no possibility of examining impacts of any other number, including the "Executive Number." And, because the possible impacts of selecting such a projection have not been examined as required by SEPA, this projection cannot be used for purposes of the current process.

Based on the manner in which the Executive Projection is presented in the Recommendation, we presume that the Executive and planning staff understand that it is an indefensible number. As can be seen, in the Executive's memo, "The county-wide growth forecast recommended by the consultants is a reasonable forecast at a county-wide level (251,490). . . . The growth forecast recommendation is based on the consultant and staff recommendations for 2029 (251,490) with adjustments to the Growth Management Coordination Council allocations to urban and rural areas."<sup>4</sup>

Then, despite this clear indicator that the Executive Projection recommendation is to plan for population growth of 251,490, only two pages further on, there are charts that show that all 'planning' discussion contained in the remainder of the document is based on population growth of only 245,973—a difference of 5,517 people, which just happens to be a difference sufficient to bring us full circle and perfectly (albeit inexplicably) back to a scenario of significant, overall, UGA reduction.

It appears the Executive attempts to explain or cover this magic/'sleight of hand' by offering "reserve" population and lands, or some system of monitoring. However, as explained in greater detail below, according to the GMA, the County must ensure its UGAs are sized, at the time of its 10-year update (*now*), to accommodate its projected 20-year growth. This means that 'reserves' may be used *only* to accommodate growth expected to occur *beyond* the 20-year planning period, and as part of a program to conduct longer term planning.

In no event, however, can 20-year population growth, or the land needed to accommodate that 20-year growth, be placed in a "reserve." Any representation to the contrary is merely a 'red herring', perhaps offered to the cities and their vocal planners in the hopes that the cities and planners will somehow believe they are actually being allocated the additional population they know they must be planning for, along with the land area need to accommodate that population.

In addition to being a meaningless 'red herring,' any attempt to use the proposed "reserve" land and population strategy as part of the 20-year planning process would violate the GMA requirement of determining *now*, at the time of the 10-year UGA review and revision process, how and where the 20-year population growth will be accommodated.

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<sup>4</sup> Urban Growth Area Review, Whatcom 2031, County Executive Recommendation at 3 (Aug. 17, 2009).

Not only would such an attempt violate the GMA, but to do so would violate the June 5, 2008, Stipulation,<sup>5</sup> and the Board's July 2, 2008,<sup>6</sup> and March 20, 2008, Orders,<sup>7</sup> which clearly state that the County must complete its UGA review and update process by or before December 1, 2009. The Stipulation and Orders make clear that the planning for the 20-year planning period must be done **now**: it makes no allowance for the County to plan for a little now, and then make a 'plan' to deal with some population growth and land necessary to accommodate that population later by merely calling the portion not planned for, a "reserve."

## **2. The Executive's Recommendation Ensures Continued Excessive Development in Rural and Resource Areas**

Just as the County has publicly acknowledged, it is generally known that there is excessive residential development occurring in the County's rural and resource areas, and that such level of consumption of that land is undesirable. At present, County data shows that the consumption of rural and resource land for residential uses has increased by over 250% of the amount projected in the County's 2004 Comprehensive Plan.

Evidence indicates that when the amount of single-family residential land-supply in urban areas is reduced, the amount of rural land development increases commensurately, and vice versa; that is when the urban developable-land supply increases, the amount of development in rural lands is reduced. Therefore, by further reducing the amount of land supply that will be available over the planning period, the County ensures continued increase of the consumption of rural and resource land.

The Executive's recommendation also ensures aggravation of already existing problems, which include the following:

- increase in traffic congestion, vehicle-miles travelled, and greenhouse gas emissions as new population must travel greater distances to jobs, recreation, and shopping opportunities in the urban areas, particularly Bellingham, which the County expressly acknowledges is the County's center;
- increase in non-compatible land uses (residences next to odor-, dust-, and noise-producing resource facilities); and
- increase in road and other public service/infrastructure costs.

