SQUALICUM VALLEY COMMUNITY ASSOCIATION

Whatcom County Council
Whatcom County Courthouse
Bellingham, Washington, 98225

October 23, 2006

Re: Urban Cluster Developments in Designated Forest Resource Lands

Council Members;

The Growth Management Act (GMA) required each county to adopt development regulations to assure the conservation of resource land for agriculture and for forestry.[1]

Each county was required to designate forest lands that were not already characterized by urban growth, that had long-term significance for the commercial production of timber, and assure that their development regulations would not only avoid interference with the continued use of those forest lands, but positively assure their conservation.[2]

The GMA recognized that clustering may be appropriate in a county's general rural areas.[3] Indeed, the "rural" discussion in the GMA confirms counties can allow clustering within "rural" lands, but only if that clustering is rural in character. It is very important to recognize that "rural" lands, by definition, do not include designated forest lands.

Forest lands are their own entity. They are "resource" lands, not "rural" lands.[4] The Western Washington Growth Management Hearings Board, (with jurisdiction over Whatcom County) has long frowned upon and rejected county comprehensive plans that allowed clustering in forest lands.

In 1997, in response to the controversy regarding the use of clustering and the GMA's outright prohibition of its use on resource lands, our legislature decided they needed to step in and clarify the situation. They adopted a new specific provision allowing for clusters, but only within agricultural lands.[5]

It is important to note, while the Legislature decided to specifically allow clusters within agricultural lands, it did not allow for clusters in forest lands.

If clusters were generally allowed in all resource lands, there was no need for the legislature to adopt a special measure to allow clusters in agricultural lands. Because they did, it is obvious that the legislature understood that the GMA did not allow for clusters in resource lands. Since they then only allowed for clustering in agricultural lands, it is equally obvious they meant to continue to prohibit clustering in forest lands.

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1 RCW 36.70A.040
2 RCW 36.70A.170
3 RCW 36.70A.070 (5) (b)
4 RCW 36.70A.070 (5)
5 RCW 36.70A.177

In 2000, the Washington Supreme Court explained that the combination of the GMA's mandate to protect resource lands, combined with its requirement to designate these lands, created a legislative mandate for their protection.[6]

Whatcom County, in creating contrary development regulations, implementing policy and regulating individual developments, has failed to do so in a manner consistent with that mandate. As a result the county has repeatedly been sued, and squandered its financial resources in lawsuits largely to defend developers, including the county executive.

In its wisdom, the Whatcom County Council, threatened with an onslaught of development activity intent on exploiting the county's apparent ratification of clustering in its rural forest zones, recently passed an emergency moratorium on such activity to provide an opportunity to remove clustering as a development option in designated forest lands.

The purpose of our forestry district was to implement the forestry designation of the Whatcom County Comprehensive Plan, established pursuant to the GMA, to encourage resource land owners to manage resource lands for long-term productivity in forestry.[7]

But instead, Whatcom County has acquiesced to those who ignore the designated uses of the land they acquired, and has allowed spot zoning and incompatible uses in the forestry zone. It sometimes appears that our leaders are more intent on creating development regulations that allow large landowners to circumvent the law rather than regulations that implement the objectives of the GMA.

Jefferson County attempted to promulgate development regulations that ignored the mandate of the GMA and were designed to benefit owners of large tracts of timber lands. They found themselves before the Hearing Board which observed that the, "great pains gone to in this ordinance to accommodate development interests of the largest forest land owners leads to a result that continues to threaten rather than conserve tens of thousands of acres that are currently devoted to the production of timber and not currently subject to development pressure."[8]

Jefferson County, in an attempt at "innovative zoning" regulations, also considered clustering in its designated forest lands. The Hearing Board found their regulations inconsistent with the GMA [9]

In ruling, the Hearing Board observed that the greatest impediment to forestry is "density of nearby residential development." They said, " In order to reach the GMA goals and requirements for conserving productive forest lands, forest lands must not only be designated but also protected from incompatible uses. Development must be regulated so that it occurs in densities and physical patterns compatible with commercial forest management."[10]

The issue is density. Clustering creates density.

