Schroader, Kathy

From:	Wiser, Sonja
Sent:	Wednesday, May 25, 2016 2 05 PM
To:	Orjiako, Oliver, 'Steve C Morasch'
Cc:	McCauley, Mark, steve dijulio@foster com, Tilton, Rebecca, steve dijulio@foster com, Schroader, Kathy, Bill Wright, Eileen Quiring, John Blom-Hasson, Karl Johnson, Richard Bender, Ron Barca-Boeing, Ron Barca-MSN
Subject:	RE June 26, 1997 - Poyfair Remand
Attachments:	David McDonald - 2015-04-13-1 pdf, David McDonald - 2015-09-03-1 pdf, David McDonald - 2015-09-14-1 pdf

Enclosed are 3 copies of letters from Mr McDonald dated 4/13/15, 9/3/15 and 9/14/15 - for the record

-----Original Message-----
From Orjiako, Oliver
Sent Wednesday, May 25, 2016 1 08 PM
To 'Steve C Morasch'
Cc Wiser, Sonja, McCauley, Mark, steve dijulio@foster com
Subject RE June 26, 1997

Hello Sir

You are most welcome As we have maintained for a while now that there are no court and ruling from the Growth Board that Clark County is not incompliance with Judge Poyfair remand David McDonald also provided a very good write up of the chronology relating to the actions and outcome of the remand and to the fact that the county responded to the remand satisfactorily Thank you

Best,

Oliver

-----Original Message-----
From Steve C Morasch [mailto stevem@landerholm com]
Sent Wednesday, May 25, 2016 12 25 PM
To Orjiako, Oliver
Cc Wiser, Sonja, McCauley, Mark, steve dijulio@foster com
Subject RE June 26, 1997

Oliver,

I wanted to thank you and your staff for sending this to the PC This is helpful and satisfies my email request earlier today for documentation of the history of the County's response to the Poyfair remand

Steve

Steve C Morasch | Attorney at Law

Landerholm P S
805 Broadway Street, Suite 1000
P O Box 1086
Vancouver, WA 98666-1086
T | T 503-283-3393 | F 360-816-5913
www landerholm com

-----Original Message-----
From Wiser, Sonja [mailto Sonja Wiser@clark wa gov]
Sent Wednesday, May 25, 2016 11 23 AM
To Bill Wright, Eileen Quiring, John Blom-Hasson, Karl Johnson, Richard Bender, Ron Barca-Boeing, Ron Barca-MSN, Steve C Morasch
Cc Tilton, Rebecca, Schroader, Kathy
Subject FW June 26, 1997

-----Original Message-----
From Orjiako, Oliver
Sent Wednesday, May 25, 2016 11 08 AM
To Albrecht, Gary, Alvarez, Jose, Anderson, Colete, Euler, Gordon, Hermen, Matt, Kamp, Jacqueline, Lebowsky, Laurie, Lumbantobing, Sharon, Orjiako, Oliver, Schroader, Kathy, Wiser, Sonja
Subject FW June 26, 1997

FYI and for the record Sonja, please provide to the PC members too Thanks

-----Original Message-----
From McCauley, Mark
Sent Tuesday, May 24, 2016 10 10 PM
To Boldt, Marc, Stewart, Jeanne, Olson, Julie (Councilor), Mielke, Tom, Madore, David
Cc steve dijulio@foster com, Orjiako, Oliver, Euler, Gordon, Vetto, Jane
Subject June 26, 1997

Councilors, I found the a a decision showing Clark County to be in compliance with the GMA after the Poyfair remand, with the exception of 3,500 acres that were fixed by subsequent action Notice the source the Growth Management Hearings Board website Fairly authoritative

Once the GMHB found us to be in compliance we are in the clear unless the decision was appealed--which it wasn't

Mark

http //www gmhb wa gov/Legacy/western/decisions/1995/95-67_comp_ord htm

Sent from my iPad

FRIENDS OF CLARK COUNTY
PO BOX 513
VANCOUVER, WASHINGTON 98666
friendsofclarkcounty@tds net

September 14, 2015

Board of County Councilors
Planning Commission Members
% Mr Oliver Orjiako, Director
Clark County Community Planning
1300 Franklin Street
3rd Floor
Vancouver, Washington 98660

Via pdf and e-mail to Oliver Orjiako@clark wa gov and via hand delivery

Mr. Orjiako:

This letter is to respond to the letter in the record from Carol Levanen dated August 4, 2015 and the e-mail from Carol Levanen dated August 31, 2015 and correct the inaccuracies in her two submissions. I am submitting these comments on behalf of Friends of Clark County

Both of Ms. Levanen's submissions wrongfully suggest that the County failed to comply with the rulings in Case 96-2-00080-2[1]. The majority of the contents of

[1] In her August 31, 2015 e-mail she states the following:

"This WWGM Hearings Board Remand demonstrates that all of Judge Poyfair's orders were not followed. Instead, the Board isolated the remand to just Agri-Forest and Rural Centers and ignored action on the other orders handed down by the Superior Court. 'They' timed this remand decision to happen just after the Court of Appeals decision of 1999, counting on CCCU's attorney not being available to protest the remand action. CCCU believes that the Clark County 1994 Comprehensive Land use Plan was the most corrupt process of any in the state except perhaps Seattle. The Plan in place today, is the same plan that was adopted in the rural and resource land in 1994 It has never been changed and after over twenty years, legitimate changes must be made."

In her letter dated August 4, 2015 she makes three assertions: 1) Clark County is not in compliance with Judge Poyfair's ruling because it never did a SEPA analysis of the Agri-Forest Lands, 2) The County never complied with "the Court orders or the Order of Remand"..."No progress reports can be found and the Hearing Board only conducted a few compliance hearings for agri-forest and rural centers. 'They' failed to assure the County complied with *all* of the court orders which also included items 3) Statutory Mandate, (4) Agri-Forest Lands (6) Comprehensive Plan EIS, and (7) Rural Land Densities This resulted in the 36,000 acres of Agri-Forest Land and the rural centers never having an EIS to support changes that did occur

these two documents is simply not supported by the record and/or totally misrepresents or obfuscates the reality of Judge Poyfair's decision and the other related legal actions.

The simple truth is that Ms. Levanen and Ms. Rasmussen, who herald themselves as the preservers of rural life despite many farmers and foresters who object to their positions, more than achieved their goals in 1990s to reduce lot sizes in the rural zone, eliminate the Agri-Forest zone, implement Rural Centers and reduce development regulations that would have provided more protective regulations of the environment.

In order to understand the claims that Ms. Levanen is wrongfully asserting, one must go back and follow the record from the filing of the first appeals that challenged the County's 1994 Comprehensive Plan to the last Compliance Order issued by the WWGMHB in 2006.

History of the *Achen* Appeal and *Poyfair* Remand

In 1994, after work by multiple task forces, input from thousands of citizens, scores of public hearings and intermediary and interlocutory legal actions, our County adopted our first Comprehensive Plan. A myriad of parties appealed the Comprehensive Plan to the WWGMHB While the appeals were being litigated, Clark County executed a stipulation in WWGMHB Case No. 94-2-0014 stating that the County failed to enact interim development regulations designed to designate and protect critical areas and natural resource lands. Instead, the County relied on various combinations of existing non-GMA ordinances and zoning, which it admitted failed to meet the identification, designation or protection requirements of state law. Therefore, the County agreed to go back to the public process on their development regulations

In September 1995, The WWGMHB issued a Final Decision and Order (FDO) in the case commonly known as *Achen et al* case of which CCCU was a Petitioner. There were 16 separate motions filed on reconsideration and the WWGMHB subsequently ruled on each of those and issued an Order on Reconsideration on December 6, 1999. Several appeals were taken from the WWGMHB FDO. However many issues of non-compliance found by the WWGMHB were not appealed and those issues were remanded to the County for compliance.

The appeals from the WWGMHB FDO and Order on Reconsideration were assigned to Clark County Superior Court Judge Poyfair. Judge Poyfair subsequently issued an opinion that reversed the WWGMHB Final Decision and Order (FDO) on several grounds and held the following: 1) The Agri-Forest designation violated GMA; 2) the County's failure to solicit meaningful public input for the Agri-Forest designation violated the public participation provisions of the GMA requiring early and continuous public participation in the development and adoption of the comprehensive plans; 3) The county failed to ensure a variety of densities in the rural area because it removed the

later", and 3) Some claim that some writings (no citations to the articles are provided so it is impossible to know which articles to which she refers) misconstrue the 1999 Court of Appeals opinion regarding the use of OFM numbers (One appeal was take from Judge Poyfair's rulings and that was an appeal by CCNRC challenging the portion of Judge Poyfair's ruling regarding the county's assertion that they were mandated to use the OFM number in determining rural population allocation)

designation of rural centers from its Community Framework Plan, 4) determined the rural population allocation based upon the use of the selected OFM number and 5) the EIS was inadequate because it failed to include the Agri-Forest designation in its analysis.

Judge Poyfair also issued an Order on Reconsideration denying various motions for reconsideration and clarification and affirming the Findings of Fact, Conclusions of Law and Order issued on April 4, 1997 with one exception, which dealt with the issue of variety of rural densities. He found that the eradication of the centers violated the planning goal of requiring a variety of rural densities and reaffirmed that the WWGMHB erred by mandating that the County use OFM projections for allocation of rural population. *See* Order on Reconsideration (June 5, 1997)[2].

One piece of Judge Poyfair's ruling that CCCU continues to ignore, and most important to the current process, is that Judge Poyfair found there ***was substantial evidence in the record to support the County's designation of agricultural resource lands***. CCCU did ***not*** appeal that portion of the Poyfair decision and it remains valid to this day

Procedurally, Judge Poyfair remanded the case to the WWGMHB who, in turn, issued a Remand Order in August 1997 that remanded all the issues from the Poyfair decision to the County. The Remand Order stated:

> Therefore, it is ordered that Clark County is not in compliance with the Growth Management Act as to those matters set forth in the separate appeals and the matter is remanded to Clark County to achieve compliance consistent with earlier orders of the Board *as modified by the Superior Court orders referenced above which are incorporated herein*. Because of the unusual scope and complexity of the issues, under the provisions of Chapter 429, Laws of 1997, Section 14(3)(b), compliance shall be achieved by March 2, 1998. The County shall submit a report on the progress it is making toward compliance by December 15, 1997.
>
> *See WWGMHB* #95-2-0067 dated August 11, 1997 (emphasis supplied).

This remand is known as the "Poyfair Remand". As can be seen by the language of the Order, the WWGMHB remanded all issues in Judge Poyfair's ruling to the County, including the issue subsequently appealed by CCNRC. After the remand, Clark County went back to work on all of the issues ordered to be remanded to the County.

While the Poyfair Remand was being dealt with at the County level, CCNRC appealed one issue--whether or not the County was ***required*** to use the OFM number in determining a cap on rural population allocations. The appellate court ruled that, although GMA did not ***require*** the county to use OFM's projections as a cap on non-urban

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[2] Both the April 4, 1997 Findings of Fact, Conclusions of Law and Order and the June 5, 1997 Order on Reconsideration were drafted and submitted by CCCU's attorney.

growth, it ***could*** use the OFM projection number if doing so would otherwise meet the goals of the Act. Specifically, the court stated:

> Without so holding, we assume that the GMA *permits* a county to use OFM's population projections when planning for lands outside its urban growth areas.
>
> *Clark Cnty Natural Res Council v. Clark Cnty. Citizens United, Inc*, 94 Wash. App. 670, 676, 972 P.2d 941, 944 (1999)(emphasis in the original)

Thus, as set forth by Judge Poyfair, GMA allows for the County to use a variety of tools for population allocation, including the OFM numbers. but does not mandate that those tools be utilized. The Court of Appeals issued its opinion on March 12, 1999. CCNRC filed a petition for review with the Washington Supreme Court but that Petition for Review was denied in November 1999.[3]

In addition, while the matter was pending in front of Judge Poyfair (his hearing was held on October 16, 1996), other actions were being taken on the *Achen* case The County was attempting to comply with the portions of the WWGMHB's original FDO and Order on Reconsideration where the County was found to be non-compliant with the GMA but those findings of noncompliance ***were not appealed and were not in front of Judge Poyfair.*** Thus the process had now become bifurcated with some of the non-compliance issues being appealed to the Superior Court (Poyfair) and some of the issues being remanded to the County.

