

SQUALICUM VALLEY COMMUNITY ASSOCIATION

FACTUAL BACKGROUND AND HISTORY OF THE CASE

This matter is represented to simply be an application for a Conditional Use Permit (CUP) to allow Lake Whatcom Water & Sewer District (water district) to (1) extend an 8" water line from a well located at Agate Bay to the Lake Whatcom Residential Treatment Center (treatment center); (2) to install a tank/reservoir of more than 100,000 gallons; and (3) make certain improvements to enlarge and increase the capacity of the water district's pumping station at Opal Terrace. As it is presented, this is all undertaken solely to improve the water quality of the treatment center and provide adequate fire protection to its residents.

In fact, the proposal is really part of a larger undertaking by the water district that has been planned for some time. In close proximity to the treatment center is land that the Vineyard Development Group seeks to develop for residential purposes.

But water is a limiting factor for that development. In September of 2005, Vineyard Development Group LLC (Vineyard) manager William Sygitowicz commissioned a Water Service Feasibility Study¹ through the water district which addressed a series of steps to be taken to provide water to Vineyard's property. In that study the water district determined it should acquire the treatment center's water system and consolidate it with the district's Agate Heights water system. As part of the consolidation, new water mains and a new reservoir needed to be installed on the treatment center property as part of the system to serve Vineyard.² The Opal Terrace pump station would need to be upgraded, too.

According to the Feasibility Study, the physical facility requirements for a water system to serve Vineyard with domestic potable water and fire flow would need:

- Reservoir at Vineyard property
- Reservoir near the treatment center property
- Increased water treatment plant capacity
- Water transmission mains to both reservoirs
- Four new transmission pumping stations to fill the Vineyard reservoir
- Upgrade of the Opal Terrace pump station to feed the lower treatment center reservoir

According to the Feasibility Study, "The additional segment of water main, the treatment center reservoir, and the upgrade of the existing Opal Terrace Booster Station would also be required as part of a system expansion to serve the Vineyard Development property. This reservoir would also be the location of the new pump station necessary to fill the upper Vineyard reservoir.

The LWRTC reservoir could provide gravity service to the Treatment Center and twelve properties on Opal Terrace cul-de-sac currently served directly by the Opal Terrace booster station. The District may also consider expanding the Agate Heights Water System to serve approximately 350 more connections, consisting mostly of existing homes along North Shore Road now served by

1 See attachment # 1; LWW&SD Water Service Feasibility Study – Vineyard Development Group LLC

2 *Ibid* p.3 1.3

SQUALICUM VALLEY COMMUNITY ASSOCIATION

private wells and/or Lake withdrawals.”³

According to the Water Service Feasibility Study, there is no need for expansion of the pumping station or installation of the lower reservoir at the treatment center other than it being required for the extension of service to serve Vineyard. The water district admits that much. The 8” lines are only needed to provide capacity beyond the needs of the treatment center, too.

At a meeting of the water district board in late September 2005, the board reviewed and discussed the Water Service Feasibility Study for the proposed development. At that meeting concerns were voiced about the provision of urban levels of service in a rural area.⁴ The study they reviewed also discussed the legal requirement to produce a State Environmental Protection Act (SEPA) checklist for the anticipated water system expansion, which should rightly cover the entire expansion project.⁵

The Water Service Feasibility Study discusses the dilemma Vineyard and the water district faced. “A SEPA checklist will be required for the water system expansion since it involves aboveground structures such as reservoirs and booster pump stations. The SEPA checklist must cover the entire water system project. Typically, the District would be the SEPA lead agency for projects impacting their facilities. Since the Vineyard subdivision process will also require a SEPA environmental checklist, the District and Developer should discuss how best to combine or separate the two processes.”

Based on the study and further negotiation with Vineyard, the water district approved Resolution 705 on November 23, 2005.⁶ The resolution authorized the water district's general manager to enter into negotiations with Vineyard for extension of water and sewer service to Vineyard's property.

The resolution also stated that Whatcom County Planning & Development Services (county planning) had already verbally indicated support for the Vineyard project including the extension of these urban services.

Pursuant to Resolution 705, on March 8, 2006, the water district and Vineyard entered into a formal developer agreement⁷ which has been recently renewed and remains in full force and effect between the parties.

