From:	Rebecca Messinger
To:	Cnty 2025 Comp Plan
Subject:	FW: For the Record April 8, 2025 Separate Business Item #3-Amended Resolution
Date:	Tuesday, April 8, 2025 8:36:39 AM
Attachments:	DTM_Council-RLS-Ltr-250407-Final.pdf Untitled attachment 00008.htm image001.png image002.png image003.png image004.png

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Good morning,

Please see the below email and attachment from David McDonald re: Separate Business item #3.

Thank you,

Rebecca Messinger
Clerk to the Council
COUNTY MANAGER'S OFFICE

564-397-4305

From: David McDonald <david@mcdonaldpc.com>
Sent: Tuesday, April 8, 2025 7:55 AM
To: Kathleen Otto <Kathleen.Otto@clark.wa.gov>; Rebecca Messinger <Rebecca.Messinger@clark.wa.gov>
Cc: Sue Marshall <Sue.Marshall@clark.wa.gov>; Michelle Belkot <Michelle.Belkot@clark.wa.gov>; Wil Fuentes <wil.fuentes01@gmail.com>; Matt Little <Matt.Little@clark.wa.gov>; Glen Yung <Glen.Yung@clark.wa.gov>; Oliver Orjiako <Oliver.Orjiako@clark.wa.gov>; Jose Alvarez <Jose.Alvarez@clark.wa.gov>; Christine Cook <Christine.Cook@clark.wa.gov>
Subject: For the Record April 8, 2025 Separate Business Item #3-Amended Resolution

Ms. Otto:

Attached please find my letter for the record for this morning's agenda item Separate Business Item #3. My apologies for the late submission but I did not see the memorandum filed by the attorneys on April 5, 2025 until yesterday afternoon.

Best Regards,

David

David T. McDonald
david@mcdonaldpc.com

April 7, 2025

Clark County Council
% Kathleen Otto, County Manager
Rebecca Messinger
Public Services Center
6th Floor
1300 Franklin Street
Vancouver, WA 98660

RE: Comments ***For the Record*** for Comprehensive Plan Update Re: Amended Resolution on Resource Lands Study[1]

By email only to Kathleen Otto at kathleen.otto@clark.wa.gov and Rebecca Messinger at rebecca.messinger@clark.wa.gov.

Dear Councilors:

On Saturday April 5, 2025, a collective of land use attorneys[2] with ethical duties to clients who have strong financial interests in the County's determinations, filed an 8 page "memorandum" that claims, without a direct legal citation, the law "requires" the County to complete a resource land study as a part of their comprehensive plan update. Setting aside the irony that for more than 15 years, including during the litigation of the last comprehensive plan update, at least two of these attorneys claimed that there was no requirement for a county wide study prior to de-designating resource lands, there is no case to which the memorandum cites for

[1] My name is David McDonald. I am submitting these comments in my own name, and not on behalf of any other group or organization. Although I am an attorney, I am speaking for myself as a 40-year resident of this county who happens to also have a law degree. Since 1985, I have served on dozens of committees regarding land use issues, including many involving the first Comprehensive Plan and the updates that followed. I have been involved as a resident, and as an attorney, in multiple county land use decision making processes and also legal actions in front of the Growth Board tribunals and the Washington courts. I have authored legal submittals that have been adopted by the County as part of their Comprehensive Plan updates and I also have brought legal challenges against the County on a variety of policies that they have adopted under SEPA and the GMA. Thus, as a resident of the County, and an attorney, I have supported many county policies and plans as well as challenged the County on their legal decisions. Over the years the overwhelming amount of my legal work on land use and environmental issues has been *pro bono*. Currently, my legal representation of Friends of Clark County is limited to my representation in the current litigation involving Chelatchie Bluff SMO. Thus, I want to make clear that I am not acting as their attorney in submitting these comments. Importantly, as a resident, I would be harmed by the County expanding urban growth boundaries more than the land necessary to accommodate the forecasted growth as determined by staff. I would also be harmed as a taxpayer, unlike Mr. Howsley and Mr. Hammer who live in Portland, by the County expending hundreds of thousands of dollars on a study that is not legally required or necessary as part of this Comprehensive Plan update. Based upon the adopted VBLM and the OFM population forecast, staff has consistently stated that all forecasted growth can be accommodated within the existing UGAs and therefore there is no need to even consider adding Agricultural Lands of Long-Term Commercial Significance to any UGA.

