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June 7, 2010

Whatcom County Council
311 Grand Avenue, Suite 105
Bellingham, Washington 98225

Dear Council Chair Crawford and Whatcom County Council,

SUBJECT: Preliminary comments on the Rural Element Update, Density Overlay, and Limited Areas of More Intense Rural Development (LAMIRD) Alternatives

Futurewise Whatcom is the local chapter of the statewide land-use advocacy organization, Futurewise, whose mission is to promote healthy communities and cities while protecting farmland, forests and shorelines today and for future generations.

Comments on the Density Overlay and LAMIRD Alternatives

Thank you for the opportunity to provide preliminary comments on the alternatives to the Planning Commission's recommendations for Limited Areas of More Intense Rural Development (LAMIRDs) and the Density Overlay. We appreciate the opportunity to give you our initial appraisal.

The Density Overlay or "Rural Community" Designation

While the Density Overlay or "Rural Community" designation is not fully spelled out, we are concerned, based its summary and the way it seems to be applied in the staff PowerPoint presentation on the "Rural Element Update" dated May 25, 2010, that it does not comply with the Growth Management Act requirements for rural density. As the Washington State Supreme Court has held:

A rural density is "not characterized by urban growth" and is "consistent with rural character."^{FN23}

^{FN23}. " 'Rural character' " includes lands:

- (a) In which open space, the natural landscape, and vegetation predominate over the built environment;
- (b) That foster traditional rural lifestyles, rural-based economies, and opportunities to both live and work in rural areas;
- (c) That provide visual landscapes that are traditionally found in rural areas and communities;
- (d) That are compatible with the use of the land by wildlife and for fish and wildlife habitat;
- (e) That reduce the inappropriate conversion of undeveloped land into sprawling, low-density development;
- (f) That generally do not require the extension of urban governmental services; and
- (g) That are consistent with the protection of natural surface water flows and ground water and surface water recharge and discharge areas.¹

The Growth Management Act defines urban growth as:

- (19) "Urban growth" refers to growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to RCW [36.70A.170](#).

¹ *Thurston County v. Western Washington Growth Management Hearings Bd.*, 164 Wn.2d 329, 359 – 60, 190 P.3d 38, 53 (2008).

"Characterized by urban growth" refers to land having urban growth located on it, or to land located in relationship to an area with urban growth on it as to be appropriate for urban growth.²

A county can consider local circumstances, but rural must not be characterized by urban growth and must preserve rural character.³

It is important to note that neither the definition of "urban growth" nor the definition of "rural character" talks about preserving the current developed rural character. But that appears to be the central purposed of the "Density Overlay." This is contrary to the Growth Management Act. The Growth Management Act directs the county to adopt regulations consistent with open space, the natural landscape, and vegetation are to predominate over the built environment, the county is to foster tradition rural lifestyles including farming and forestry, the county is to maintain traditional rural landscapes, the rural area is to be compatible with the use of the land by wildlife and for fish and wildlife habitat, the county the county is to reduce the inappropriate conversion of undeveloped land into sprawling, low-density development, and to have a development pattern that generally does not require the extension of urban governmental services into the rural area. None of the considerations are addressed by the "Density Overlay." This is clearly inconsistent with the Growth Management.

The densities proposed for the "Density Overlay" are also inconsistent. The tenth slide in "Rural Element Update" proposed that if the current zone is R2A, the minimum lot size would be two acres. If the current zone is RR-1, RR 1, RR-2, RR 2, RR-3, the minimum lot size would be one acre. This minimum lot sizes have two problems, the first is that the county's existing zoning is not a proper criterion. It is not allowed in the definition of rural character and is not consistent with not allowing urban densities in the rural area. In fact, the Washington Supreme Court has upheld a county determination that densities of one dwelling unit per acre are urban densities.⁴ The proposed densities are also denser than the 2.4 acre minimum lot sizes upheld in the Clallam County decision.

