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Mr. Oliver Orjiako
Community Planning
1300 Franklin Street
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Via pdf and e-mail only—Oliver.Orjiako@clark.wa.gov

Dear Mr. Orjiako:

There have been some public comments, and some documents placed in the public record, regarding Clark County's current agricultural land designations. Some of those comments, and maps, have been alleging that the County has failed to adequately designate agricultural resource lands and, most surprisingly, has relied on the "Poyfair Remand" opinion for that premise.

Before I go in depth into how the County is in compliance with designating Agricultural Resource Lands, and challenging the soils and designations is without merit, I think it is important to note that Judge Poyfair's opinion from Case No. 95-2-05656-7. In case number 95-2-05656-7, CCCU specifically asked Judge Poyfair to make the following finding:

There is not substantial evidence in the record to support the County's designation of agricultural lands. In particular, there is not substantial evidence to demonstrate how those lands designated satisfy the GMA definitional criteria; that is, that those lands are primarily devoted to agricultural production and are of long term commercial significance for the production of agricultural products. The only explanation provided regarding the designation of agricultural resource lands is contained in a staff report prepared after the RNRAC had completed its work which states "soils was a critical factor". This is not to suggest the County was incapable of analyzing the required statutory criteria: the County undertook a comprehensive

analysis of resource land designations in urban reserve areas when it was compelled by the Board to re-examine these designations. The County should have undertaken a similar analysis before designating any agricultural resource lands.

Because there is not substantial evidence in the record that satisfies the GMA's definitional criteria, the agricultural resource land designations are invalid.

CCCU v. WWGMHB, 96-2-00080-2 Findings of Fact, Conclusions of Law and Order at page 5¹.

Judge Poyfair specifically rejected that Proposed Conclusion of Law and instead affirmed the County's actions with the following ruling: *"There is substantial evidence in the record to support the County's designation of agricultural resource lands"*. (emphasis supplied). Based upon the plain language of Judge Poyfair's order, he found that the County was in compliance with GMA as to this aspect of the appeal, the County had provided substantial evidence for its agricultural lands designations and Judge Poyfair rejected any finding that the County had not provided substantial evidence to demonstrate that the agricultural lands satisfied the GMA. CCCU did not appeal this ruling. Therefore, any assertion that has been made, or might be made by any person, that the County did not support its original agricultural lands designations is contrary to the Order drafted by the attorney for CCCU and signed by Judge Poyfair.

These comments recognize that Alternative #4 seeks to reduce the parcel sizes of the Forest Resource lands, the Agricultural Resource lands and the Rural lands. However, these comments are limited to the Agricultural land designations and considerations. These comments also recognize that the reductions in parcel size proposed by Alternative #4 would increase pressure on other larger lots to upzone to smaller parcels.

Clearly, Washington state law, the GMA and Clark County ordinances specifically recognize legally created non-conforming use lots throughout the County and nothing in any of the Alternatives attempts to limit those uses. No one disputes that those landowners in the rural area with legally developable non-conforming use lots should not be allowed to develop. However, although Alternative #4 does not state that it is de-designating resource lands, by upzoning many rural and resource land zones, and recognizing non-conforming lots that are not legally developable (meaning that they are not "legal lots under current Clark County Code), it creates pressure on the resource lands to try and put their lands into non-resource based use.

¹ A copy of the pertinent page is attached.

According to staff and county counsel, there is no way to determine how many lots Alternative #4 will make legally developable that are, in fact, not legally developable. In fact, recently, Friends of Clark County requested a GIS map all of the lots listed in Alternative #4 that were not currently legally developable. The response was that the data was not available, meaning that no one from the County can assess how many lots that designated as legal buildable lots by Alternative #4 are currently legally buildable lots.