On October 1, 1996, the WWGMHB issued a Compliance Order and Order of Invalidity regarding multiple issues that had been remanded to the County pursuant to the original FDO and Order on Reconsideration ***that were not a part of the appeal in front of Judge Poyfair***. In that October 1, 1996 Compliance Order and Order of Invalidity, the WWGMHB found the County non-compliant on a number of issues that had been remanded One such issue involved growth in the rural area The WWGMHB found that the work on the population allocation, and zoning and designations, in the rural areas regarding rural, resource lands and urban reserve areas to be invalid. *See* http://www.gmhb.wa.gov/LoadDocument.aspx?did=866 (Compliance Order and Order of Invalidity dated October 1, 1996) This Order covered multiple areas of the County's Comprehensive Plan[4] Some of those Findings and Conclusions of this new October 1,

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[3] The correct legal citation for the Court of Appeals' decision in *Clark County Natural Resources Council v Clark County Citizens United, Inc*, 94 Wash.App 670, 677, 972 P 2d 941, *review denied*, 139 Wash.2d 1002, 989 P 2d 1136 (1999)

[4] 1 Include all property of the Ridgefield municipal boundaries within the UGA;

2. Eliminate the new "redesignated" UGA of the City of Camas and redesignate the area between Camas and Vancouver;

1996 Compliance Order and Order of Invalidity were appealed to the Clark County Superior Court and the appeals were assigned to Judge Nichols (Nichols I). CCCU participated in these appeals.

While the appeals were pending before Judge Nichols, the WWGMHB held another compliance hearing in October 1997 on issues where the county had been found to have been non-compliant with the GMA but which had not been appealed from the WWGHB and assigned to Judge Nichols[5]. So, now the original FDO and Order on

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3 Adopt appropriate criteria to determine if and/or when UGA boundaries need to be moved,

4. Determine the proper designation of "non-prime" industrial lands outside the Vancouver UGA,

5. Eliminate all non-prime industrial designations within the urban reserve area,
6 Adopt development regulations to prohibit the conversion of prime industrial land to

other uses,

7. Clarify or eliminate the "no net loss" industrial policy concerning both "prime" and "non-prime" industrial lands;

8 Eliminate any and all resource lands from the urban reserve area and place appropriate resource designations on the properties;

9. Adopt and implement a public participation process that complies with the Act for the commercial code;

10 Adopt techniques to buffer resource lands in accordance with the CFP and GMA Strong consideration must be given to aggregation of non-conforming lot sizes, as well as other techniques to reduce the impact of parcelizations that occurred between 1991 and 1994 Adopt development regulations that prevent incompatible uses from encroaching on resource land areas;

11 Increase the minimum lot sizes of rural areas located north of the "rural resource line",

12 Adopt effective implementing DRs for existing stormwater pollution.

13. Analyze and make appropriate changes to the capital facilities element taking into consideration the incorporated plans, the completed Vancouver capital facilities element and the increase population projection.

In order to comply with the Act, Ridgefield must take appropriate action to correctly designate and analyze all property within its boundaries.

[5]So, as a result of the *Achen et al* appeal to the WWGMHB, some issues were appealed (Poyfair) and some were remanded for the County to come into compliance At a subsequent Compliance hearing on the issues that had not been appealed (Poyfair) but had been remanded to the County, there was another split and some of those findings by the WWGMHB were appealed (Nichols) while others were found to be compliant and others were remanded to the County for further work to come into compliance Once Poyfair ruled, CCNRC appealed one aspect of his ruling (OFM numbers) but the *entire* decision was remanded to the WWGMHB and, in turn, to the County to obtain compliance Once Nichols ruled, the Board held a hearing and re-issued a new Compliance Order and Order of Invalidity but there does not appear to be any further compliance orders or hearings on the Nichols appeal In March of 2009, the Board held a compliance hearing on the Poyfair remand that CCCU filed a motion to dismiss that claiming that

Reconsideration were now trifurcated: 1) Some issues were in front of Judge Poyfair; 2) Some issues were in front of Judge Nichols and 3) Some of the original issues that had been remanded to the County, but not appealed, were still being handled by Compliance hearings in front of the WWGMHB.

After the October 1997 Compliance hearing, the WWGMHB issued a Compliance Order on December 17, 1997. The various parties stipulated to the following issues to be a part of the October 1997 hearing.

CCNRC should have filed a new petition rather than have a compliance hearing on whether the County had complied with the Poyfair remand Finally, in 2006, the WWGMHB issued a final Order in the *Achen et al* case that stated the following:

> THIS Matter comes before the Board upon its order to show cause why compliance should not be found on the remaining issues in this case The Board issued an Order to Show Cause Re: Compliance, on May 8, 2006, providing that the parties must respond no later than May 22, 2006 or the case would be dismissed. No response was received from any party
>
> Although compliance was shown on some issues, compliance for several remaining issues in this case has never been found in a Board order This case has been open for a number of years without action by any party However, on September 7, 2004, Clark County adopted a revised comprehensive plan Several aspects of this revised comprehensive plan were challenged in a Petition for Review and eventually found compliant See *Building Association of Clark County, et al , v. Clark County*, WWGMHB Case No 04-2-0038c (Amended Final Decision and Order, November 23, 2005) The unchallenged portions of the revised comprehensive plan are presumed valid and deemed compliant. RCW 36 70A.320(1) Therefore, with the adoption of a revised comprehensive plan and the issuance of the November 23, 2005, Amended Decision and Order in *Building Association of Clark County, et al , v Clark County*, WWGMHB Case No 04-2-0038c, the Board determines that any compliance issues remaining in this case have most likely been resolved
>
> For that reason, the Board issued its show cause order of May 8, 2006. With the absence of any response by any party, the Board concludes that compliance should be found and this case closed.
>
> **ORDER**
>
> Based on the foregoing, COMPLIANCE on the remaining issues in this case is found and the case is CLOSED

As some of the remand issues from our original compliance order of October 1, 1996, as modified by an order on reconsideration dated November 20, 1996, are presently on appeal to Superior Court[6], a stipulated order was entered limiting the issues for this hearing. Various petitioners sent letters, dated July 29, 1997, and August 26, 1997, that expressed satisfaction with Clark County's compliance which further narrowed the scope of this hearing. The issues that were presented for the hearing on October 9, 1997, involved the size of the Camas urban growth area (UGA), UGA movement in general, resource lands (RL) that had been included in urban reserve areas (URA) instead of being designated, the capital facility plan (CFP), and stormwater. Briefing and oral argument were held contemporaneously with the compliance case of *Clark County Natural Resources et al., v Clark County*, et al., #96-2-0017, (CCNRC II)[7].

Judge Nichols eventually ruled that the WWGMB had improperly placed the burden of showing compliance upon the local government and remanded the case to assign the burden of proof to the petitioners to show lack of compliance and that the Order of Invalidity had to be reconsidered. He also found that Clark County's appeal of issues determined in the original FDO of September 20, 1995, was untimely. *See Clark*

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[6] The Nichols' appeal.

[7] That order was issued December 2, 1997 and held that In this case, the WWGMHB held that "Clark County is not in compliance with the Act with regard to designation and protection of critical aquifer recharge areas. The existing protections are not consistent with Clark County's CP and or CFP In order to comply with the Act, Clark County must adequately identify critical aquifer recharge areas and adopt development regulations that protect those identified areas Clark County is not in compliance with the Act with regard to geological hazard area designations and has not adopted development regulations to protect those areas In order to comply with the Act, Clark County must designate geological hazardous areas and adopt appropriate development regulations for their protection Clark County is not in compliance with the Act because of its failure to designate fish and wildlife habitat conservation areas of local importance, its failure to establish a "review trigger" area surrounding priority habitat and species areas, its failure to apply development regulations to all priority habitat and species areas involved in conversion of forest lands to pasture lands, the exemption of subsection 2(a)(c) and (d) application to all priority habitat and species areas and its failure to provide adequate buffers for Type 1 through 5 waterways including Type 5 waterways in rural areas and its failure to provide a specific measuring standard for establishment of those buffer areas In order to comply with the Act the County must make the appropriate FWH designations and adopt DRs that protect FWH "

County v. Western Washington Growth Management Hearings Board, Superior Court Case No.96-2-05498-8 Dated December 31, 1997[8](Nichols I).

On February 5, 1998, the WWGMHB issued a new Compliance Order and Order of Invalidity in response to Judge Nichols' ruling using Judge Nichols' burden allocation. In that Compliance Order and Order of Invalidity, the WWGMHB held that the County was out of compliance on the following four issues:

> 1. Policies and development regulations (DRs) relating to future adjustments to UGAs (if different issue than the December 17, 1997, order) are not in compliance;
>
> 2. Policies and DRs to eliminate non-prime industrial designations in urban reserve areas as set forth in the November 22, 1996, order on reconsideration are not in compliance,
>
> 3. Failure to increase of the minimum density in rural areas north of the east fork of the Lewis River to an appropriate size that is greater than 5 acres[9] is in violation of the GMA;
>
> 4. Failure to develop policies and DRs designed to buffer resource lands and limit encroaching development in rural and resource areas is not in compliance.

In addition, the Order also reaffirmed the Order of Invalidity as to CCC 18.302, 18.303, 18.305, and those sections of Ordinance 1996-05-01 relating to resource lands and rural lands as they substantially interfered with goals 1, 8, 9, and 10 of the Act[10]. The WWGHMB affirmed that decision in an Order on Reconsideration issued April 30, 1998.

Clark County took an appeal from that February 5, 1998 Order and April 30, 1998 Order on Reconsideration (and, again, CCCU participated in that appeal) The case was again assigned to Judge Nichols (Nichols II) *Clark County v Western Washington Growth Management Hearings Board*, Superior Court Case No. 98-2-02032-0. On August 20, 1999, the Court issued a "Partial Judgment" solely as to the Order of Invalidity and stated that the Partial Judgment "overturned and overruled" the WWGMHB's Order of Invalidity that was part of the February 5, 1998 and April 8, 1999 WWGMHB Orders. The "Partial Judgment" was based on an Opinion by Judge Nichols dated July 1, 1999 that held that the County had discretion under GMA to use a 5 acre minimum rural lot size (1 unit per minimum 5 acres). The "partial judgment" was entered, the Order of Invalidity lifted as to

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[8] Judge Nichols also issued a letter opinion on December 10, 1997, which formed the basis for the Remand Order dated December 31, 1997

[9] As set forth below, the original FEIS recommended 10-15 acre minimums in the rural zones

[10] I have no records of what happened after this Order. There is not any further opinions that I have found addressing the issues that were subject of Judge Nichols' ruling

all of the issues on the appeal and the 5 acre minimum lot size in the rural area remained intact, and remains to this day No parties took further action on this appeal.

While the CCNRC appeal of the OFM issue from the Poyfair's ruling was pending in the Court of Appeals, and the other cases were pending in front of Judge Nichols, the County went to work to achieve compliance with Judge Poyfair's Order[5] As a result of the Poyfair Remand, the County engaged in an extensive public participation process as to both the Rural Activity Centers issue (which had been stripped from the original CP) and the Agri-Forest designation issue These two components of the Remand involved 38,000 acres of land in the rural area that were eventually ***upzoned*** in order to obtain the variety of rural densities required by the Poyfair rulings.

The WWGMHB held a compliance hearing on the Poyfair Remand on March 10, 1999[11], two days ***before*** the Court of Appeals issued its decision in the CCNRC appeal of Judge Poyfair's order regarding the use of the OFM number CCCU filed a motion to dismiss the compliance proceeding on March 2, 1999 challenging the jurisdiction of the WWGMHB to hear CCNRC allegations that the County was still non-compliant because it had eliminated the Agri-Forest Zone and created the Rural Centers.

