

**WHATCOM COUNTY**

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**J.E. "Sam" Ryan**  
Director

**Memorandum**

TO: The Honorable County Council  
Jack Louws, County Executive

FROM: Cliff Strong, Senior Planner *CS*

THROUGH: Mark Personius, Asst. Director *MP*

DATE: May 3, 2017

SUBJECT: 2016 Critical Areas Ordinance Update  
County Council Review Workshop for May 16, 2017

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On May 16, 2017 the Council will continue its review of the Critical Areas Ordinance Update.

Topics to be covered include review of questions, comments, and suggestions by Councilmembers related to:

- Article 2. Administrative Provisions
- Article 3. Geologically Hazardous Areas
- Article 4. Frequently Flooded Areas
- Article 5. Critical Aquifer Recharge Areas
- Article 6. Wetlands
- Article 7. Habitat Conservation Areas

The issues listed herein are those remaining from the staff memo from your May 2<sup>nd</sup> workshop that Council has not yet addressed.

To prepare for this meeting, please review this memo, the draft code, and the BAS Report Addendum. The **yellow highlighted text** in this memo indicates Council proposed edits.

(Councilmembers also have other suggestions for Article 5, Critical Aquifer Recharge Areas, and for Article 8, Conservation Program on Agriculture Lands, but we will review them at a later date.)

## ARTICLE 2. ADMINISTRATIVE PROVISIONS

### ISSUE 64. (Brenner)

#### 16.16.265 Critical areas protective measures.

~~When an impact to critical area or a buffer has been proposed or a buffer will occur because of a proposed development, a standard buffer width has been altered, or mitigation is required, one or more of the following protective measure shall be applied:~~

**Staff Response:** Staff is neutral; they both mean the same thing (all impacts are “proposed” prior to the development being built).

### ISSUE 65. (Brenner)

#### 16.16.265 Critical areas protective measures.

B. **Notice on Title.** The owner of any property containing any critical area or buffer for which a development permit is about to be issued and for which the proposed development will impact a critical area or buffer shall record a notice with the County Auditor real estate records, in a format approved by the technical administrator, and provide a copy of the filed notice to the Planning and Development Services Department at the time the permit is issued. The notice shall ~~state advise of~~ the general presence of ~~the-an impacted~~ critical area or buffer on the property, and ~~the fact that~~ limitations on actions in or affecting the critical area or buffer exist. The notice shall provide that restrictions on uses within the critical area exist until such time as the technical administrator approves a change in restriction and such approval is filed. This notice on title shall not be required for a development proposal by a public agency or public or private utility within a right-of-way or easement for which they do not have fee-simple title. This requirement may shall be waived by the Technical Administrator for certain geologically hazardous areas if s/he finds that the risk is so low as to not warrant notification (e.g., old alluvial deposits); and/or if the technical administrator determines there will be no impacts to critical areas or buffers on the development site.

**Staff Response:** The proposed amendments here change the standard as to whether something is recorded on the title from having a critical area onsite to having an *impacted* critical area onsite. That’s fine, if that’s how Council wants to proceed, though it does mean that subsequent buyers wouldn’t know that there are critical areas on the property prior to purchasing the property. It seems like it would be in the public’s interest to know this before buying a property.

Additionally, this section seems to be contradictory to the proposed deletion of 16.16.260(C) & (E) (Issue 59, above), for even if it just applies to an *impacted* critical area onsite this section still says it needs to be recorded, though she’s proposed deleting that requirement in the other two sections.

### ISSUE 68. (Donovan)

*Is 16.16.270(B)(2)(k) creating a new exemption (a new “reasonable use”?) Why allow new exemption for 2500 sq. ft. single family house?*

**Staff Response:** No. If someone has a lot that’s totally encumbered with critical areas, we must still allow the use of that property; otherwise it could be found to be a “regulatory taking”. Across the State, a single family residence is typically considered the least impactful use, and thus the most “reasonable” use to allow to impact a critical area. However, there have been many court and GMHB cases challenging jurisdictions attempt at limiting the house to the smallest size possible. The courts generally look to the sizes of homes in the neighborhood and lean toward a median home size as reasonable. The

inserted language comes from PDS Policy PL5-85-001A, adopted and in use since 1985 as a guide to what a reasonable house size is in Whatcom County. However, also see Issue 67 regarding what that size might be.