[2] The land use attorneys are joined by "Northwest Partners" which is basically the building and development community.

the proposition that they assert. In addition, the plain language of the WAC is contrary to their assertions. This Council should reject their legal analysis.

On March 5, 2025, at a duly noted Council Time, the Council considered the following agenda item: " Annual Work Plan and 2025 Comp Plan Update - Work Plan - Community Planning Overview. During that time, the Council had a lengthy and robust discussion with the staff and County Manager regarding the efficacy, and possible need, for a resource land study ***at this time***. After that discussion, the Council determined that this study was not necessary at this time and, in fact, would impeded and thwart the County's ability to complete its comprehensive plan update by December 31, 2025. The County Manager summarized the direction given to her by the Council as follows:

> Pause everything now, we'll continue the discussions throughout the year and any decisions would be in 2026. Okay and then we will communicate with the 3 consultants that reached out I think you know it's setting them up for success as well so that they're not trying to do 6 months of work in a couple of months and so I think we can have a discussion with them that's a positive outcome and I would take Councilor Yung's direction of the letter, I would even go one step further and have staff actually talk to them first before we put it in writing because we want to make sure that the communication doesn't come across like this is what we are doing, this is your responsibility, let's have a discussion of why we're doing it and then we can solidify that in an email to them..

Councilor Marshall then confirmed that was an accurate summarization but added that it would also "remove the mining site specific requests" and the Council approved that direction by a 5-0[3] margin.[4]

First and foremost, although the submitted "memorandum" uses such language as "the clear law", the memorandum cites no case that actually holds that a county must conduct a county wide resource land study during ***every*** comprehensive plan update. It is puzzling that a position can be so "clear" where there is no language in any case to which the "memo" cites for legal authority. In addition, there is no statute or rule that says that ***every*** comprehensive plan should include a full county wide resource land study. If such a case existed, or such a rule or statute existed, then the memorandum would have highlighted and bolded that citation, and the

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[3] At the end of the Council Time, Councilor Yung returned to the issue during "councilor reports" and seemed to want to change his position to first have a consultation with the cities but the other 4 councilors did not agree and, in fact, Councilor Little emphasized that he was in agreement with the County Manager's summary of the direction she and staff were to follow (Councilor Little: "Yeah I understand those concerns (meaning those voiced by Councilor Yung) but I support the decision as Kathleen (Otto) described it". Chair Marshall and Councilors Belkot and Fuentes were in support of the Amended Resolution as well. Councilor Belkot described doing the work during the comprehensive plan update as a "heavy, heavy lift".

[4] https://www.youtube.com/watch?v=dZdPyGBRUS0 starting at 1:35:30

memorandum would have been less than one page long. In addition, contrary to the various assertions, neither the WAC nor the Department of Commerce Guidelines state that a resource land study is ***required*** as part of every comprehensive plan update. Thus, any assertion that failure to conduct such an analysis will result in the plan being found non-compliant and "likely being declared invalid" is speculation at best and fear mongering and threatening at worst.

The statutes, rules and many of the cases cited by the "memo" were included in a letter to the County by Futurewisee, and joined in by FOCC prior to the October 2024 Planning Commission work session. Specifically, the WACs that require a countywide analysis ***do not require*** it for every periodic update but simply state that ***if*** the County intends to de-designate any resource lands, ***then*** it must do the countywide study. WAC 365-190-040(10)(b) and (c) and WAC 365-190-050(1).

