From:	Oliver Orjiako
To:	Jeffrey Delapena
Subject:	FW: Requirement for Resource Lands Study under Washington"s Growth Management Act.
Date:	Monday, April 7, 2025 8:11:45 AM
Attachments:	image001.png image002.png 2025-04-05 Memo to Clark County re Countywide Analysis_FINAL.pdf image003.png image004.png image005.png image006.png

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Hi Jeff,

FYI. For the record. Thanks.

OLIVER ORJIAKO
Director
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From: Horenstein, Stephen W. <SHorenstein@schwabe.com>
Sent: Saturday, April 5, 2025 10:39 AM
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Subject: Requirement for Resource Lands Study under Washington's Growth Management Act.

Good morning, Councilors, and staff.

We have prepared the attached memorandum for your consideration and to provide our collective input as you contemplate modifying your work plan to not proceed with the resource lands analysis required by GMA as you complete your 10 year update to our communities' Comprehensive Growth Management Plans. We believe you will find this memo instructive as you move forward with your deliberations on this issue.

Please feel free to reach out with any questions you may have.

Best…Steve

Stephen Horenstein

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To: Board of County Councilors

From: Steve Horenstein, Maren Calvert, Jamie Howsley, Ezra Hammer, LeAnne Bremer, NW Partners for a Stronger Community

Date: April 5, 2025

Subject: Countywide Analysis of Resource Lands is Mandatory for 10 Year Update to Comprehensive Plan

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We provide this memorandum for your consideration in your growth management planning discussions and decision making. As we understand it, Clark County Staff advised the Board of County Councilors ("County Council") that it need not conduct a countywide analysis of agricultural lands as part of its currently-ongoing comprehensive plan review and update. The Board of County Councilors acquiesced in staff's recommendation.

SUMMARY OF ANALYSIS

- We believe that staff's advice and the County Council's decision is inconsistent with Washington law.

- An analysis of all lands designated resource or agriculture must be studied during each update to the Clark County's (the "County") Comprehensive Growth Management Plan (the "Plan").

- Minimum guidelines established by the Washington State department of Commerce must be followed *each time* the Plan is updated

- After much litigation (including cases in which Clark County was reversed on the issue), the law is now clear that the Growth Management Act ("GMA") requires planning counties to conduct a "comprehensive countywide analysis" for all designations, de-designations, and comprehensive plan updates. A failure to conduct that analysis will result in the designation, de-designation, *or plan update* being found non-compliant and returned to the County for corrective action with the likely possibility of the Plan being declared invalid, causing a withholding of certain state funds until the plan is corrected and approved by the Growth Management Hearings Board ("GMHB").

- There are both substantive and procedural issues with the County's SEPA process to support the Plan. Of particular note is the fact that the County is proposing to formally amend its scoping resolution to remove the resource/agriculture land study on a consent agenda and without public hearing or less formal public input in violation of SEPA and the enhanced public participation requirement of GMA.

DETAILED ANALYSIS

As discussed below, several decisions from the GMHB, Washington Court of Appeals, and the Washington Supreme Court, as well as recent revisions to the Washington Administrative Code chapter 365-190 made in 2023, explicitly require all counties planning under the GMA to conduct a comprehensive countywide analysis of all natural resource lands and agricultural lands during every periodic review of the comprehensive plan.

As the County Council knows, the GMA required Clark County to designate agricultural lands, forestlands, mineral resource lands (collectively, "natural resource lands"), and critical areas on or before September 1, 1991. RCW 36.70A.170; RCW 36.70A.060. When designating those lands, the County was required to consider the minimum guidelines established under RCW 36.70A.050. RCW 36.70A.170(2).

Next, the GMA required the County to adopt a comprehensive plan that, among other things, governed development of and protections for those designated lands by July 1, 1993. RCW 36.70A.070(1) and (5); WAC 365-190-040(3). "The Legislature intended the land use planning process of GMA," including the natural resource designations and comprehensive plan drafting, "to be area-wide in scope." *Clark County Natural Resources Council v. Clark County*, No. 09-02-0002, 2009 GMHB LEXIS 67 *36, *citing City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd*., 136 Wn.2d 38, 52, 959 P.2d 1091, 1097 (1998).