In keeping with the steps described in the Water Service Feasibility Study, on May 10, 2006, the water district entered into an agreement with the treatment center to purchase its water distribution system and was granted an easement for the water main and tank site. The water district contracted to build a new 2” gravity service to the treatment center including an 80,000 gallon reservoir.⁸

3 *Ibid* p.3 1.3

4 See attachment #2; Minutes of LWW&SD Meeting of 9/29/06

5 Water Service Feasibility Study p.3 1.5

6 See attachment #3; LWW&SD Resolution 705, November 23, 2005

7 See attachment #4 LWW&SD – Vineyard Development LLC Agreement

8 See attachment #5 LWW&SD – LWRTC Agreement

SQUALICUM VALLEY COMMUNITY ASSOCIATION

On November 30, 2006 the water district issued its own determination of non-significance (DNS) for the project to service the treatment center. And when the treatment center and the water district made their application for a Conditional Use Permit (CUP), the needed reservoir had grown to 105,700 gallons.

The water district, in resolving the dilemma whether to disclose the entire scope of the system expansion, determined it was best not to acknowledge that the project, or that the requested CUP, was part of a larger plan to supply water and sewer to Vineyard, and misrepresented that fact in its SEPA checklist.

Presumably unaware of the plans by the water district to provide water to Vineyard, and unaware of the misrepresentation in the water district's SEPA checklist, the County's Staff Report, provided to the Hearing Examiner July 5, 2007,⁹ did not question the water district's asserted determination of non-significance.

The Staff Report was in the blind about the functional and physical connection of the treatment center project and the Vineyard development and hundreds of other potential hookups in the Agate Heights area anticipated in the Water Service Feasibility Study.

As a result, County staff (Martin Blackman) incorrectly testified at the Open Record Hearing in July of 2007 that, "This project is pretty fairly and accurately reflected by the staff report." Clearly, Mr. Blackman was unaware of the arrangements already underway between Vineyard and the water district relative to the treatment center.

At that hearing, representatives of this organization futilely sought a continuance, given their lack of notice, and attempted to advise the Hearing Examiner of the treatment center service being part of a larger plan. Their concerns were dismissed and their continuance was denied.

These issues were appealed, ultimately to the Superior Court which ordered this hearing reopened, also noting the misrepresentations in the SEPA checklist. This brings us here today.

PROPOSAL FAILS TO MEET CRITERIA FOR APPROVAL OF CONDITIONAL USE

To be approved as a conditional use a proposal must (1) be harmonious and in accord with the general and specific objectives of Whatcom County's Comprehensive Plan and zoning regulations; (2) be designed and constructed so as to not change the essential character of the area; (3) not be disturbing to neighboring uses; (4) not create excessive additional requirements for public facilities and services, and not be detrimental to the economic welfare of the community; and (5) not result in the damage of any natural feature of major importance.

The Whatcom County Code explicitly states that the Comprehensive Plan and County Wide

⁹ Open Record Hearing of July 5, 2007; Findings & Conclusions ; Exhibit #4

SQUALICUM VALLEY COMMUNITY ASSOCIATION

Planning Policies are to direct the development of utilities such as are under consideration here.¹⁰ The proposal is not in accord with the county's Comprehensive Plan which requires we discourage extension of urban levels of water service to areas not designated as urban growth areas. The County Wide Planning Policies similarly are opposed to extension or expansion of urban services into rural areas.¹¹ The Coordinated Water System Plan (CWSP) makes the distinction between rural and urban levels of water service and observes the inappropriateness of urban levels of water service in rural zones.¹²

The CWSP adopts the legislature's definition of "rural services" from the GMA; that rural services may include domestic water delivered at an intensity usually found in rural areas, but it can not be at an intensity normally associated with urban areas. An intensity of water service typically and historically common in urban areas is an "urban service" and does not become a "rural service" simply by extending the same level of service to an area zoned rural or designated resource land.

If allowed, the expansion of this urban level of water service will lead to inappropriate growth that will inevitably change the essentially rural character of the area. The ensuing growth will be incompatible with neighboring resource lands, intended for active forestry uses.

