

May 17, 2013

The Honorable Kathy Kershner, Chair
Whatcom County Council
311 Grand Avenue
Bellingham, Washington 98225
Sent via email to council@co.whatcom.wa.us.

Re: Comments on AB2013-180

Dear Chair Kershner and Council Members:

We appreciate this opportunity to comment on AB2013-80, the Planning Commission's recommendation regarding compliance with specified provisions¹ of *Futurewise et al. v. Whatcom County*, GMHBWWR Case No. 11-2-0010c, Compliance Order and Case No. 05-2-0013, Order Following Remand on Issue of LAMIRDs (Jan. 4, 2013) ("Compliance Order").

We join in Futurewise's comments to the Planning Commission and the County Council on this matter. We would further emphasize that the Planning Commission recommends not changing two LAMIRD boundaries that the Growth Management Hearings Board ("Board") found to be out of compliance with the Growth Management Act ("GMA"), and which the County did not appeal. In one case (Birch Bay-Lynden & Valley View), the Planning Commission apparently was concerned that experts hired by the property owner concluded that the change in the boundary would reduce the value of the property. In the other case (Smith & Guide Meridian), the Planning Commission simply "disagrees" with the Board and agrees with the property owner's attorney, who argued in his letter and testimony that the Board did not understand the GMA and urged the Planning Commission to "ignore" the staff recommendation of compliance.

Even more egregiously, the Planning Commission recommends adoption of findings drafted by the attorney for the property owners (see AB 2013-80 at pdf pp. 75-77). These findings include incorrect statements of law and unsupported factual conclusions. Notably, the findings assert a novel legal theory: that changes in zoning constitute a "taking" if the "benefit to the community by downzoning this property is not roughly proportional to the damage to the property owner." We would respectfully request the County to provide citations to case law that support this proposition. If the County decides to advance this theory, we would further request evidence of (1) the County's quantitative calculation of the "benefit to the community" of planning and zoning, and (2) the County's *independent* assessment of "damage" to the property owner.

¹ The County remains out of compliance with Compliance Order findings that it has appealed to the Skagit County Superior Court and that were not addressed by the Planning Commission.

Profits from a business depend on understanding the rules of the business, and real estate development is no exception. There is no entitlement to build commercial development unless and until a vested right has been obtained, and zoning does not create a vested right. Washington is the earliest vesting state in the country, and Whatcom County likely is the easiest place in Washington to submit (and extend) an application providing a vested right. Nonetheless, the affected property owners do not contend that they have vested rights. Therefore, they are not entitled to commercial zoning.

A letter from Tom Filion's Land Office was submitted on behalf of the owner of the Birch Bay-Lynden and Valley View property owner, stating Mr. Filion's belief that the permitted uses on the site without a LAMIRD designation "do not seem useful at all." Conditional uses are discounted because there is "little incentive" to meet the criteria. A letter from an appraiser concludes that the permitted uses on the property are not "highest and best uses." Even overlooking the self-serving nature of these submittals, they do not support a conclusion that revising the LAMIRD boundary in accordance with the Compliance Order is a regulatory taking. The property owner is not entitled to "highest and best use," and a realtor's opinion that uses are "not useful" or may not be pursued is not sufficient to establish a taking.

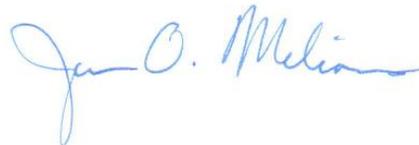
Nor has the property owner exhausted his options of applying for a Type 2 or 3 LAMIRD, a Master Planned Resort, or a Major Industrial Development, all of which can be allowed in Rural areas where appropriate under the GMA.

Finally, if the County truly believes that substantial new urban-level development is appropriate at that location, the GMA provides the option of designating an Urban Growth Area that could encompass Birch Bay Square and the property at issue.

The record does not support the Planning Commission's recommendation to defy the Compliance Order, and we urge the Council to adopt the staff recommendation to revise the boundaries in accordance with the Compliance Order.

Contrary to the proposed "Conclusions" in the draft ordinance, and for all of the reasons set forth herein (including the analysis in Futurewise's comments), the proposal as forwarded to the Council is not consistent with the GMA or with the Whatcom County Code, it does not create an internally consistent Comprehensive Plan, it is not consistent with Countywide Planning Policies, and the development regulations do not implement an internally consistent Comprehensive Plan.

Very truly yours,



Jean O. Melious

Attorney for Eric Hirst, Laura Leigh Brakke,
Wendy Harris and David Stalheim

Excerpts from the Audio of the Planning Commission Meeting, March 28, 2013

Jack Swanson (Belcher Swanson law firm), representing three property owners, starts at 1 hour, 19 minutes and 50 seconds into the audio.

What happened? I think I know. [The public] got sick and tired of the idea that land use planning in Whatcom County has been handed over to the Growth Management Hearings Board, and neither this Planning Commission nor the County Council has the final say in anything any more.

1:21:10 It angers me a great deal, and I wish I knew what to do about it. . but I think land use planning should be local, rather than statewide, like it is now, and I don't know how to tell you to fix it.

[With respect to the Birch Bay Lynden and Valley View Type I LAMIRD – Boulos property near I-5 entrance], we have 2 lawsuits pending right now. We appealed the original GMHB, where they said that this was outside the logical outer boundary, that would be the 2011 Board decision, and then we brought a bunch of new evidence in. . .the Board got it wrong anyway, but we brought new evidence in. The next ordinance was the 2012 one. . .but the Board came back and said “well, we don't think that means anything. And we were really not pleased that we left the other properties in the LAMIRD,” so this was a do-over for them.

Around 1:23: And the one question I have about that is, I'm really concerned that we may get to the County Council here and they may throw up their hands and give up with the Growth Board, and remove my client's property from the LAMIRD, and then we'll have an election, we'll win the lawsuit and then we'll have an election in November, and we'll have a different County Council that at that point will refuse to put it back in the LAMIRD.

1:25 So that's my request is, leave it in the LAMIRD. Tell the Council, tell the Council to stand up to these people for a change. Am I getting angry?

1:27 And the final one is Smith and Guide Meridian, and we only have one lawsuit on this one. That would be the Pullar property. . . .

1:28:45 Once again, I just can't tell you how I feel that the Board has just completely overstepped its bounds and gone far beyond what the Legislature intended. And I guess that the response to that by people who disagree with me is “Well, take 'em to court!” So, I have.

I'm just really saddened by the fact that Whatcom County, at various points along the way over the past four or five years, has in my view completely dropped the ball in terms of appealing these decisions, these unreasonable decisions by this Growth Board.

1:29:15 And now, as you know, you're probably getting to wonder what the people felt like when they got on the rail, the cattle cars on the tracks that would take them to Auschwitz, you know. Because that's kind of where you are, right now, because of the failure of the County to appeal last year, year before, not appealing certain issues. You're now stuck with those, and it's going to be a real fight to see what you can do to help out the people of Whatcom County, who deserve a lot more than what they're getting right now. So that's my sales pitch, if you don't mind.

Planning Commission Chair Michelle Luke: Thank you.

Swanson: Thank you.

Luke: Anyone else wish to speak?