## ISSUE 69. (Brenner)

### 16.16.270 Reasonable use.

#### B. Reasonable Use Standards.

2. To qualify as a reasonable use, the technical administrator or hearing examiner, as appropriate, must find that the proposal is consistent with all of the following criteria:

k. For single-family residences, the maximum impact area shall be no larger than 2,500 3000 square feet. This impact area shall include the residential structure as well as appurtenant development that are necessarily connected to the use and enjoyment of a single-family residence. These appurtenant developments include garages, decks, driveways, parking, utilities (exclusive of an on-site septic system), and all lawn and landscaping, with the following exceptions:

i. On lots outside of the shoreline jurisdiction, when an extended driveway is necessary to access a portion of a development site with the least impact on critical area and/or buffers, those portions of the driveway shall be excluded from the 2,500-3000 square foot maximum impact area provided that the access road meets the standards of WCC 16.16.620(E) or 16.16.720(C), as applicable.

**Staff Response:** Staff had originally proposed 2,500 s.f. since it's consistent with the Shoreline Management Program rule, and so we'd used it for years as a guideline for reasonable uses. However, the Natural Resources Supervisor now says that such inconsistency is OK, as the 2,500 s.f. rule would still apply in the shoreline jurisdiction, where lots tend to be smaller. In fact, given that rural, non-shoreline lots tend to be much larger (5 & 10 acres), he now believes we could actually bump this up to 4,000 s.f. or 10% of the parcel size, whichever is smaller.

## ISSUE 70. (Donovan)

**Subsection (C)(1)(a):** Need clarity on this change. Why an exemption for single family homes?

**Staff Response:** Most the changes here relate to separating out the reasonable use rules from the variance rules, which were moved into a new section (staff felt that the two mechanisms are different and each warrants its own section). The existing "exemption" for SFR from a reasonable use public hearing allows staff to process the permit and keep the cost lower for homeowners.

## ISSUE 74. (Brenner)

### 16.16.280 Appeals.

A. Final permit decisions made by the technical administrator shall be subject to appeal in accordance with the procedures of Chapter 2.33 WCC and WCC Title 20; provided, that the applicant may request administrative review by the director of planning and development services prior to initiating a formal appeal process. Decisions of conditions applied to specific permits shall be subject to the appeal provisions for that permit. A request to the director for an administrative review stays the appeal process.

~~G. Any issue not raised in the original appeal filing is thereafter waived.~~



**Staff Response:**

Subsection (A) - Since the appeal hasn't actually started, staff suggests that this read, "A request for administrative review shall stay the time within which one must file an appeal until a decision on the review is issued."

Subsection (G) - Staff recommends against. This was proposed by staff so as to ensure all appeal issues are raised with the first appeal body in the appeal process. Eliminating it would mean that someone could appeal to the Hearing Examiner, not raise certain issues, then appeal to the County Council and add new issues, then appeal to the courts and add new issues. Normally in any appeal process the appellant must raise all issues up front so that each appeal body addresses the same issues.

## ARTICLE 3. GEOLOGICALLY HAZARDOUS AREAS

### ISSUE 78. (Brenner)

#### 16.16.310 Designation, mapping, and classification.

(C)(1) **Landslide Hazard Areas.** Landslide hazard areas shall include areas **potentially** susceptible to landslides based on a combination of geologic, topographic, and hydrologic factors. They include any areas susceptible to mass movement due to any combination of bedrock, soil, slope (gradient), slope aspect, slope form (concave, convex, planar), geological structure, surface and subsurface hydrology, or other physical factors. Landslide hazard areas shall also and include areas along which landslide material may be routed or which may be subject to deposition of landslide delivered material. Potential landslide hazard areas include but are not limited to the following areas. ~~Landslide hazard areas shall be further classified as follows:~~

#### 16.16.375 Review and reporting requirements.

A. When County critical area maps or other sources of credible information indicate that a site proposed for development or alteration is, or may be, located within an active or **potential** geologically hazardous area, the technical administrator shall have the authority to require the submittal of a geological assessment report.

**Staff Response:** In both of these subsections, the proposed change deletes the term "potentially" or "potential" (used in reference to geohazardous areas). Staff is OK with this; however, it should be pointed out that this terminology was recommended by Dan McShane, a local geologist and member of the Citizens Advisory Committee. His argument was that in geologist terms, all geohazardous areas are only "potential" unless they're in the act of actually moving. However, staff doesn't believe that removing the term will have any effect on the code.