The proposed conditional use is inconsistent with the County Wide Planning Policies which oppose the extension or expansion of urban services into rural areas.¹³ The Coordinated Water System Plan adopts the distinction enunciated in the Growth Management Act (GMA) between rural and urban levels of water service and observes the inappropriateness of urban levels of water service in rural zones.¹⁴

In time, environmental impacts on the Lake Whatcom watershed will increase the degradation of Bellingham's reservoir and require substantial public investment in facilities for water treatment and for remediation of those impacts to the detriment of a community that will be practically and economically damaged by that additional growth.

If allowed, the expansion of this urban water service will foster low density growth that will lead to more intense rural development and inevitably change the rural character of the area presently surrounding Lake Whatcom. The water district's Water Service Feasibility Study describes their numerous opportunities, such as at Agate Heights, that extension of service to the treatment center will create in the future beyond the treatment center.¹⁵

As these changes to the present rural character of the area occur, the pressure to reclassify the area for more intense rural development will mount. Given the utilities infrastructure proposed by the water district, ultimately, reclassification of the area for urban growth could occur.

10 See WCC 20.82.010

11 CWPP 5C7, 5C8, 5C9, 5P3,

12 CWSP Part 2 Section 5.1

13 CWPP 5C7, 5C8, 5C9, 5P3,

14 CWSP Part 2 Section 5.1

15 See Water Service Feasibility Study p.3, 1.3

SQUALICUM VALLEY COMMUNITY ASSOCIATION

Allowing this project to proceed will lead to serious disturbance to neighboring zones and conflict with the primary use of the adjoining rural forestry zone . More residential growth in this rural area will be incompatible with these neighboring resource lands, intended for active forestry and forestry related enterprises.

Granting this permit will result in increased residential development in the watershed and damage Lake Whatcom. Increasing environmental impacts on the watershed will so continue the degradation of Bellingham's reservoir to require additional facilities, and substantial public investment, for water treatment and for remediation of other impacts; all to the detriment of a community that will be practically and economically damaged.

SCOPE OF THIS HEARING MUST INCLUDE VINEYARD DEVELOPMENT PLANS

The Hearing Examiner cannot adequately address the criteria for approval of this CUP if the water district's entire plans are not included in an appraisal of the effects of granting a CUP for this piece of the project. The district's plans are detailed in the Water Service Feasibility Study and executed through the agreements between the water district and Vineyard and the water district and the treatment center. Those facts should be considered as the Examiner evaluates the short-term and long-term impacts of this project.

The water district's misrepresentation was intentional, material and prejudicial to the earlier deliberations of the Hearing Examiner. The water district consciously decided not to disclose, and even to deny, the connection between the treatment center proposal and their larger plans to deliver water to Vineyard and others. The district is piece-mealing the project to avoid the level of scrutiny an environmental impact statement entails.

This reconvened Open Record Hearing cannot consider the appropriateness of the extension of service to the treatment center separate from the Vineyard project and the water district's considerations regarding expansion of the Agate Heights water system.¹⁶

THIS EXPANSION PROJECT REQUIRES AN ENVIRONMENTAL IMPACT STATEMENT

The Hearing Examiner has jurisdiction generally over SEPA determinations of significance, determinations of non-significance, and mitigated determinations of non-significance. The Hearing Examiner should send this matter back and require a complete Environmental Impact Statement (EIS)

The water district's obvious cover up of its real plans has not only preempted a full review of the overall projects impacts, but their self serving representations and lack of candor in the process should be reason enough to remove them entirely from any significant role in appraising the significance of the proposed system expansion. At a minimum, the Hearing Examiner should condition any CUP on the county preparing an accurate SEPA checklist and true determination of

¹⁶ See Water Service Feasibility Study p. 3, 1.3

SQUALICUM VALLEY COMMUNITY ASSOCIATION

the proposals environmental significance and allowing public review and appeal of the same.

ALL ELEMENTS OF THE PROPOSAL MUST BE CONSIDERED TOGETHER

Chapter 20.82 of the Whatcom County Code clearly presumes that when considering specific project proposals it is the intent of the code to comprehensively address all related elements of a proposal.¹⁷ Not only has the applicant here, and the county, failed to present the true scope of the project, but they would likewise suggest we should also ignore an important associated element, the utility lines, as proposed.

