

**TO: Whatcom County Planning Commission**  
**FROM: Robert A. Carmichael and Simi Jain, Attorneys for Caitac USA Corp.**  
**RE: Public Comment re April 5, 2013 Draft Comprehensive Plan and Zoning Code Amendments**  
**DATE: April 8, 2013**

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Caitac USA Corp. (“Caitac”) previously submitted amendments for consideration on March 28, 2013, and has spent some time further refining its proposed amendments. We submit this comment with requests for the Planning Commission to adopt specific amendments. Although, given that Staff’s recent amendments were provided on Friday, April 5, more time to refine our proposed amendments and comments would be helpful.

### **I. Issue 1**

The Growth Management Hearings Board (“Board”) agreed with the petitioner’s main concern that there are large areas of rural Whatcom County with 40 acre or larger lot sizes and the County needs measures to control the subdivision of these large parcels into 5 acre parcels. (*Futurewise et al v. Whatcom County*, GMHB case no. 11-2-0010c and 05-2-0013, Compliance Order and Order Following Remand on Issue of LAMIRDs at 30 and 32 (01.04.13) (“Board Decision”).

The Planning Staff’s following proposed amendments to the rural element of the Comprehensive Plan should be clarified to allow R10A zoned areas within urban growth areas. Even if there is not presently R10A zoning in UGAs, this does not mean that R10A zoned land should not be considered for inclusion within a UGA in the future. Inclusion of R10A zoned lands within the UGA is consistent with the current Comprehensive Plan. Under the GMA, the comprehensive plan shall be an internally consistent document. RCW 36.70A.070. The County’s current Comprehensive Plan contains goals and policies which address expansion of urban growth areas to include land zoned R10A. (Policy 2R-4, Policy 2S-3)<sup>1</sup> Therefore, Staff’s proposed

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<sup>1</sup> Policy 2R-4: Limit development within urban growth areas with no municipal sewer and water service through zoning at a density no greater than one unit per ten acres. Comp Plan, at 2-20.

Policy 2S-3: Facilitate phasing of development within urban growth areas as follows:

- Require at least ten acre minimum lot sizes within unincorporated portions of urban growth areas until public facilities and services are provided to serve such development at urban levels of service.
- Recognizing that UGAs are sized to accommodate urban growth over a 20 year period and that all land within UGAs will not be required to meet urban land needs immediately, allow Agriculture and Rural Forestry zoning designations, on an interim basis, within UGAs. These zones function as holding districts that will allow continued resource land uses in the near term while protecting these areas from suburban sprawl. It is anticipated that they will be rezoned to allow phased urban development within the 20-year planning period when public facilities and services can be provided at urban levels of service.

Comp Plan, at 2-20

amendments should include the following clarifying language so that land presently zoned R10A is not precluded from inclusion within UGA's. The proposed amendments are as follows:

**1. Addition to Staff Amendment (in bold)**

Portions of the rural area that historically contain larger lots have been zoned for densities of one dwelling per ten acres. These areas provide for a variety of densities important to the rural character and must be retained. Rezones from R10A to allow higher densities must be limited to those where rezones would not adversely affect rural character, such as R10A areas which are surrounded by higher density zoning or development. ~~where higher densities on nonconforming lots have already been established.~~ Densities of one dwelling per ten acres may also be included within urban growth areas and urban growth area reserve. (Rural designation, Comp Plan Amendments at 7)

**2. Additions to Staff Amendment (in bold)**

WCC 20.36.253

The R-2A district is allowed only within areas designated as Rural Neighborhoods, as described in the Comprehensive Plan. R-5A and R-10A districts are allowed in the Rural areas; the Comprehensive Plan contains policies regarding application of these districts within the Rural designation. The R-10A district is allowed in Urban Growth Area Reserve **and Urban Growth Area** designations.

