

From: Council
To: Blystone, Kate; Boxx, Becky; Council Members; Rebecca Craven
Date: 11/9/2009 8:05 AM
Subject: Fwd: Public Comment on Downzoning and Fairness
Attachments: FAIRNESS.doc

>>> "Wendy Harris" <w.harris2007@comcast.net> 11/7/2009 1:09 PM >>>
To: County Council Members

From: Wendy Harris

Re: Comprehensive Plan Amendments to UGAs

November 24, 2009 County Council Meeting

YES, ITS FAIR: Amendments To Downzone The Whatcom County Comprehensive Plan And The GMA Process

Can we please lay to rest the unfounded claim that any attempt to downzone property that limits the owner's future ability to develop is somehow fundamentally unfair?

Whatcom County has undertaken a Growth Management Act ("GMA") mandated review and revision to its Comprehensive Plan. Pursuant to this review, it is clear that greater protection is needed for the County's natural resources and agricultural land, and that most Urban Growth Areas ("UGA") are oversized. Downzoning is required in many parts of the County.

However, as soon as appropriate amendments to the Comprehensive Plan are proposed that would limit future development rights, instant cries of "unfairness" are raised, either by small property owners, by large development corporations such as Trillium, or by the cities themselves, such as Blaine. The "unfairness" argument asserts that in reliance on existing zoning, property was purchased with the intention of future development and therefore, downzoning violates reasonable expectations regarding future land use.

The "fairness" argument might seem persuasive on its face, but a closer examination reveals that it is a disingenuous attempt to extend development rights, liberally protected under the state "vesting doctrine" to the GMA, a law with a completely different purpose and intent. While property rights, i.e., the right to occupy and reasonably use property, are protected under the GMA, development rights, i.e., speculative investment in a future right to develop property, are not protected under the GMA.

Washington's vesting doctrine follows a minority rule that offers greater protection of development rights than other U.S. jurisdictions. Our vesting doctrine entitles property owners to have building permit applications processed under the regulations in effect at the time a complete permit application is filed, regardless of subsequent changes in zoning and other land use regulations. The vesting policy has been codified under state law and expanded judicially to encompass additional types of development permits.

However, Washington also acknowledges that development interests often come at a cost to public interest. Therefore, under the vesting doctrine, property owners can obtain a valuable and protected interest to develop property, but only when a complete building permit application is filed. This requirement is intended to prevent "permit speculation", striking a balance between the public's interest in controlling development and the developer's interest in being able to plan their conduct with reasonable certainty.

As The Washington Supreme Court explained:

Development interests and due process rights protected by the vested rights doctrine come at a cost to the public interest. The practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use. A proposed development which does not conform to newly adopted laws, is by definition, inimical to the public interest embodied in these laws. If a vested right is too easily granted, the public interest is subverted.

Erickson v. McLerran, 123 Wn.2d 864 (1994)

Specifically, the Washington Supreme Court has recognized that the GMA imposed substantial new requirements on local governments that must be recognized in addition to the vesting doctrine, requiring greater emphasis on natural resource protection and urban planning. The Supreme Court notes that the GMA reflects legislative awareness that "land is scarce, land use decisions are largely permanent and, particularly in urban areas, land use decisions affect not only the individual property owner, but entire communities." Erickson, Id.

Thus, property owners who have failed to protect their development rights under existing zoning regulations through submission of a complete building permit application have also failed to vest their rights and are subject to any changes in zoning law, including those indicated under the GMA Comprehensive Plan review process. And principles of fundamental fairness were weighed heavily by both the judiciary and the legislature in development of these laws.

Using the GMA to provide a "second bite at the development apple" is inappropriate and abusive. True "unfairness" exists when property owners assert development rights to which they are not entitled under the GMA in an attempt to defeat rights conferred upon the public by the state.

Sincerely

Wendy Harris,

Bellingham Resident