The reservoir, the pumping station and the associated pipes are all elements of a proposal to deliver water to support future urban development on Squalicum Mountain notwithstanding its current zoning. Even the water district expressed the concern that the proposal, if fully disclosed, would raise the issue of urban services in the rural zone.¹⁸

Even if the project is viewed more narrowly as just providing service to the treatment center, still the project's constituent components—the pipes, the pump station and the reservoirs—must be considered together. The water district has not specifically or separately sought a conditional use permit for the pipes, and the county has argued that they are unconditionally allowed everywhere. But the pipes are a material and integral part of the proposal and must be specifically considered as part of this project.

Because of the association of the pipes with the other elements of the proposal they cannot be considered an unconditionally permitted use.¹⁹ The pumping station upgrade is clearly unneeded except to provide capacity for additional development. The reservoir far exceeds the needs of the treatment center.

Therefore, the Hearing Examiner must evaluate the reservoir, the pumping station and the proposed water lines together, not individually. The application cannot be approved unless the entire project is harmonious with the Comprehensive Plan and its related policies.

Taken together they are an expansion of urban services in a rural zone, part of a larger plan to extend urban services outside of any area designated for urban growth, into resource lands. As such, the project is not harmonious with the Comprehensive Plan nor the Countywide Planning Policies and is not in accord with the Plan's general and specific objectives.

The project also has been designed in a way that will inevitably change the essential character of the surrounding neighborhood. Therefore, the project fails to meet the CUP criteria in the County Code and the application should be denied.

17 See WCC 20.82.021

18 See Attachment 2; Minutes of LWW&SD Meeting of 9/29/06

19 See WCC 20.82.021

SQUALICUM VALLEY COMMUNITY ASSOCIATION

COMPREHENSIVE PLAN DEFINES RURAL WATER SERVICE, BARS URBAN SERVICES

The foregoing demonstrates that this project should be denied because, among other things, it involves the expansion of urban services into rural areas in contravention of the County Code and the Comprehensive Plan. In this and the following sections, we analyze in greater depth the issue of whether the project is properly characterized as an urban service.

Urban services are those that are historically and typically found in cities. Rural services do not include domestic water systems capable of providing water at intensities normally associated with urban areas. Those are the legislature's definitions from the Growth Management Act and were adopted by Whatcom County in its Comprehensive Plan, its County Wide Planning Policies and its Coordinated Water System Plan. Whatcom County's Comprehensive Plan, and its related Planning Policies include this objective: "Discourage urban levels of water and sewer service extensions or expansions to serve development outside of Urban Growth Areas."²⁰

The Coordinated Water System Plan (CWSP) adopts the legislature's definitions of urban and rural services. The Growth Management Hearings Board (GMHB) is the primary body that interprets the intent of the legislature and the meaning of the the Growth Management Act.(GMA) In the fall of 2000, the Western Washington Growth Management Hearings Board, considering a petition in Skagit County, ruled that while "rural services" may include domestic water delivered at an intensity usually found in rural areas, it must not be at an intensity normally associated with urban areas.

Th CWSP adopts the definitions of the legislature found in the GMA to distinguish between urban and rural levels of water service. Specifically, that rural services are services at an intensity found in rural areas and usually not found in urban areas.²¹ Urban services are services historically and typically found in urban areas. Any element of this proposal that facilitates the expansion or extension of urban services cannot be permitted, even conditionally.

To obtain this CUP, the water district must meet the first criterion for doing so and prove that approval would be "harmonious and in accord with the general and specific objectives of Whatcom County's Comprehensive Plan and zoning regulations" which have adopted the GMA definitions of rural and urban water services in the CWSP. Clearly, to allow urban water service to expand in this rural area, and subsequently be further expanded even into resource lands, is inconsistent with the Comprehensive Plan and the Whatcom County Code that requires that the Comprehensive Plan and its policies, that intend to keep urban services out of rural areas, direct utility development.

CODE DOES NOT DEFINE "RURAL" AND "URBAN" WATER SERVICE

The county asserts that the Code does not require a CUP for water lines 8" and smaller; therefore 8"

²⁰ See CWPP 2EE-4, 5C7, 5C8, 5C9, 5P3,

²¹ RCW 36.70A.030 (17)

SQUALICUM VALLEY COMMUNITY ASSOCIATION

lines are permitted uses in the rural zone; and, therefore, they must constitute a rural level of service. But this reasoning is not just circular, it contradicts the GMA because it makes the rural/urban distinction rise or fall exclusively on pipe size. The state agency charged with enforcing the GMA has explained that is not the case. . generally that water lines that do not specifically require a conditional use permit are then permitted uses in the rural zone, where urban services are generally barred, and therefore can be classified as a rural level of service. But the code section that enumerates the pipe specifications that trigger the requirement of a conditional use permit bases the distinction on pipe diameter. Consequently, if one accepts the county's inference, the county code would be defining rural levels of water service on the basis of pipe size.

