

WHATCOM COUNTY

Planning & Development Services
5280 Northwest Drive
Bellingham, WA 98226-9097
360-676-6907, TTY 800-833-6384
360-738-2525 Fax



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: 20 November 2017

SUBJECT: 2017 Critical Areas Ordinance (CAO) Update
Committee of the Whole Workshop on November 21, 2017

The "Ongoing Ag" Issue

The Growth Management Act (GMA) requires that we protect the functions and values of critical areas, but it also encourages the preservation of agricultural land and farming. These goals may seem at odds with each other, but the courts and the Growth Management Hearings Boards have consistently invalidated regulations that don't achieve both. Two solutions have survived the challenges: The Voluntary Stewardship Program (VSP) (27 counties went this route) and Conservation Program on Agriculture Lands (CPAL) (12 counties, including Whatcom County, went this route).

Succinctly, CPAL is a program that allows agriculture that was occurring in critical areas in 1995 (when we first adopted our CAO) to continue to farm in those critical areas as long as they developed a Conservation Farm Plan (CFP) and use NRSC BMPs to manage water quality. However, new agriculture (either a new operation or expansion of existing operations into new critical areas) are required to follow the standard CAO regulations. Under this program, though, one can lose one's classification of ongoing (grandfathered) ag were one to cease farming for 5 years.

In its review of the CAO, Council became concerned with farmers who lose this status, and has provided direction to amend the definition of "ongoing agriculture" in 16.16.900.

Our existing definition is:

"Ongoing agriculture" means those activities conducted on lands defined in RCW [84.34.020\(2\)](#), and those activities involved in the production of crops and livestock, including, but not limited to, operation and maintenance of existing farm and stock ponds or drainage ditches, irrigation systems, changes between agricultural activities, and maintenance or repair of existing serviceable structures and facilities. Activities that bring an area into agricultural use are not

part of an ongoing activity. An operation ceases to be ongoing when the area on which it was conducted has been converted to a nonagricultural use, or has lain idle for more than five consecutive years unless that idle land is registered in a federal or state soils conservation program. Forest practices are not included in this definition.

Council’s preliminarily approved definition reads:

“Ongoing agriculture” means agricultural uses and practices including, but not limited to: Producing, breeding, or increasing agricultural products; rotating and changing agricultural crops; allowing land used for agricultural activities to lie fallow in which it is plowed and tilled but left unseeded; allowing land used for agricultural activities to lie dormant as a result of adverse agricultural market conditions; allowing land used for agricultural activities to lie dormant because the land is enrolled in a local, state, or federal conservation program, or the land is subject to a conservation easement; conducting agricultural operations; maintaining, repairing, and replacing agricultural equipment; maintaining, repairing, and replacing agricultural facilities, provided that the replacement facilities are no closer to the critical area than the original facilities; and maintaining agricultural lands under production or cultivation. An operation ceases to be ongoing when the area on which it was conducted has been converted to a nonagricultural use.

This definition is basically the same as our definition of “agricultural activities” (and, in fact, comes from Thurston County’s definition of “agricultural activities” in their VSP program, as proposed by Dannon Traxler). The primary differences between the two are that the Council version does not reference the Open Space Taxation Act (RCW [84.34.020\(2\)](#), see Attachment 1), nor does it have the provision that one loses this classification after a period of time (5 years).

In essence, by adopting this definition, *any* of the following activities would be allowed in critical areas:

- Farming (including new ag) and the construction of ag buildings in wetlands with a Conservation Farm Plan (16.16.620(E));
- Construction or improvements (except buildings) for all ag uses in an HCA buffer (16.16.720(E)); and,
- All ag activities (including new ag) within critical areas with a Conservation Farm Plan (16.16.800).

Up until this point, only grandfathered (i.e., ongoing ag) ag has been allowed in critical areas.

Staff understands Council’s and the farmers’ concerns about someone losing their status of ongoing ag if they are not able to farm for a period of time. But staff has pointed to the Growth Management Hearings Board’s decisions where they have found jurisdictions to be out of compliance with the Growth Management Act when their regulations allowed indefinitely maintaining that classification, be it through not having a sunset clause or allowing indefinite extensions.

But we think we've come up with an approach that could provide more flexibility to farmers, at least those enrolled in the Farm & Agricultural Land Tax Program¹, while still ensuring protection of critical area functions and values.

Essentially, under the State's Open Space Taxation Act (RCW 84.34 and WAC 458-30), were a farmer to reclassify their property from Farm & Agricultural Land to Farm & Agricultural *Conservation* Land this would qualify as being in a "state soil conservation program" under our existing "ongoing ag" definition. Under this program one can let their land lie fallow ("idle"), or continue to farm, yet maintain one's ongoing ag status.

