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MEMO

TO: Whatcom County Council

FROM: Jack O. Swanson

DATE: May 20, 2013

RE: Rural Element
Smith Gardens - Fort Bellingham Rural Neighborhood Designation

This memo addresses the Property mentioned above, which the Planning Commission recommended be included in the Rural Neighborhood Designation in Fort Bellingham/Marietta and contrary to two previous decisions of the Growth Management Hearings Board (the "Board").

BACKGROUND

The discussion concerning this area goes back quite a few years. For several decades, the Petitioner's Property enjoyed the benefits of residential zoning at a density of one dwelling unit per acre (RR-1). The zoning also provided for agricultural activities, including floraculture, which has been practiced by the owners for many years. In 2005, Whatcom County adopted ordinances as part of its mandatory update which were appealed to the Board. That decision was appealed to Superior Court and ultimately the Court of Appeals and the Washington Supreme Court. In 2011, the case worked its way back down the appellate system to the Board. Compliance proceedings were initiated and the County was directed to review what was then the Fort Bellingham/Marietta LAMIRD for appropriate size and descriptors. After months of discussion, the County adopted Ordinance No. 2011-013. This Ordinance included Smith Gardens in the Type I LAMIRD.

BOARD'S RESPONSE TO THE 2011 ORDINANCE

In response to keeping the Smith Gardens property in the LAMIRD, the Board found that having a LAMIRD that close to an Urban Growth Area was "clearly

erroneous.” The idea was that these lands should be protected from development until the urban growth area should be expanded further. In support, the Board stated

“Though the GMA does not explicitly prohibit the establishment of a LAMIRD adjacent to a UGA, such placement is contrary to other provisions of the Act.”¹

It seems clear that the Board intended to impose a bright-line rule -- that no LAMIRD should be allowed to be on the border, or even close to the border, of a UGA. However, as was made clear in the Gold Star case, the Board is prohibited from imposing a bright-line rule in determining whether the County is in compliance with the GMA.² Knowing that the Board was wrong in establishing a bright-line rule, the Petitioners filed an appeal in Whatcom County Superior Court 12-2-00336-6.

COUNTY'S 2012 ORDINANCE

In response to the Board's 2012 FDO, the County passed Ordinance 2012-032 modifying the zoning by creating the Fort Bellingham/Marietta Rural Neighborhood. This designation would allow R-2A zoning and the County explicitly chose this designation based upon the 2011 small-lot development of the area.

The Board was then tasked with determining whether the County's 2012 Ordinance was in compliance with the GMA and the prior FDO. In the 2013 Compliance Order, the Board found the Rural Neighborhood designation “clearly erroneous” and remanded the Ordinance back to the County. The reasons for this remand seem to be based entirely on the County's inclusion of “a number of large undivided parcels.”³

Once again, the Board's logic is fundamentally flawed. Using the Board's own logic, Goal 2MM-1 of the Comprehensive Plan states “Areas zoned for densities greater than one dwelling per five acres shall be contained within Rural Neighborhood boundaries. Rural Neighborhood boundaries shall not be expanded beyond those established in 2012, which were drawn to include areas that were developed at higher rural densities in 2011.” This Goal explicitly states that these boundaries will not be expanded. This means that the Board's decision to remand back to the County to review the boundaries of this designation is completely unfounded. There is nothing to review – the Rural Neighborhood is appropriately contained and accurately reflects the 2011 small-lot development that just *happens to have* a few larger (greater than two acres per dwelling unit) parcels.

¹ See the Board's Final Decision and Order (“FDO”) dated January 9, 2012, page 104.

² Gold Star Resorts, Inc. v. Futurewise, 167 Wn.2d 723, 222 P.3d 791 (2009).

³ Compliance Order 11-2-0010c dated January 4, 2013.

In addition, the Board clearly stated that the County must find a designation that is not urban but that would “recognize the existing small-lot development pattern without promoting the increased density and demand for urban services that LAMIRD designation entails.” It seems that the Board would only be satisfied by freezing all applications to subdivide all property in the Fort Bellingham/Marietta Rural Neighborhood and is attempting to justify this result by requiring the County to find some designation between “urban” and “rural” without explicitly stating what that would look like.