WCC 20.36.305(3)

Lot clustering is required for residential developments on parcels 10 acres or greater when the property is located within an urban growth area reserve **or urban growth area.**

Next, while Staff's proposed amendment for R10A rezones is an improvement over prohibition, rezones of R10A land to higher density should not be precluded in circumstances where the parcel(s) is mostly surrounded by higher density zoning or higher density development. There are a limited number of parcels within the County which meet this criteria. The ability to rezone these parcels to a higher density provides the County and property owners flexibility for those circumstances where the County could expand its UGA in the future. The land abutting Caitac's property is zoned, R5A, RGC, R10A, LII and it abuts the Bellingham city limits. (See attached map) Therefore, its property seems appropriately situated for a rezone to a higher density in the future.

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Staff's proposed addition to Policy 2GG-3 addresses the need to leave open the possibility of rezones of some R10A land. However, the criteria are somewhat random and difficult to meet. For instance, potential rezones could be limited because neighboring land has not been developed due to the presence of critical areas.<sup>2</sup> The critical areas ordinance is meant to protect critical areas and not rural character. With the rezone criteria as proposed, such a realistic scenario expands the affect that the presence of critical areas have on neighboring properties. Therefore, we propose the following amendments:

### 3. Deletion to Staff Amendment (in strikethrough) and Addition (in bold)

Policy 2 GG 3: Uses and densities within the Rural designation should reflect established rural character. Rezones within the Rural designation should be consistent with the established rural character and densities. **Rezones of land in the R10A district may be approved if the land abutting the rezone area has higher density zoning or higher intensity zoning than the R10A district or higher density development than allowed in the R10A district. Parcels are abutting even if there is a public or private road between them.**

~~in the general area of the proposed rezone. Land in the R10A district may be rezoned to a rural zone that allows higher density only if:~~

~~A. Residential density (the average size of parcels that contained a residence as of January 1, 2013) within 500 feet of the area to be rezoned is less than 7.5 acres, and~~

~~B. The proposed rezoning area is not within an area designated as a rural study area in the 2007 Rural Land Study accepted by the County in Resolution 2009-040, and~~

~~C. The proposed rezoning area is not in a designated urban growth area reserve.~~

(Deletion to Policy 2GG-3) (Rural designation, Comp Plan Amendments at 7).

If the Planning Commission adopts the above amendments or something similar, we propose the following findings for your consideration:

1. Allowing rezones of land zoned R10A in limited circumstances will not result in the conversion of all R10A zoned land to R5A.
2. There are a limited number of parcels zoned R10A which are mostly surrounded by higher density zoning or higher intensity zoning or higher density development.

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<sup>2</sup> Caitac may qualify for a rezone under Staff's new April 5th rezone criteria. More time would be required to verify this.

Next, the criteria proposed by Futurewise under Issue No. 1, in its March 26, 2013 letter should not be adopted by the Planning Commission for the following reasons:

Futurewise proposed 1. The average built density in the rural area within 1,000 feet of the zone is one or more dwelling units per five acres:

Response: Rezones in Whatcom County are required to be consistent with the Whatcom County Comprehensive Plan. Site specific rezones must be consistent and compatible with current uses and zoning of the surrounding land. (WCC 20.90.063 (2)(d)). Criteria based solely on built density removes from consideration the surrounding zoning as a factor for rezones. This is not consistent with the County's requirement for site specific rezones. The criterion will also tend to freeze in place existing zoning as this requires total build out of land to density. This is unrealistic because property owners have a choice as to whether to build on their property. A neighbor should not be penalized from seeking a rezone simply because their neighbors either cannot or will not build a residence on their property. Also, this criterion is not necessary for the County to comply with GMA per the Board's recent decision.

Futurewise proposed 2. The proposed rezone is not adjacent to an existing area designated Rural Forestry –Resource Lands, Commercial Forestry –Resource Lands, or Agriculture –Resource Lands in the Comprehensive plan;

Response: It not clear why this criterion is necessary if land is rezoned to R5A. Presently, R5A land is adjacent to Rural Forestry, Resource Lands, Commercial Forestry—Resource Lands or Agriculture.