Conceptually, it could work like this: Currently most farmland is enrolled in the Farm & Agricultural Land Tax program, (regardless of whether they're ongoing ag or new ag)². But say you're classified as ongoing ag and for some reason you can no longer farm for some period of time (which is Council's concern). That farmer could switch their property into the Farm & Agricultural *Conservation* Land (Open Space) Tax program³. At that time, the farmer would document through a Conservation Farm Plan/Critical Area Assessment the extent of their critical areas and what portions of the critical areas are/were being farmed under "ongoing ag" status in WCC 16.16.800. Essentially, a baseline measurement of size, functions, and values would be established. The farmer could then leave their property "idle" (i.e., "fallow") for any number of years (or continue to farm) and still maintain their ongoing ag status and enjoy a reduced tax assessment (albeit at a slightly higher rate than in the Farm & Agricultural Land Tax program).

If in the future the farmer decided to develop their property or sell to a developer, they could do so, though they'd need to follow the standard protocol for taking it out of the Open Space Tax program. But if sometime in the future the farmer wanted to start commercial farming again, or sell or rent to another farmer, they would switch back to the Farm & Agricultural Land Tax program. At this point, a second (revised) Conservation Farm Plan/Critical Area Assessment would be performed to measure what, if anything has changed. For if it's been many years, or even decades, the critical areas have probably changed (plants tend to grow, water tends to accumulate, etc.).

We would then allow them to farm back to their original (baseline) ongoing ag boundaries, including into any expanded critical areas, as long as they mitigate for the impacts to the *difference* between their original (baseline) size, functions, and values (documented by the first assessment) and any new expanded size, functions, and values (documented by the second assessment). This mitigation could be in the form of buffer or critical area enhancement on their property (e.g., planting hedgerows along affected streams), buying credits from a mitigation bank, paying an in lieu fee (if that mitigation program is implemented), or other options. And of course we would require that they have a Conservation Farm Plan to address water quality via the standard NRCS BMPs.

¹ Currently 95.7% (105,620 of a total of 110,336 ag use acres) is enrolled in the Ag or Ag Conservation program.

² Minimum requirements are found in RCW [84.34.020\(2\)](#), Attachment 1.

³ This is basically equivalent to the Farm & Agricultural Land Tax program except that one doesn't have to meet the minimum income requirements. See Attachment 1, subsection (8).

That said, there may need to be some minimum standards as to what we could allow to be impacted (e.g., only Class III or IV wetlands under a certain size, maintain a certain setback from streams, etc.). Also, we believe this would work for any sized property or ag activity, but we would need to work through the details of that, as well as what could be done for those who've already let their status lapse.

Obviously we haven't had the time to work out all the details, and frankly, we'd want to do that in collaboration with the farming community, the Assessor's office, the Whatcom Conservation District, and other affected stakeholders. We estimate that it will take a minimum of 4-6 months to work through the details, conduct public review, and reach a recommended implementation program to bring back to Council.

Dannon Traxler, representing several of the agricultural groups, has submitted an email supporting this strategy (Attachment 2). (Though she continues to support Council's amended definition of ongoing ag.)

Staff Recommendation: Given that our CPAL program has been found to be GMA compliant, staff instead proposes that Council maintain our current definition for "ongoing ag," above, leave our current CPAL regulations in place while staff develops this new approach with the farming community, and bring it back to Council when it's ready sometime in 2018. We would even suggest including a directive in the adopting ordinance reading:

Planning and Development Services staff shall work with the farming community to develop a program wherein farmers can enroll their property in the Farm and Agricultural Conservation Land Tax program as a means of maintaining their ongoing ag status pursuant to the concept presented at Council's workshop on November 21, 2017. Any proposed code amendments to effect said program shall be processed pursuant to WCC 20.90 with all due haste, but no later than January 1, 2019.

