

ROBERT A. CARMICHAEL, Attorney
bob@zenderthurston.com

MEMORANDUM

TO: Whatcom County Planning Commission and Whatcom County Council

FROM: Robert A. Carmichael, Attorney for City of Lynden

RE: Agricultural Land and UGA Issue

DATE: September 17, 2009

~~DISTRIBUTED TO
SEP 17 2009
ALL COUNCIL MEMBERS
WHATCOM COUNTY COUNCIL~~

By any measure, Lynden has demonstrated its need for additional UGA to accommodate projected population growth. Perhaps the principal argument in opposition to reducing Lynden's proposed UGA is that it will lead to the loss of agricultural land entitled to protection under the GMA. The purpose of this memorandum is to show that this contention is erroneous.¹

RELEVANT LEGAL AUTHORITY

The County is mandated to designate urban growth areas capable of accommodating 20 years of projected population growth based on an honest assessment of historical growth patterns. *RCW 36.70A.110*. To determine how the presence of agricultural land affects this duty, the County should start with the definition of agricultural land under the GMA.

As stated by the Washington State Supreme Court, for GMA purposes agricultural land 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 areas used or capable of being used for production based on land characteristics, and (c) that has long-term commercial significance for agricultural production, as indicated by soil, growing capacity, productivity, and whether it is near population centers or vulnerable to more intense uses.

Lewis County v. Western Washington Growth Management Hearings Board, et al, 157 Wn.2d 488, 502, 139 P.3rd 1096 (2006) (emphasis on word "and" is in original).

From the above definition it is clear that "long-term commercial significance for agricultural production" is a prerequisite for designation of agricultural land. According to the Washington Supreme Court:

Although some of the soils may be of a type appropriate for agricultural use, soil type is only one factor among many others in the legal test for agricultural land of long term commercial

¹ This memorandum focuses exclusively on the City's proposed UGA area in contention, south of Badger Road between Benson and extending to the west beyond Double Ditch Road.

significance.

City of Arlington et al., v. Central Puget Sound Hearings Board et al, 164 Wn.2d 768, 781, 193 P.3rd 1077 (2008).

The Washington Supreme Court has made clear:

Thus, counties must do more than simply catalog lands that are physically suited to farming. They must consider development prospects (the “possibility of more intense uses”) in determining if land has the enduring commercial quality needed to fit the agricultural land definition.

Lewis at 500-501.

Consideration of development prospects to determine if “land has the enduring commercial quality needed to fit the agricultural land definition” should require consideration of availability of public facilities and services and proximity to existing urban development. These are important factors in determining whether an area is “conducive to the conversion” of farmland. *Lewis* at 504.

WAC 365-190-050 provides a framework (and is often cited by our state supreme court) intended to guide counties in determining which agricultural lands have “long-term commercial significance.” That regulation says that counties:

shall also consider the combined effects of proximity of population areas and the possibility of more intensive uses of the land as indicated by:

- (a) The availability of public facilities;
- (b) Tax status;
- (c) The availability of public services;
- (d) Relationship or proximity to urban growth areas;
- (e) Predominant parcel size;
- (f) Land use settlement patterns and their compatibility with agricultural practices;
- (g) Intensity of nearby land uses;
- (h) History of land development permits issued nearby;
- (i) Land values under alternative uses; and
- (j) Proximity of markets.

WAC 365-190-050 (1).

In *Arlington v. Central Puget Sound Hearings Board et al.*, 138 Wn. App. 1, 154 P.3rd 936 (2007), affirmed in pertinent part at 164 Wn.2d 768, 193 P.3rd 1077 (2008), the state supreme court relied on the above factors to determine that a particular parcel adjacent to Interstate 5 was not agricultural land of long-term commercial significance. Evidence presented included testimony from a long-time prior owner of the property that their farming efforts were not economically sustainable.²

SUMMARY OF CITY'S POSITION

In the present case, the evidence is clear and compelling that the land proposed for Lynden's UGA does not have long-term commercial significance for agricultural production.³ Moreover, the evidence shows that the County previously considered the viability of the subject area for agricultural production, balanced that against establishing a location for Lynden to grow, and determined that the area proposed for Lynden's UGA is precisely the location most appropriate for Lynden's future urban development. Lynden relied upon such policy direction and other direction from the County, to plan and make the necessary investments to accommodate the urban growth, as proposed based on conservative population forecasts. After considering all of the appropriate factors (including without limitation being adjacent to a growing city with the capacity to provide services) the land proposed for Lynden UGA does not have long-term commercial significance for agricultural production.