### ISSUE 79. (Brenner)

#### 16.16.320 Geologically hazardous areas – General standards.

B. **Impact Avoidance.** Impact avoidance measures shall include, but not be limited to if possible, locating the use/development outside of the hazard area, reducing the number, size or scale of buildings, driveways and other features; altering the configuration or layout of the proposed development; implementing special engineering methods for construction, drainage, runoff management etc.; foregoing construction of accessory structures; preserving native vegetation; and other feasible protective measures as determined by an alternatives analysis. For some geologic hazards, impact avoidance may mean no development will be permitted on a property. ~~impact~~

avoidance may not be possible. In those instances the applicant will be made aware of risks and will sign a "Hold Harmless" agreement with the county, which will also be attached to title of property.

**Staff Response:** Staff doesn't have an issue with the first amendment (changing "but not be limited to" to "if possible," as we don't see that it will have an impact on the code.

Staff recommends against deleting, "impact avoidance may mean no development will be permitted on a property." This line comes straight from the WAC. Deleting it could lead to development in geohazard areas such as active landslides, known debris flows, or alluvial fans.

Additionally, this change may be considered inconsistent with CompPlan Policy 10E-10, which states, "Require applicants for development permits located in natural hazard areas to provide development plans designed to minimize the potential to exacerbate the natural hazard as well as the risk of damage to property or threats to human health and safety. In natural hazard areas where engineering solutions cannot be designed to withstand the forces expected to occur under the design event of a particular natural hazard, or off-site adverse impacts to adjacent properties or ecosystems cannot be adequately mitigated, *Whatcom County may deny development permits intended for permanent or seasonal human habitation as described in the Critical Areas Ordinance.*" (emphasis added)

As to the last sentence about a hold harmless agreement, staff is OK with but recommends the following instead:

Where assessment by a qualified professional has shown that mitigation of the hazard or avoidance cannot fully eliminate the risk to human safety, the technical administrator may require the applicant to enter into a Release and Indemnification Agreement with the county, which will be attached to title of the property along with a Notice on Title for Regulated Critical Areas. The Release and Indemnification Agreement shall not substitute for the implementation of all reasonable mitigation measures recommended by the qualified professional to minimize the risk to human safety, and shall only be used to allow development in a geologically hazardous area when the risk to human safety has been minimized to as low as reasonably practicable.

## ISSUE 82. (Brenner)

### 16.16.325 Landslide Hazard Areas – Standards.

- A. **General Standards.** The following activities may be allowed in active landslide hazards areas when all reasonable measures have been taken to minimize risks and other adverse effects associated with landslide hazards, and when the amount and degree of the alteration are limited to the minimum needed to accomplish the project purpose:
1. Developments that will have no not increase the threat to the health or safety of people and will not increase potential for landslides on or off the site and meet the reasonable use standards as set forth in WCC 16.16.270.
  3. Access roads and trails that are engineered and built to standards that avoid minimize the need for major repair or reconstruction beyond that which would be required in non-hazard areas. Access roads and trails may be permitted only if the applicant demonstrates that no other feasible alternative exists, including through the provisions of Chapter 8.24 RCW. If such access through critical areas is granted, exceptions or deviations from technical standards for width or other dimensions and specific construction standards to minimize impacts, including drainage and drainage maintenance plans, may be required specified.

**Staff Response:** Staff is neutral.

## ISSUE 84. (Brenner)

### 16.16.340 Seismic Hazard Areas – Standards.

Development may be allowed in seismic hazard areas when all of the following apply:

- B. Public roads, bridges, utilities, and trails shall be allowed when there are no feasible alternative locations and geotechnical analysis and design are provided that ensure the minimize potential damage to roadway, bridge, and utility structures and facilities will not be susceptible to damage from seismically induced ground deformation. Mitigation measures shall be designed in accordance with the most recent version of the American Association of State Highway and Transportation Officials (AASHTO) Manual or other appropriate document.

As well as in:

### 16.16.345 Alluvial Fan Hazard Areas – Standards.

- B. Roads, utilities, bridges, and other infrastructure when that are located and designed to prevent reduce adverse impacts on critical areas and avoid the need for channel dredging or diking or other maintenance activities that have the potential to substantially degrade river and stream functions.

And:

### 16.16.355 Erosion hazard areas – Standards.

- (A)(1) Developments that will have no minimize the threat to the health or safety of people, will not increase the risks of alluvial fan hazards on or off the site, and meet the reasonable use or variance standards as set forth in WCC [16.16.270](#).