In order to meet the public participation component that Judge Poyfair said was lacking in the original process, the County convened two separate Task Forces, one to evaluate the Agri-Forest[12] designation and one to evaluate the Rural Centers designation. These task forces were made up of a variety of individuals and met multiple times Both task forces wrestled with the myriad of issues involved. Ultimately, the Task Forces provided reports (majority reports and minority reports) to the Planning Commission and the Board of County Commissioners.

Most importantly, the Findings of the Agri-Forest Task Force were as follows:

- "Generally recognized and maintained consistency with immediately surrounding lot sizes, referred to as "what is" in task force deliberations

[11] This writer does not know why the hearing was held in March 1998 instead of March 1997 but as set forth in the body of the May 11, 1999 Compliance Order, the delay was attributed to the Petitioners *Achen et al*

[12] The County appointed a 13-member task force composed of a variety of stakeholders with interest in this issue The public participation process involved 17 different task force meetings at which public comment was solicited and received, four separate open house meetings resulting in written comment, two separate direct mailings to all property owners within the 35,000 acres, newsletters, press releases, ads and use of the County website. After the task force issued its final report to the planning commission (PC), the PC held a public hearing and issued a recommendation to the BOCC The BOCC then held two public hearings on May 19, 1998, and May 28, 1998, and held four separate deliberative open meeting sessions The public participation in this record was shown to be not only "early and continuous" but also extensive The County should be justifiably proud of the manner in which it conducted this public participation process

- Recognized pre-GMA designations, and limit (sic) associated down zoning
- Generally utilize larger lot designations in the northern portions of the County than in the southern portion.
- Predominantly applied transitional designations, typically Rural 10, to properties which form a transition from resource designations to rural designations
- Predominantly apply a Rural 10 designate (sic) to parcels adjacent to urban growth boundaries, in recognition that CTED documents suggest 10 acres as the minimum parcel size which can be easily converted to future urban use
- Avoid isolated small areas of spot zoning
- Consider on site uses, topography, and natural conditions
- Avoid future land division on remainder lots from previous cluster developments "

See WWGMHB Compliance Order "Poyfair Remand" dated May 11, 1999.

The above Findings were based on what was available to the Task Force members including the following:

> The task force had been supplied with a series of maps (Ex. 235-247) and other materials noted in Ex. 84. The maps showed parcel size, agricultural or forest soil suitability, current and pre-GMA zoning designations, current use taxation status, aerial photographs, pending plat or segregation requests, recent lot creation status, habitat areas, wetlands, steep slopes and utility lines. Ex.80 demonstrated that the task force also considered post-1990 parcels, land values under alternative uses and eco-system importance. Ex. 80 set forth the criteria (statutory, WAC, BOCC and task force,) that were considered by the individual members. Included was a staff report dated May 4, 1998 (Ex. 12), which pointed out that prior to GMA approximately 80% of the 35,000 acres had been designated in non-resource classifications. ***None of the approximately 7,000 acres of pre- GMA resource designation (35,000 x 20%) survived to become GMA-RL-designated areas.***

See WWGMHB Compliance Order "Poyfair Remand" dated May 11, 1999.

At this point, I want to point out that in the present case, CCCU is complaining that the process undertaken above never happened. Rural property owners and stakeholders had a big seat at the table and were provided a plethora of documents, maps, and information that were used to make the final decision Rural stakeholders were not cut out of the process and there was considerable consideration of the nature of the

rural area both pre, and post, the passage of the GMA in 1990. As can be seen from the above, the current claims by CCCU are simply unsupportable One prime example is that 7,000[13] acres that had been designated as resource land ***prior*** to the passage of GMA was now being excluded from resource designation based upon objections and or analysis that was conducted by rural property stakeholders Moreover, as detailed below, CCCU did not challenge the County's determinations on these issues. In fact, as will be seen, CCCU was in accord with the final determination of the BOCC after it completed its work in late May 1998.

Prior to the March 10, 1999 Compliance Hearing on the Poyfair Remand, not only did CCCU not make ***any*** claim that the County was not in compliance with Judge Poyfair's order, CCCU's filed a motion to dismiss that sought ***to prevent the WWGHB from reviewing the County's decisions to eliminate the Agri-Forest Zone and to create the Rural Centers*** [14] CCCU placed nothing in the record at the Compliance Hearing, either in pleadings or at the hearing, that the County was not in compliance with Poyfair's Order, much less the GMA[15]. Yet, CCCU acted affirmatively to prevent the County's actions in response to the Poyfair Remand to be reviewed by the WWGMHB for compliance

Also, and despite Ms Levanen's protestations to the contrary, CCCU was not hamstrung at all in litigating any matter and had plenty of opportunity to pursue the matter as evidenced by the fact that CCCU appealed a portion of this Compliance Order to Clark County Superior Court. *See CCCU v WWGMHB*, Clark County Superior Court Case No. (99-2-02394-7)(Bennett Appeal). During this appeal, CCCU asked Judge Bennett for an Order requiring that the County to comply with the *City of Redmond*'s decision *See* Clark County Superior Court Case # 99-2-02394-7 dated August 9, 1999 (filed August 27,1999). Again, during this appeal, CCCU never claimed that the County failed to comply with Poyfair's Order in any respect. To be clear, CCCU was present

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[13] If one takes the 36,000 acres out of the Agri-Forest zone, that allowed for approximately 7,200 rural 5 acre minimum residential lots

[14] As evidenced by CCCU's actions and the language in the Compliance Order, CCCU was pleased with these two determinations by the County, were distrustful of the WWGMHB and did not want the WWGMHB to review out of a concern that they might not find the County's actions in compliance with the GMA. CCCU participated in this compliance hearing and did not raise any issues that alleged the County had not complied with Judge Poyfair's Order Given the dissent, there was some basis to believe the WWGMHB might have found non-compliance *See* Dissent by William Neilsen

[15] In fact the Compliance Order specifically states:

> "As a result of the remand, the County engaged in an extensive public participation process as to both the rural activity centers issue and the agri-forest designation issue There was no challenge to those processes. Petitioners Clark County Natural Resource Council, et al, (CCNRC) directed their challenges to the substantive outcome of both issues Original petitioners N Lackamas and ***CCCU supported the County's actions*** Participant Lewis River Land Company, LLC (LRLC) also supported the County's actions in designating its property other than RL. Those 4 groups will hereafter generally be referred to as respondents." (emphasis supplied)

with legal counsel in all four Clark County Superior Court Appeals, as well as the Poyfair Remand Compliance hearing, but never did CCCU ever request the WWGMHB to find that the County was not in compliance with the Poyfair Remand. They cannot now credibly claim the contrary.

The May 11, 1999 Order was the second to last Order on any request, by any party, to find that the County had, or had not, complied with any WWGMHB Order on the original *Achen et al* appeals. The last Compliance hearing that the parties had a right to participate in was in 2000 regarding the transportation component. Only CCNRC and the County participated in that hearing.

On May 8, 2006, 2 years after the County issued its new 2004 Comprehensive Plan, the WWGMHB issued an Order to Show Cause Re: Compliance in *Achen*. Specifically, the OSC had a provision that the parties must respond no later than May 22, 2006 or the case would be dismissed. No response was received from any party including CCCU. The WWGMHB issued an ***Order Finding Compliance and Closing Case***.[16] Therefore, the County is legally compliant with the Poyfair Remand

Ms Levanen's Claims/E-mail

The County is also factually compliant with the "Poyfair Remand". Ms. Levanen asserts that because the Compliance hearing in March 1999 only addressed the

[16] The Order stated:

> Although compliance was shown on some issues, compliance for several remaining issues in this case has never been found in a Board order This case has been open for a number of years without action by any party However, on September 7, 2004, Clark County adopted a revised comprehensive plan Several aspects of this revised comprehensive plan were challenged in a Petition for Review and eventually found compliant. See *Building Association of Clark County, et al , v Clark County*, WWGMHB Case No 04-2-0038c (Amended Final Decision and Order, November 23, 2005) The unchallenged portions of the revised comprehensive plan are presumed valid and deemed compliant RCW 36 70A 320(1).Therefore, with the adoption of a revised comprehensive plan and the issuance of the November 23, 2005, Amended Decision and Order in *Building Association of Clark County, et al , v Clark County*, WWGMHB Case No 04-2-0038c, the Board determines that any compliance issues remaining in this case have most likely been resolved
>
> For that reason, the Board issued its show cause order of May 8, 2006 With the absence of any response by any party, the Board concludes that compliance should be found and this case closed
>
> **ORDER**
>
> Based on the foregoing, ***COMPLIANCE on the remaining issues in this case is found*** and the case is CLOSED (emphasis supplied).

Agri-Forest and Rural Centers issues, it failed to address whether the County was now in compliance with all portions of the issues remanded to the County as part of the Poyfair Remand Nothing could be farther from the truth

The foundation of Poyfair's Orders was that because the county added in the Agri-Forest designation and excised the rural centers at the 11th hour of the process, it skewed the rural designations and failed to comply with the GMA By going back and meticulously and painstakingly going through a very contentious process, for all intents and purposes, the County eliminated the Agri-Forest Zone and created larger Rural Centers than had been initially contemplated.

Ms. Levanen says that because the other issues were not addressed by the WWGMHB, they are presumed non-compliant. Her claim is legally false and ignores the fact the CCCU did ***not*** want the WWGMHB to review the County's compliance because it was in favor of CCCU. If CCCU felt that the County was non-compliant at that time, instead of trying to prevent the WWGMHB from determining compliance, CCCU could have easily, as they were doing in multiple appeals, ***they could have raised all of those issues at that time.*** CCCU cannot now claim no compliance after forfeiting the rights to request the WWGMHB to find non-compliance and attempting to stymie the WWGMHB from hearing the compliance issues that were raised by CCNRC.

The basic principle is that the burden is on the party claiming non-compliance to show the County is non-compliant. *See* Order date December 31, 1997 (Nichols I) and Compliance Order and Order of Invalidity dated February 5, 1997 (holding that Superior Court held that burden is on party asserting non-compliance to prove County is non-compliant-precursor to Nichols II). However, once a finding of Invalidity has been made by the WWGMHB, the burden is on the party challenging Invalidity to prove that Invalidity is not appropriate.

Therefore, all CCCU had to do was to assert and prove that the County was not in compliance with Poyfair's Order at any Compliance hearing (and the March 10, 1999 would have been the logical one because all parties were present and the WWGMHB was trying to determine if the Comp Plan was now in compliance with the GMA by striking the Agri-Forest Designation and creating the Rural Activity Centers). As stated, the elimination of the Agri-Forest designation, and creation of the Rural Centers, were two of the main components of the Poyfair Order. Judge Poyfair's Order states "The eradication of the centers (rural centers) violates the planning goal requiring a variety of residential densities." So, the County put the Rural Centers back in, and expanded the boundaries of those Centers. The County's position in front of the WWGMHB was that the removal of the Agri-Forest designation along with creation of the Rural Centers brought them into compliance with Judge Poyfair's Order and CCCU agreed implicitly and explicitly.

Ms. Levanen also claims that the County is out of compliance with the Poyfair Remand regarding SEPA. She is again, factually and legally incorrect. Although, it is not clear if the County did a supplemental FEIS on Remand, there was no need for the County to conduct such a review because the FEIS was *only* found to be

inadequate because the analysis: 1) failed to include an analysis of the Agri-Forest designation and 2) failed to address the exclusion of the Rural Centers. Once the County eliminated the Agri-Forest designation, and put the rural centers back into the Comprehensive Plan, there was no longer a SEPA violation. Moreover, the County's Comprehensive Plan has had to comply with SEPA since the Remand in 2004 and 2007. There have been no challenges to the SEPA analysis of which I am aware and therefore, it has complied with SEPA.