In addition, from some of the public comments, both orally at various public BOCC meetings and in written submissions, some argue that Alternative #4 is justified based upon the fact that the designated resource lands are, in fact, not properly designated. However, after years of litigation, may rulings by the WWGMHB and various courts, the decisions have been consistent that the lands designated under the current plan are properly designated as resource lands, presumed valid and compliant with GMA.² Most recently, the Washington Court of Appeal's 2011 decision on the County's 2007 comprehensive plan update concluded that Clark County's current agricultural lands designations are presumed valid.³

The underlying legal principle is that the GMA provides that counties must designate "[a]gricultural lands that are not already characterized by urban growth and that have long-term significance for the commercial production of food or other agricultural products." RCW 36.70A.170(1)(a). Importantly, "[T]he intent of a landowner to use land for agriculture or to cease such use is not the controlling factor in determining if land is used or capable of being used for agricultural production." WAC 365-190-060. In addition, the county must adopt development regulations "to assure the conservation of" those agricultural lands designated under RCW 36.70A.170. RCW 36.70A.060(1). *Lewis Cnty. v. W. Washington Growth Mgmt. Hearings Bd.*, 157 Wash. 2d 488, 498-99, 139 P.3d 1096, 1101 (2006). Therefore, any claims in support of changes to the current designations must not be based on the intent of the landowner for a specific piece of property.

The prevailing definition for agricultural lands 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 land in areas used or capable of being used for production based on land characteristics, and* (c) that has long-term commercial significance for agricultural

² Clark County has already done these designations and been found compliant with the GMA, *CCCU, Inc and Michael Achen and Catherine Achen.*, 96-2-00080-2, Final Order, Poyfair, J.

³ *Clark Cnty. Washington v. W. Washington Growth Mgmt. Hearings Review Bd.*, 161 Wash. App. 204, 234, 254 P.3d 862, 876 (2011) *vacated in part sub nom. Clark Cnty. v. W. Washington Growth Mgmt. Hearings Review Bd.*, 177 Wash. 2d 136, 298 P.3d 704 (2013)

production, as indicated by soil, growing capacity, productivity, and whether it is near population areas or vulnerable to more intense uses. We further hold that counties may consider the development-related factors enumerated in WAC 365-190-050(1) in determining which lands have long-term commercial significance.

Lewis Cnty. v. W. Washington Growth Mgmt. Hearings Bd., *supra* at 502 (emphasis supplied).

Under a previous case, *Manke*, and the *Lewis County* case, both the Growth Board decisions and the court decisions make it almost explicit that where there is a reduction in lot sizes (for example as proposed by Alternative #4) then that heightens the pressure on the area to be used for non-agricultural uses.

The designation of agricultural resource lands is covered by WAC 365-190-060. Under these administrative rules, counties *must* approach the effort as a county wide or area wide process and not on a “parcel by parcel” basis. WAC 365-190-060(1). In addition, the legal directives are clear that the county is not to consider economic issues in designating lands:

Serving the farmer's “non-farm” economic needs is not a logical or permissible consideration in designating agricultural lands under the GMA. That is because it is a goal in and of itself, not a characteristic of farmland to be evaluated in determining whether such land has long-term commercial significance. A farmer's presumed need for “non-farm” income does not necessarily relate to soil, productivity or growing capacity under RCW 36.70A.030(10), nor to proximity to population areas or the possibility of more intense uses of land. It has to do only with the farmer's bottom line.

Lewis Cnty. v. W. Washington Growth Mgmt. Hearings Bd., 157 Wash. 2d at 505.

The County went through that process prior to the adoption of the 1994 Comprehensive Plan (affirmed by Judge Poyfair's decision) and it appears those designations were affirmed by the County in 2004 and 2007 as shown on the maps. When Clark County designated its lands in accordance with the regulations, it can utilize all classifications of soils from the United States Department of Agriculture Natural Resources (not just Soil Classifications 1 and 2 as has been argued by members of CCCU). Clark County defined its “Prime Agricultural Soils” as Classes I, II & III. *See*

http://www.clark.wa.gov/planning/comp_plan/documents/Figure22-Soil-Agricultural.pdf.