The second problem is that these minimum lot sizes will not protect rural character. Taking just one of the elements from the definition of rural character, that rural densities must be compatible with the use of the land by wildlife and for fish and wildlife habitat, and we see the inconsistency. At densities of one dwelling unit per 2.5 acres, 70 percent of the wildlife species are not supported unless special planning for wildlife protection is undertaken.⁵ Even if the special planning is done, about half of the wildlife species will not be supported.⁶ At one dwelling unit per acre, 80 percent of the species are not supported and 65 percent of the wildlife species are not supported even with special wildlife planning.⁷ Failing to support half to 80 percent of the wildlife species is clearly not maintaining the compatibility of the use of the land by wildlife. In fact, the available scientific and technical data shows the proposed minimum lot sizes will violate every element of rural character.

The Alternative Maps

"Rural Element Update" (May 25, 2010) included a series of maps depicting the Planning Commission recommendation and an "Alternative." We have the following comments on several of the Alternatives.

Cain Lake Alternative "Rural Element Update" (May 25, 2010) p. 13

We think designating the parts of the lake divided into small lots and within the area developed as of 1990 as a LAMIRD is more consistent with the Growth Management Act than applying the "Overlay" to the entire west side of Cain Lake Road. It allows the small lots to continue at their 1990 densities and would preclude the

² RCW 36.70A.030(19).

³ *Thurston County v. Western Washington Growth Management Hearings Bd.*, 164 Wn.2d 329, 359 – 60, 190 P.3d 38, 53 (2008).

⁴ *Quadrant Corp. v. State Growth Management Hearings Bd.*, 154 Wn.2d 224, 234 – 40, 110 P.3d 1132, 1137 – 40 (2005).

⁵ Washington State Department of Fish and Wildlife, *Landscape Planning for Washington's Wildlife: Managing for Wildlife in Developing Areas* p. 1-1 (Olympia, Washington: December 2009). Accessed on June 4, 2010 at:

http://wdfw.wa.gov/hab/phs/landscaping/landscape_planning_wildlife.pdf

⁶ *Id.*

⁷ *Id.*

subdivision of the larger lots, which would better protect the water quality of the lake. It also avoids the problem that, as we documented above, the “Overlay” violates the GMA.

We believe that the R10A recommend for the land east of Cain Lake Road better complies with the GMA requirement to protect rural character and water quality than the proposed R5A in the alternative, especially given that it would allow the large lots in this area to be divided into Growth Management Act non-complaint two acre lots. We recommend you follow the Planning Commission recommendation on that area.

Chuckanut Alternative “Rural Element Update” (May 25, 2010) p. 15

Because the “Overlay” violates the GMA, we recommend it not be applied to the Chuckanut area.

Eliza Island Alternative “Rural Element Update” (May 25, 2010) p. 17

We prefer the Planning Commission recommendation because it recognizes the very limited public facilities and services available to Eliza Island and the high potential for aquifer contamination due to salt water intrusion from over development. However, Eliza Island could legally be designated as a LAMIRD. The Growth Management Act, in RCW 36.70A.070(5)(d)(i) and (5)(d)(v), requires that for Type I LAMIRDs that the development intensity shall be consistent with the uses in existence on July 1, 1990. So the allowed density for this island should not exceed the 1990 platted density.

Emerald Lake Alternative “Rural Element Update” (May 25, 2010) p. 19

We think designating the parts of the lake divided into small lots and within the area developed as of 1990 as a LAMIRD better complies with the Growth Management Act than applying the “Overlay” to that area. It allows the small lots to continue at their 1990 densities and would preclude the subdivision of the larger lots, which would better protect the water quality of the lake. It also avoids the problem that, as we documented above, the “Overlay” violates the GMA.

We believe that the R10A recommended for the land south and southeast better complies with the GMA requirement to protect rural character and water quality than the proposed RR5A and R5A zones in the alternative, especially given that it would allow the large lots in this area to be divided into Growth Management Act non-complaint two acre and one acre lots. We recommend you follow the Planning Commission recommendation on that area.

Fort Bellingham Alternative “Rural Element Update” (May 25, 2010) p. 19

We believe that the Alternative’s RR5A and R5A zones violate the Growth Management Act because they would allow the large lots in this area to be divided into two acre and one acre lots. We recommend you not apply these zones to this area.