Ms. Levanen states that "'They'[17] timed the Compliance decision to happen just after the Court of Appeals decision of 1999, counting on CCCU's attorney not being available to protest the remand action". This statement is not only factually incorrect, the record shows the opposite occurred and CCCU and their attorneys participated fully in all of the proceedings.

No one outside the Court of Appeals knows when the Court is going to release its opinions. Therefore, the WWGMHB would not have known when the Court of Appeals was going to release its opinion in the CCNRC appeal of Judge Poyfair's Conclusion of Law Even if the WWGMHB had that knowledge, it is irrelevant because the Compliance Hearing occurred on March 10, 1999, two days ***before*** the Court of Appeals released its opinion. Moreover, any claim that the CCCU attorney's ability to act was compromised in anyway is unsupportable given that CCCU's attorney filed the motion to dismiss on March 2, 1999, 8 days ***before*** the Compliance Hearing and 10 days ***before*** the Court of Appeals issued its decision. In addition, CCCU's attorney appealed the Order from the March 10, 1999 Compliance Order.

Therefore, Ms. Levanen's claim that the timing of the Compliance hearing was compromised by the issuance of the Court of Appeals' opinion is totally unsupportable since CCCU filed motions to dismiss the compliance hearing, and participated in the compliance hearing, ***before*** the Court of Appeals rendered its decision

Ms. Levanen states that, "The Plan in place today, is the same plan that was adopted in the rural and resource land in 1994 It has never been changed and after over twenty years, legitimate changes must be made." This is patently false. The 1994 plan had 35,000 acres of Agri-Forest land designated. After the Poyfair Remand, all but 3,500 acres of that land was removed from Resource Land[18]. The 1994 plan eliminated Rural Centers, which were reinstated as part of the Poyfair remand and are now part of the current Comprehensive Plan that has been found compliant.

There are now a variety of rural densities in the Comprehensive Plan as evidenced by 3000 acres in the Rural Centers and the elimination of the Agri-Forest

[17] This writer believes that she is referring to the WWGMHB.

[18] The WWGMHB decision which disallowed the 3500 acres was appealed to the Superior Court by CCCU whose attorney filed a Motion For Judgment on the pleadings (Bennett Appeal) that the Court granted and then remanded to the Growth Board to consider in light of the Supreme Court case in *Redmond*. This writer is still unclear if the 3500 acres remained in resource land designation or reverted to 5 acre rural designation

Resource lands Moreover, in 2007, thousands of acres of resource land was de-designated and put into the Urban Growth Areas and/or annexed into city boundaries. New development regulations changed the way that the County dealt with timber lands[19] and, in some cases, allowed conversion of those lands to non-resource development. All of these changes, among others, have occurred over the 21 years since the original passage of the 1994 plan

Finally, any claim that the voices of the rural residents have not been heeded since the inception of the GMA process is factually unsupportable. The County originally planned for 10-15 acre rural minimum lot sizes (not for resource lands but for just the rural zone). If one goes back and looks at the original FEIS[20] that Ms Levanen mightly claims should have been redone, it is apparent that the rural people eventually convinced the county and the courts to reduce those minimums to the 5-acre minimum that the County ultimately imposed that minimum lot requirement[21].

The County staff had originally recommended either 10 or 15-acre minimum rural residential lot sizes north of the Resource Line (East Fork Lewis River) but that was ultimately rejected. In addition, the original Wetlands Ordinance was

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[19] The County convened a Forest Conversion Task Force that consisted of myself, three local tree farmers, a representative of DNR and a representative of WDFW and that Task Force developed a comprehensive set of regulations for protection and conversion of forest lands.

[20] The Final EIS for the County's Growth Management plans focuses its attention on Alternatives B and C. Alternative B provided for 10 acre minimum lot sizes north of the East Fork of the Lewis River, and Alternative C provided for 15 acre minimum lot sizes north of the East Fork of the Lewis River. *See*, FEIS at II-11, 15 In support of the 15 acre rural lot size, the FEIS states at II-16 "minimum lot sizes in rural areas (15 acres) and for resources land would be larger and reflect the recommendation of the Washington State Department of Natural Resources (DNR)) and DCTED for minimum lot sizes in resource lands

The FEIS also included an Alternative A, which was a continuation of the County's existing policies, including 5 acre lots However, the FEIS concluded that continuation of the County's then current Rural Land Use Policies would not be consistent with the County's Community Framework Plan, nor the intent of the GMA As the FEIS indicates at II-8 under Alternative A the policies of the adopted Comprehensive Plans would remain in effect "This alternative may not meet the intent of the CFP (Community Framework Plan), and would be difficult to reconcile with the intents of the GMA to concentrate urban development in cities".

The FEIS goes on to note the virtues of large rural lot sizes north of the East Fork of the Lewis River As it states at III-9

> Alternative B would protect rural and resource lands from urban types of development Areas outside of designated UGAs would not receive urban levels of service. Lots in rural areas would be a minimum of five acres in size in the southwestern portion of the County, and 10 acres north of the East Fork of the Lewis River and east of 182nd Street This would allow residents to keep animals and engage in small-scale farming and resource-based industries such as commercial forestry, Christmas tree operations, dairying, berry farming, orchards, and mining . Supporting commercial and public uses would be concentrate d in designated Villages or Hamlets Rural lands would also serve as buffers between resource lands and urban areas

[21] Although the WWGMHB found the 5 acre rural zone non-compliant and issued an Order of Invalidity, Judge Nichols reversed that Order (Nichols II)

dramatically changed after an outcry from organized groups from the rural area led by Chuck Cushman Moreover, there were many rural stakeholders on the Task Forces[22] that were appointed as part of the Poyfair Remand and those voices spoke in the various reports that were issued

Public hearings went long into the night and, in an effort to have more rural stakeholders present at those hearings, some public hearings were held at LaCenter High School rather than in downtown Vancouver Certainly, there were many, many issues with the development of the original plan. Citizens, the County, the WWGMHB and the Courts were all trying to interpret what the real requirements of the GMA were, and how to comply. In addition, as the County was going through its processes, amendments were being made to the GMA in the legislature and after almost 6 years, the 1994 plan was compliant with all of the directives of the courts and with the tacit or explicit assent of all the parties.

Thank you for allowing me to comment on the history of the County's actions and the claims being made by CCCU Please submit these comments to the record on both the Comprehensive Plan update and the DSEIS. I hope staff, the Planning Commission Members and the Board of County Councilors find this to be of assistance as they weigh the issues in front of them.

Sincerely,

David T. McDonald
On Behalf of Friends of Clark County

[22] Lonnie Moss, one of the founders of CCCU was also a member of the County Planning Commission during the remand period

FRIENDS OF CLARK COUNTY
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Dear Councilors:

Please accept my comments on the proposed Comprehensive Plan update as the legal representative of Friends of Clark County and in my individual capacity. I am a 30 year resident of rural Clark County having lived the past 25 years in the same home in unincorporated Clark County in the Fairgrounds area I became active in Growth Management issues in the County prior to the passage of the Growth Management Act in 1990 when I worked in support of the County's Habitek project in the Vancouver Lake Lowlands. During the past twenty five years I have served in multiple volunteer capacities involving growth issues in Clark County including as a member of the Boundary Review Board of Clark County, including a term as Chair, a member of multiple task forces addressing growth related issues including: the Rural Centers Task Force, the Vacant Buildable Lands Committee, the Forest Conversion Task Force, the Agricultural Task Force and, early on, the Technical Advisory Committee.

In addition I helped draft legislation on growth issues including the first Sensitive Lands Ordinance for the City of Ridgefield I have also been lead and/or co-counsel representing a number of different groups and individuals on land use issues including litigation in conjunction with, as well as opposing, our County's land use policies. I have litigated cases in front of the WWGMHB and the local Superior Court in support of, and in opposition to, our County's land use policies. Finally, as a private citizen, I have testified more times than I can remember on land use policies as legislation and as applied to site specific projects, in front of Clark County Hearings Examiners, the Clark County Planning Commission, the Clark County Board of County Commissioners and the equivalent legislative bodies in the City of Ridgefield.

I have seen a lot of misinformation, and disinformation, regarding what has been dubbed the "Poyfair Remand" and, therefore, my initial comments are a summary of the history of the GMA in this county with a focus on providing the current councilors with a legal and factual history regarding Judge Poyfair's decision, the subsequent actions by the County on Remand and the final finding of compliance. Any statements that the County is not in compliance with Judge Poyfair's ruling are, at best, inaccurate.

It is with the foregoing background that I provide you with the following comments

History of GMA Clark County

The legislature enacted the GMA in 1990 and 1991 largely " 'in response to public concerns about rapid population growth and increasing development pressures in the state, especially in the Puget Sound region ' " *King County v Cent Puget Sound Growth Mgmt Hearings Bd*, 142 Wash.2d 543, 546, 14 P.3d 133 (2000) (quoting Alan D. Copsey, *Including Best Available Science in the Designation and Protection of*

Critical Areas Under the Growth Management Act, 23 SEATTLE U.L.REV. 97, 97 (1999)). I 547 qualified for the ballot but, before the election, the state legislature enacted the GMA After decades of lax and optional land use regulations, the legislature's stated intent was to combat "***uncoordinated and unplanned growth***." RCW 36.70A.010.[1]

"In seeking to address the problem of growth management in our state, the Legislature ***paid particular attention to agricultural lands***." *King Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd* , at 555(emphasis supplied). Most importantly when determining the populations, and attendant zoning in the rural and resource lands areas, any innovative techniques used to create a variety of rural densities must be "consistent with the overall meaning of the Act, a development regulation must satisfy the Act's mandate to conserve agricultural lands for the maintenance and enhancement of the agricultural industry". *Id at 560.* The explicit purpose of RCW 36.70A.177 is to provide for creative alternatives that *conserve* agricultural lands and *maintain* and *enhance* the agricultural industry *Id at 561*(emphasis in original).

After the passage of the Growth Management Act, and prior to the County adopting its own plan, many attempted to circumvent the provisions of the Act. For example, in 1993, according to a County staff report drafted by then Planning Director Craig Greenleaf, the dawn of the GMA triggered an onslaught of property divisions not before seen in the County. Planning Director Greenleaf determined that "the rapid pace of development in Clark County which would undermine the goals of the Growth Management Act in the absence of emergency moratoria has continued at ever increasing rates". By October 1993, the Planning Division received an average of 135 permit applications per month, an increase of 17% from 1992. Subdivision applications increased over 1992 by 27%. Cluster subdivision applications averaged 6 per year between 1980 and 1989. The rate more than doubled to 13 3 per year.

According to this same staff report, areas that would have qualified for designation as natural resource lands were particularly hard hit. A comparison of the number of lots created for the months of May and June for the years 1992 to 1994 shows that while fewer than 40 new lots were created in 1992, that number had risen to over 270 for the same two month period by the year 1994

Specifically, Planning Director Greenleaf stated:

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[1] "One of the primary purposes of the Act is to direct new growth into IUGAs or UGAs. The Legislature has determined by adoption of the GMA that directing growth to urban areas provides for better use of resource lands and more efficient uses of taxpayer dollars. A county must size an IUGA large enough to accommodate the growth that will be directed into it A recognition of growth that has already taken place will prevent undue oversizing of the IUGAs. Likewise a recognition of the growth that will occur outside IUGAs (due to preexisting lots in rural areas) should not encourage growth in those areas but merely recognize its existence. The GMA requires counties to adopt policies, DRs and innovative techniques to prohibit urban growth outside of properly established IUGAs and UGAs The more a county utilizes these techniques to funnel growth into urban areas, the more discretion is afforded under the Act in sizing IUGAs or UGAs." *C U.S T.E R. v. Whatcom County,* WWGMHB #96-2- 0008,

> There has clearly been a significant increase in [large lot] segregation in recent years in response to potential changes in county code The County Assessor's Office has few records from prior to 1989. In 1989 there were 117 segregation requests. In 1990, the year of the initial Growth Management legislation, the number of requests jumped to 789 In the month of April, 1993, during which the emergency ordinance was announced, there were requests for the segregation of 407 parcels, which represents an 800% increase from March of 1993, and is more than were received during the entire 1992 calendar year From January 1990 to the inaction of the emergency ordinance on April 19, 1993, requests for the segregation of a total of 2,473 parcels have been received. *At an estimated 5 acres per parcel, this corresponds to 12,365 acres, or over 19 square miles. The 2,473 parcels represent about 2,000 or more students added to local school districts* (Emphasis supplied)

As part of the GMA process, several focus groups were formed to address various issues One such group was the Rural and Natural Resource Lands Focus Group which was divided into an agricultural group, a forest group and a mineral group. Those groups then made recommendations to the county staff, which in turn made recommendations to the Planning Commission and the BOCC On October 13, 1994, Craig Greenleaf issued a staff report to the Planning Commissioners In that report he concluded that.