Despite clear state legislative direction to the contrary, the present Recommendation ensures that rural- and resource-land consumption rates will continue to escalate, along with the inherently connected VMT/GHG, traffic congestion, and public service/infrastructure cost increases.

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<sup>5</sup> *Petree, et al. v. Whatcom County, et al.*, WWGMHB Case No. 08-2-0021c, Stipulation (June 5, 2009).

<sup>6</sup> *Petree, et al. v. Whatcom County, et al.*, WWGMHB Case No. 08-2-0021c, Order Finding Noncompliance (July 2, 2008).

<sup>7</sup> *Petree, et al. v. Whatcom County, et al.*, WWGMHB Case No. 08-2-0021c, Order Granting Motion for Extension of Compliance Period (July 2, 2008)

- a. **Although the Kremen/Stalheim proposal presents a significant risk that population will not be adequately captured in urban areas, the DEIS does not examine the potential impacts of such a failure**

The County has completely failed to analyze the likely environmental impacts of its proposal (or, 'getting it wrong'), in clear violation of SEPA requirements.

The County essentially acknowledges, via its population and land "reserve" proposal, that it is not presently planning for growth it anticipates will occur over the 20-year planning period. Such a failure to plan must include examination of the likely environmental impacts if growth continues to settle in the rural areas of the County at the same historical rate, or at an even greater rate.

The County recognizes that it must, in the Environmental Impact Statement, identify, analyze, and describe the potential environmental impacts of proposed planning alternatives.

State law requires that alternatives examined must include, at a minimum, one "no-action" alternative, and one proposed 'action' alternative. The reasoning behind the requirement of including a "no-action" alternative is to provide a baseline to compare the environmental impacts of doing nothing—i.e., maintaining the status quo as to population growth rates and numbers, and UGA boundaries as is—with at least one other, different, alternative.

As set out in Part 1. above, what the County's Draft EIS refers to as "no action" alternatives include *changes* to the population growth numbers and rates, and, therefore, do not constitute the minimum "no-action" alternative required by state law.

Although it is not a substitute for actual analysis conducted in connection in a current DEIS, we can look for guidance to the "no action" alternative contained in the 2004 Whatcom County and the City of Bellingham EIS,<sup>8</sup> which appears to be included by reference in the DEIS prepared in connection with the current process.

According to this 2004 EIS, such continued growth in the rural areas was clearly identified as unacceptably harmful to the environment, and was, accordingly, not considered as a possible alternative.

In contrast, in the present situation, we are faced with even greater population growth numbers than those examined under the 2004 EIS (due to the additional time frame under review), but no additional urban expansion areas to accommodate that additional growth. To the contrary, the Executive proposes to now reduce Bellingham's UGA! This would

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<sup>8</sup> The 2004 EIS was completed in connection with Bellingham's Comprehensive Plan and Urban Fringe Subarea Plan updates.

indicate that the environmental harms identified already in the 2004 EIS, “no action” alternative would likely be even worse than identified in 2004, and yet the present DEIS does not address those harms at all.

**b. The County cannot continue to use planning strategies that have previously been shown to not achieve the purpose and goals of the GMA**

As explained in section above, the 2004 EIS made clear that a “no action” alternative was not a viable alternative because it would exacerbate on-going environmental harms. Nonetheless, the County declined to meaningfully expand Bellingham’s UGA in connection with that process.

Now, with an additional seven (or nine, if using the 2031 population-growth numbers) years growth to be planning for, the County proposes to *reduce* Bellingham’s UGA to accommodate more growth than was being considered harmful to rural areas if not captured in connection with the 2004 EIS.

However, the Washington State Court of Appeals has made clear that planning jurisdictions cannot ignore reality (simply ignoring the facts is not a valid planning strategy). In *Kitsap County v. Central Puget Sound Growth Management Hearings Board*, the court of appeals ruled that if reality shows that the steps a jurisdiction has taken in the past to encourage growth in urban areas and to avoid sprawl in rural areas are achieving the opposite result, the jurisdiction cannot continue with the same strategies and simply wish the results will change. Instead, the jurisdiction must change strategies.<sup>9</sup>

In the present situation, the Executive’s recommendation seeks to constrict the availability of urban land based on some theory that by making less land available (and therefore, less capacity for single-family homes), people will somehow be convinced to live in constricted and more costly, housing environments. Simple logic tells us such reasoning is non-sensical, and the sole data available to date makes clear the opposite is true.