The Western Washington Growth Management Hearings Board ruled that, “it is not appropriate or possible to set a water pipe size as an urban vs. rural level of service.” The board ruled that rural water services must be at an intensity not found in urban areas. Whatever the dimensions of the pipes, if they can supply water at an intensity historically and typically provided in cities, they're an urban level of service.²² The code does not otherwise attempt to distinguish rural from urban levels of water service or define the difference in any other way except to explicitly state that the Comprehensive Plan and County Wide Planning Policies are to direct the development of such utilities.²³

Wherever the county asserts, directly or indirectly, that 8” diameter distinguishes between rural and urban levels of water service they are wrong. The fact is that the county code does not explicitly define a difference between rural and urban levels of water service. Only the Coordinated Water System Plan, part of the Comprehensive Plan, defines rural and urban levels of water service , and that plan adopts the legislature's definition of “rural services” enunciated in the GMA.

Domestic water systems may be allowed in rural areas but only if they are at an intensity not usual in urban areas.²⁴ An intensity of water service common throughout Bellingham, or any urban area, is clearly an urban service and does not become a rural service simply by proposing to install the same intensity of service in an area zoned rural or designated resource land.

Comprehensive plans and development regulations are presumed to comply with the GMA. Subsequent site-specific land use decisions by a local jurisdiction must be generally consistent with the comprehensive plan and development regulations.²⁵

In reviewing a proposed land use project, a local government must determine whether the proposed project is consistent “with applicable development regulation, or in the absence of applicable regulations the adopted comprehensive plan.”²⁶ If a zoning code explicitly requires that all proposed uses comply with a comprehensive plan, then the proposed use must comply with both the zoning

22 *Evergreen Islands v. Skagit County Final Decision and Order* 00-2-0046c

23 See WCC 20.82.010

24 See CWSP Part 2, Section 5.1; and RCW 36.70A.030 (17)

25 *Woods v. Kittitas County*, No. 78331-4 Washington State Supreme Court

26 *RCW 36.70B.030(1)*

SQUALICUM VALLEY COMMUNITY ASSOCIATION

code and the comprehensive plan.²⁷

There is no applicable regulation in the county code which defines “rural service.” It is clearly the intent of the county code that the Comprehensive Plan and Planning Policies direct utilities development. “Comprehensive Plan land use designations, Comprehensive Plan policy directives and the specific provisions of this chapter, shall be the basis for decisions regarding utility development.”²⁸

Indeed, it was intended that the provisions of the utilities chapter of the county code would regulate utility development in conjunction with the directives of the Comprehensive Plan and Planning Policies, not supersede them.

FIRE CODE & ZONING CODE DO NOT REQUIRE “URBAN” WATER INTENSITY

The Whatcom County Fire Marshall's Office in its memo²⁹ only requires that the proposal comply with applicable codes and ordinances adopted by Whatcom County. This is offered to refute the assertion that 8” water lines are, somehow, required by law. This is not meant to deny that greater protection would be a valuable improvement. The Fire Marshall's recommendation to improve fire protection at the treatment center would be to assure the availability of 500 gallons per minute for one hour; or 30,000 gallons.³⁰ This is radically less than the water district proposes to install, but is consistent with the needs of the Vineyard project.

CWSP does not require 8” water lines in the R5 zone. The minimum requirement is 6”, however exceptions to the minimum may be granted by the appropriate agency if fire flow is not required under current land use. CWSP minimum design standards have no fire flow requirement in the R5A zone.³¹ Fire protection can be adequately supplied with a smaller reservoir.

While this project is represented to be in the interest of public health and safety, there is no evidence in the record from any public health officer that the extension of water service is necessary for a documented public health reason.

