

**Schroader, Kathy**

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**From:** Orjiako, Oliver  
**Sent:** Tuesday, March 22, 2016 3 24 PM  
**To:** Albrecht, Gary, Alvarez, Jose, Anderson, Colete, Euler, Gordon, Hermen, Matt, Kamp, Jacqueline, Lebowsky, Laurie, Lumbantobing, Sharon, Orjiako, Oliver, Schroader, Kathy, Wisner, Sonja  
**Subject:** FW Cluster Memo 032216 v4 docx  
**Attachments:** Cluster Memo.032216 v4.docx

All.

FYI and for the record Thanks

-----Original Message-----

From Cook, Christine  
Sent Tuesday, March 22, 2016 2 54 PM  
To McCauley, Mark, Orjiako, Oliver; Euler, Gordon, Horne, Chris  
Subject. Cluster Memo.032216.v4 docx

All changes discussed have been made. This is the final, I hope

MEMORANDUM

To Councilor David Madore, Council Chair Marc Boldt, Councilors Jeanne Stewart, Julie Olson and Tom Mielke, Acting County Manager Mark McCauley

From Planning Department Director Oliver Orjako, Gordy Euler, Chief Civil Deputy Prosecuting Attorney Chris Horne, Senior Deputy Prosecuting Attorney Chris Cook

Re Councilor Madore's Questions Concerning Clustering

Date March 22, 2016

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Question: Staff and our PA Office asserted that clustering for AG-10 and FR-20 zones are not optional. They stated that they are required and that those zones would not be legally defensible if clustering was not required. Please provide the legal references to applicable RCWs, WACs, Hearing Board decisions, and case law that confirm the staff's assertion.

Response: The Growth Management Act (GMA) requires that counties designate and protect agricultural and forest lands that are considered to have long-term commercial viability. RCW 36 70A 170, 36 70A 030(3)(a) and 36 70A 060(1). Clark County chose to do so with AG-20, FR-40 and FR-80 zoning designations. GMA and its implementing administrative code require that the county adopt development regulations "that assure the conservation of designated agricultural, forest and mineral lands of long-term commercial significance." WAC 365-196-815(1)(a), RCW 36 70A 060(1)(a). These county regulations are found primarily in CCC 40 210 010. GMA contemplates that agricultural and forest lands are primarily for agricultural and forest uses, respectively, and that all other uses are to be accessory uses, including the building of a residence. WAC 365-196-815(1)(b)(i)-(ii).<sup>1</sup>

The proposal for smaller minimum parcel sizes for resource lands came from the Rural Lands Task Force, and a previous Board directed that the idea be considered during the 2016 comprehensive plan update. As has been repeatedly stated, about 80% of AG-20

<sup>1</sup> (b) 'Conservation' means measures designed to assure that the natural resource lands will remain available to be used for commercial production of the natural resources designated. Counties and cities should address two components to conservation:

(i) Development regulations must prevent conversion to a use that removes land from resource production. Development regulations must not allow a primary use of agricultural resource lands that would convert those lands to nonresource purposes. Accessory uses may be allowed, consistent with subsection (3)(b) of this section.

(ii) Development regulations must assure that the use of lands adjacent to designated natural resource lands does not interfere with the continued use, in the accustomed manner and in accordance with the best management practices, of these designated lands for the production of food, agricultural products, or timber, or for the extraction of minerals.

Wash. Admin. Code 365-196-815(1)

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parcels are less than 20 acres in size. BERK's previous work with the Rural Lands Study shows that more farming in Clark County is happening on smaller parcels (per the USDA Agricultural Census). These two facts, along with the results of the Rural Preference Census, led staff to propose smaller minimum parcel sizes for AG-20 and FR-40 parcels. Reduction in minimum lot size without some development restrictions is not likely to be approved by either the hearings board or the courts.

WAC 365-196-815 requires the county to prevent conversion of lands to nonresource uses and to prohibit a primary use that would convert lands to nonresource uses. See footnote 1, above. The county must also assure that uses of lands adjacent to designated resource lands do not interfere with the use of the designated lands for production of food, agricultural products, or timber. Footnote 1. Staff and the PA's Office are concerned that doubling the number of homes that can be built (increased development capacity) on agricultural and forest lands would not, by itself, pass GMA muster given GMA's emphasis on conservation and protection of resource lands. RCW 36 70A.060, WAC 365-196-815. This statute and WAC both require that counties limit nonresource uses on designated resource lands by adopting development regulations. Footnote 1.

RCW 36 70A 177 and WAC 365-196-815(3) allow the use of innovative zoning techniques, including clustering. To comply with the requirements to protect resource lands, staff proposes that the Board adopt clustering as a requirement of allowing additional residential density through creation of smaller parcels in the proposed AG-10 and FR-20 zones.<sup>2</sup> Clustering is not required by the GMA, and staff does not recommend required clustering for all residential development in Clark County's resource zones. For example, no clustering should be required to build homes on pre-existing lots in a resource zone.