Local data makes clear that during the initial periods of GMA planning, when the County ensured the cities had sufficient land to accommodate their population growth in urban areas, residential growth in the rural areas saw a significant drop. Then, as time progressed and the urban land supply was consumed, and the County failed to ensure that the cities maintained an adequate land supply, we began to see alarming and ever increasing consumption of rural lands as the population spilled out of the urban areas,

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<sup>9</sup> *Kitsap County v. CPSGMHB*, 138 Wash. App. 863, 158 P.3d 638 (2007) (as clarified on denial of reconsideration, Jul. 31, 2007). Although Kitsap is a ‘developable lands’ county, the facts are sufficiently analogous to apply the court’s holding to the present situation.

going further and further into the rural land areas, as they sought affordable single-family housing opportunities.

Even if the County were to work with the cities to provide additional incentive to shift growth to the cities, as noted by the Urban Land Institute in its Working Paper on Land Use Policy and Practice, “. . . infill strategies, even if universally accepted, cannot happen fast enough or in great enough numbers to make much of a difference by 2025.”<sup>10</sup>

Now, despite clear evidence that the County theory of ‘urban constriction’ is not a workable strategy for GMA planning, the County proposes to do more of the same by failing to plan to accommodate the most likely, actual population growth, and to instead create these fictitious population and land “reserves.”

### **3. The Executive’s Recommendation Fails to Include Mandated GMA Elements and Consider GMA Goals**

As you are likely aware, planning actions must include certain mandatory elements, and must be guided by the 13 goals of the GMA. The Executive’s recommendation, however, fails to consider these goals and mandates.

For example, the Executive’s recommendation gives no indication of how it will “Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock”, or “Protect the environment and enhance the state’s high quality of life, including air and water quality, and the availability of water,”) or, “Encourage economic development . . . promote economic opportunity for all citizens of this state, especially for unemployed and for disadvantaged persons, promote the retention and expansion of existing businesses and recruitment of new businesses . . . .”<sup>11</sup> Nor does is there a housing element that ensures “the vitality and character of established residential neighborhoods”, a mix of housing types, and adequate provisions for existing and projected needs of all economic segments of the community”,<sup>12</sup> etc.

The following provides additional detail of these failures.

#### **a. The County Executive’s Recommendation does not include an adequate Capital Facilities Plan**

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<sup>10</sup> Urban Land Institute, Working Paper on Land Use Policy and Practice, Greenfield Development Without Sprawl: The Role of Planned Communities (ULI Paper), 2004, at 1.

<sup>11</sup> See RCW 36.70A.020

<sup>12</sup> See RCW 36.70A.070.

According to the GMA, at the same time they set UGA boundaries, jurisdictions must have capital facilities plans that show how they will serve projected growth.<sup>13</sup> Although some of the cities in Whatcom County have explained that they have or will have the services needed to serve the projected population, and described what their capital facilities plans will show, most or all plans are not available. This lack applies to the County's UGAs as well. The Kremen/Stalheim proposal attachments indicate the County has completed some work in connection with capital facilities planning, but that the County's work is not yet complete. The County's UGA update is not compliant without a complete and necessary Capital Facilities Plan.

(An irony here is that, even though the County has not completed its own capital facilities plans, the County points to some of the cities' lack of completed plans as the reason for denying the cities the UGAs and population allocations they requested!)

**b. The County Executive's Recommendation provides no indication of how housing demands will be met.**

Neither the County's proposal, the LCA nor the DEIS include consideration of what will be the populations' demands for housing during the planning period.