> In the work of the Forest Focus group, the delineation of the Rural Resource line was developed to recognize the difference in character of the two areas. Less parcelization has occurred in the area north of the East Fork and aerial photos also illustrated that much of the parcelization shown on the map did not actually have buildings constructed. Based upon this work and the need to support the population projections forecast for the rural areas, staff recommends a minimum lot size of five acres south and west of the Rural resource line *and 10 acres* north and east of the Rural Resource line
>
> In that report, Mr Greenleaf proposed a matrix of alternatives including the use of Purchase of Development Rights, Transfer of Development rights and Conservation Easements to prevent further unmitigated building upon rural lands beyond the need for the 20 year

population projection. The Planning Commission agreed with the staff report and

Finally, in that document, Mr. Greenleaf stated that: "Cluster developments and rural Planned Unit Developments allow for significant increases in rural development densities, which *deplete and undermine agricultural and forest resource activities, and result in incompatibilities with existing rural uses.* (Emphasis supplied).[2]

In 1994, after work by multiple task forces, scores of public hearings and intermediary lawsuits, our county adopted our first comprehensive plan. The plan was appealed by a myriad of parties and became known as the *Achen* appeal The WWGMHB issued a Final Decision and Order (FDO) and there were 16 separate motions on reconsideration on which the WWGMHB ruled, many involved rulings with respect to whether the plans of the various cities were in compliance.

In 1995, while the matter was being appealed to the WWGMHB, Clark County executed a stipulation in WWGMHB Case No. 94-2-0014 stating that the County failed to enact interim development regulations designed to designate and protect critical areas and natural resource lands. Instead, the County relied on various combinations of existing non-GMA ordinances and zoning, which it admitted failed to meet the identification, designation or protection requirements of state law.

However, several appeals were taken from the WWGMHB FDO. Clark County Superior Court Judge Poyfair heard one such appeal. Judge Poyfair's opinion reversed the WWGMHB Final Decision and Order (FDO) on several grounds and held the following: 1) The agri-forest designation violated GMA; 2) Failure to solicit meaningful public input for the ag-forest designation violated the public participation provisions of the GMA requiring early and continuous public participation in the development and adoption of the comprehensive plans; 3) The county failed to ensure a variety of densities in the rural area because it removed the designation of rural centers from its Community Framework Plan and set 5 acre minimum lot sizes based upon the OFM numbers. Most importantly, Judge Poyfair found there was substantial evidence in the record to support the County's designation of agricultural resource lands. CCCU did ***not*** appeal that decision. On remand to the WWGMHB, the Board issued a Remand Order remanded the matter to the county. Order on Remand[3]. *See WWGMHB #95-2-0067*

After Judge Poyfair's ruling, an appeal was taken to the Washington State Court of Appeals on the sole issue of whether or not the County was ***required*** to use the

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[2] In April 1993, the County finally issued an emergency moratorium, but it was specifically limited to cluster subdivisions and planned unit developments in the rural areas It specifically did not address the continuing parcelization and development of other rural areas, including as yet undesignated and unprotected critical areas and natural resource lands

[3] http://www.gmhb.wa gov/LoadDocument.aspx?did=869

OFM number in determining a cap on rural population allocations. The appellate court ruled that, although GMA did not ***require*** the county to use OFM's projections as a cap on non-urban growth, it ***could*** use the OFM projection number if doing so would otherwise met the goals of the Act. Specifically, the court stated:

> Without so holding, we assume that the GMA *permits* a county to use OFM's population projections when planning for lands outside its urban growth areas
>
> *Clark Cnty Natural Res. Council v. Clark Cnty. Citizens United, Inc* , 94 Wash. App. 670, 676, 972 P.2d 941, 944 (1999)(emphasis in the original)

While the matter was pending in front of Judge Poyfair (his hearing was held on October 16, 1996), other actions were being taken on the *Achen* case because the County was attempting to take actions in response to the original *Achen* opinion by the WWGMHB that were not appealed to Judge Poyfair. On October 1, 1996, the WWGMHB issued a Compliance Order and Order of Invalidity regarding multiple issues. The WWGMHB found the County non-compliant on a number of issues. One such issued involved growth in the rural area. The WWGMHB found that the work on the population allocation, and zoning and designations, in the rural areas regarding rural, resource lands and urban reserve areas to be invalid[4].

While the matter was pending in the Court of Appeals on the sole issue of the use of the OFM number, Clark County went back to work to comply with Judge Poyfair's order[5]. As a result of the remand, the County engaged in an extensive public participation process as to both the rural activity centers issue and the agri-forest designation issue (Poyfair had ruled that the county had been non-compliant as to the public participation element in the development of the agri-forest zone and the elimination of the rural centers from the Community Framework Plan). There were no challenges to those processes. The County appointed a Rural Centers Task Force (upon

[4] Clark County has adopted a maximum population projection, maximum market factor, maximum vacant lands analysis and maximum urban growth areas It must be consistent with that process by minimizing rural growth and doing anything and everything available to direct new growth into the urban growth areas The rural growth protection of 25,071 does not provide for any new lots and only a 95% build-out of existing lots Given the evidence contained in this record particularly the neglect of Clark County to take action from 1991 through 1994 for rural and resource lands, the current failure to take effective steps to conserve resource lands once they were designated and prevent the kind of sprawl in rural areas that the Act is designed to prohibit, the present rural zoning code DRs adopted at the time of the CP and as part of Ordinance #1996- 05-01 substantially interfere with the goals of the Act and are found to be invalid under the test provided in RCW 36 70A 300. Specifically CCC 18 302, 18 303 and those sections of Ordinance #1996-05-01 relating to resource lands, rural lands and urban reserve areas are declared to be invalid Those sections substantially interfere with goals 1, 8, 9 and 10" The county had allowed for a 5-acre minimum in the rural area, as opposed to a 10-acre minimum The County and CCCU appealed the Order of Invalidity in part and Judge Nichols reversed the WWGMHB as to the validity of the 5-acre minimum in the rural area Judge Nichols held that the county's five-acre minimum for the rural area complied with the Act. Thus the current zoning of one dwelling unit per five acres is GMA compliant. The proposed reductions by Alternative #4 would be in contravention of that compliance.

[5] http://www gmhb wa.gov/LoadDocument aspx?did=869).

which I served) to review the original Rural Activity Centers that had been deleted from the Community Framework Plan ***and*** do so in light of the new 1997 amendments to RCW 36.70A.070(5). It is important to note that the County undertook this process *while Judge Poyfair's opinion was being appealed to the Washington Court of Appeals*.

The RCTF made recommendations that substantially expanded the boundaries of the designated Rural Centers (Amboy, Brush Prairie, Chelatchie Prairie, Hockinson, MeadowGlade—Farghar Lake was added later). For example, in the 2004 plan, Amboy had 400 acres in land use, Brush Prairie had 327 acres, Chelatchie Prairie had 523, Dollars Corners had 329 acres, Hockinson had 264 acres and MeadowGlade had 1308 acres. The county ultimately adopted the Rural Centers majority report asserting that the designation of the rural centers represented the use of innovative techniques within the rural element to create a variety of densities without diminishing the rural character. Thus, these rural centers acted in the way projected by GMA, to have some higher densities concentrically moving to the edge of the less dense five acre rural element and, if abutting to resource lands, permitting a buffer to those lands.

The task force started in December 1997 and ended in March 1998 The Task Force issued a majority report, a minority report and an alternative report. The Planning Commission recommended adoption of the minority report but the Board adopted the majority report (which had a 75% consensus) As to the remand on the agri-forest zone, the public participation process was robust:

> The BOCC began its work regarding the 35,000 acres by appointing a 13-member task force composed of a variety of stakeholders with interest in this issue. The public participation process involved 17 different task force meetings at which public comment was solicited and received, four separate open house meetings resulting in written comment, two separate direct mailings to all property owners within the 35,000 acres, newsletters, press releases, ads and use of the County website After the task force issued its final report to the planning commission (PC), the PC held a public hearing and issued a recommendation to the BOCC. The BOCC then held two public hearings on May 19, 1998, and May 28, 1998, and held four separate deliberative open meeting sessions. The public participation in this record was shown to be not only "early and continuous" but also extensive. The County should be justifiably proud of the manner in which it conducted this public participation process.
>
> *See WWGMHB* #95-2-0067 Compliance Order ***(May 1999)***[6]

The WWGMHB found that the county was compliant with its designation of all but 3,500 of the 35,000 acres it designated on Remand. NO party took exception to, or appealed, that 1999 Compliance Order on Poyfair's Remand. Therefore, the

[6] http //www gmhb wa gov/LoadDocument aspx?did=871

actions taken by the County are deemed valid. The Poyfair Remand formally ended in 2006 when the WWGMHB sent out notice to all parties requesting objections to the whether or not the County had complied with Judge Poyfair's remand. No party replied and the WWGMHB held that "Based upon the foregoing, COMPLIANCE on the remaining issues in this case is found and the case is CLOSED" (upper case in original).[7]

The RCTF spent hundreds of hours reviewing the various rural centers in the county, setting boundaries for those centers and focusing on concentrically increasing lot sizes from the "hub" of the rural centers out to their defined boundaries The entire purpose was to allow a variety of densities as a part of the rural element None of those decisions has ever been challenged By 1999, the second comprehensive plan effort was launched. The state Office of Financial Management (OFM) projected a 20-year Clark County population increase to between 453,280 and 571,061 people. As adopted, the county's 2004 plan assumed an annual growth rate of 1 69 percent, resulting in a projected mid-range population forecast of 517,741 (according to the current US census, Clark County's 2014 population is 451,008 which is lower than the low end of the 1997 projection). Urban growth areas were expanded by 6,124 acres, or 9 57 square miles

Fourteen appeals challenging the 2004 plan were filed with the hearings board. The appeals focused, in part, on a last-minute reduction in the assumed growth rate, moving it from 1.83 percent to 1.69 percent. There was no challenge to the rural element by the parties to the matter in front of the WWGMHB. The hearings board upheld the county's plan on the issues raised. The court noted that:

In 2005, a new Board found the growth rate assumed in the 2004 plan was unrealistically low based on historic trends, and agreed to reopen the plan Relying on county assurances for an increased local process, the city of Battle Ground and development petitioners withdrew their appeals. On Nov. 23, 2005, the hearings board issued its amended Final Decision and Order in the case of *Building Association of Clark County v Clark County*, WWGMHG No. 04-2-0038c. The decision upheld the 2004 plan

In the final findings of fact, the WWGMHB found the following:

> "The County's development regulations to conserve agricultural lands and prevent interference from incompatible uses are unchallenged and therefore deemed compliant. . A property owner who wishes to change the designation of commercially significant agricultural land that also has an Urban Reserve or Industrial Urban Reserve overlay, must still meet the criteria for designation and zoning map changes outlined in CCC 40.50.010. Any

[7] http://www gmhb wa gov/LoadDocument aspx?did=263

> owner of commercially significant agricultural land would be obliged to do the same.... The limitations in county code at CCC 40.50 010 deter the conversion of adjacent lands designated agricultural lands within the current twenty-year planning horizon" Decision at 48-49.