Staff recommends that, when larger agricultural or forest parcels are divided pursuant to the new AG-10 or FR-20 densities, clustering be required to retain the majority of the parent parcels for resource uses. The PA's Office supports this recommendation because the clustering requirement would greatly enhance the county's argument that it is conserving resource land, which is required by statute and the Washington Administrative Code. Staff will propose regulations similar to CCC 40 210 020(D), Rural Cluster Development (currently, for Rural parcels only), except that clustering will be mandatory when resource parcels are divided to achieve the greater allowed residential density.

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<sup>2</sup> Please note that staff and the PA's office *recommend* that the Board adopt clustering as a requirement for the creation of reduced sized lots in the new resource zones, for the reasons stated in this memorandum. Neither the Planning Department nor the PA's Office asserts that clustering is mandatory in the resource zones.

**Question** Staff asserts that a management plan is also required for the remainder lots of those cluster developments. Please provide the relevant specifications, examples, RCWs, WACs, Hearing Board decisions, and case law that confirm the staff's assertion

**Response** To address these issues, it must be recalled that the county is proposing to modify its Comprehensive Plan to allow increased development in the resource zones. At the same time, the county is obligated to conserve designated resource areas. See discussion in prior section. Given the need to accommodate both commitments, the county must show that there is a way to allow increased development and still conserve the resource areas. Use of cluster developments is therefore critical to accomplish the county's goal of AG-20 to AG-10 and FR-40 to FR-20. Management plans required for the remainder parcels are equally critical to assure that this land is not converted to nonresource uses. RCW 36 70A 060(1)(a), WAC 365-196-815(1)(b) and (3)(a), (b)(2). Requiring management plans for remainder parcels is also consistent with portions of current county code.

At present, one choice for clustering on Rural parcels is to create cluster lots equal to the maximum allowed density. CCC 40 210 020(D)(3)(c)(2)(a). An example would be a 20-acre parcel in a five-acre zone going to four 1-acre cluster lots and a 16-acre remainder lot (which would not be buildable). Subsection (a) requires that the remainder parcel be used only for agriculture and forestry uses, or as open space. Subsection (a)(i) requires an open space, equestrian, farm or forest management plan for the remainder parcel. Requiring a management plan for a resource zone remainder would thus be consistent with the current county ordinance for the Rural zones, and would comply with state law regarding conservation of resource lands as well.

**Question** I also ask for relevant legal references that limit the percent of the density bonus we can use for cluster developments on R, AG, and FR parcels

**Response.** Although section 40.210.020(D)(3)(a) allows for a density bonus of 110%<sup>3</sup>, this provision is not being proposed for clustering on agricultural and forest lands. A density bonus would not assist the county in complying with state law requirements to conserve resource land.

It would be difficult to defend authorizing additional density of nonresource uses in the resource zones without also adopting measures to assure conservation of resource lands. RCW 36 70A 060; WAC 365-196-815. A density bonus for a nonresource use would go in the other direction.

**Question** Staff also asserted that the ordinance must be passed before the preferred Alternative is submitted to the state. Please confirm this. I thought that such county code amendments did not need to be finished ahead of that submission. I thought that in years past, that county code updates followed the submission of the Comp Plan Update.

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<sup>3</sup> This means that with 50 acres in a five-acre zone, one extra cluster lot could be created (there could be 11 instead of 10).

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Response As detailed within this memorandum, it would not be defensible to adopt Comprehensive Plan provisions that would allow increased density of nonresource development within the agricultural and timber zones without also adopting development regulations to assure continued conservation of resource lands. Many aspects of an updated Comprehensive Plan are implemented through development regulations. In any case, state law mandates that counties update development regulations along with their plan updates. RCW 36 70A 130(1), (5)

Question: Staff also asserted that they have been working very hard for some time now on the Cluster Ordinance. I was surprised because the BOCC rescinded the Cluster option in our February 16 Comp Plan Hearing. The BOCC removed the cluster ability for AG and FR zones entirely. When did staff start working on the resource Land Cluster ordinance?

Response Work on a cluster ordinance has gone on for some time. At Councilor Madore's suggestion, the county conducted a Rural Preference Survey in late 2013 that included a question about clustering. When the Board initially adopted alternatives for the DSEIS in the summer of 2014, Alternative 2 included the decrease in minimum parcel sizes for agricultural and forest lands. Staff suggested at that point that the chances of being successful with this change would be increased by requiring that subsequent land divisions be clustered. Staff then began research on a cluster provision so that it could be discussed, depending on the Board's decision. Councilor Madore, on more than one occasion, has requested that clustering be included in the DSEIS as a possible mitigation measure; clustering is mentioned in the DSEIS in the mitigation section on page 6-23. The Board on February 23 adopted a Preferred Alternative that did not include Alternative 4, but staff has continued to recommend clustering because the Preferred Alternative includes the residential density increases on resource lands that were proposed as part of Alternative 2.

Question Please share the draft policy work with me. As a policy maker, I believe policy making is my responsibility. My goal as a policy maker is to create policy that not only lawful, but flexible and supported by the rural citizens. It would be inappropriate for the executive branch to create policy that the policy makers find out about just before the Planning Commission considers it. I feel that the wrong agents are driving this process in place of the policy makers. Do you agree? I ask that you open the door to my participation up front. I have specifics to incorporate into a cluster ordinance.

Response These questions do not fall within the scope of the Planning Department's work on the comprehensive plan update.