Using Bellingham as an example, the County's proposal would cause Bellingham's existing single-/multi-family housing ratio to shift to even greater reliance on multi-family housing. We are not aware, however, of any study that shows that home buyers will start exhibiting a preference for multi-family housing. To the contrary, evidence suggests that the lack of single-family housing options in Bellingham (and other cities) is a significant cause of the high rate of housing growth in the rural areas, and that Bellingham needs to increase, rather than decrease, its supply of single-family housing opportunities.

According to research conducted by the Urban Land Institute, successful infill can only be achieved where there is sufficient land to accommodate a diverse mix of housing types, sizes and prices. Thus, a community that can only accommodate growth that is willing to reside in multi-family housing will not be capable of capturing the growth it otherwise could. This excess growth will move on to the areas that provide the closest access to its jobs, recreation, shopping, and medical care. Because the County's center for jobs, medical care, recreation and shopping is Bellingham, and the areas that are closest and that can provide the housing types that are missing in Bellingham are in the County's rural areas, that un-captured population will continue to migrate to the available rural lands.

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<sup>13</sup> RCW 36.70A.070. See also KCRP, et al. v. Kitsap County, CPSGMHB Case No. 06-3-0007, Final Decision and Order (Jul. 26, 2006) (holding county non-compliant where Capital Facilities Element lacked plan to accommodate 20-years' growth).

c. **The Recommendation violates GMA Goal 7's "Predictability" Standard**

Another fundamental goal for which the Executive's Recommendation contains no consideration is Goal 7, which articulates the GMA's "predictability" standard.

As held by the Central Board, "[predictability is] an underpinning of GMA planning."<sup>14</sup> The Central Board has further explained:

Planning is about expanding the realm of predictability. Part of the predictability that the GMA provides to citizens is through the future land use map and zoning designations for different parts of the City. These designations delineate lands into different land use categories with different types of land uses allowed . . . the GMA provides all citizens predictability in the location and type of future growth and development that will be accommodated.<sup>15</sup>

The Board went a step further, explaining that at least one difference between planning that provides for predictability and planning that does not, is that "[a] 'predictable' process would **not be based on the luck of the draw.**"<sup>16</sup> (Emphasis in original.)

In the present situation, we appear to be faced only with such "luck of the draw."

- Without a word of explanation, the Executive recommends a population projection that is significantly lower than the "reasonable" projection recommended by its own consultant;
- Urban growth areas that have been a part of cities population accommodation and related capital facilities planning for many year are 'disappeared;'
- Five Year Review Areas are 'disappeared;' and
- "Reserve" lands (and populations!) appear

As to the proposed "Reserve" lands and population, the issue of predictability arises largely from the temporal and locational unknowns connected with them.

The Boards agree that in order to comply with the GMA "predictability" standard, such a strategy must include objective and concrete standards, and specific criteria.<sup>17</sup>

<sup>14</sup> *Fuhrman v. City of Bothell*, CPSGMHB Case No 05-3-0025c, Final Decision and Order (Aug. 29, 2005) at 21.

<sup>15</sup> *Olsen, et al., v. City of Kenmore*, WWGMHB Case No. 03-3-0003, Final Decision and Order (June 30, 2003), at 5 (discussing the city's permit-extension process under Goal 7).

<sup>16</sup> *Camwest v. of King and Snohomish Counties v. City of Sammamish*, CPSGMHB Case No. 05-3-0041, Final Decision and Order (Feb. 21, 2006), at 25 (emphasis in original).

<sup>17</sup> *FOSC, et al. v. Skagit County*, WWGMHB Case No. 96-2-0025, Final Decision and Order (Jan. 03, 1997), at 2 (noting the GMA standard of predictability, and holding: "The purpose of a performance standard is to have an objective standard against which to compare an as yet unclassified object. Such a concrete standard provides predictability. If the County's definition of FWHCA is its performance standard, then that definition should provide standards against which to compare the area under review. A project proponent, the public and county officials

However, in the present situation, although the “reserve” areas are identified on maps, there does not appear to be any objective or concrete standards, specific criteria, or even a policy proposed to ensure that (presently un-planned for) additional growth during or beyond the 20-year planning period will definitely be directed to those areas.<sup>18</sup> Without such a commitment, there can be no predictability for landowners.