To facilitate counties' land use designations and comprehensive planning, the Department of Commerce promulgated minimum guidelines for designating natural resource lands in WAC 365-190-040; for agricultural lands in WAC 365-190-050; and for mineral lands in WAC 365-190-070.[1] While the Department of Commerce and GMHB have not always been clear about whether those minimum guidelines are mandatory or permissive, they resolved any question about that issue in recent years. For example, in 2012 the GMHB explained, "the Minimum Guidelines include suggestions and recommendations as well as requirements: they include use of the word 'should' and 'may' as well as directive words such as 'shall' and 'must'." *Weyerhaeuser Company,*

[1] "WAC 365-190-040 does not apply strictly to agricultural lands; rather it provides the overarching framework for a County to address natural resource lands. Instead, the GMHB looks to *Lewis County* and the factors in WAC 365-190-050 which guide counties when addressing agricultural lands. WAC 365-190-050(1) requires a county-wide or area-wide analysis when classifying and designating agricultural land (not a parcel-by-parcel analysis) to assure conservation of agricultural land." *Clark County Citizens United v. Clark County*, GMHB Case No. 16-2-0005c (F.D.O. Mar. 23, 2017) at p. 39.

et al. v. Thurston County, GMHB Case No. 10-2-0020c (F.D.O Jul. 17, 2012) at p. 14. *See also Friends of the San Juans v. San Juan County*, GMHB No. 16-2-0001 (F.D.O. Jun. 30, 2016) at p. 10 (discussing confusion and reciting string of cases clarifying the mandatory nature of the "must" requirements of the minimum guidelines).

After years of litigation about whether the minimum guidelines apply only to the original round of land use designations, or if counties must also consider and apply the minimum guidelines to subsequent land use designations, de-designations, and comprehensive plan revisions, that debate is now well settled. Numerous GMHB decisions, from all three GMA regions have explicitly held the minimum guidelines outlined in the WAC sections cited above apply to the original land designations, de-designations, *and* all subsequent reviews of designations and comprehensive plans. *City of Leavenworth et al. v. Chelan County*, No. 20-1-0006c, 2020 GMHB LEXIS 128, *6 *citing DCCRG/Futurewise v. Douglas County*, EWGMHB No. 09-1-011 (F.D.O., Jan 19, 2010) at 15-16; *Friends of the San Juans v. San Juan County*, GMHB No. 16-2-0001 (F.D.O. Jun. 30, 2016) at p. 8 ("it is clear from appellate court decisions and numerous decisions of the Board (from all three GMA regions) that in order to de-designate natural resource lands, jurisdictions must go through the same process of analysis applicable when designating those natural resource lands").

During Clark County's last comprehensive plan update, Clark County attempted to meet this requirement when it de-designated agricultural lands near the cities of Ridgefield, Camas, and LaCenter. The GMHB found the county's review of only the parcels at issue was insufficient. Reviewing "[a]n update on one 56.55-acre parcel does not constitute an analysis to ensure the viability of agricultural economy in Clark County in accordance with WAC 365-190-050(5)." *Clark County Citizens United v. Clark County*, GMHB Case No. 16-2-0005c (F.D.O. Mar. 23, 2017) at p. 41. Similarly, the County's consideration of the Eisemann memorandum regarding the subject parcels, a county staff report regarding 102 acres of land, and a parcel-by-parcel update, even when taken together, do not constitute an area-wide or county-wide study as required by the law. *Id*. at 42.

For several decades, the GMA and related WAC provisions have required counties to periodically "review and, *if needed*, revis[e]" natural resource designations and comprehensive plans. RCW 36.70A.130(5)(b); WAC 365-190-040(3) (emphasis added). Currently, Clark County is required to conduct those reviews by December 31, 2025. Importantly, the plain language of these requirements explicitly state that the "review" of land use designations and comprehensive plans are mandatory. Only the County's decision about whether to revise either the designations or the comprehensive plans are discretionary.