In June 2005, the Board of County Commissioners launched a two-year update process that culminated in adoption of a 2007 Comprehensive Plan amendment The plan assumed a 2.2 percent growth rate for the first six years and a 2.0 percent growth rate for the remainder of the 20-year plan. Those assumptions resulted in a population forecast of 584,310, and urban growth areas were expanded by 12,023 acres.

The 2007 plan was appealed. The appellants were, in order, Karpinski, Clark County Natural Resources Council, and Futurewise, They were arguing that the county had erroneously moved 4,351 acres from agricultural designation to a non-resource designation, and included those lands within urban growth areas. As a result of the appeals process, the rezoning of about 1,500 acres was ruled invalid (1/3), and those lands were removed from urban growth areas and again designated as agricultural lands. All 1,500 acres had been zoned for employment lands. After approximately 7 years of litigation, the final order on compliance was issued by the WWGMHB on September 4, 2014.

Rural and Resource Land Element of CP

The Washington Supreme Court has emphasized that any county's actions, although entitled to some deference, are constricted by the goals and requirements of the GMA. *King Cnty. v. Cent. Puget Sound Growth Mgmt Hearings Bd.*, 142 Wash. 2d 543, 561, 14 P.3d 133, 142 (2000)("Local governments have broad discretion in developing [comprehensive plans] and [development regulations] tailored to local circumstances." *Diehl*, 94 Wash App. at 651, 972 P.2d 543. Local discretion is bounded, however, by the goals and requirements of the GMA).

The statute provides for specific planning goals that are applicable to the allocation of population to the rural and resource land zones:

> (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
>
> (2) Reduce sprawl Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

> (8) Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.
>
> (9) Open space and recreation Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities
>
> (10) Environment Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water
>
> (11) Citizen participation and coordination Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.
>
> (12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.
>
> RCW 36.70A.020

In 1997, the Washington State Legislature amended the Growth Management Act in Senate Bill 6094. One aspect of the amendments concerned the Rural Element. Under §7(5), the purpose of the Rural Element is to limit areas of "more intensive rural development" as follows:

1 Rural development may consist of infill, development or re-development of "existing commercial, industrial, residential or mixed use areas,

2. Limited small scale recreation and/or tourist uses "principally designed to serve the existing and projected rural population" which may be served by public services which "shall be limited to those necessary to serve the recreation or tourist" and shall not be allowed to expand "low density sprawl";

3. Limited **intensification** of development of non-residential uses and business, which, although not designed to serve the existing and projected rural populations, do provide job opportunities for rural residents;

4. A county shall adopt measures to minimize and contain the existing areas for intensive rural development as appropriate.

Therefore:

A. Lands should not extend beyond the logical outer boundary of the existing area or use and thereby allow a new pattern of low-density sprawl.

B Existing areas should be clearly identifiable and contained within a logical boundary delineated predominately by the built environment.

C. The county shall establish the logical outer boundary of an area of more intensive rural development considering the following factors:

i The need to preserve the character of existing natural neighborhoods and communities,

ii Physical boundaries such as bodies of water, streets and highways and land forms and contours,

iii. Prevention of abnormally irregular boundaries; and

iv. The ability to provide public facilities and public services in a manner that *does not permit low density sprawl*

The continuing purpose of the "Rural Element" factor in the Growth Management Act is to.

1 Preserve open space, the natural landscape and vegetation over the built environment;

2. Foster traditional rural lifestyles and rural-based economies;

3. Provide visual landscapes traditionally found in rural areas;

4 Only encourage land uses, which are compatible with the use of the land by wildlife and for fish and wild habitat;

5. Land uses which reduce the inappropriate conversion of undeveloped land into sprawling low-density development;

6 Land uses should not require the extension of urban governmental services; and

7. Land uses which are consistent with protection of natural surface water flows and ground water and surface water recharge and discharge areas.

Importantly, Rural character in the GMA has a visual element. Rural character is defined as patterns of land use where natural landscapes and vegetation predominate over the built environment and where traditional visual landscapes are provided. RCW 36.70A 030(15)(a) and (c). The rural element of a county plan must contain measures governing development that "assure visual compatibility" with surrounding rural areas RCW 36.70A 070(5)(c)(ii). The visual element goes to densities as the increase in the number of residences, and the attendant development to those residences, affects the visual character of the rural area.

CURRENT PROCESS

Alternative # 4 constitutes site-specific, spot zoning created by circumventing the usual and customary public participation process system to satisfy the demands of a limited single interest non-diverse group of citizens with a specific and limited agenda The Alternative was created with complete disregard of the County's planning process and without any input from the Department charged with updating the County's Comprehensive Plan. The site-specific zoning changes ignore, and violate, the statutorily mandated criteria for designating rural and resource lands. It fails to follow the mandates of the Washington Supreme Court and ignores years of development of the County's own Comprehensive Plan and development regulations. It does not represent an "update" but rather is a tidal change by removing any Growth Management Act policies, processes and criteria for determining zoning for the rural and resource lands of the County.

There are those within the single interest group that has dominated the development of the Alternative #4 that are making inaccurate statements regarding the *Poyfair* opinion and the history of Growth Management in this County It is important to note the individuals who identified themselves with the rural area to Councilor Madore, and specifically identify themselves with CCCU, were prominent figures on all of the task forces appointed by the County Not only were they active participants but also they succeeded over many objections to obtaining higher densities than had originally bee proposed along with development regulations that allowed for increased uses and the development and implementation of the Rural Centers. The few individuals in this single interest group may claim that they are still waiting for the County to comply with the original Remand but, as set forth in detail above, Judge Poyfair's order was fully complied with over 15 years ago, confirmed, and the case finally closed in 2006 The agri-forest designation was eliminated and the rural centers were returned to the plan were authorized

Alternative #4 violates the edicts of the GMA and the County's own resolutions that have been enacted as part of this process in the following ways:

1. The development, and consideration of, this alternative violates the Public Participation element of the GMA and violates the County's adopted Public Participation resolution that the county passed in January 2014 (2014-01-10) and therefore should not be considered and should not be considered as an alternative in the SEPA process that had been ongoing until halted in January of this year.

2. The development of Alternative #4 violates the county's own resolution (2014-06-17) in that it considers changes to the Comprehensive Plan that violate the county's adoption of the OFM number, the 90/10 split on allocation of population between the Urban Growth Areas and the rural and resource land areas;

3. The development of Alternative #4 violates the County's policies on the rural area, fails to protect rural and resource lands and fails to protect the rural character as defined by state statute,

4. The inclusion of Alternative #4 should be excluded from the SEPA process as it violates the Board's Principle and Value to minimize the conversion of farmland in the rural area; and

5. Alternative #4 does not represent the actual "legal buildable" lots on the site specific zoning changes proposed in the Alternative.

Public Participation Element Violated

The first issue is whether the development of Alternative #4 meets the "public participation" component of the Growth Management Act. The answer is no, it does not meet either the letter or the spirit of that provision.

RCW 36.70A.130(2)(a) provides:

> Each county and city shall establish and broadly disseminate to the public a public participation program consistent with RCW 36.70A.035 and 36.70A.140 that identifies procedures and schedules whereby updates, proposed amendments, or revisions of the comprehensive plan are considered by the governing body of the county or city no more frequently than once every year . . .

RCW 36.70A.140 provides:

> Each county and city that is required or chooses to plan

> under RCW 36.70A.040 shall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments. In enacting legislation in response to the board's decision pursuant to RCW 36 70A 300 declaring part or all of a comprehensive plan or development regulation invalid, the county or city shall provide for public participation that is appropriate and effective under the circumstances presented by the board's order. Errors in exact compliance with the established program and procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is observed

In this case, the county adopted a public process model in Resolution #2014-01-10 and adopted the Clark County Public Participation Plan and Preliminary Scoping Schedule (Public Participation Plan or PPP). The PPP first recognized the purpose of GMA is to ensure "***early*** and continuous public participation" and requires that "local programs clearly identify schedules and procedures for public participation in the periodic update process" with a goal to "ensure broad participation by identifying key interest groups, soliciting input from the public and "***insuring that no single group or interest dominates the process***" (emphasis supplied).

The document also states that the county will coordinate with the cities on countywide planning issues and "will coordinate meetings to discuss issues and seek consensus with each municipality before taking final action"

In this case, Councilor Madore specifically excluded Planning Staff, including the planning director Oliver Orjiako and Gordy Euler, from participating in the development of the plan. Rather, according to e-mails discovered through a PRA request, the alternative was initially being developed between a few individuals who identify with one single issue special interest group and Peter Silliman (who has no background in planning of which I am aware and who did not work with any member of the planning department). Those e-mails show that Councilor Madore was being sent e-mails regarding this process to both his business (US digital) and county e-mail address but none of them appear to have been forwarded to staff, much less made known to staff

This clandestine and exclusive method of developing a proposal that has widespread impact on every citizen of this county is exactly what the GMA is designed to prevent. There is no explanation for this action except that Councilor Madore deliberately excluded any individual from staff or the public that might have provided a different perspective than his own. This is purely and simply a result oriented Alternative completely void of complete, open and transparent public process. Therefore, what now appears to be Councilor Madore's preferred alternative for the SEPA process violates both the statutory provisions of the GMA and flies in the face of the County's own resolution passed in January 2014 (2014-01-10).

The lack of public process in the development of Alternative #4 pales in comparison with how the county has traditionally developed Comprehensive Plan Amendments (see history of public participation above). For example, in the 2004 review process, the county the County appointed a steering committee of elected officials from all Clark County cities and a technical advisory committee that included the planning staff of the local jurisdictions and the staff from special districts to develop the assumptions that Clark County would use to size its UGAs. These committees met regularly from 2000-2004 to examine data and make recommendations to the County Commissioners on various aspects of the comprehensive plan including assumptions on which to base the size of the urban growth areas (UGAs). The minutes of the Steering Committee show that a wide range of opinion and analysis based on studies done by diverse groups was gathered and evaluated.

GMA and the county's own resolution require *"early"* participation by the public. As can be seen by the vetting of the other three Alternatives, they went through a much greater public process including but not limited to the following:

a) Vetted at Open Houses in August;

b) A City/County coordination meeting in September,

c) A scoping hearing before PC,

d) A second Councilor WS;

e) A second City County coordination meeting;

f) Review of Alternatives by PC in October;

g) BOCC WS on three alternatives on 10/22;

h) OH on 10/29-10/30,

i) Planning commission meeting on alternatives; and

j) A third City county coordination meeting.

Even before the August Open houses, all members of the public were able to meet with staff and view the alternatives in their development stages. Plus the county had issued a number of policy issue papers

NONE of that was followed in the behind the scenes development of Alternative #4. Moreover, this Alternative has no analysis by staff so that at the 2 open houses where it was touted, staff could not answer the questions of the public because staff had no had in the development of the alternative.

Therefore, Alternative #4 cannot be submitted for the SEPA process because it has not even gone through the required public process as set forth in GMA and the county's own resolutions.

Alternative #4 Violates The County's Own Resolution (2014-06-17) In That It Considers Changes To The Comprehensive Plan That Violate The County's Adoption Of The OFM Number, The 90/10 Split On Allocation Of Population Between The Urban Growth Areas And The Rural And Resource Land Areas

Resolutions promulgated by this Board adopt two important numbers regarding population totals and allocations (2014-01-9 and 2014-06-17). At bottom, the County resolutions adopted a population figure of 562,000 people with 90% of the increases to occur within the current UGAs and 10% to non-urban. Alternative #4 would violate the Board's own resolutions and Principles and values determinations by increasing the number of lots to over 17,0000 (almost 8000 more than under two of the three alternatives), which would have the impact of increasing the total population at a minimum of 21,280 in the county forecast, all of which to occur in the rural area. Even assuming that the county could not increase its OFM number, in order to keep the 90/10 split, the County would have to select a population increase for the entire county of 191,000 people which dwarfs the high OFM number Such an increase in the rural area is not only unsustainable but it is in violation of two of the County's resolutions and disregards GMA standards for planning.