Likewise, there are no objective or concrete standards, or specific criteria to identify under what circumstances a “reserve” population might be added to a particular cities’ population allocation. Without such information, there can be no predictability for the cities or their citizens, or service providers.

Even if there were policies stating that future growth would definitely go to those areas, the County’s history indicates it would easily deny that policy. Previously, in the case of the Five Year Review Areas, where there were specific policies that identified those areas for review within five years of their specific identification, and provided for priority UGA inclusion, the County asserted the time frame for review did not actually apply, and then asserted that locational and temporal policies related to the Five Year Review Areas were not binding. The Board agreed.

In the present situation, without a interlocal agreements regarding the “reserve” areas, that include specific, objective criteria; and a set population projection and allocation, or a set time at which the population might be included in a particular jurisdiction’s planning, or even specific criteria to identify when would be the time to include the additional population, there is no way for service providers or owner to actually plan for the proposed “reserve” areas or population.

As a result, the Executive’s proposed “reserves” comply only with the “luck of the draw standard,” rather than the GMA’s “predictability” standard.

#### **4. The County’s Reserve Proposals Are Merely Proposed To Appease The Cities Whose Requests For Additional Population And Employment Allocation And UGA Expansion Have Been Ignored**

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should be able to examine the condition of the area under review and observe whether the area is one listed in the definitions.”); *Cf. Abenroth, et al. v. Skagit County*, WWGMHB Case No. 97-2-0060c, Compliance Hearing Order (Sept. 23, 1998), at 3 (holding county comprehensive plan invalid where “Provision of new ‘floating’ C/I development by way of a simple rezone . . . contains no specific criteria to provide predictability of future land use and preclude inappropriate conversion.”)

<sup>18</sup> The current “Proposed Urban Reserve Definition and Criteria” is vague and provides only subjective without even identifying who would determine whether the “criteria” had been met. For example, the document states: “Cities must demonstrate a capacity to serve existing land uses within land areas being considered for transfer from the Urban Reserve to the Urban Growth Area.” Who will determine the sufficiency of the city’s demonstration? At a minimum, the County’s “reserve” proposal must include a provision requiring the inclusion of an Interlocal Agreement and the time a “reserve” area is identified.

It appears the cities are beginning to understand that the County's proposed 'reserve' land areas and population numbers and allocations are offered merely to sooth and deflect the cities' frustration with the County's UGA and population determinations.

**a. Urban "reserves"**

In apparent response to cities' requests for a population projection and allocations that exceed levels the County is willing to select, the County proposes placing certain, identified land areas in 'reserve' status. Although the areas are specifically identified on maps, other issues related to their status remain un-explained. For example, the County set out some criteria for determining when circumstances would be ripe to include reserve areas, but the substance of the criteria is vague and there is no apparent procedure to indicate who determines whether the criteria is met.

For example, Although other jurisdictions have relied on 'reserve' areas for growth *beyond* the 20-year planning period, the County does not indicate what period of growth the reserves are intended to serve. The County, however, by offering the reserves in the form of appeasement to the cities, indicates the reserves are for use during the 20-year planning period. Use of reserves for the 20-year planning period must be rejected. The GMA requires counties to set specific UGA boundaries to accommodate growth projected to occur over the 20-year planning period. It does not allow irresolute, noncommittal and with contingencies, theoretical areas where growth might go at some time in the future as provided by the County's "reserve" proposal.

**b. Population "reserves"**

At present, the County appears to be proposing two types of population reserves. The first is for cities other than Bellingham. According to this proposal the County has set aside a certain amount of population that a city can 'have' if the particular city in is able to fulfill certain, presently unclear, criteria.