WAC 365-190-040(10)(b) and (c) state:

> (10) Designation amendment process.
>
> (b)(i) De-designations of natural resource lands can undermine the original designation process. De-designations threaten the viability of natural resource lands and associated industries through conversion to incompatible land uses, and through operational interference on adjacent lands. Cumulative impacts from de-designations can adversely affect the ability of natural resource-based industries to operate.
>
> (ii) Counties and cities should maintain and enhance natural resource-based industries and discourage incompatible uses. Because of the significant amount of time needed to review natural resource lands and potential impacts from incompatible uses, frequent, piecemeal de-designations of resource lands should not be allowed. Site-specific proposals to de-designate natural resource lands must be deferred until a comprehensive countywide analysis is conducted.
>
> (c) Reviewing natural resource lands designation. In classifying, designating and de-designating natural resource lands, counties must conduct a comprehensive countywide analysis. Counties and cities should not review natural resource lands designations solely on a parcel-by-parcel basis. Designation amendments should be based on consistency with one or more of the following criteria:
>
> (i) A change in circumstances pertaining to the comprehensive plan or public policy related to designation criteria in WAC 365-190-050(3), 365-190-060(2), and 365-190-070(3);
>
> (ii) A change in circumstances to the subject property, which is beyond the control of the landowner and is related to

> designation criteria in WAC 365-190-050(3), 365-190-060(2), and 365-190-070(3);
>
> (iii) An error in designation or failure to designate;
>
> (iv) New information on natural resource land or critical area status related to the designation criteria in WAC 365-190-050(3), 365-190-060(2), and 365-190-070(3); or
>
> (v) A change in population growth rates, or consumption rates, especially of mineral resources.

WAC 365-190-050(1) provides:

> (1) In classifying, designating and de-designating agricultural resource lands, counties must conduct a comprehensive countywide analysis consistent with WAC 365-190-040(10). Counties and cities should not review resource lands designations solely on a parcel-by-parcel basis.

Nothing in the WAC, the case law or the Department of Commerce Guidelines directs the County to conduct such a county wide resource land study during every Comprehensive plan update. Rather, the cases cited in the "memorandum" simply hold that ***if*** the County does want to de-designate resource lands, ***then*** it must do a County Wide study.

The memo also seems to rely on RCW 36.70A.060. However, RCW 36.70A.060 requires ***the conservation of natural resource lands once they are designated***, not a process for designation or de-designation. The statute does not require a countywide study of what lands should be de-designated, but merely stands for the proposition that once designated, the county must pass development regulations to conserve them. Thus, the County ***only*** has to do a countywide analysis if the county is de-designating resource lands such as the agricultural lands at issue.

As to the claims that such a study is required is "clear", the record is to the contrary. On March 14, 2024, Mr. Howsley sent a letter to Dr. Orjiako stating that the County had not budgeted for a county wide resource land study and so he and his firm were going to hire a consulting firm to do a full study of the resource lands throughout the county. The letter ***did not*** state that the county ***was required*** to do a study. Moreover, Mr. Howsley pledged to share the scope of the work that his consultants were projecting would be necessary ***prior to initiating the analysis***. If this was so clear, it is curious why Mr. Howsley, or any other land use attorney or the building and development representatives did not, at that time, demand that the County initiate and pay for such a study. A cynical person might assume that they did not believe it was mandatory or they did not want the County to do it because they wanted it completed by the consultant they selected.

If Mr. Howsley did a comprehensive county wide study, he never submitted to the record, and he certainly did not have his consultants connect with County staff regarding the scope of the

possible work. Instead, the consultant produced what can only be described as flawed submittals that did not address the correct criteria for de-designations and were solely site specific (i.e. ***not county wide as Mr. Howsley had said was*** required) (*See* the myriad of FOCC letters filed in December 2024 regarding each submittal). Those submittals claimed to support "de-designation" of the land of the clients Mr. Howsley represented. Yet they have no value in determining whether lands should, or should not, be de-designated because they did not meet the requirements that the "memorandum" asserts must be done on a county wide basis. Yet, the submittals still claimed to support de-designation. Again, if they believed that this was mandatory, then why did they pay for the piecemeal site specific analysis that clearly does not meet the standards that they set forth in their memorandum.