Moreover, the county is on a deadline, ***and a schedule imposed by this Board and the mandates of GMA***. Even assuming that the County was to change its numbers, it would have to do so by starting the entire process over including notices of hearings Engaging in that reckless conduct would no doubt result in this County being out of compliance with the GMA as it would not be able to make the June 2016 deadline.

In addition, adding this document to the SEPA process now increases the cost of the SEPA process by 50%. According to staff, the original allocation for consultants on the SEPA process was $100,000. By adding this ONE ill conceived alternative to the process at this date is going to cost the County another approximately $50,000 ***all to satisfy the site specific zoning requests of a single, special interest group of individuals whose primary goal is to eliminate GMA planning.***

Such reckless disregard for the ordinances already passed, as well as the ongoing planning process to date, not to mention the additional costs, and justify the council rejecting this Alternative #4 as being part of this year's Comprehensive Plan update.

The Development Of Alternative #4 Violates The County's Policies[8] On The Rural Area, Fails To Protect Rural And Resource Lands And Fails To Protect The Rural Character As Defined By State Statute

[8] No single attribute describes the rural landscape Instead combinations of characteristics that are found in rural settings impart the sense of what we commonly describe as rural. These factors are cumulative in nature and the more of these factors that are present influence feelings of whether a particular area is rural In many cases these characteristics are subjective and frequently not all of them are found in each area When describing rural conditions the public will often describe these areas in terms of a certain lifestyle The factors listed below are those that usually describe "rural character."

- The presence of large lots,
- Limited public services present (water, sewer, police, fire, roads, etc);
- Different expectations of levels of services provided,
- Small scale resource activity,
- Undeveloped nature of the landscape;
- Wildlife and natural conditions predominate, • closer relationship between nature and residents,
- Personal open space;
- A sense of separation from intense human activity,
- A sense of self-sufficiency, and • rural commercial supporting rural area population

Planning for rural lands in Clark County is important for the following reasons.

- To maintain a rural character,
- To recognize their location at the urban fringe, where they are susceptible to sprawl development which can overwhelm the existing character, infrastructure and way of life,
- To serve as transition areas between urban and resource uses because urban and resource uses are dependent on each other, but are not always compatible;
- To provide services and goods that support resource activities,
- To supply nearby urban residents with locally harvested resource products which are fresh and often less costly,
- To allow the efficient provision of public facilities and services by clearly delineating between urban and rural uses so that growth is directed to more compact urban centers,
- To add an important dimension to the quality of life through the existence of rural lands, open space and natural or critical areas,
- To provide for the planned future expansion of urban uses, if necessary or needed, in the rural lands that border designated urban areas, and,
- To protect and enhance streams and riparian habitat necessary for sustaining healthy populations of salmonids

I have set forth the broad requirements of GMA above Recently, several Washington Supreme Court cases have re-emphasized that Counties cannot simply ignore the mandates of the act in setting zoning regulations in the rural areas. The Washington Supreme Court has been clear that the rural element must contain protective measures for rural areas to prevent site-specific rezones that circumvent the GMA. *Kittitas County v. EWGMHB*, 172 Wash.2d 144 (2011). The *Kittitas* case the County setting a 3-acre minimum zone complied with GMA. In rejecting the overall rural 3-acre minimum lot size, the Supreme Court held after lengthy analysis stated·

> We hold that the Board properly interpreted and applied the law in finding that the County has failed to comply with the GMA's requirements to develop a written record explaining its rural element, include provisions in the Plan that protect rural areas, provide for a variety of rural densities in the Plan, protect agricultural land, and protect water resources
>
> *Kittitas Cnty v E. Washington Growth Mgmt. Hearings Bd.*, 172 Wash. 2d 144, 181, 256 P.3d 1193, 1211 (2011)

Alternative #4 suffers from many of the same infirmities that caused the Washington Supreme Court to reject the County's plan, including its 3-acre minimum densities. Below are some of the descriptions that apply to what should be considered in addressing whether an action does, or does not, protect rural character and resource lands. Nothing in the record developed by Councilor Madore in his backroom work with GIS suggests any broad based public input as to any site-specific zone change much less how each and every one of his changes will enhance the rural character, much less protect resource lands. On the other end of the spectrum, Kitsap County's CP on the rural element a maximum density of one dwelling unit for five acres.[9]

The Rural and Natural Resource Element is an integral part of the county's 20-Year Plan This element concentrates on how future land use needs within rural and resource lands will be met, and the methodology used to designate resource lands This element emphasizes how rural and resource lands should be used in the future, supporting the ongoing and future resource activities (farming, forestry and mineral extraction) and encouraging such activities on a smaller scale in the rural non-resource lands Together, this element in concert with the rest of the 20-Year Plan supports the long-range vision for Clark County

[9] "Rural character" refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan . That provide visual landscapes that are traditionally found in rural areas and communities"

i Kitsap County has a maximum density in the rural area of one dwelling unit per five acres This zoning allows for large amounts of undeveloped land and for the protection of critical areas and rural character Additionally, Kitsap County, through the Parks, Recreation, and Open Space Plan and through goals and policies outlined in Chapter Ten "Parks" of the Comprehensive Plan, has a mission to

This abject failure to vet this Alternative with the public, and to insert it at this late stage of the proceedings where the County is already deep into the SEPA process that started last summer (see the County's Timeline for scope of work adopted as part of its resolution 2014-01-10), is unfair to the majority of the citizens in this County.

Thus, Alternative #4 fails to comply with the rural element requirement of GMA and the current policies and elements of the Comprehensive Plan. Although anecdotal local circumstances can be considered in determining that changes to the minimum 5 acre lot sizes (and here Alternative 4 allows for substantially higher densities of 1 and 2.5 acre parcels), the Alternative totally fails to provide any details as to how the densities were arrived at (other than by a false claim that they accurately reflect what is "on the ground" a claim that cannot be verified by staff or legal counsel—see discussion below) existing.

Alternative #4 Does Not Represent The Actual "Legal Buildable" Lots On The Site Specific Zoning Changes Proposed In The Alternative.

Given the history of lot segregations in this county, there are many parcels that have been segregated that are not legal, buildable lots. At this juncture, if one assumes that Councilor Madore's map is accurate, neither he, nor staff, nor legal counsel can state which, if any, of the lots he has designated for zone change are legal, buildable lots. As set forth above, there was a land rush of segregations of lots in the non-urban areas of the county during the development of the original County Plan. It is unknown if any of those lots became legal buildable lots. According to my understanding it could take anywhere from 30 minutes to 30 hours to determine whether any lot identified by Councilor Madore for up zoning would meet what he states are the reality of what is on the ground.

More importantly, it is unclear if this broad ranging Alternative that has tentacles that stretch into the majority, if not all, of the current comprehensive plan policies and development code regulations can legally be considered in the SEPA process as an SEIS

Since there is no analysis, or consensus, as to whether Councilor Madore's theory that his Alternative actually reflects the actual reality on the ground, there is no justification for it

Conclusion

preserve parks and other visual landscapes for future generations It was awarded the 2011 Governor's Smart Communities Award for "Year of the Rural".

The law says the following:

> The legislature finds that uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and the wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state. It is in the public interest that citizens, communities, local governments, and the private sector cooperate and coordinate with one another in comprehensive land use planning. Further, the legislature finds that it is in the public interest that economic development programs be shared with communities experiencing insufficient economic growth.

This planning process is not about a denial of private property rights This planning process is about maintaining and updating legal valid county wide planning policies in compliance with state law that have been developed over years with the input of thousands of citizens, elected officials and county staff personnel and which keep our county in compliance with the worthy goals of a state wide law.

This is about public participation in a process that has been required by state law and acknowledged by this Board by several different resolutions. This is about honoring those lawful and statutorily mandated obligations This is about respecting state law and the work that has been done by so many over so long a period of time

Councilor Madore is simplifies the matter in a way that obfuscates the importance of countywide planning pursuant to the Act when he said the following on his public Facebook page·

> "Some say that no citizen should have private property rights, that the "greater good" is served by requiring citizens to live in high density transit oriented inner cities and that rural properties should be left to nature, that government should buy up private property rights to prohibit any further rural development"

Although some "may" say what he states, although I have not heard any citizen ever say "no citizen should have private property rights", in fact the opposite is true The protection of private property rights is woven into every GMA policy and statutory provision. No one has the right to do whatever they wish with their property, not even a single select group of like-minded individuals who happen to have Councilor Madore's ear Zoning regulations go back to the early 1900s and have been repeatedly and constantly upheld The constitution has a takings clause If the actions taken by this

county over the past twenty-five years had constituted a "takings", then those individuals would be compensated.

One of the primary purposes of the Act is to direct new growth into IUGAs or UGAs The natural consequence of implementing that purpose is that growth will occur at higher densities within well-designated urban growth boundaries. Such planning may result in higher density transit orient inner cities and rural areas are to be more natural. Such a result is consistent with the purpose and mandates of the law. The Legislature has determined by adoption of the GMA that directing growth to urban areas provides for better use of resource lands and more efficient uses of taxpayer dollars. This primary purpose is a statutorily mandated and, even though some may not like it, as our legal representatives, you must implement it.

Sincerely,

David T. McDonald
Ridgefield, Washington
Attorney for Friends of Clark County

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September 3, 2015

Mr. Oliver Orjiako
Community Planning
1300 Franklin Street
3rd Floor
Vancouver, Washington 98660

Via pdf and e-mail only—Oliver Orjiako@clark wa gov

Dear Mr. Orjiako.

There have been some public comments, and some documents placed in the public record, regarding Clark County's current agricultural land designations Some of those comments, and maps, have been alleging that the County has failed to adequately designate agricultural resource lands and, most surprisingly, has relied on the "Poyfair Remand" opinion for that premise.

Before I go in depth into how the County is in compliance with designating Agricultural Resource Lands, and challenging the soils and designations is without merit, I think it is important to note that Judge Poyfair's opinion from Case No. 95-2-05656-7. In case number 95-2-05656-7, CCCU specifically asked Judge Poyfair to make the following finding

> There is not substantial evidence in the record to support the County's designation of agricultural lands. In particular, there is not substantial evidence to demonstrate how those lands designated satisfy the GMA definitional criteria; that is, that those lands are primarily devoted to agricultural production and are of long term commercial significance for the production of agricultural products. The only explanation provided regarding the designation of agricultural resource lands is contained in a staff report prepared after the RNRAC had completed its work which states "soils was a critical factor" This is not to suggest the County was incapable of analyzing the required statutory criteria· the County undertook a comprehensive

> analysis of resource land designations in urban reserve areas when it was compelled by the Board to re-examine these designations. The County should have undertaken a similar analysis before designating any agricultural resource lands.
>
> Because there is not substantial evidence in the record that satisfies the GMA's definitional criteria, the agricultural resource land designations are invalid.
>
> *CCCU v. WWGMHB*, 96-2-00080-2 Findings of Fact, Conclusions of Law and Order at page 5[1].

Judge Poyfair specifically rejected that Proposed Conclusion of Law and instead affirmed the County's actions with the following ruling: ***"There is substantial evidence in the record to support the County's designation of agricultural resource lands".*** (emphasis supplied). Based upon the plain language of Judge Poyfair's order, he found that the County was in compliance with GMA as to this aspect of the appeal, the County had provided substantial evidence for its agricultural lands designations and Judge Poyfair rejected any finding that the County had not provided substantial evidence to demonstrate that the agricultural lands satisfied the GMA. CCCU did ***not*** appeal this ruling. Therefore, any assertion that has been made, or might be made by any person, that the County did not support its original agricultural lands designations is contrary to the Order drafted by the attorney for CCCU and signed by Judge Poyfair.

These comments recognize that Alternative #4 seeks to reduce the parcel sizes of the Forest Resource lands, the Agricultural Resource lands and the Rural lands. However, these comments are limited to the Agricultural land designations and considerations. These comments also recognize that the reductions in parcel size proposed by Alternative #4 would increase pressure on other larger lots to upzone to smaller parcels.