⁴The county's designations of soils also shows areas of "Good" and "Fair" soils. If one views a map of the soils with an AG-20 overlay, the County has designated those lands that have class I-III soils as AG-20 parcels. See County GIS mapping.

Moreover, once designated, the county must act to conserve those lands through development regulations. WAC 365-190-060(2). Thus, the imposition of development regulations is the county's legally mandated tool for protecting and conserving designated agricultural lands. By law those development regulations cannot prohibit uses that legally existed prior to the designation and must include the following:

1. Regulations that assure that natural resources lands will remain available to be used for commercial production and prevent conversion to a use that removes the land from resource production and prohibit a primary use of agricultural lands that would convert the land to a non-agricultural land purpose. WAC 365-196-815(1)(b);
2. Regulations that endeavor to meld with other regional, state and federal resource management programs applicable to the same lands. WAC 365-196-815(2)(b);
3. Utilize innovative zoning techniques that are designed to assure the conservation of agricultural lands and encourage the agricultural economy while limiting any non-agricultural purpose to lands either with poor soils or not otherwise suitable for agricultural uses. WAC 365-196-815(3); and
4. Those "innovative" techniques could include: a) *limits the density of development*, b) restrictions or prohibitions on nonfarm uses and limitations on accessory uses to those that designed to conserve⁵ agricultural lands and any non-agricultural use should be limited to lands with poor soils or otherwise not suitable for agricultural purposes, c)

⁴ The 2007 comprehensive plan maps also show the soils that are available for forests. http://www.clark.wa.gov/planning/comp_plan/documents/Figure21-Soil-Forest.pdf

⁵ (b) "Conservation" means measures designed to assure that the natural resource lands will remain available to be used for commercial production of the natural resources designated. Counties and cities should address two components to conservation:

(i) Development regulations must prevent conversion to a use that removes land from resource production. Development regulations must not allow a primary use of agricultural resource lands that would convert those lands to nonresource purposes. Accessory uses may be allowed, consistent with subsection (3)(b) of this section.

(ii) Development regulations must assure that the use of lands adjacent to designated natural resource lands does not interfere with the continued use, in the accustomed manner and in accordance with the best management practices, of these designated lands for the production of food, agricultural products, or timber, or for the extraction of minerals. WAC 365-196-815

Cluster zoning with remainder in Agricultural land, d) Large lot zoning with minimum lot sizes large enough to achieve successful farming practice, e) quarter/quarter zoning that allows for (1) one acre home site per 40 acres f) slide scale zoning⁶ and g) TDRs. WAC 365-196-815(3).

FOCC asserts that Alternative #4 violates WAC 395-190-060(2) by allowing for a large scale reduction in large lot zoning with minimum lot sizes that would be large enough to achieve successful farming practices. Also, the more one allows the smaller developable lots in the rural area, the more pressure there is on other landowners with large lots to parcel them out. For example, under Alternative #4 as proposed, the county could have two AG 20 lots sitting side by side. If one of those AG-20 lots is currently divided into 20 non-legally developable one acre parcels, Alternative #4 would recognize those lots and allow 20 homesites. Once that occurs, by law the County would have to allow the adjoining AG 20 parcel to develop 20-one cre lots either under a Comprehensive plan amendment or an assertion of a change in circumstances. The “domino” effect would be real and sustained.

Washington State Supreme Court has held in the Soccer Fields decision that [t]he County was required *to assure the conservation of agricultural lands and to assure that the use of adjacent lands does not interfere with their continued use for the production of food or agricultural products.*⁷ A ten acre minimum lot size and density will not meet this standard. Professor Arthur C. Nelson analyzed agricultural land preservation techniques and concluded that “[m]inimum lot sizing at up to forty-acre densities merely causes rural sprawl—a more insidious form of urban sprawl.”⁸ Further, Clark County’s average farm size has increased from 37 acres in 2007 to 39 acres in 2012, an increase of 5.4 percent.⁹ During the same time period, Washington’s average farm size increase by 4 percent.¹⁰ The increase in average farm size does not support a reduction in the minimum lot size and density.