DIRECTION RECEIVED FROM COUNTY PDR PROGRAM

In 2002, Whatcom County established its Agricultural Purchase of Development Rights (PDR) Program Guidelines through adoption of Resolution No. 2002-040 ("PDR Program"). *Exhibit 1*. Twelve target areas were identified (and mapped) to receive priority consideration for PDR Program participation. *Exhibit 1, p. 4; App. A*. One of the most heavily weighted positive factors in determining target areas was whether an area could serve as a buffer between farmland and other uses. *Exhibit 1, p. 5*. Target Area No. 9 west of Lynden and Target Area No. 10 north of Lynden were established to provide the desired buffer between farmland and other uses. In 2003, these target areas serving as buffers for Lynden's growth were enhanced and enlarged in amendment to the PDR Program adopted under Resolution No. 2003-036. *Exhibit 2*. The PDR Program has been revised and updated since that time, but the target areas originally established around Lynden in 2002 and as amended in 2003, largely remain the same. See current 2009 PDR Program Map at *Exhibit 3*.

The PDR Program Map of target areas is very telling. It shows a buffer around Lynden to the north along the Badger Road and to the west along Guide Meridian. Excluded from the target areas is the area between Benson Road and Guide Meridian, taking in both sides of Double Ditch Road south of Badger.

² The Board rejected this anecdotal evidence, but the Washington Supreme Court found it persuasive and held it should have been considered. This is consistent with prior holdings that while landowner intent or use is not conclusive, they are legitimate factors to be considered in whether the land has long-term commercial significance. *Arlington* at 27-28.

³ "Land proposed for Lynden's UGA" or "Lynden's proposed UGA" refers to both its current existing UGA and the area proposed by Lynden for inclusion in its UGA extending to properties south of Badger Road, west of Benson Road and on both sides of Double Ditch Road (but not extending to Guide Meridian).

Exhibit 3. This area is inside the PDR target area “buffer.” *Exhibit 3.* Based on the configuration of PDR target areas around Lynden, it is the logical residential area for Lynden’s future population. *Exhibit 3.* And it is exactly where Lynden has proposed an urban growth area necessary to meet its projected population forecast.

That this area south of Badger Road on both sides of Double Ditch Road appears tailor made for Lynden’s UGA is not an accident. When the PDR Program was being debated, it was noted that this would be the area set aside for Lynden’s urban growth needs. The following are from official meeting minutes of discussion at the Council Natural Resources Committee, September 10, 2002, from which the recommendation came.⁴

Olason: The committee [PDR Advisory Committee] looked at the most potential urban areas that would creep into agricultural areas, and identified where growth should occur and where it should not occur. The committee left out an area to the east of Lynden, and area to the southwest, **and an area in the middle of the area to the south, up to the Guide Meridian.** The area to the north buffers a fairly large, easily developed, high value farmland that goes to the border. The committee tried to figure out how to accommodate growth without developing preconceived notions of where it should go. Through this technique, they developed a concept of where they wanted urban growth to go. Without targeting, they would be in the position where they would buy scattered parcels everywhere.

Exhibit 4, Natural Resource Committee Meeting Minutes, p. 2, (Sep. 10, 2002) (emphasis added). Following substantial discussion about the target areas around Lynden, the Natural Resources Committee and the Council approved the target areas proposed by the PDR Advisory Committee. *Id.* The intent of the Council in 2002, as readopted in subsequent years and carried forward on the PDR maps today, is that the land inside the half ringed buffer of PDR target areas surrounding Lynden on the north and south would be eligible for Lynden’s future urban growth when needed.⁵ Lynden has demonstrated in other documents submitted that its 20-year need for urban growth does include a portion of those lands south of Badger and west of Benson. Lynden has relied on the direction received from the County to plan and invest in infrastructure capable of serving its existing and proposed UGA.