Futurewise proposed 3. There are no priority habitats –other than streams or rivers –or species identified within a quarter mile of the proposed rezone as established in the Washington State Department of Fish and Wildlife GIS database that is not more than six months old;

Response: The Whatcom County Critical Areas Ordinance regulates critical habitat areas within the County. So additional criteria on this issue is not necessary and appears unnecessarily blunt and prohibitive.

Futurewise proposed 4. The area is not closed to the appropriation of surface or ground water, and ground water sources are not in hydraulic continuity with surface waters closed to appropriation unless there is a water service provider with sufficient water rights to serve the area within the zone and an approved water service plan;

Response: The above criteria would prevent the withdrawal of groundwater from a well. The County should not preclude property owners from withdrawing groundwater under the exemption allowed in state law for wells under RCW 90.44.050.

Futurewise proposed 6. A proposed rezone to Residential Rural-5 (RR-5A) or Rural-5 (R5A) will not increase the acreage of the RR-5A or R-5A area in these zones above the existing acreage in the zones or the acreage in the zones on January 1, 2013 whichever is lower; and

Response: The above criterion is not clear. It seems to require that at the same time the County rezones land from RR5A or R5A, the County would have to down zone land elsewhere in order to keep the acreage stagnant or, the County could never rezone land to RR-5A or R5A. This restriction contradicts the whole idea of allowing R10A to R5A zoning in the first instance.

## **II. Issue 2**

### **A. Clustering provisions**

Open space should be included as a purpose of lot clustering. The proposed definition of reserve tract under WCC 20.97.345 includes open space. Therefore, Staff's proposed amendment to WCC 20.36.305 is not consistent with the definition of reserve tract. Therefore, we propose the following amendment.

#### **1. Amendment to WCC 20.36.305(1) (addition in bold)**

(1)The purpose of lot clustering is to provide an alternative method of creating economical building lots with spatially efficient sizes. Clustering is intended to reduce development cost, increase energy efficiency and reserve areas of land which are suitable for agriculture, or forestry or open space ~~or possible future development.~~

Rural land may someday be included within the UGA. Within UGAs, the County recognizes the need for small cluster lots to maintain large reserve tracts for future urban development. (Policy 2T-2, Comp Plan 2-22, 2-23)<sup>3</sup> The same logic holds true for large parcels within the rural designation. Therefore, there should be no 500' separation or maximum number of lots per cluster subdivision for larger parcels of land.

#### **2. Amendment to WCC 20.36.320(6)**

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<sup>3</sup> •All residential land divisions will be developed as cluster subdivisions.

All clustered lots will be grouped together in one cluster. Clustered lots will be as small as possible in order to maintain a large reserve tract available for future urban development. Wells, sewage disposal systems, and easements associated with these facilities may be placed on the reserve tract only if it is not feasible to place them within the boundaries of the clustered lots. (Policy 2T-2, Comp Plan 2-22—23)

In order to preserve rural character, no more than 16 residential lots shall be permitted in one cluster and there shall be at least 500 feet of separation between any new clusters, **except when the cluster subdivision is located on a parcel or contiguous parcels under the same ownership greater than 20 acres.**

## **B. Reserve Tract requirements**

The size of a reserve tract is linked to the zoning density. However, if a property owner were to provide a reserve tract greater than the minimum required for the zoning district, the property owner should be permitted to remove excess reserve areas.