Clearly, Washington state law, the GMA and Clark County ordinances specifically recognize legally created non-conforming use lots throughout the County and nothing in any of the Alternatives attempts to limit those uses. No one disputes that those landowners in the rural area with legally developable non-conforming use lots should not be allowed to develop. However, although Alternative #4 does not state that it is de-designating resource lands, by upzoning many rural and resource land zones, and recognizing non-conforming lots that are not legally developable (meaning that they are not "legal lots under current Clark County Code), it creates pressure on the resource lands to try and put their lands into non-resource based use.

[1] A copy of the pertinent page is attached.

According to staff and county counsel, there is no way to determine how many lots Alternative #4 will make legally developable that are, in fact, not legally developable. In fact, recently, Friends of Clark County requested a GIS map all of the lots listed in Alternative #4 that were not currently legally developable The response was that the data was not available, meaning that no one from the County can assess how many lots that designated as legal buildable lots by Alternative #4 are currently legally buildable lots

In addition, from some of the public comments, both orally at various public BOCC meetings and in written submissions, some argue that Alternative #4 is justified based upon the fact that the designated resource lands are, in fact, not properly designated. However, after years of litigation, may rulings by the WWGMHB and various courts, the decisions have been consistent that the lands designated under the current plan are properly designated as resource lands, presumed valid and compliant with GMA [2] Most recently, the Washington Court of Appeal's 2011 decision on the County's 2007 comprehensive plan update concluded that Clark County's current agricultural lands designations are presumed valid.[3]

The underlying legal principle is that the GMA provides that counties must designate "[a]gricultural lands that are not already characterized by urban growth and that have long-term significance for the commercial production of food or other agricultural products." RCW 36.70A 170(1)(a). Importantly, "[T]he intent of a landowner to use land for agriculture or to cease such use is not the controlling factor in determining if land is used or capable of being used for agricultural production." WAC 365-190-060. In addition, the county must adopt development regulations "to assure the conservation of" those agricultural lands designated under RCW 36.70A 170. RCW 36 70A.060(1). *Lewis Cnty. v. W Washington Growth Mgmt Hearings Bd.*, 157 Wash 2d 488, 498-99, 139 P.3d 1096, 1101 (2006). Therefore, any claims in support of changes to the current designations must not be based on the intent of the landowner for a specific piece of property.

The prevailing definition for agricultural lands is:

> land: (a) not already characterized by urban growth (b) that is primarily devoted to the commercial production of agricultural products enumerated in RCW 36.70A.030(2), *including land in areas used or capable of being used for production based on land characteristics, and* (c) that has long-term commercial significance for agricultural

[2] Clark County has already done these designations and been found compliant with the GMA, *CCCU, Inc and Michael Achen and Catherine Achen,*, 96-2-00080-2, Final Order, Poyfair, J

[3] *Clark Cnty Washington v W Washington Growth Mgmt Hearings Review Bd* , 161 Wash App 204, 234, 254 P 3d 862, 876 (2011) *vacated in part sub nom Clark Cnty v W. Washington Growth Mgmt Hearings Review Bd.*, 177 Wash. 2d 136, 298 P 3d 704 (2013)

> production, as indicated by soil, growing capacity, productivity, and whether it is near population areas or vulnerable to more intense uses. We further hold that counties may consider the development-related factors enumerated in WAC 365-190-050(1) in determining which lands have long-term commercial significance.
>
> *Lewis Cnty v. W. Washington Growth Mgmt. Hearings Bd., supra* at 502 (emphasis supplied).

Under a previous case, *Manke*, and the *Lewis County* case, both the Growth Board decisions and the court decisions make it almost explicit that where there is a reduction in lot sizes (for example as proposed by Alternative #4) then that heightens the pressure on the area to be used for non-agricultural uses.

The designation of agricultural resource lands is covered by WAC 365-190-060. Under these administrative rules, counties ***must*** approach the effort as a county wide or area wide process and not on a "parcel by parcel" basis. WAC 365-190-060(1). In addition, the legal directives are clear that the county is not to consider economic issues in designating lands:

> Serving the farmer's "non-farm" economic needs is not a logical or permissible consideration in designating agricultural lands under the GMA. That is because it is a goal in and of itself, not a characteristic of farmland to be evaluated in determining whether such land has long-term commercial significance. A farmer's presumed need for "non-farm" income does not necessarily relate to soil, productivity or growing capacity under RCW 36.70A.030(10), nor to proximity to population areas or the possibility of more intense uses of land. It has to do only with the farmer's bottom line.
>
> *Lewis Cnty. v. W. Washington Growth Mgmt. Hearings Bd.*, 157 Wash. 2d at 505.

The County went through that process prior to the adoption of the 1994 Comprehensive Plan (affirmed by Judge Poyfair's decision) and it appears those designations were affirmed by the County in 2004 and 2007 as shown on the maps. When Clark County designated its lands in accordance with the regulations, it can utilize all classifications of soils from the United States Department of Agriculture Natural Resources (not just Soil Classifications 1 and 2 as has been argued by members of CCCU) Clark County defined its "Prime Agricultural Soils" as Classes I, II & III. *See*

http://www.clark.wa.gov/planning/comp_plan/documents/Figure22-Soil-Agricultural.pdf.[4] The county's designations of soils also shows areas of "Good" and "Fair" soils If one views a map of the soils with an AG-20 overlay, the County has designated those lands that have class I-III soils as AG-20 parcels. *See* County GIS mapping.

Moreover, once designated, the county must act to conserve those lands through development regulations. WAC 365-190-060(2). Thus, the imposition of development regulations is the county's legally mandated tool for protecting and conserving designated agricultural lands By law those development regulations cannot prohibit uses that legally existed prior to the designation and must include the following:

1 Regulations that assure that natural resources lands will remain available to be used for commercial production and prevent conversion to a use that removes the land from resource production and prohibit a primary use of agricultural lands that would convert the land to a non-agricultural land purpose. WAC 365-196-815(1)(b),

2. Regulations that endeavor to meld with other regional, state and federal resource management programs applicable to the same lands. WAC 365-196-815(2)(b);

3. Utilize innovative zoning techniques that are designed to assure the conservation of agricultural lands and encourage the agricultural economy while limiting any non-agricultural purpose to lands either with poor soils or not otherwise suitable for agricultural uses. WAC 365-196-815(3), and

4. Those "innovative" techniques could include: a) *limits the density of development*, b) restrictions or prohibitions on nonfarm uses and limitations on accessory uses to those that designed to conserve[5] agricultural lands and any non-agricultural use should be limited to lands with poor soils or otherwise not suitable for agricultural purposes, c)

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[4] The 2007 comprehensive plan maps also show the soils that are available for forests http //www.clark wa gov/planning/comp_plan/documents/Figure21-Soil-Forest pdf

[5] (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. WAC 365-196-815

Cluster zoning with remainder in Agricultural land, d) Large lot zoning with minimum lot sizes large enough to achieve successful farming practice, e) quarter/quarter zoning that allows for (1) one acre home site per 40 acres f) slide scale zoning[6] and g) TDRs. WAC 365-196-815(3).

FOCC asserts that Alternative #4 violates WAC 395-190-060(2) by allowing for a large scale reduction in large lot zoning with minimum lot sizes that would be large enough to achieve successful farming practices. Also, the more one allows the smaller developable lots in the rural area, the more pressure there is on other landowners with large lots to parcel them out. For example, under Alternative #4 as proposed, the county could have two AG 20 lots sitting side by side. If one of those AG-20 lots is currently divided into 20 non-legally developable one acre parcels, Alternative #4 would recognize those lots and allow 20 homesites. Once that occurs, by law the County would have to allow the adjoining AG 20 parcel to develop 20-one cre lots either under a Comprehensive plan amendment or an assertion of a change in circumstances. The "domino" effect would be real and sustained.

Washington State Supreme Court has held in the Soccer Fields decision that [t]he County was required *to assure the conservation of agricultural lands and to assure that the use of adjacent lands does not interfere with their continued use for the production of food or agricultural products.*[7] A ten acre minimum lot size and density will not meet this standard. Professor Arthur C. Nelson analyzed agricultural land preservation techniques and concluded that "[m]inimum lot sizing at up to forty-acre densities merely causes rural sprawl-a more insidious form of urban sprawl."[8] Further, Clark County's average farm size has increased from 37 acres in 2007 to 39 acres in 2012, an increase of 5 4 percent.[9] During the same time period, Washington's average farm size increase by 4 percent.[10] The increase in average farm size does not support a reduction in the minimum lot size and density.

In conclusion, the comments that have been provided by proponents of Alternative #4 regarding agricultural lands seem to be a misplaced attempt at de-

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[6] I believe a good example of this would be the zoning in our Rural Centers

[7] *King County v. Central Puget Sound Growth Management Hearings Bd (Soccer Fields)*, 142 Wn 2d 543, 556, 14 P.3d 133, 140 (2000) emphasis in original

[8] Arthur Nelson, *Preserving Prime Farmland In the Face of Urbanization: Lessons from Oregon* 58 JOURNAL OF THE AMERICAN PLANNING ASSOCIATION 467, 471 (1992). The Journal of the American Planning Association is a peer-reviewed journal.

[9] United States Department of Agriculture, National Agricultural Statistics Service, *2012 Census of Agriculture Washington State and County Data Volume 1* • Geographic Area Series • Part 47 AC-12-A-47 Chapter 2 County Level Data, Table 8 Farms, Land in Farms, Value of Land and Buildings, and Land Use: 2012 and 2007 p 271 (May 2014) accessed on Aug. 2, 2015 at: http://www agcensus usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_2_County_Level/Washington/wav1 pdf.

[10] *Id.*

designation. These lands are designated and presumed valid. There is a specific process for de-designation that is not being undertaken Therefore, the comments regarding soils and resource lands that appear to undermine the designations should not, and cannot be used as grounds for justifying reductions in the minimum lot sizes and, given that Clark County used the minimum lots sizes as one of the regulatory tools under WAC 365-196-815(3) to protect those resource lands, by embracing Alternative #4, the County is acting in contravention of the mandate to protect these previously designated, GMA compliant and presumptively valid agricultural lands

Please submit these comments under both the DSEIS and the record on the Comprehensive Plan update to the extent that the records are different.

Sincerely,

David L. McDonald

is no substantial evidence in the record to support the designation of agri-forest lands as resource lands under the GMA.

Additionally, the failure to solicit meaningful public input for the agri-forest resource lands violated the public participation provisions of the GMA requiring early and continuous public participation in the development and adoption of comprehensive plans.

5. Agricultural Resource Lands. There is ~~not~~ substantial evidence in the record to support the County's designation of agricultural resource lands. ~~In particular, there is not substantial evidence to demonstrate how those lands designated satisfy the GMA definitional~~ criteria; that is, that those lands are primarily devoted to agricultural production and are of long-term commercial significance for the production of agricultural products. The only explanation provided regarding the designation of agricultural resource lands is contained in a staff report prepared after the RNRAC had completed its work which states, "soils was a critical factor." This is not to suggest the County was incapable of analyzing the required statutory criteria: the County undertook a comprehensive analysis of resource land designations in urban reserve areas when it was compelled by the Board to re-examine these designations. The County should have undertaken a similar analysis before designating any agricultural resource lands.

~~Because there is not substantial evidence in the record that satisfies the GMA's definitional criteria, the agricultural resource land designations are invalid.~~

6. Comprehensive Plan EIS. The Comprehensive Plan EIS issued by the County violates the State Environmental Policy Act ("SEPA"), RCW Ch. 43.21C. The agri-forest resource land designations were disclosed subsequent to the publication of the final Plan EIS and were not disclosed or discussed in any way in the EIS alternatives. The removal of rural activity centers also was not addressed in the EIS. The County did not require additional environmental review and did not solicit additional public comments. The County failed to comply with SEPA's requirement for additional environmental review when a proposal changes substantially from the one addressed in the initial EIS. The Board's decision to uphold the adequacy of the

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