NO LONG TERM COMMERCIAL SIGNIFICANCE FOR AGRICULTURAL PRODUCTION

The land in Lynden’s proposed UGA (south of Badger, west of Benson and on both sides of Double Ditch Road) does not possess long term significance for agricultural production and therefore does not require special protection from urban growth. A routine standard review of the area soil reveals it has substantial clay content, is plagued with a high water table, and drains poorly.⁶ At best, the soils in the

⁴ Mr. McShane and Mr. Fleetwood were on the Committee. Ms. Caskey-Schreiber, Ms. Brenner and Mr. Nelson participated in the discussion.

⁵ Indeed, in the County Executive’s Recommendation dated August 17, 2009 (p. 16), he plainly states: “Since the early 1990’s Lynden and Whatcom County have known that future growth would extend west between Benson Road and Guide Meridian.”

⁶ Soils in the area are predominately Edmonds-Woodlyn and Hale. *Exhibit 5 and Exhibit 6, “Zoom” of Soil Map from Exhibit 5.* Soil characteristics for these marginal soil types are described in detail at *Exhibit 7, Soil Survey of Whatcom County Area, Washington, by Soil Conservation Services, US Department of Agriculture, May 1992. A more complete excerpt of this document is Exhibit L to the Memorandum of the City of Lynden (Carmichael and Jain) to the Planning*

area allow for modest agricultural production, mostly confined to grasses and small grain and corn silage. *Exhibit 5, Custom Soil Resource Report for Whatcom County Area, Washington, Sep. 15, 2009.*

Local conditions, however, further compromise agricultural production in the area. The area is susceptible to significant flooding from stormwater coming from Canada. *Exhibits 8 - Letter from Ebe Farms LLC to County Executive, Aug. 17, 2009; Exhibit 9 - Declaration of Dick Bedlington, Sep 16, 2009; Exhibit 10 - Photos of January 2009 flooding on Badger Road*. In an area with poor drainage to begin with, this has resulted in ruined crops, further complicating the ability to economically farm the land. *Exhibit 9.*

The problems with area soils is confirmed in writing by some of the largest farmers in Whatcom County: "These are less than prime agricultural soils and are further hampered with severe drainage and flooding issues." *Exhibit 8.* The nature of the soil in Lynden's proposed UGA is also confirmed by Mr. Dick Bedlington, who has farmed almost 80 acres in the subject area, some of which for approximately 35 years. Due principally to drainage limitations of the soil and a high water table, Mr. Bedlington testifies that the land "produces a very marginal yield. And when there is flooding, our crops get ruined." *Exhibit 8, p. 2, par. 13.* Mr. Bedlington further testifies that the land does not produce a cash flow to make a profit, but "At best it is a break even proposition every year, assuming there is not flooding." *Exhibit 8, p. 2, par. 13.*

Neighboring farmers within the proposed Lynden UGA have come to similar conclusions as Mr. Bedlington. *Exhibit 11 - Declaration of Peter Steiger, Sep. 17, 2009; Exhibit 12 - Emails of Fred Bovencamp to County PDS, Sep. 17, 2009.* One such neighboring farmer recently accepted a buyout for his dairy cows. *Exhibit 9 pp. 2-3; Exhibit 11*. This farmer, Mr. Steiger, has farmed in the area since 1961, and has more recently farmed approximately 137 acres within Lynden's proposed UGA. *Exhibit 11.* Mr. Steiger testifies that the high water table raised the iron content in the soil which adversely affected the milk production and reproductive health of his dairy cows and the forage quality of the soil. *Exhibit 11.* Another neighboring farm family in the proposed Lynden UGA (Bovencamp), has held their land for 60 years. *Exhibit 12.* For the past 30 years, they have leased it out for crops, mostly corn silage. *Id.* Mr. Bovencamp indicates that due to soil limitations, the farm never operated at a profit and that the current lease rarely produces sufficient revenue to pay the property taxes. *Id.* The Bovencamp property is also perhaps the "first point of attack" in seasonal flooding. *Id.* Mr. Bovencamp concludes that "any concern about the preservation of prime, productive farmland as it relates to our acreage is unfounded." *Id.*

Between them, Mr. Bedlington, Mr. Steiger, and the Bovencamp family have farmed the majority of the acreage in the proposed Lynden UGA for many decades. Based on information concerning soil limitations, high water table, chronic flooding problems, marginal yields and the inability of long-time farmers to make a profit from the land, the subject land appears to have limited upside for agricultural production. To be protected agricultural land under the GMA the land must have "long term commercial significance for agricultural production."