In conclusion, the comments that have been provided by proponents of Alternative #4 regarding agricultural lands seem to be a misplaced attempt at de-

⁶ I believe a good example of this would be the zoning in our Rural Centers.

⁷ *King County v. Central Puget Sound Growth Management Hearings Bd. (Soccer Fields)*, 142 Wn.2d 543, 556, 14 P.3d 133, 140 (2000) emphasis in original.

⁸ Arthur Nelson, *Preserving Prime Farmland in the Face of Urbanization: Lessons from Oregon* 58 JOURNAL OF THE AMERICAN PLANNING ASSOCIATION 467, 471 (1992). The Journal of the American Planning Association is a peer-reviewed journal.

⁹ United States Department of Agriculture, National Agricultural Statistics Service, *2012 Census of Agriculture Washington State and County Data Volume 1 • Geographic Area Series • Part 47 AC-12-A-47 Chapter 2: County Level Data, Table 8. Farms, Land in Farms, Value of Land and Buildings, and Land Use: 2012 and 2007* p. 271 (May 2014) accessed on Aug. 2, 2015 at: http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_2_County_Level/Washington/wav1.pdf.

¹⁰ *Id.*

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designation. These lands are designated and presumed valid. There is a specific process for de-designation that is not being undertaken. Therefore, the comments regarding soils and resource lands that appear to undermine the designations should not, and cannot be used as grounds for justifying reductions in the minimum lot sizes and, given that Clark County used the minimum lot sizes as one of the regulatory tools under WAC 365-196-815(3) to protect those resource lands, by embracing Alternative #4, the County is acting in contravention of the mandate to protect these previously designated, GMA compliant and presumptively valid agricultural lands.

Please submit these comments under both the DSEIS and the record on the Comprehensive Plan update to the extent that the records are different.

Sincerely,


David T. McDonald

1 is no substantial evidence in the record to support the designation of agri-forest lands as resource
2 lands under the GMA.

3 Additionally, the failure to solicit meaningful public input for the agri-forest resource
4 lands violated the public participation provisions of the GMA requiring early and continuous
5 public participation in the development and adoption of comprehensive plans.

6 5. Agricultural Resource Lands. There is ~~not~~ substantial evidence in the record to
7 support the County's designation of agricultural resource lands. ~~In particular, there is not~~
8 ~~substantial evidence to demonstrate how those lands designated satisfy the GMA definitional~~
9 ~~criteria; that is, that those lands are primarily devoted to agricultural production and are of long-~~
10 ~~term commercial significance for the production of agricultural products. The only explanation~~
11 ~~provided regarding the designation of agricultural resource lands is contained in a staff report~~
12 ~~prepared after the RNRAC had completed its work which states, "soils was a critical factor."~~
13 ~~This is not to suggest the County was incapable of analyzing the required statutory criteria: the~~
14 ~~County undertook a comprehensive analysis of resource land designations in urban reserve areas~~
15 ~~when it was compelled by the Board to re-examine these designations. The County should have~~
16 ~~undertaken a similar analysis before designating any agricultural resource lands.~~

17 ~~Because there is not substantial evidence in the record that satisfies the GMA's~~
18 ~~definitional criteria, the agricultural resource land designations are invalid.~~

19 6. Comprehensive Plan EIS. The Comprehensive Plan EIS issued by the County
20 violates the State Environmental Policy Act ("SEPA"), RCW Ch. 43.21C. The agri-forest
21 resource land designations were disclosed subsequent to the publication of the final Plan EIS and
22 were not disclosed or discussed in any way in the EIS alternatives. The removal of rural activity
23 centers also was not addressed in the EIS. The County did not require additional environmental
24 review and did not solicit additional public comments. The County failed to comply with
25 SEPA's requirement for additional environmental review when a proposal changes substantially
26 from the one addressed in the initial EIS. The Board's decision to uphold the adequacy of the