**Staff Response:** Staff is neutral, though in 16.16.345(B) we suggest that it be “minimize” instead of “reduce.”

## ARTICLE 4. FREQUENTLY FLOODED AREAS

### ISSUE 88. (Brenner)

#### 16.16.430 Review and report requirements.

- F. Critical areas assessment report requirements may be waived for single-family developments and structures accessory to agricultural uses when the technical administrator and the public works department determine that no minimal adverse impacts or risks to life, property, or ecological functions will occur.

**Staff Response:** Staff recommends against. Again, these amendments seem to lessen the County’s ability to protect and remove the ability to assess risks to life, property, or ecological functions. This would violate the FEMA BiOp and is not consistent with GMA or ESA.

## ARTICLE 5. CRITICAL AQUIFER RECHARGE AREAS

### ISSUE 89. (Brenner)

#### 16.16.520 Critical aquifer recharge areas – General standards.

In addition to the applicable general protective measures found in WCC 16.16.265, Aall development in a critical aquifer recharge area shall meet the following standards:



- A. The proposed development will not cause ~~significant contaminants contamination to enter the~~ aquifer and will not significantly ~~adversely~~ affect the recharging of the aquifer ~~in an adverse manner.~~

**Staff Response:** Staff recommends against. What constitutes “significant” contamination versus insignificant contamination?

## ARTICLE 6. WETLANDS

### ISSUE 99. (Brenner)

#### 16.16.670 Review and reporting requirements.

- (C)(2) ~~When the proposed single-family dwelling and associated features are located outside the standard buffer required under WCC 16.16.630 (no encroachment), no assessment report shall be required.~~ When the proposed single-family dwelling and associated features are located outside the standard buffer required under WCC 16.16.630 (no encroachment), no assessment report shall be required.

**Staff Response:** Reinserting this language isn’t really necessary, as per WCC 16.16.250 only projects that would potentially impact a critical area are required to submit an assessment. This language was proposed for deletion as it’s redundant.

## ARTICLE 7. HABITAT CONSERVATION AREAS (HCA)

### ISSUE 106. (Brenner)

#### 16.16.700 Purpose.

- C. Regulate development so that isolated populations of species are not created and habitat degradation and fragmentation are ~~avoided~~minimized, especially along riparian corridors.

**Staff Response:** Staff is neutral.

### ISSUE 112. (Donovan)

*What are the implications of the inserted “When pursuant to Article 2,” given that Article 2 would seem to expand administrative discretion?*

#### 16.16.720 General standards

The following activities may be permitted in habitat conservation areas and/or their buffers when, pursuant to Article 2, all reasonable measures have been taken to avoid adverse effects on species and habitats, any applicable Washington Department of Fish and Wildlife management recommendations have been applied, compensatory mitigation is provided for all adverse impacts that cannot be avoided, and the amount and degree of the alteration are limited to the minimum needed to accomplish the project purpose; provided, that locally important species and habitats shall be subject to WCC [16.16.730](#):

**Staff Response:** You will notice throughout the code that cross-references to other pertinent sections were added, basically as a reminder to readers to look at those sections as well. Even without them, those sections would apply; however, the Citizens Advisory Committee thought it would be helpful to add them.

At your workshop on 4/4/17, Councilmember Donovan asked if staff could provide language that more precisely identifies the sections in Article 2.

**16.16.720 General standards**

The following activities may be permitted in habitat conservation areas and/or their buffers when, pursuant to WCC 16.16.255 and 16.16.260, all reasonable measures have been taken to avoid adverse effects on species and habitats, any applicable Washington Department of Fish and Wildlife management recommendations have been applied, compensatory mitigation is provided for all adverse impacts that cannot be avoided, and the amount and degree of the alteration are limited to the minimum needed to accomplish the project purpose; provided, that locally important species and habitats shall be subject to WCC 16.16.730:

**ISSUE 114. (Brenner)**

**16.16.720 Habitat conservation areas – General standards.**

- G. Stormwater conveyance or discharge facilities such as dispersion trenches, level spreaders, and outfalls may be permitted in a habitat conservation area buffer on a case-by-case basis when the technical administrator, with detailed written findings, determines that all of the following are met:
  - 4. The discharge meets freshwater and marine state water quality standards, including the need to evaluate cumulative impacts to 303(d) impaired waterbodies and total maximum daily load (TMDL) standards as appropriate at the point of discharge. Standards should include filtration through mechanical or biological means, vegetation retention, timely reseeding of disturbed areas, use of grass-lined bioswales for drainage, and other mechanisms as appropriate within approved stormwater “special districts.”

**Staff Response:** This language was added by the Technical Advisory Committee, based on the argument that this is already a requirement of the federal Clean Water Act.