Attachment 1

Chapter 84.34 RCW: OPEN SPACE, AGRICULTURAL, TIMBERLANDS—CURRENT USE— CONSERVATION FUTURES

RCW 84.34.020 Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

- (1) "Open space land" means (a) any land area so designated by an official comprehensive land use plan adopted by any city or county and zoned accordingly, or (b) any land area, the preservation of which in its present use would (i) conserve and enhance natural or scenic resources, or (ii) protect streams or water supply, or (iii) promote conservation of soils, wetlands, beaches or tidal marshes, or (iv) enhance the value to the public of abutting or neighboring parks, forests, wildlife preserves, nature reservations or sanctuaries or other open space, or (v) enhance recreation opportunities, or (vi) preserve historic sites, or (vii) preserve visual quality along highway, road, and street corridors or scenic vistas, or (viii) retain in its natural state tracts of land not less than one acre situated in an urban area and open to public use on such conditions as may be reasonably required by the legislative body granting the open space classification, or (c) any land meeting the definition of farm and agricultural conservation land under subsection (8) of this section. As a condition of granting open space classification, the legislative body may not require public access on land classified under (b)(iii) of this subsection for the purpose of promoting conservation of wetlands.
- (2) "Farm and agricultural land" means:
 - (a) Any parcel of land that is twenty or more acres or multiple parcels of land that are contiguous and total twenty or more acres:
 - (i) Devoted primarily to the production of livestock or agricultural commodities for commercial purposes;
 - (ii) Enrolled in the federal conservation reserve program or its successor administered by the United States department of agriculture; or
 - (iii) Other similar commercial activities as may be established by rule;
 - (b)(i) Any parcel of land that is five acres or more but less than twenty acres devoted primarily to agricultural uses, which has produced a gross income from agricultural uses equivalent to, as of January 1, 1993:
 - (A) One hundred dollars or more per acre per year for three of the five calendar years preceding the date of application for classification under this chapter for all parcels of land that are classified under this subsection or all parcels of land for which an application for classification under this subsection is made with the granting authority prior to January 1, 1993; and
 - (B) On or after January 1, 1993, two hundred dollars or more per acre per year for three of the five calendar years preceding the date of application for classification under this chapter;

- (ii) For the purposes of (b)(i) of this subsection, "gross income from agricultural uses" includes, but is not limited to, the wholesale value of agricultural products donated to nonprofit food banks or feeding programs;
- (c) Any parcel of land of less than five acres devoted primarily to agricultural uses which has produced a gross income as of January 1, 1993, of:
 - (i) One thousand dollars or more per year for three of the five calendar years preceding the date of application for classification under this chapter for all parcels of land that are classified under this subsection or all parcels of land for which an application for classification under this subsection is made with the granting authority prior to January 1, 1993; and
 - (ii) On or after January 1, 1993, fifteen hundred dollars or more per year for three of the five calendar years preceding the date of application for classification under this chapter. Parcels of land described in (b)(i)(A) and (c)(i) of this subsection will, upon any transfer of the property excluding a transfer to a surviving spouse or surviving state registered domestic partner, be subject to the limits of (b)(i)(B) and (c)(ii) of this subsection;
- (d) Any parcel of land that is five acres or more but less than twenty acres devoted primarily to agricultural uses, which meet one of the following criteria:
 - (i) Has produced a gross income from agricultural uses equivalent to two hundred dollars or more per acre per year for three of the five calendar years preceding the date of application for classification under this chapter;
 - (ii) Has standing crops with an expectation of harvest within seven years, except as provided in (d)(iii) of this subsection, and a demonstrable investment in the production of those crops equivalent to one hundred dollars or more per acre in the current or previous calendar year. For the purposes of this subsection (2)(d)(ii), "standing crop" means Christmas trees, vineyards, fruit trees, or other perennial crops that: (A) Are planted using agricultural methods normally used in the commercial production of that particular crop; and (B) typically do not produce harvestable quantities in the initial years after planting; or
 - (iii) Has a standing crop of short rotation hardwoods with an expectation of harvest within fifteen years and a demonstrable investment in the production of those crops equivalent to one hundred dollars or more per acre in the current or previous calendar year;
- (e) Any lands including incidental uses as are compatible with agricultural purposes, including wetlands preservation, provided such incidental use does not exceed twenty percent of the classified land and the land on which appurtenances necessary to the production, preparation, or sale of the agricultural products exist in conjunction with the lands producing such products. Agricultural lands also include any parcel of land of one to five acres, which is not contiguous, but which otherwise constitutes an integral part of farming operations being conducted on land qualifying under this section as "farm and agricultural lands";
- (f) The land on which housing for employees and the principal place of residence of the farm operator or owner of land classified pursuant to (a) of this subsection is sited if: The housing or residence is on or contiguous to the classified parcel; and the use of the housing or the residence is integral to the use of the classified land for agricultural purposes;