The second type of population reserve is for the City of Bellingham. Under this second scenario,

- the County states that, as the commercial/industrial/jobs/services center of the County, Bellingham must accept *more* population than Bellingham requested,
- the County then allocates *less* population to Bellingham than Bellingham requested, and, then,
- the County places an amount of population in reserve status, which, when added to the amount the County has allocated to Bellingham, is *more* than Bellingham requested.

While, admittedly, counties have the jurisdiction to allocate growth to cities, the County's method of doing so in the present situation is unclear as is its factual or

policy premises. This is likely an area that warrants clarification and/or some showing of its work.<sup>19</sup>

Additionally, we are so far unable to locate an example of other jurisdictions that have placed population in reserve status. One reason for such a lack may be that the GMA requires jurisdictions to select a population growth projection that reflects the growth projected to occur over the 20-year planning period. As is the case with the GMA requirement to set UGA boundaries, the GMA does not allow jurisdictions to sort of identify, noncommittally or with contingencies, theoretical population-growth projections.

Another oddity in the case of Bellingham, is that the County has granted Bellingham two additional years to determine how Bellingham will accommodate, not only the base population allocated to it, but also the allocated reserve population. Although every other city indicated it needed additional time to determine its boundaries and how it could best accommodate population, the County denied the requests.

To repeat, this delay granted to the City of Bellingham is a clear violation of the June 5, 2008, Stipulation and the Boards' July 2, 2008, and March 30, 2009 Orders, which state, in no uncertain terms, that by or before December 1, 2009, Whatcom County must review and revise its UGAs to ensure they can, at the time of adoption, accommodate the population and employment growth projected to occur through 2029. A decision, even if made by December 1, 2009, to continue to postpone UGA revision questions for two or more years does not comply with the Board's Order to complete UGA revisions by December 1, 2009..

##### **5. According to the County's proposal, some key work can simply be delayed**

The Executive's proposal explains that some work will be delayed until the 2011 comprehensive plan update process. One example, as explained above, is the population allocation and UGA boundary for the City of Bellingham, which, in addition to violating the GMA, violates the Stipulation, and Orders in this matter.

Another tool the County and Bellingham propose to use, in addition to the fictional "reserves", is that of "monitoring." Bellingham and the County justify the use of low population numbers and allocations, and reduced land-supply to serve that population over the planning period, based on an assertion that regular monitoring will allow adjustments to be made if population growth or urban-land supply are difference than being proposed. Any evidence monitoring shows that UGA expansion is needed, however, will be useless if necessary changes are not made.

Already, other evidence, such as the excessive consumption of land, shows there already is not sufficient urban land. But even that clear evidence has not caused the County to act to expand

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<sup>19</sup> The GMA requires that when setting UGAs, planning jurisdictions must 'show their work.'

the urban land supply, and there is nothing to indicate that any results provided by such proposed monitoring would cause any positive action.

Additionally, the two jurisdictions have talked about monitoring for at least the past three to four years; but Bellingham actively removed any mention of monitoring when it updated its Comprehensive Plan in 2006, and despite all their discussion, neither jurisdiction has taken any action to put any sort of monitoring system in place. Notably, the County has previously identified its review of plats granted and some other County actions as 'monitoring.' At the same, though, it has acknowledged that the numbers presented by such review are incomplete and unreliable.

**6. The Recommendation Relies on the County's LCA, Which Contains Numerous, Significant Errors**

Although the cities (including Bellingham) generally state in their proposals that they support the methodology used by the County in its LCA, they do not agree with the data input into that methodology. Inputs with which some or all cities disagree include the following:

**a. The LCA treats aggregated parcel remnants as developable land**

As explained by the cities, the County's LCA aggregates parcel remnants, then treats the aggregated acreage totals as though the remnants have *actually* been aggregated and can be used to accommodate housing. As noted by the City of Bellingham, this treatment results in artificially and erroneously inflated land-capacity figures. In fact, some calculations indicate that this artificial land-capacity inflation may be near 25%!