Glen at Maple Falls Alternative “Rural Element Update” (May 25, 2010) p. 23

Designating the small lots at the Glen at Maple Falls as a LAMIRD better complies with state law than applying the “Overlay” to that area. It allows the small lots to continue at their 1990 densities. It also avoids the problem that, as we documented above, the “Overlay” violates the GMA.

Gooseberry Pt. (Lummi Peninsula) Alternative “Rural Element Update” (May 25, 2010) p. 25

Water resources on the Lummi Peninsula are quite limited. Salt water intrusion has already led to the closure of several of the public water-supply wells on the Lummi Peninsula.⁸ Existing water resources on the Lummi

⁸ Water Resources Division, Lummi Natural Resources Department, Lummi Nation Nonpoint-Source Management Program p. 7 (January 2002). Accessed on June 4, 2010 at: http://www.lummi-nsn.org/NR/Water/WaterResourcesWeb/documents/NonPointSource/4_NPSMP.pdf

Peninsula can only serve an additional 110 homes.⁹ Some of the water associations lack the water to serve all of the existing lots.¹⁰ The definition of rural character and RCW 36.70A.070(5)(c)(iv) require that the rural element protect groundwater resources. So comprehensive plan designations and zones that would allow the creation of new lots on the Lummi Peninsula would violate the GMA. The Planning Commission recommendation best complies with the Growth Management Act and that is what we recommend.

The Alternative's use of the RR5A zone, which would allow the subdivision of larger lots into smaller lots will just create more unbuildable lots that do not have drinking water supplies. This violates the Growth Management Act since it puts surface and ground water at risk. We recommend you not adopt the alternative.

Hinotes Corner Alternative "Rural Element Update" (May 25, 2010) p. 27

The Alternative's expansion of the LAMRID onto the large lots and the designation of the remaining land R5A and allowing new two acre lots violates the GMA for the reasons we have identified previously. We recommend that those aspects of the Alternative not be adopted.

Lake Samish Alternative "Rural Element Update" (May 25, 2010) p. 29

Creating new small lots on Lake Samish will just increase the water quality problems at the lake. In addition, the large lots at the south end of the lake are outside the logical outer boundary. We recommend that those lots be excluded from the LAMIRD to comply with the Growth Management Act.

North Bellingham Alternative "Rural Element Update" (May 25, 2010) p. 31

As we have seen, one acre lots are an urban density, not a rural density. So we recommend that the RR5A zone with its allowance for one acre lots not be allowed.

Sandy Point Alternative "Rural Element Update" (May 25, 2010) p. 33

The areas of small lots that existed in 1990 would qualify as a LAMIRD if done properly. However, as we have seen, one acre lots are an urban density, not a rural density. So we recommend that the RR5A zone with its allowance for one acre lots not be allowed outside the logical outer boundary of the LAMIRD.

Wiser Lake East Alternative "Rural Element Update" (May 25, 2010) p. 35

As we have seen, R5A zone with its allowance for two acre lots violates the Growth Management Act. So we recommend that the RR5A zone with its allowance for two acre lots not be allowed.

Designating Type 1 LAMIRDS

As the County Council is currently considering designating Type 1 LAMIRDS, we offer the following suggestions. A Type 1 LAMIRD, authorized by RCW 36.70A.070(5)(d)(i), designates existing areas of commercial, industrial, residential or mixed-use development. In summarizing the requirements for Type 1 LAMIRDS the Washington State Supreme Court wrote.

Areas allowed "consist[] of the infill, development, or redevelopment of existing commercial, industrial, residential, or mixed-use areas, whether characterized as shoreline development, villages, hamlets, rural activity centers, or crossroads developments." RCW 36.70A.070(5)(d)(i). Counties must "adopt measures to minimize and contain the existing areas or uses of more intensive rural development" so that "[l]ands included in such existing areas or uses shall not extend beyond the logical outer boundary of the existing area or use, thereby allowing a new pattern of low-density sprawl." Laws of 1997, ch. 429, § 7(d)(iv); RCW 36.70A.070(5)(d)(iv). For Whatcom County, "an existing area or existing use is one that was in existence ... [o]n July 1, 1990." RCW 36.70A.070(5)(d)(v), (A).