The foregoing material demonstrates that the land is not particularly significant agricultural land. The

fatal limitation, however, on the land's long term commercial significance for agricultural production becomes evident with consideration of the factors identified in WAC 365-190-050. Under this regulation, the County "shall also consider the combined effects of proximity of population areas and the possibility of more intensive uses of the land." Specific consideration must be given to, *inter alia*, the availability of public facilities and services; the relationship or proximity to urban growth areas; land use settlement patterns and their compatibility with agricultural practices; intensity of nearby land uses; and history of land development permits issued nearby.

Availability of public facilities and services. In his Executive Recommendation dated August 17, 2009, the County Executive admits:

Lynden does not have sufficient lands designated for growth to keep pace with historic growth patterns. The city proposed an expansion of 354 gross acres to accommodate an additional 7,417 people. The city has completed capital facilities plans for water and sewer systems, schools, and other necessary capital facilities to support this level of growth.

Executive's Recommendation, August 17, 2009, p. 16. The City has been assured that its Water System Comprehensive Plan, Sewer System Comprehensive Plan, and Transportation Plan are all part of the record in these proceedings. *Exhibit 13.* Lynden's capital facilities planning and investments have without exception included its proposed urban growth area west of Benson Road and on both sides of Double Ditch Road.⁷ The Lynden Public Works Director estimates that City ratepayers stand to bear approximately 5.5 - 5.7 million dollars in water and sewer utility costs if this area is not included in the City's UGA. About half of that amount, approximately 2.7 million dollars, represents expenditures made on sewer capital facilities already constructed based on population projections in the City's approved 2007 Comprehensive Sewer System Plan. *Exhibit 14, Statement of Duane Huskey, Sep. 17, 2009.* The population projections in the City's Sewer System Plan are consistent with (not identical to) the population projections used to size Lynden's proposed UGA. Note that this Comprehensive Sewer System Plan and Lynden's population projections therein were approved by Whatcom County.

Relationship or proximity to urban growth areas. Lynden's proposed urban growth area is immediately adjacent to existing urban development within the city limits to the east and to the south. *Exhibit 15, aerial photo.* The entire urban growth area as proposed by Lynden is easily served with all facilities and services necessary to support urban development. *See above section.* Lynden's proposed UGA is clearly the logical place to accommodate its projected future population.

Land use settlement patterns and their compatibility with agricultural practices. Residential development within the City abuts Lynden's proposed urban growth area on two sides. The development within city limits has clearly now pushed up against the agricultural land in Lynden's proposed UGA. *Exhibit 15.* This relatively recent urban growth within city limits has not been compatible with farming in the proposed UGA.

⁷ Lynden has sufficient water rights to meet the needs of projected population growth. *See transmission from Robert Carmichael to David Stalheim dated Sep. 9, 2009.* In addition, Lynden maintains a strict policy of requiring that any property owner that is part of an annexation request transfer their water rights to the City. The properties within Lynden's proposed UGA have water rights for an ample quantity of water to serve said area. *Exhibit 16.*

The surrounding recent development has been residential. There is no natural or man-made physical barrier or buffer between the relatively dense residential development inside the city limits and the agricultural uses. There is no major arterial such as the Badger Road to the north or Guide Meridian to the west to separate the residential development and the agricultural uses in the proposed urban growth area.

Consequently, the settlement pattern in the area is not compatible with agricultural practices. According to Mr. Bedlington, he has been besieged with complaints in recent years from the residential property owners in nearby subdivisions. *Exhibit 9, p. 3*. Noise, dust, and spraying are the most common sources of complaints. *Id. at p. 3*. Despite the right to farm ordinance and notice to area property owners of his rights, he estimates having to respond to 30 – 40 complaints from neighboring urban residences this year alone. *Id. at p. 3*. Moreover, increased traffic has resulted from the re-opening of the 17th Street Bridge in Lynden and turned Double Ditch Road into “major thorough fare.” *Id. at p. 3*. This increased traffic has made it very difficult (and dangerous) for farm equipment to use or cross Double Ditch Road. *Id. at p. 3*.