Seventeen years ago, the Washington Supreme Court analyzed this language, finding that a "county *must review its entire* comprehensive plan" as directed by the GMA. *Thurston County v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 329, 343 (2008) (emphasis added). Once that review is done, parties may challenge a county's revisions or decision not to revise a comprehensive plan. *Id*. When reaching this conclusion, the Court relied upon the RCW 36.70A.130(1)(a) requirement that counties "*take legislative action to review*, and if needed,

revise" the comprehensive plan. *Id*. at 342.[2] The phrase "legislative action" means, at a minimum, that the county "must" conduct "a review and evaluation;" then, it must identify any revisions made or explain "that a revision was not needed and the reasons therefore;" notify the public of those actions; hold a public hearing; and then adopt a resolution or ordinance to implement its decisions. *Id.* The county's review and evaluation of the land use designations and the comprehensive plan, therefore, are the foundation of the GMA update process.

Several parties litigated the scope of the required GMA review between 2008 and 2023.[3] During those years, the relevant provisions of the WAC required periodic reviews, conducted through a "comprehensive countywide process." Thus, in 2020, the GMHB concluded "the referenced WACs do not require a regional or countywide **analysis**; the WAC clearly states that the requirement is for a countywide or area-wide **process**." *City of Leavenworth*, 2020 GMHB LEXIS 128, *7 (emphasis added).

Indeed, several GMHB decisions between 2008 and 2023 confused the terms "analysis" and "process," using them interchangeably.[4] In 2020, the City of Leavenworth challenged Chelan County's de-designation of agricultural lands, arguing the county had failed to conduct a countywide analysis. The GMHB rejected the City's argument and criticized past decisions for confusing the terms "analysis" and "process" and assuming they were "interchangeable; they are not." *Id*.; *see also id*. at *9. The term "analysis" is defined by Bouvier Legal Dictionary as:

> A **very careful study** based on a process of examination **without prejudged conclusions**. Analysis is a generic term for a wide range of processes of examination of any argument, idea, practice, or thing. Among the characteristic forms of analysis share are these: the use of a process of examination rather than an ad hoc consideration; the study of anything by its components as well as by the whole; the examination of causes that lead to the thing studied as well as results that come from it; the context of the thing, including **comparisons to similar and dissimilar things; the testing of ideas about the thing as hypotheses rather than conclusions**.

City of Leavenworth, 2020 GMHB LEXIS 128 at *8-*9 (emphasis added). The word "process," in contrast, is:

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[2] The Court cited a previous version of RCW 36.70A.130(1)(a), but the operative language in today's version of that statute is unchanged.

[3] See e.g. *Friends of the San Juans v. San Juan County*, GMHB No. 16-2-0001 (F.D.O. Jun. 30, 2016) at pp. 13-14, footnotes 41, 44, and 45 (discussing county-wide process and analyses that are required for natural resource and timber lands).

[4] *See e.g. Clark County Citizens United v. Clark County*, GMHB Case No. 16-2-0005c (F.D.O. Mar. 23, 2017).

> A method of doing anything, including a legal action. A process is a means of doing or performing any task. A process as a matter of patent is a particular routine that, when followed, allows the production of a particular device or thing.

Id. at *7. Because Chelan County had held countywide hearings, considered countywide public comments, and reviewed various parcels in the county against the criteria listed in WAC 365-190-040(10)(b), the GMHB held the county had followed a countywide **process**, as required by the WAC and county code. "The question of the adequacy of the **analysis** by which the de-designation was made is another matter." *Id*. at *9 (emphasis in original).

Acknowledging the years of litigation over the "the ongoing review and update requirements in RCW 36.70A.130, and the process for implementing those requirements," the Department of Commerce revised the WACs again in 2023. WAC 365-190-040(3). Those revisions removed the word "process" from the body of the minimum guidelines in WAC 365-190-040(10)(b)(ii) and (c), WAC 365-190-050(1), WAC 365-190-060(1), WAC 365-190-070(1), and WAC 365-190-480(2)(e) and replaced it with the word "analysis." *See* WSR 23-08-037, Permanent Record of the Department of Commerce, Mar 29, 2023, at pp. 6-9 and 66. Thus, as of 2023, there can be no doubt the WAC requires that a county "**must**" conduct "a comprehensive countywide **analysis**" of all natural resource lands during every periodic comprehensive plan and land use designation review.