⁹ Hon. Judge Thomas Zilly United States & Lummi Indian Nation v. State of Washington, Department of Ecology, et al. No. C01-0047Z Order Conditionally Approving Settlement Agreement p. 6 (Nov. 2, 2007). Accessed on June 4, 2010 at: <http://www.lummi-nsn.org/NR/Water/PDF/WaterLitigation/Order%20Approving%20Settlement.pdf>

¹⁰ *Id.* at 14.

LAMIRDs are not intended for continued use as a planning device, rather, they are “intended to be a one-time recognition of existing areas and uses and not intended to be used continuously to meet needs (real or perceived) for additional commercial and industrial lands.” *People for a Liveable Comty. v. Jefferson County*, No. 03-2-0009c (Growth Mgmt. Hr’gs Bd. Final Dec. and Order Aug. 22, 2003). (In general, planning in rural zones must “protect the rural character of the area” and “contain[] or otherwise control[] rural development.” RCW 36.70A.070(5)(c), (i)).¹¹

As the Supreme Court wrote, in determining the location of a Type 1 LAMIRD, the county must identify the *logical outer boundary* (sometimes called an LOB) of the area. The logical outer boundary is delineated predominately by the “built environment” that existed on July 1, 1990, in Whatcom County’s case.¹² The “built environment” includes man-made structures located above and below the ground, such as existing buildings, sewer lines, and other urban level utilities or infrastructure.¹³ The extent of the infrastructure or the service area that existed in 1990 or the date when the county was first required or chose to fully plan under the GMA may be used to set the logical outer boundary.¹⁴ Vested developments not built in 1990 or the date the county was required or chose to fully plan under the GMA cannot be used to determine the built environment.¹⁵ Subdivided or platted land that was not developed in 1990 or the date the county was required or chose to fully plan under the GMA cannot be used to define the built environment.¹⁶ Existing zoning cannot be the sole criteria for determining the location of a LAMIRD, it can however be used as an exclusionary criteria.¹⁷ In order to minimize and contain the existing development, the county must draw the boundary closely around the built environment and be able to clearly justify its choices.¹⁸ Vacant land may be included in the LAMIRD and a county may make minor adjustments to a logical outer boundary to include undeveloped property.¹⁹ Such undeveloped property is to provide for infill.²⁰ Infilling is allowed if it is “‘minimized’ and ‘contained’ within a ‘logical outer boundary.’”²¹

In addition to the man-made environment, a county must address the following factors in establishing the logical outer boundary: “(A) the need to preserve the character of existing natural neighborhoods and communities, (B)

¹¹ *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 727 – 28, 222 P.3d 791, 793 (2009).

¹² RCW 36.70A.070(5)(d)(iv).

¹³ *City of Anacortes v. Skagit County*, WWGMHB Case No. 00-2-0049c Final Decision and Order (C/I Development Issues) p. *13 (February 6, 2001), *Panesko, et al. v. Lewis County, et al.*, WWGMHB Case No. 98-2-0011c Final Decision and Order & Compliance Order, 2001 WL 246707 p. *15 (March 5, 2001), *People For A Liveable Community, Jim Lindsay, et al. v. Jefferson County*, WWGMHB Case No. 03-2-0009c Final Decision and Order p. *21 (August 22, 2003), & *James A. Whitaker v. Grant County*, EWGMHB Case No. 99-1-0019 Second Order on Compliance, 2004 WL 2624887 p. *3 (November 1, 2004).

¹⁴ *Burrow v. Kitsap County*, CPSGMHB Case No. Case No. 99-3-0018 coordinated with *Alpine, et al. v. Kitsap County*, Case No. 98-3-0032c [Portion dealing with Compliance with Remand Items 3.d and 3.f] Order on Compliance in a Portion of Alpine and Final Decision and Order in *Burrow* p. *14 (March 29, 2000).

¹⁵ *City of Anacortes v. Skagit County*, WWGMHB Case No. 00-2-0049c Final Decision and Order (C/I Development Issues) p. *18 (February 6, 2001).