Oddly, the Board did not explicitly find that the use of the Rural Neighborhood designation was inconsistent with the GMA and the Comprehensive Plan. The Board found that the use of R-2A zoning was acceptable in the Rural Element.⁴ By carving out the larger parcels in this area, the County would be going against the fundamental principles of the GMA which is to have a consistent, predictable plan so that the average landowner is not blindsided by changes in zoning. Just because the larger parcels are not identical to their adjacent neighbors does not justify a drastic change in zoning from one parcel to the next. It would not make any sense to have a checker-board pattern of zoning which is what the Board is advocating.

2013 COMPLIANCE

For the Smiths, while the nursery has been here for a very long time, its ability to operate at this location may be coming to a close. The surrounding area is obviously more residential in character. The waterfront location creates special issues with regards to environmental regulations. The increasingly difficult regulatory environment may force the company to relocate its activities.

In anticipation of this day, the Smiths have a 15 lot subdivision application pending which affects the southerly 15 acres of the land under consideration. This application is expected to go to the Hearing Examiner later this year. Attached is a copy of a map showing the preliminary plat and adjoining activities on the Smith Gardens site.

In addition, the adjoining neighbors, the Satusheks also have a pending short plat application which will likely result in that land becoming four parcels instead of the long skinny tract which presently shows on the maps.

To protect their interests going forward and identical to the course of action after the 2012 FDO from the Board, the Smiths filed an appeal with Whatcom County Superior Court 13-2-00287-2. The Board’s rationale for carving out the “large parcels” is once again unfounded and the Smiths have a very good chance of succeeding in their litigation.

⁴ Compliance Order 11-2-0010c dated January 4, 2013, page 59, line 13-27.

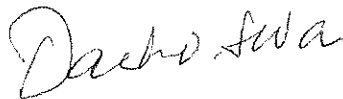
Today's reality is that a good deal of subdivision activity is already underway and will likely occur. Remaining land which is occupied by the Smith Gardens operation is presently only 24.09 acres. The R5A zoning would yield four new building sites. Rural neighborhood designation would yield only eight new units – a significant blow to the owners, but hardly an earth shattering imposition on the rural element. In fact 2 acre tracts are quite consistent with the existing development pattern where many parcels are one acre or even less.

PLANNING COMMISSION FINDINGS

The Planning Commission has been diligent in recommending to the Council the changes necessary to come into compliance with the Board's order. During one of the work sessions, the Planning Commission adopted Findings of Fact, Reasons for Action, and Conclusions that would clearly articulate to the Board the reasons for keeping some of the larger parcels in the Fort Bellingham/Marietta Rural Neighborhood. For reasons that are entirely unclear, they are not included in the materials submitted to Council for the hearing dated May 21, 2013. If the Council agrees to adopt the Planning Commission's recommendations regarding the redrawn boundary of the Fort Bellingham/Marietta Rural Neighborhood (which would include Smith Gardens in the rural Neighborhood), the Findings and Conclusions that the Planning Commission adopted would need to be approved as well. Attached with this letter are the Findings of Fact and Reasons for Action that we proposed dated April 8, 2013 that the Planning Commission voted to adopt.

It is no secret that many citizens and Council members are truly sick and tired of dealing with a Board that routinely goes off the rails and refuses to allow Whatcom County the autonomy to zone in a manner that is best suited for this area. I appreciate your patience and time in attempting to fully and finally resolving this matter. Thank you for your consideration.

Sincerely yours,



JACK O. SWANSON

John C. Belcher*
Jack O. Swanson
Chester T. Lackey
Terrance G. Lewis
Douglas K. Robertson
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Belcher | Swanson

LAW FIRM, PLLC

Bradley D. Swanson
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Peter R. Dworkin
Mark A. Lackey
Hugh C. Klinedinst
Kristen C. Reid

April 8, 2013

Whatcom County Planning Commission
5280 Northwest Dr.
Bellingham, WA 98226

*Re: Fort Bellingham/Marietta Rural Neighborhood
Smith Gardens Property
Proposed Findings of Fact and Conclusions*

Dear Planning Commission:

This letter is a follow-up to our letter dated March 28, 2013 regarding the same.