If the true objective of the water district was to remedy a health and/or safety concern, there is a legitimate and straightforward means of doing so. But as we have shown above, the water district's reason for seeking permission to expand urban services for the treatment center is to serve Vineyard Development.

An urban level of water service can be provided to the treatment facility by first admitting it is an urban level of service, documenting the health and safety emergency that necessitates the same, and providing the service in a manner that will reasonably preclude the level of service later leading to a

²⁷ *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 770, 129 P.3d 300 (2006)

²⁸ WCC 20.82.010 Intent.

²⁹ See Attachment 6; Fire Marshall's memo of December 28, 2006

³⁰ See Attachment 7; Whatcom County Fire Marshall's letter of September 19, 2005

³¹ See CWSP Part 2, Section 5, p. 5-12

SQUALICUM VALLEY COMMUNITY ASSOCIATION

pattern of growth that someday will become the rationale for rezoning the area, or reclassifying it for urban growth.

The legal means of providing water to the treatment facility are amply described in the GMA, and specifically referenced in the Comprehensive Plan.³²

But the fact is that this proposal is not really about remedying health or safety issues. It is about expanding the water district and providing urban water services in the watershed to as many new customers as possible.

APPROVAL OF THIS PERMIT IS INCONSISTENT WITH THE LAW AND COURT RULINGS

The Comprehensive Plan states, "Outside urban growth areas, the presence of urban levels of services such as water and sewer can put financial pressure on rural areas to develop more densely than desired. County-Wide Planning Policies restrict cities from delivering urban levels of water and sewer service for urban uses outside urban growth areas."³³

In fact it is recommended that urban services be withheld until annexation by the city.

The Washington State Supreme Court has clearly stated the significance of the legislature's intent to prohibit urban services outside of areas designated for urban growth. It is clear from the legislature's inclusion of such restrictions that it realized that zoning alone would not keep our rural lands rural and protect our resource lands from incompatible low density residential development.

The legislature attempted to be very clear on how they defined urban and rural governmental services, and sought to prohibit, or at least limit to documented health emergencies, the expansion of urban services in rural areas. This was intended to have limit the expansion of water and sewer services that inevitably drive development.

In upholding the Western Washington Growth Management Hearings Board's ruling that barred the extension of urban services out to Cooper Point, the Supreme Court said, "This plain language of the statute reflects the Legislature's overall goals and policies for the GMA: 'to reduce sprawl and to reduce the inappropriate conversion of undeveloped land into sprawling, low density development'; 'to protect the rural character of an area'; and 'to bar extension or expansion of urban governmental services into designated rural areas.'

Moreover, the record before the Board suggested that the push for further development or a future reclassification of Cooper Point from rural to urban growth area would be likely, if not inevitable."

The court added that neither their ruling nor the act prevented counties from responsible, long-range planning, but simply required that such plans comply with the legislature's mandate to preserve

³² RCW 36.70A.110 (4); CWPP 2N4, 2S2

³³ Whatcom County Comprehensive Plan p 2-17 see also

SQUALICUM VALLEY COMMUNITY ASSOCIATION

rural character and to first designate areas for urban growth before providing the governmental services they require.

Approval of this conditional use should be denied because the proposed reservoir, the enhanced pumping station and the associated pipes and mains represent the expansion of an urban level of water service in a rural area and are therefore not harmonious with the Whatcom County Comprehensive Plan and its County Wide Planning Policies.

This proposal is an affront to the legislature's intent in passing the Growth Management Act, and clearly inconsistent with the ruling of the Supreme court.

If the application is not denied, the applicant should be required to demonstrate the necessity of this project on the basis of a health, safety and environmental emergency, and then comply with the provisions of RCW 36.70A.110 (4).

The pumping station upgrade is unneeded except to provide capacity for additional development.

8" pipes are not required and are unneeded for service to the treatment center, for domestic use or fire flow. The pipe size should be minimized, not sized for service to Vineyard and others.

Based on the Fire Marshall's letter of September 19, 2005 attached, the reservoir is larger than necessary for the treatment center's fire flow needs, and is sought as a part of the system designed to serve Vineyard and others in the future.

And finally, the Hearing Examiner should require the applicants address the misrepresentations that were the foundation of the self serving determination of non-significance and require a full EIS of the actual system expansion as described in the Water Service Feasibility Study..

Respectfully Submitted

Virginia Watson
President