- (g) Any land that is used primarily for equestrian related activities for which a charge is made, including, but not limited to, stabling, training, riding, clinics, schooling, shows, or grazing for feed and that otherwise meet the requirements of (a), (b), or (c) of this subsection; or
 - (h) Any land primarily used for commercial horticultural purposes, including growing seedlings, trees, shrubs, vines, fruits, vegetables, flowers, herbs, and other plants in containers, whether under a structure or not, subject to the following:
 - (i) The land is not primarily used for the storage, care, or selling of plants purchased from other growers for retail sale;
 - (ii) If the land is less than five acres and used primarily to grow plants in containers, such land does not qualify as "farm and agricultural land" if more than twenty-five percent of the land used primarily to grow plants in containers is open to the general public for on-site retail sales;
 - (iii) If more than twenty percent of the land used for growing plants in containers qualifying under this subsection (2)(h) is covered by pavement, none of the paved area is eligible for classification as "farm and agricultural land" under this subsection (2)(h). The eligibility limitations described in this subsection (2)(h)(iii) do not affect the land's eligibility to qualify under (e) of this subsection; and
 - (iv) If the land classified under this subsection (2)(h), in addition to any contiguous land classified under this subsection, is less than twenty acres, it must meet the applicable income or investment requirements in (b), (c), or (d) of this subsection.
- (3) "Timberland" means any parcel of land that is five or more acres or multiple parcels of land that are contiguous and total five or more acres which is or are devoted primarily to the growth and harvest of timber for commercial purposes. Timberland means the land only and does not include a residential homesite. The term includes land used for incidental uses that are compatible with the growing and harvesting of timber but no more than ten percent of the land may be used for such incidental uses. It also includes the land on which appurtenances necessary for the production, preparation, or sale of the timber products exist in conjunction with land producing these products.
- (4) "Current" or "currently" means as of the date on which property is to be listed and valued by the assessor.
- (5) "Owner" means the party or parties having the fee interest in land, except that where land is subject to real estate contract "owner" means the contract vendee.
- (6)(a) "Contiguous" means land adjoining and touching other property held by the same ownership. Land divided by a public road, but otherwise an integral part of a farming operation, is considered contiguous.
- (b) For purposes of this subsection (6):
- (i) "Same ownership" means owned by the same person or persons, except that parcels owned by different persons are deemed held by the same ownership if the parcels are:
 - (A) Managed as part of a single operation; and
 - (B) Owned by:
 - (I) Members of the same family;
 - (II) Legal entities that are wholly owned by members of the same family; or

- (III) An individual who owns at least one of the parcels and a legal entity or entities that own the other parcel or parcels if the entity or entities are wholly owned by that individual, members of his or her family, or that individual and members of his or her family.
- (ii) "Family" includes only:
 - (A) An individual and his or her spouse or domestic partner, child, stepchild, adopted child, grandchild, parent, stepparent, grandparent, cousin, or sibling;
 - (B) The spouse or domestic partner of an individual's child, stepchild, adopted child, grandchild, parent, stepparent, grandparent, cousin, or sibling;
 - (C) A child, stepchild, adopted child, grandchild, parent, stepparent, grandparent, cousin, or sibling of the individual's spouse or the individual's domestic partner; and
 - (D) The spouse or domestic partner of any individual described in (b)(ii)(C) of this subsection (6).
- (7) "Granting authority" means the appropriate agency or official who acts on an application for classification of land pursuant to this chapter.
- (8) "Farm and agricultural conservation land" means either:
 - (a) Land that was previously classified under subsection (2) of this section, that no longer meets the criteria of subsection (2) of this section, and that is reclassified under subsection (1) of this section; or
 - (b) Land that is traditional farmland that is not classified under chapter [84.33](#) or [84.34](#) RCW, that has not been irrevocably devoted to a use inconsistent with agricultural uses, and that has a high potential for returning to commercial agriculture.

Attachment 2

From: Dannon Traxler

To: Rud Browne; Barbara Brenner; Todd Donovan; Satpal Sidhu; Ken Mann; Carl Weimer; Barry Buchanan;

Council; Dana Brown-Davis; Jennifer Schneider; Mark Personius; Cliff Strong; Ryan Ericson; Cristy Sears

Subject: Ag Groups' Comments on CAO

Date: Monday, November 13, 2017 10:42:22 AM

Dear Council Members,

I've met with Ryan Ericson to discuss staff's proposal on revisions to the CAO related to ongoing agriculture, and I've discussed staff's proposal with my clients. We are generally supportive of the direction that staff has proposed. At the same time, we request that Council retain the REVISED definition of Ongoing Agriculture while we work through the issues in the coming months. I won't be able to attend the special meeting tomorrow, because I am out of state. Also, the state Farm Bureau meeting is tomorrow through Wednesday, so Farm Bureau reps are unable to attend tomorrow's meeting. For those reasons, I'm requesting that you wait to take any vote on this matter and that you give us until the next meeting (the meeting originally set for this discussion) for our formal response.

Thank you,

Dannon Traxler

Sent from my iPhone