In support of retaining the Smith Gardens property within the Rural Neighborhood, we prepared changes to County Staff's "Proposed Findings of Fact and Reasons for Action." Our changes are contained in the attached Exhibit A.¹

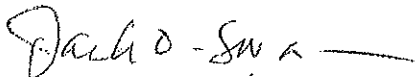
As a result of these proposed changes to County Staff's "Proposed Findings of Fact and Reasons for Action," County Staff's "Proposed Conclusions" must be changed. Our changes are contained in the attached Exhibit B.²

Again, we respectfully request that the Planning Commission ignore the staff's recommendation and retain the Smith Gardens property within the Fort Bellingham/Marietta Rural Neighborhood.

Thank you for your consideration.

Very truly yours,

BELCHER SWANSON LAW FIRM, PLLC



JACK O. SWANSON
Attorney at Law

Cc: client

¹ Note that all additions are underlined and all deletions are struck-through.

² See Note 1.

Exhibit A

Add the following Findings of Fact and Reasons for Action:

With regard to the Fort Bellingham/Marietta former LAMIRD, the Board originally held in its FDO of January 4, 2012 that the LAMIRD was too close to an Urban Growth Area. Therefore, the Board held that the entire LAMIRD was "clearly erroneous." In response, based upon a 2011 survey showing predominantly small lots, we created the Rural Neighborhood designation allowing R2A zoning in that area. We believe this new designation clearly reflects the rural character of the area.

In response, in its FDO dated January 9, 2013, the Board stated that inclusion of large undivided parcels within the Rural Neighborhood was in violation of the Growth Management Act – specifically the "internal consistency" contained within the preamble of RCW 36.70A.070. The owner of Smith Gardens (a 24 acre parcel situated at the southeast end of the Fort Bellingham/Marietta Rural Neighborhood) appealed both of the Board decisions which are pending. We support those appeals.

The Rural Neighborhood was created and is used in the Fort Bellingham area because of its somewhat unique situation. The Rural Neighborhoods and particularly Fort Bellingham have been recognized as areas established with predominantly residential uses, with higher densities, than surrounding rural areas. The neighborhood was zoned RR1 for decades and much of the development in that area developed at that density (1 unit per acre). Because of this previous development, it is unlikely that there will ever be pressure to bring the full array of urban services into the Fort Bellingham Rural Neighborhood.

The Lummi Nation reservation already has a sewer line that serves homes there. The owners of that property have no incentive to participate financially in extending the sewer out to that area. The existing septic systems work just fine for most residents. The topography also suggests a lack of interest in extending sewer and Bellingham city limits out that far. The Nooksack River provides a boundary for containing the rural neighborhood.

There has been little support from residents just outside the city limits to become part of the city. The landowners at the city limit are typically industrial users who already have city services and do not desire to be subjected to city regulation. The distance from the end of the sewer to the Fort Bellingham rural neighborhood is over one mile and there is no one available to pay the cost of extending the sewer out.

Because of the foregoing, many of us have concluded that the Bellingham city limit will remain where it is now and there is no need to extend the urban growth area further to the west for many decades. This information is contained in the record and was referenced by the Board in the January 9, 2012 FDO when it explicitly stated "during the recent review of Whatcom County's UGA's the area was not proposed for inclusion in the Bellingham UGA."

The Smith Gardens property and the Satushek property to the east are scheduled for subdivision and short subdivision development within the next couple of years. This means that the remaining acreage on the Smith Gardens site is the only land that has potential for division into smaller lots.

Rural Neighborhood zoning would allow two acre lots which could result in an overall density of 12 residential units if the Smith Gardens property is left inside the Rural Neighborhood. These units would be completely consistent with the existing development in the area and in most cases, much less dense. Most of the developed lots in the Fort Bellingham area are 1 acre or smaller.

As the regulatory burden continues to grow, the likelihood that Smith Gardens will be able to continue to operate on this site gets smaller and smaller. While the site remains profitable for now, that may not be the case in 10 years. Plans need to be made today for the conversion of the Smith property into other uses. The most likely choice is residential uses that are clearly compatible with the existing development there now. The problem with that analysis is that 4 building sites, each on a 5-acre tract, are unlikely to justify the demolition of the buildings in the conversion of the 24 acres into such a project. Rather, with no incentive to remove the buildings and convert the site, there is a significant likelihood that the site could become another cement plant. That is, a place where 100-year old buildings simply stand and rot, for the most part, because the cost of removal and conversion cannot be justified by the uses that would be available at R5A zoning.