From the record, other than Mr. Howsley's March 14, 2024 letter, which does not state that the County is ***required*** to complete a county wide study as part of its comprehensive plan update, no land use attorney or city made any claim that such a study was ***required*** until the Planning Commission hearing on November 7, 2024. Ironically, that claim by the same individuals who authored the April 5, 2025 memorandum, came a month after Futurewise, in a letter joined by FOCC, asserted that the proposals made to bring agricultural and forest lands into the UGAs could not happen because the County had not conducted a study as required by law. Again, one would think that if these land use attorneys believed that there was such a "clear" requirement, they would have been advocating for it at least by 2023. Yet, they seemed to at least implicity concede that the WAC requirement for a county wide study only applies when the county wants to de-designate previously designated lands.

In addition to reviewing the legal analysis of the memorandum, as well as the lack of assertion by the parties until November 2024, it is important to view the legal analysis of individuals with vested financial interests in the outcome through a prism of skepticism. There history of legal analysis can be considered a mixed bag when challeneged. Let's be clear, the authors of "memorandum" have ethical and financial duties for those interests for whom they advocate, but they have no ethical or legal duty to the County or the Council.

So, as a gentle reminder, Mr. Horenstein advocated for the Rural Industrial Land Bank, on behalf of a client, in the 2016 update where the county de-designated agricultural lands without conducting a county wide study. The County's decision was reversed by the Growth Board on appeal (agreeing with FOCC and Futurewise). Mr. Howsley has at various times advocated for lands to be de-designated in County without a county wide study and, despite the Growth Board ruling against the County (agreeing with FOCC and FW) and holding that de-designating the lands violated GMA, all the lands are part of Ridgefield (ad La Center) because the City of Ridgefield (and La Center) annexed them prior to the Board's ruling[5].

[5] The same applies to La Center lands that were annexed despite being de-designated in violation of the law.

Mr. Horenstein and Mr. Howsley also helped draft, and promoted, SB 5517 (FRDU) on behalf of PVJR as PVJR's legal representative. It is hard to dispute that the FRDU fiasco has proved an expensive, time sucking, litigious and abject failure for the County.

Mr. Horenstein and Mr. Howsley were both strong proponents of lifting the UH at 179th street extolling the promise that removing that holding would make the 179th intersection the economic hub of Clark County. Three years later, Mr. Horenstein, representing the same client, produced a different economic[6] study saying that there would be no economic growth at that area, and then convinced the council to rezone his client's General Commercial Property to high density residential. The growth in the area so far has been a deluge of residential units and the County is about to shut down 179th street for 2 years to change one major intersection.

Most recently Mr. Howsley told the Council over and over that the Growth Board's ruling, and FOCC's position, that the County must conduct an EIS prior to holding a hearing to determine if the SMO should be applied to Chelatchie Bluff was not legally supportable. After 3 and ½ years of time, energy and money expended by the County, the Court of Appeals disagreed.

In conclusion, the Council has already determined the VBLM and the OFM numbers. Based upon those determinations, neither of which were appealed, the Staff has concluded that, with a very few exceptions, all forecasted growth can be accommodated in the existing UGAs. Thus, there is no need, or legal reason, to conduct any study regarding resource lands at this time. The Council's direction is to complete the current comprehensive plan update and, once that is done, engage in a thorough and thoughtful process regarding resource lands. Staff and the County Manager support the Council on that determination and, assumedly, are already acting on the Council's direction.

There is no need to deviate from the decisions made on March 5, 2025 at a publicly noted public hearing and I urge you to pass the Amended Resolution as drafted.

Sincerely,

David T. McDonald

[6] Ironically produced by the Johnson Economic group.

David T. McDonald

Admitted To Practice In Oregon and Washington
State and Federal Courts