### **1. New Amendment (in bold):**

**The reserve area may be reduced in size so long as the minimum required reserve area is maintained.**

Next, the County permits that “Wells, sewage disposal systems, and easements associated with...” cluster subdivisions may be located within the reserve area in the urban growth area “if it is not feasible to place them within the boundaries of the clustered lots.” *Supra* fn. 2. In Snohomish County’s regulations concerning Rural Cluster Subdivisions and Short Subdivisions, community wells, well houses, water lines, water system appurtenances and community drain fields are permitted within its open space tracts. Also, certain drainage facilities are also allowed such as detention ponds, stormwater treatment wetlands and stormwater infiltration trenches and bioswales. SCC 30.41C.090(2)(c)(ii)-(iii). In addition to these allowances, Snohomish County has required that a certain portion (30%) of the open space tract remain undisturbed. SCC 30.41C.090(2)(d). The County has proposed an amendment which addresses these points. However, we propose the following amendment to what Staff current proposes to leave open the possibility that not all underground utilities are listed:

### **2. Addition to Amendment (in bold):**

WCC 20.36.320

...

2) A note on the subdivision plat shall establish a reserve tract per the definition in WCC 20.97.345 that is protected in perpetuity so long as it is not within an urban growth area. A reserve tract may contain underground infrastructure necessary for the subdivision, including underground utilities **but not limited to**, stormwater ponds, and on-site septic system components. Above-ground hard surface infrastructure such as roads and water tanks may also be included in the reserve tract, but the area they occupy shall not be included in the reserve tract percentage required in WCC 20.36.253. ~~The “reserve tract” may be considered as a building lot; provided, that such lot is included in the overall density calculation of the original parcel of record.~~

Finally, the 80% requirement for R10A with public water under the Rural zone makes it extremely difficult for Caitac to accomplish even a 59 unit cluster subdivision on its property under R10A zoning. Presuming that the existing golf course could be used as part of the reserve tract calculation,<sup>4</sup> Caitac would have 114 acres to develop and fit a north-south road, east and west roads, internal roads, stormwater ponds, community septic systems, water tanks and transmission lines and a 59 unit cluster subdivision with the current separation requirements and limits on lot number. Approximately 75 acres is required. This leaves a remainder of about 6% of the site for unforeseen site limitations. Under R5A zoning, there is a 75% reserve area requirement. So, Caitac would have 142.5 acres to develop for a 114 unit cluster subdivision under an R5A zoning and 83 acres would be required. This leaves a remainder of at most 10% of the entire site for unforeseen site limitations which are not known at this time.

If the existing golf course were not considered open space and thus deducted from the reserve area, only 86 acres would be available for development under R10A and about 108 acres would be available under R5A. A safer percentage of reserve area for the Caitac property would be 70%.

**3. Amendment to WCC 20.36.253**

District	Gross Density	Conventional	Cluster	Min. Reserve Area (outside UGA)
R5A with public water	1 dwelling unit/5acres	5 acres	12,500 sq. ft.	<del>75%</del> <b>70%</b>
R10A with public water	1 dwelling unit per 10 acres	10 acres	12,500 sq. ft	<del>80%</del> <b>70%</b>

If the Planning Commission were to adopt any of the above changes listed under Issue 2, the following findings should be considered:

<sup>4</sup> Caitac believes that the existing golf course would be included in the reserve tract under the definition of “open space” under WCC 20.97.275:

“Open space” means any parcel or area of land or water not covered by structures, hard surfacing, parking areas and other impervious surfaces except for pedestrian or bicycle pathways, or where otherwise provided by this title or other county ordinance and set aside, dedicated, for active or passive recreation, visual enjoyment or critical area development buffers, as established in the Whatcom County Critical Areas Ordinance. For properties within the jurisdiction of the Shoreline Management Program (WCC Title [23](#)), submerged lands and/or tidelands within the boundaries of any waterfront parcel that are located waterward of the ordinary high water mark shall not be used in open space calculations.

County staff agreed with this approach when Caitac sought a rezone from R10A to R5A in 2011

1. The GMHB required that the reserve tract should be preserved in perpetuity. With limited utilities or infrastructure permitted in the reserve tract, it is necessary to reduce the reserve tract percentage to allow flexibility in the design of cluster subdivisions.