There is really no place in productive forest lands for urban development. Clustering to create

6 *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn 2d 543, 562 (2000)
7 WCC 20.42.010
8 *Olympic Environmental Council et al v. Jefferson County* WWGHMB case No. 94-2-0017
9 ibid
10 ibid

small lots for incompatible residential uses is entirely inappropriate. A comprehensive plan or development regulation that allows clustering in designated forest land does not comply with state law and will lead to yet more litigation should the county, again, fail to comply with the GMA and continue in its acquiescence to the development community.

The Washington Supreme Court severely limited the use of "innovative zoning techniques" under RCW 36.70A.177 and the non-resource use of resource lands.

The Court stated unequivocally that the GMA was needed to protect resource lands in order to, "ensure the viability of the resource-based industries that depend on them. Allowing conversion of resource lands to other uses, or allowing incompatible uses nearby, impairs the viability of the resource industry."[11]

This is the point. Along with critical areas protections and the preservation of rural character throughout our state, one of the GMA's important aims was the protection of resource based economic activity; to protect the industries that produce the fish, food, fiber and timber for our economy.

The court found that converting resource lands to residential housing, by clustering or any other means, would violate the "conservation mandate" of the GMA if, as a policy, it undermines the industries that rely on them.

The fact that a speculator bets they can get a rezone and encourage the development of some forest land they bought near a city, rather than wait sixty years for the timber to mature, has no bearing.

The GMA was needed and intended to protect future generations from the exigencies of the moment, and the avarice of those in the present who care not for those future generations, save perhaps their own.

Setting aside adjacent lands, as so called reserve tracts, is no remedy if those lands will not continue in forestry. If they are locked up as open space to buffer gated communities, or even worse, for future development, the purpose for which those lands were designated is lost.

The Whatcom County code says development in the Forestry Zone District shall not use areas which can effectively, on a commercial basis, support or contribute to support productive forestry operations.[12] The county must follow its own regulations, respect the "conservation mandate" of the GMA, and follow the direction of the Washington Supreme Court.

County development regulations are not to interfere with the continued use of forest lands for the production of timber.[13] And a comprehensive plan's rural element must not conflict with the designated use of forest lands.[14]

How then can we consider the use of clustering in forest lands when even locating residential development of such densities adjacent to them is to be discouraged?

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11 *Redmond v. Central Puget Sound Growth Management Hearing Board* 136 Wn.2d 38 (2000)
12 WCC 20.85.103 Resource Lands
13 RCW 36.70A.060 (1)
14 RCW 36.70A.070(5)(v)

Any residential development in forest lands, even one per twenty acres, requires extensive review to gage its impact on the designated use of those and adjacent resource lands. The use of a minimum twenty acre lot size in a forestry zone, in itself, is not sufficient to comply with the GMA requirement to preclude conflicting uses in resource lands.[15]

Gerrymandering lot boundary lines to accomplish a result similar to clustering is not consistent with county or state codes either.

And the Hearing Board found that re-zoning an area within a "sea of rural resource land" to rural residential, done because it was an allowable use, did not comply with the GMA.[16]

In conclusion, allowing the clustering of residences on suitable forest land, by ordinance or other means, is not an appropriate or legal alternative in any rural areas that are resource lands designated for forestry. Urban Cluster Development is illegal in rural zones that have been designated forest resource lands.

It is therefore imperative that the Emergency Moratorium 2006-045, passed on October 10, 2006, removing the clustering provision from Whatcom County Code 20.42, be extended for a time sufficient to allow the permanent removal of that clustering provision and bring Whatcom County's development regulations into compliance with the intent of the state's legislature, the laws of the State of Washington, and the rulings of the Washington Supreme Court.

Respectfully submitted;

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15 *FOSC v. Skagit County* 99-2-0016 (Final Decision & Order, 8-10-00)
16 *FOSC v. Skagit County* 99-2-0016 (Final Decision & Order, 8-10-00)