Intensity of nearby land uses. The nearby land uses are relatively dense residential subdivisions. *Exhibit 15. See above section.*

History of land development permits issued nearby. This history of nearby development permits is illustrated by *Exhibit 15*, which shows the surrounding residential developments and the date of their respective plat approvals. Land development has naturally progressed to and has reached the edge Lynden’s city limits along the boundary of the proposed UGA.

CONCLUSION

Since the early 1990’s, the land within the proposed Lynden UGA has been identified by both the County and Lynden as the logical area to accommodate the City’s growth, consistent with GMA. In development of target areas for its PDR Program, the County again recognized the subject area south of Badger, and west of Benson Road as the logical place to accommodate future population growth in Lynden. Higher quality farm land in areas north of Badger Road and west of Guide Meridian were identified for target areas to protect and to serve as buffer for agricultural lands farther north and west.

One of GMA’s most important objectives is to restrict urban growth to urban growth areas. The GMA recognizes that existing cities are the hubs around which urban growth should occur. The GMA mandates that the County, in consultation with cities, designate urban growth areas of sufficient size to accommodate 20 years of projected population growth. The City of Lynden has presented a comprehensive and coherent proposal for an urban growth area, using conservative population growth estimates, which will accommodate 20 years of projected population growth. The GMA requires that sufficient land be set aside in Lynden’s UGA to accommodate its projected 20-year population growth.

The only legal argument against Lynden’s proposal is grounded upon the GMA’s mandate to protect agricultural land. The GMA definition of agricultural land is land “that has long-term commercial significance for agricultural production, as indicated by soil, growing capacity, productivity, and whether it is near population centers or vulnerable to more intense uses.” A thorough evaluation reveals

that the subject land does not have long-term commercial significance for agricultural production.

The evidence shows that the land within Lynden's proposed UGA is not prime agricultural land, but rather consists of poorly drained soil, with a high water table, and high clay content. The land produces only a marginal yield of silage crops and grasses and does not produce a positive cash flow. Moreover, the entire area within the proposed Lynden UGA is susceptible to flooding, which has ruined crops.⁸

Moreover, in determining whether the land has "long-term commercial significance for agricultural production," the County is obliged to consider the "combined effects of proximity of population areas and the possibility of more intensive uses of the land." Here, public services and facilities are available to serve the proposed Lynden UGA and Lynden has made a substantial investment therein. The proposed UGA is in the immediate proximity to the city and urban-residential subdivisions and those uses have proven not very compatible with abutting agricultural uses. The urban-residential development within the City surrounds the proposed UGA on the east and the south, right up to the property lines. The proposed UGA is the logical area for accommodating Lynden's growth, as was long ago recognized.

In this particular case, considering the marginal agricultural productivity of the land along with the "combined effects of proximity of population areas and the possibility of more intensive uses of the land," including the above identified factors from WAC 365-190-050, leads inexorably to the conclusion that the land in the proposed Lynden UGA is not of long term commercial significance for agricultural production. Accordingly, grounds do not exist for excluding the subject area from the Lynden UGA.⁹

⁸ If the area proposed by Lynden is included in its UGA, the City has plans to remove water from certain ditches and restore the original drainage of Pepin Creek in a manner that will provide improved fish and wildlife habitat and better control flood waters to prevent further flood damage to area residences. *See Exhibit 17, Amendment to City of Lynden Stormwater Management Plan, January 1992.*

⁹ The legal issues in this case would be closer if the land were prime agricultural land. The GMA requires protection of agricultural lands, but it also requires accommodation for 20 years of population growth in urban growth areas. Nothing in the GMA suggests that the requirement to protect agricultural land trumps the requirement to provide adequately sized urban growth areas for 20 years of projected population growth. The factors in WAC 365-190-050 provide tools for weighing the balance, but do not answer the ultimate question of priority. Fortunately, in the present case, weighing the "combined effects of proximity of population areas and the possibility of more intensive uses of the land" against the marginal agricultural yields, poorly drained soils, and frequent flooding, the balance tips in favor of Lynden's proposed urban growth area.

Exhibits
on
file @
PDS