While a county may review other criteria, beyond those specified in the WAC, "the record must contain evidence of the City's consideration of the Minimum Guidelines or the statutory direction becomes meaningless." *Weyerhaeuser Company et al., v. Thurston County*, GMHB Case No. 10-2-0020c (Amended F.D.O. Jun 17, 2011) at p. 27 citing *1000 Friends of Washington v. Anacortes*, GMHB Case No. 03-2-0017 (F.D.O., Feb. 10, 2004) at 14.

Indeed, the changes to the WAC in 2023 demonstrated that the Department of Commerce knew how to identify circumstances under which the countywide comprehensive analysis was not required. WAC 365-190-070(1) explicitly says: "[c]ounties and cities may de-designate mineral resource lands *without a comprehensive countywide analysis if* mining operations have ceased and the site reclaimed." WSR 23-08-037 at p. 9 (emphasis added). If the Department of Commerce had intended to allow counties a similar degree of discretion related to agricultural lands or other comprehensive plan updates, it could have said so. Because it did not, we must assume the countywide analysis of all other natural resource lands is necessary. *King County v. King County Water Dist. No. 20*, 194 Wn.2d 830, 847 (2019) (where legislature extends a provision to cities and towns, and does not do so for counties, "[o]ur settled rules of statutory interpretation compel us to conclude that this difference in treatment was intentional") (citation omitted).

Given the clear law requiring GMA planning counties to conduct a "comprehensive countywide analysis" for all designations, de-designations, and comprehensive plan updates, a failure to conduct that analysis will result in the designation, de-designation, or plan update being found non-compliant. As Clark County knows, if the action goes so far as to interfere with the goals of

the GMA, the update may even be declared invalid.[5] *See City of Leavenworth*, 2020 GMHB LEXIS 128, *45, *49 (finding County's comprehensive plan amendment to be invalid because, in part, "the County's lack of evidence in supporting its conclusions that this property was appropriate for de-designation and for designation as rural residential…is striking and indicates a purposeful interference with the goals of the GMA"); *Clark County v. Friends of Clark County et al*., GMHB Case No. 16-2-0005c (Cert. of Appeal. Mar. 22, 2018) at pp. 4-5 (GMHB found county filed to conduct a "county-wide or area-wide analysis as required in RCW 36.70A.050, 36.70A.060, and WAC 365-190-050," rendering its comprehensive plan amendment noncompliant and, because it interfered with GMA goals, invalid); *Clark County Citizens United v. Clark County*, GMHB Case No. 16-2-0005c (F.D.O. Mar. 23, 2017) at p. 100 (failure to conduct a county-wide or area-wide analysis prior to de-designating agricultural land rendered the comprehensive plan amendment noncompliant, and the portions that interfered with GMA goals were invalid); *Friends of the San Juans v. San Juan County*, GMHB No. 16-2-0001 (F.D.O. Jun. 30, 2016) at pp. 5 and 21 (county was noncompliant because it "did not apply an area-wide analysis to its de-designation process in violation of RCW 36.70A.170, RCW 36.70A.130(1)(d), and the applicable sections of the [WAC]," but its actions did not interfere with GMA goals and thus, were not invalid); *Weyerhaeuser Company et al., v. Thurston County*, GMHB Case No. 10-2-0020c (Amended F.D.O. Jun 17, 2011) at p. 61 (county failed to analyze minimum guidelines rendering their amendment noncompliant, but the error did not interfere with GMA goals); *Clark County Natural Resources Council v. Clark County*, No. 09-02-0002, 2009 GMHB LEXIS 67 *41, 48 (finding failure to conduct area-wide analysis before de-designating agricultural land was noncompliant , interfered with the goals of the GMA, and therefore, was invalid); *Kittitas County Conservation v. Kittitas County*, No. 07-1-0004c, 2009 GMHB LEXIS 10, *49-*50 (finding county's continued non-compliance in 2007, 2008, and 2009 by failing to conduct an county-wide or area-wide analysis of agricultural lands warranted a finding of invalidity).

