

January 27, 2014

VIA EMAIL

Whatcom County Council
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Re: Council Agenda Item AB2014-040

Dear:Whatcom County Council:

The Tea Party has asked its supporters write to you about water issues. While some good questions are raised, some of the talking points are based on incorrect information. This letter addresses two such lists of talking points, one on the Tea Party website and one on Tea Party supporter Kris Halterman's web site. The text of the Tea Party comment is in italics, and our response is in plain type.

From <http://whatcomteaparty.org/attention-local-land-owners-and-well-owners/> :

"This case, and the issue generally, raises numerous important concerns:

1. *Should private individuals and organizations assume the power to dictate "remedies" such as public policy and regulation to our elected representatives?*

Presumably, this question is criticizing the County's ability to settle lawsuits with private parties. Settlement does not "dictate" anything; the County Council would have to agree to any settlement. Property owners, such as Caitac and Trillium, recently settled Growth Management Act cases with the County. If private individuals and organizations should not be allowed to settle with the County, this policy must apply across the board.

2. *If there are water quality and quantity problems, how have those been proven – to whom?*

- The *WRIA 1 State of the Watershed* report shows year-round or seasonally closed watersheds account for a large part of the County. Ecology has found that average minimum instream flows in the mainstem and middle fork Nooksack River are not met an average of 100 days a year.
- Ecology's *Focus on Watershed Availability* report states "Most water in the Nooksack watershed is already legally spoken for." Instream flows for WRIA 1 were established in 1985 and codified at WAC 173-501. As a result of instream flow



requirements, some of the water sources are closed year round to additional withdrawals and some are closed part of the year.

- In its 1999 Water Resource Plan, the County reported that a proliferation of rural residential exempt wells already created “difficulties for effective water resource management” by drawing down underlying aquifers and reducing groundwater recharge of streams. Since the report was issued, more than 1,000 additional wells have been drilled in closed basins.
- The link between stream flows and groundwater withdrawals in the shallow Whatcom aquifers is well documented. A number of studies indicate that shallow aquifers of the County are responsible for approximately 70% of base stream flow.
- The Sumas-Blaine aquifer is the only readily available drinking water source for 27,000 rural residents of Whatcom County. Nitrate contamination in the aquifer has been documented for over 40 years. In a 2012 study, 29% of sampled wells failed to meet drinking water standards for nitrates, and 14% of wells had double the maximum allowed nitrate levels.
- A 2012 Washington State Health Department study on fecal coliform pollution in Puget Sound ranked Drayton Harbor as the second-highest contaminated shellfish bed in Puget Sound.
- Whatcom County has 77 impaired water bodies under the Clean Water Act’s Section 303(d) standard. Of these, only 6 water bodies have been analyzed and have had standards established for Total Maximum Daily Loads (TMDLs).
- **The County’s own Comprehensive Plan states:** “Surface and groundwater quality problems can be found in many areas of Whatcom County. . .There are significant legal limitation in obtaining water. Management actions between and within jurisdictions are not always well coordinated or consistent. . .These problems and issues have already led to many impacts. . .includ[ing] health concerns associated with drinking contaminated water; fisheries depletion and closure of shellfish harvesting areas and other instream problems; a lack of adequate water storage and delivery systems to meet the requirements of growth and development; concerns with the availability of water to meet existing agricultural and public water supply demands; potential difficulties and additional costs associated with obtaining building permits and subdivision approvals; and other related increasing financial costs to the community. Long-term resolution of the numerous, complex and changing water issues requires actions in many areas.”

This evidence, and much more, was cited in the Growth Management Hearings Board’s decision.

3. *The Growth Management Hearings Board is a quasi-judicial board of state appointees that reviews comprehensive plans as they relate to the GMA (the Growth Management*



Act). It is not technically qualified nor empowered to make rulings of law or fact in cases involving water law or even “environmental law.”

- The Washington State Supreme Court disagrees. “In reviewing growth management hearings board (board) decisions, courts give “ ‘substantial weight’ ” to a board’s interpretation of the GMA.” *Kittitas County v. Eastern Wash. Growth Mgmt. Hearings Bd.*, 172 Wash.2d 144, 154 (2011).
- The Supreme Court also stated: “The Board has jurisdiction to hear petitions alleging a county’s development regulations are not compliant with the GMA. RCW 36.70A.280(1)(a). Because the GMA includes requirements to protect water, the Board has statutory authority to hear petitions that challenge whether development regulations violate those GMA provisions that require a county to address water issues in its land use planning.” *Id.* at 176.

4. *Would not the correct duty and response of our local and state government be to identify and solve actual water quality and quantity problems, when and where they exist?*

We agree. Some Tea Party spokespeople have stated that the Board’s order requires “property owners” to prove water availability. This is factually incorrect. The Board’s order addresses the County’s responsibility, suggesting numerous ways that the County can improve its planning for water quality and quantity in order to comply with the Growth Management Act. We agree that the County and Ecology should work together to identify and solve water quality and quantity issues.

5. *If the denial of land use should ever be necessary, should such a “taking” (for public benefit) be compensated for? The Washington State Constitution addresses takings.*

The County has an opportunity to address water quantity issues, to ensure that no denial is ever necessary. Even if the County were to fail in its responsibility to address water scarcity, however, a denial of a land use would only occur if a proposed development did not obtain a water right and intended to use water that was already owned by a water rights holder. It is unlikely that a property owner with no water right could claim that a failure to allow that property owner to use water owned by someone else was a taking.

From <http://smlibertyroad.com/whatcom-county-council-special-council-of-the-whole-to-meet-at-6pm-jan-28th-2014-your-water-rights-are-at-stake/> :

Specific points for you and the Council that support the appeal:

1. *Dropping the appeal WON’T save any money: landowners denied building permits on the flimsy basis of the Growth Board decision will have strong grounds for their own appeals, and those legal actions will cost the county far more than continuing their suit against the Growth Management Hearings Board.*

This assertion appears fundamentally to misunderstand the nature of the Board’s decision. The Board does not, itself, adopt regulations or impose requirements. The Board has



remanded Comprehensive Plan provisions and development regulations to Whatcom County, and the County now needs to determine how to address water quality and quantity issues.

Once this fact is understood, there is no reason to assume that the County Council would pass legislation that allows building permits to be denied on legally unsupportable grounds.

- 2. Devaluing rural lands results in a massive transfer of wealth from the middle class (most current rural landowners) to the ultra-wealthy (many of whom are non-citizens) who can afford to buy and hold for as long as it takes for this nonsense to go away. How progressive is that??*

“Most current rural landowners” already have homes with wells and will be entirely unaffected by the Board’s order. The rest – “devaluation,” “massive transfer of wealth,” “non-citizens” – is unfounded speculation.

- 3. Finally, there is no factual justification for stopping a few hundred rural homes per year. All CURRENT rural water users added together don’t use as much water as Bellingham takes from the Nooksack River — which is closed to further diversions due to endangered fish — in July alone.*

If there is “no factual justification” for the County to find that water is not available in the rural area, then there will be no effect on rural development. “Stopping a few hundred rural homes per year” is, again, unfounded speculation.

Thank you for considering our comments.

Very truly yours,

Jean O. Melious
of Nossaman LLP