For the reasons stated above, and based on the new evidence and on the belief that the Board previously erred, we respectfully decline to remove the Smith Gardens from the Fort Bellingham/Marietta Rural Neighborhood.

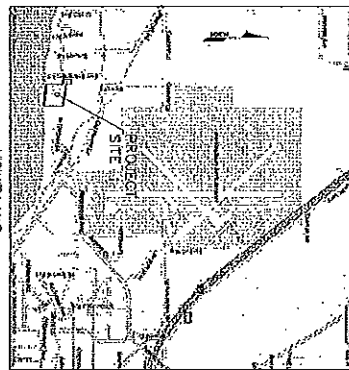
Exhibit B

Delete Proposed Conclusion I. c.:

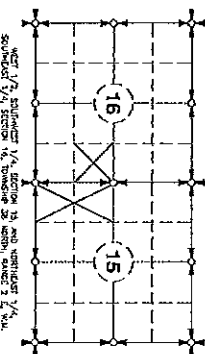
Rural Neighborhoods: Amended boundaries of the ~~Fort-Bellingham/Marietta~~, North Bellingham, and Welcome Rural Neighborhoods, along with the amendments to the zoning maps, exclude several larger parcels in order to be more consistent with the small-lot development pattern.

Revise the second and third paragraphs of Proposed Conclusion J. a. ii.:

County-wide Planning Policy B.2 states, "The county shall discourage urban level development outside Urban Growth Areas and outside of areas currently characterized by a development threshold greater than a rural development density." The proposed amendments retain requirements that higher rural densities be contained in designated LAMIRDs and Rural Neighborhoods, per WCCP Policy 2GG-2, and remove land from the Smith & Guide Meridian and Birch Bay-Lynden & Valley View Rural Community (Type I LAMIRD), and the ~~Fort-Bellingham/Marietta~~, North Bellingham, and Welcome Rural Neighborhoods.



VICINITY MAP



LEGAL DESCRIPTIONS

Project No. 2018-001
 Project Name: SMITH HERITAGE PLAT
 Project Location: 101 ASTOR STREET, BELLINGHAM, WA 98225
 Project Owner: HARRY SMITH FAMILY, LLC