**b. The County's LCA assigns/directs urban densities for the cities**

The cities also explain that the County erroneously assigns or directs the cities to achieve a minimum density of approximately 4 dwelling units per acre in all areas of the cities, despite the fact that some cities, including their UGAs, have areas specifically designated and zoned to accommodate less than 4 du/a.

By way of example, the City of Bellingham includes the Birchwood and Edgemoor neighborhoods, which are zoned for less than 4 du/a, and include many large lots. There is nothing to indicate the neighborhoods will agree to, or the City will force, the sort of downzone that would have to occur to fit the County's artificial calculation. Additionally, Bellingham's UGA includes several areas that the County itself zoned at less than 4 du/a.

In any event, as pointed out by the cities, any decision to increase densities in its neighborhoods is for the cities, and not the County to make. Furthermore, the

Supreme Court has made clear that in some situations lower densities may be appropriate within an urban area.<sup>20</sup>

**c. The County's LCA does not include consideration of annexability of lands within the cities**

According to CTED a land-capacity analysis should exclude from the developable, UGA land supply calculation all land that will not be annexed during the 20-year planning period. The County does not appear to have included any consideration of annexability in its LCA.

This issue is particularly important in light of recent Bellingham decisions to not annex areas that have been included in its UGA for many years. Realism must have a greater role in determining "accommodation" capacity.

**d. The LCA fails to include any consideration of vested lots**

The County acknowledges that there are presently sufficient legal lots (vested lots) in the rural and resource areas of the County to accommodate all County growth projected to occur (under any scenario) over the planning period.

We also know that there must be sufficient urban land capacity so that cities can adequately compete with this plentiful rural land supply, to ensure that as much population as possible can be captured by the urban centers. A sufficient urban land capacity must necessarily include at least what can be offered by the existing, vested rural parcels; that is, a plentiful housing supply that allows choices between housing types.

However, the LCA fails to consider the impact of, and connection between, the great number of vested lots in the rural County and the lack of adequate urban land capacity.

**e. The LCA is based on UGAS that are different than those addressed by the respective cities**

The record indicates that the geographic areas reviewed by the cities for purposes of their proposals differ from the areas reviewed by the County for purposes of the LCA. According to the cities, because they know their cities, their policies, their needs and desires, they selected the appropriate areas to be reviewed and the County should have used the same areas for purposes of its LCA. Because the different geographic areas offer different uses and density possibilities, the fact that the cities and County were using different areas for their respective reviews means that any comparison is meaningless.

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<sup>20</sup> *Viking Properties, Inc. v. Holm*, 155 Wash. 112, 118 P3d 322 (2005).

In order to ensure that the cities input is of some value, the County must amend the LCA to ensure it examines the same geographic areas as considered by the cities.

**f. The County must not use the LCA alone to determine appropriate Urban Growth Areas**

As noted by several of the cities, the LCA is only a starting place for determining UGAs. The County must also consider cities policies when determining UGA boundaries.

By way of example of such policies, the community vision statement for the City of Lynden states: "The predominant objective of this vision is that Lynden will retain its *community spirit, small town atmosphere and agricultural roots.*" (Emphasis added.) Lynden's vision statement specifically enumerates homes with well-maintained lawns, and "spacious streets with parking on both sides." As noted by the City of Lynden, a failure to expand its UGA for the planning period would force the city to work against its own vision.

Additionally, as correctly noted by the City of Ferndale it is the cities, not counties, that determine city densities. Ferndale notes that the County, by severely reducing Ferndale's UGA, will force Ferndale to immediately develop zoning restrictions that require much higher densities than Ferndale has historically achieved or that are workable there. Were Ferndale to impose such higher densities, it would likely experience significant economic harm because developer profits are already extremely low due in part to the low average rental and sale values, and, in the downtown area, to the very high cost of building (all new buildings in the commercial core must be flood proofed).

The County's LCA also, as noted above, 'pretends' Bellingham presently achieves a minimum of four dwelling units per acre in all residential areas – even in the Birchwood and Edgemoor neighborhoods where it is clear that the lots are much, much larger than that!

As always, please feel free to contact us with any questions or to discuss.