¹⁶ *Vince Panesko et al. v. Lewis County*, WWGMHB Case No. 00-2-0031c, *Eugene Butler, et al. v. Lewis County*, WWGMHB Case No. 99-2-0027c, & *Daniel Smith, et al., Vince Panesko, and John T. Mudge v. Lewis County*, WWGMHB No. 98-2-0011c Final Decision and Order & Compliance Order, 2001 WL 246707 pp. *26 – 28 (March 5, 2001). A plat is a formal map approved by and recorded with the county that subdivides land. “Plat” or “platted” is sometimes used interchangeably with “subdivision” or “subdivided.”

¹⁷ *Vines v. Jefferson County*, WWGMHB Case No. 98-2-0018 Final Decision and Order p.*2 (April 5, 1999).

¹⁸ *Citizens for Good Governance, 1000 Friends of Washington, and City of Walla Walla v. Walla Walla County*, Case No. 01-1-0015c & Case No. 01-1-0014cz Final Decision and Order, 2002 WL 32065594 *16 (May 1, 2002).

¹⁹ *Bremerton et al. v. Kitsap County & Port Gamble, et al. v. Kitsap County*, CPSGMHB Case No. 95-3-0039c coordinated with Case No. 97-3-0024c Finding of Noncompliance and Determination of Invalidity in *Bremerton* and Order Dismissing *Port Gamble* p. *14 (September 8, 1997) & *Citizens for Good Governance, 1000 Friends of Washington, and City of Walla Walla v. Walla Walla County*, Case No. 01-1-0015c & Case No. 01-1-0014cz Final Decision and Order, 2002 WL 32065594 *17 (May 1, 2002).

²⁰ *Panesko v. Lewis County*, WWGMHB Case 00-2-0031c Decision and Order p. *19 (March 5, 2001).

²¹ *Bremerton et al. v. Kitsap County & Port Gamble, et al. v. Kitsap County*, CPSGMHB Case No. 95-3-0039c coordinated with Case No. 97-3-0024c Finding of Noncompliance and Determination of Invalidity in *Bremerton* and Order Dismissing *Port Gamble* p. *14 (September 8, 1997) & *Panesko v. Lewis County*, WWGMHB Case No. 00-2-0031c Final Decision and Order p.*19 (March 5, 2001). *Accord Citizens for Good Governance, 1000 Friends of Washington, and City of Walla Walla v. Walla Walla County*, Case No. 01-1-0015c & Case No. 01-1-0014cz Final Decision and Order, 2002 WL 32065594 *17 (May 1, 2002).

physical boundaries such as bodies of water, streets and highways, and land forms and contours, (C) the prevention of abnormally irregular boundaries, and (D) the ability to provide public facilities and public services in a manner that does not permit low-density sprawl.”²² The county must avoid abnormally irregular boundaries, but this does not require that the boundary be drawn in a concentric circle or a squared-off block.²³ The GMA does not mandate the use of any one physical feature, such as a water body or street, in setting the logical outer boundary.²⁴ A county must take into account the requirement of including adequate public facilities and services that do not permit low density sprawl all within the logical outer boundary.²⁵

We hope this summary of the requirements for designating the logical outer boundary is helpful, and thank you for considering our comments.

Sincerely,

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Tim Trohimovich
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²² RCW 36.70A.070(5)(d)(iv).

²³ *Vines v. Jefferson County*, WWGMHB Case No. 98-2-0018 Final Decision and Order p.*3 (April 5, 1999).

²⁴ *Burrow v. Kitsap County*, CPSGMHB Case No. Case No. 99-3-0018 coordinated with *Alpine, et al. v. Kitsap County*, Case No. 98-3-0032c [Portion dealing with Compliance with Remand Items 3.d and 3.f] Order on Compliance in a Portion of *Alpine* and Final Decision and Order in *Burrow* p. *14 (March 29, 2000) & *City of Anacortes v. Skagit County*, WWGMHB Case No. 00-2-0049c Final Decision and Order (C/I Development Issues) p. *13 (February 6, 2001).

²⁵ *Panesko v. Lewis County*, WWGMHB Case No. 00-2-0031c Final Decision and Order p. *19 (May 5, 2001).