PROPERTY OWNERS

HARRY SMITH FAMILY, LLC
 101 ASTOR STREET
 BELLINGHAM, WA 98225

ENGINEER

ASSOCIATED PROJECT CONSULTANTS, INC. P.S.
 101 ASTOR STREET
 BELLINGHAM, WA 98225

SURVEYOR

WILLIAM CONSULTANTS
 101 ASTOR STREET
 BELLINGHAM, WA 98225

PROJECT SUMMARY

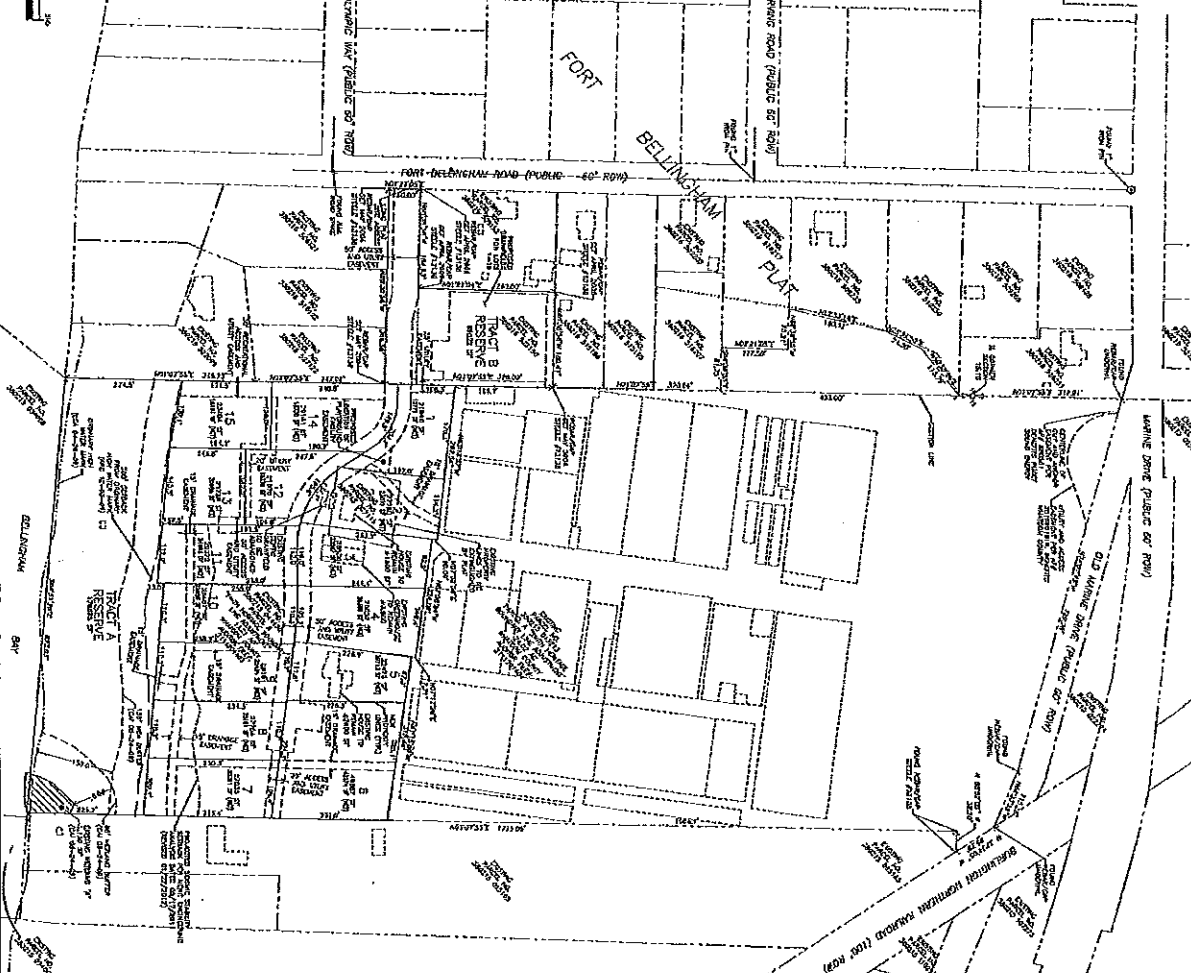
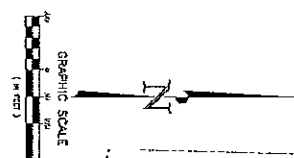
PROJECT TYPE: PRELIMINARY PLAT
 PROJECT AREA: 101 ASTOR STREET, BELLINGHAM, WA 98225
 PROJECT DATE: 10/03/2018
 PROJECT STATUS: PRELIMINARY PLAT

NOTES

1. THIS PLAT IS SUBJECT TO ALL APPLICABLE ZONING ORDINANCES AND REGULATIONS.
 2. THE PLAT IS SUBJECT TO ALL APPLICABLE EASEMENTS AND RIGHTS.
 3. THE PLAT IS SUBJECT TO ALL APPLICABLE RECORDS AND DOCUMENTS.

LEGAL DESCRIPTIONS
 Project No. 2018-001
 Project Name: SMITH HERITAGE PLAT
 Project Location: 101 ASTOR STREET, BELLINGHAM, WA 98225
 Project Owner: HARRY SMITH FAMILY, LLC

NO.	DESCRIPTION	DATE	BY
1	PRELIMINARY PLAT	10/03/2018	WILLIAM CONSULTANTS
2	REVISION	10/03/2018	WILLIAM CONSULTANTS
3	REVISION	10/03/2018	WILLIAM CONSULTANTS



<p>DB NO: 09-108A HAS INC: LONG PLAT 62</p>	<p>HARRY SMITH FAMILY, LLC SMITH HERITAGE PLAT PRELIMINARY PLAT MAP</p>	<p>ASSOCIATED PROJECT CONSULTANTS, INC. P.S. CIVIL ENGINEERS, PROJECT AND LAND USE MANAGEMENT, BUILDING, STRUCTURAL, AND ENVIRONMENTAL SERVICES 101 ASTOR STREET, BELLINGHAM, WA 98225 PHONE (360) 671-1146 FAX (360) 671-1169</p>
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