Given the above, we encourage County Council to re-consider its position. The legislative history and case law recited above – particularly the changes to the WAC in 2023 – clearly establish that the County must conduct a comprehensive countywide analysis of all natural resource lands (including agricultural lands) as part of its periodic review of the Clark County Comprehensive Plan. Indeed, the County's desire for a more comprehensive analysis of resources lands after the 10 year update is adopted may have Clark County doing this analysis under a Declaration of Invalidity issued by the GMHB with corresponding withholding of state grants and other funds while the study is being undertaken under an order of noncompliance.

SEPA

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[5] "Invalidity is a discretionary remedy available to the Board when a city or county takes action which not only fails to comply with the GMA but substantially interferes with the goals of the act." *City of Leavenworth*, 2020 GMHB LEXIS 128, *44 citing e.g. *King County v. Snohomish County*, GMHB Case 03-3-0011 (F.D.O., Oct. 13, 2003) at 19; *Jensen v. Bonney Lake*, Case 04-3-0010 (F.D.O., Sept. 20, 2004) at 25; *Neighbors for Responsible Development v. Yakima County*, Case 02-1-0009 (F.D.O., Dec 5, 2002).

The Draft Environmental Impact Statement ("DEIS") alternatives approved by the County included an action for the resource lands study, the completion of which would be a condition precedent to the County actually adopting a DEIS alternative (or elements of an alternative) that would be implicated in the results of the resource lands study. Clark County has set direction for the DEIS and we understand that it is now being prepared. Without completing the resource lands study, the County will not have complied with SEPA as officially scoped. Pursuant to WAC 197-11-408(6), DEISs must be prepared according to the scope decided upon by the lead agency in its scoping process.

Also, from procedural perspective, the County has made the decision to move forward with the resource lands study after a duly advertised public hearing on the matter. Also, as part of the DEIS scoping decision, the County Council acted to rescind the resource lands study in a work session with an unadvertised topic and that lacked any forum for public testimony regarding the proposal to abandon the study. Now, the County is proposing to formally amend its scoping resolution to remove the resource/agriculture land study on a consent agenda and without public hearing or less formal public input in violation of SEPA and the enhanced public participation requirement of GMA.

There are clearly both substantive and procedural issues with the County's SEPA process to support the plan.

AMENDED RESOLUTION STAFF REPORT

The staff report promulgated in support of an amended resolution to eliminate the resource/ agriculture land study states in relevant part as follows:

> **Alternative 3: City-initiated actions 2 and County-initiated actions 2.** The Cities of Battle Ground, Camas, La Center, Ridgefield, Washougal and the County, for the unincorporated portion of the Vancouver UGA, are considering two alternatives for addressing their projected growth. The second proposed alternatives are referred to collectively as alternative 3. By Council direction, Alternative 3 has been revised to also include all requests for site-specific comprehensive plan amendments, except requests that would require de-designation of resource lands or surface mining overlay designations, that are not already included in any of the actions initiated by cities and the county.

Again, the highlighted language is contrary to the original DEIS scoping resolution. Some cities have included AG lands in their proposed Urban Growth Area ("UGA") expansions. This requires a SEPA analysis. In addition the language that states, "that are not already included in any of the actions initiated by the cities and the county" is unclear. If this does mean the cities' proposals that include resource lands in proposed UGA expansions will be considered, as they should be, then this should be made more explicit. This is the minimum, however; all site-specific requests must be considered in this update and studied in the DEIS as the represented by the County.

Thank you for considering these comments. We appreciate your continued work on the 2025 update to the Comprehensive Plan. We look forward to the County's further discussions on this matter in upcoming public hearings.

SWH:MLC:cjh