David McDonald, Ridgefield

I am speaking tonight as a former member of the BLPAC and a person who has worked on the designation, protection and conservation of agricultural lands for over two decades.

The Buildable Lands Report is the formal report adopted by the County that contains the VBLM upon which the County relies to determine capacity for growth within its existing UGAs. The County adopted the BLR and VBLM in 2022, it was approved by the Department of Commerce and no appeal was taken. It forms the foundation of this comprehensive plan update.

Based upon the BLR, and all the county resolutions adopted since June 2022, with very narrow exceptions, all the forecasted growth can be accommodated within the existing UGAs.

Previously, I wrote two papers specific to the designation, protection and conservation of Ag Lands and I have provided them to you.

This past year, the County hired a consultant to conduct a county wide agricultural resource lands study. One of the consultant's findings is that **all currently designated lands still meet the criteria for AG Lands of LTCS.**

Mr. Morasch claims in his letter that the County should now immediately de-designate the lands by via 365-190-040. That request should be rejected.

First, de-designations are not favored under the law.

040(b) provides:

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.

Second, the County's consultant, using the correct and applicable criteria in 365-190-050, just reaffirmed that the designated lands Mr. Morasch references----- ***are agricultural lands of long term commercial significance.*** Since the County just re-established that fact, those lands do not meet the criteria for de-designation under -040(10)(c)[1]

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[1] (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

So that's it, no expansion of UGAs and protect and conserve all designated AG lands –those findings comply with the law. Thanks, and good luck.

---

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.

(11) Use of innovative land use management techniques.

Public Comment Ltr
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September 3, 2015

Mr. Oliver Orjiako
Community Planning
1300 Franklin Street
3rd Floor
Vancouver, Washington 98660

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 5[1].

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.

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[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

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[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. [4] The 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 conserve [5] agricultural lands and any non-agricultural use should be limited to lands with poor soils or otherwise not suitable for agricultural purposes, c)

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[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 zoning[6] 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-

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[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.*

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 lots 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

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

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

5. Agricultural Resource Lands. There is ~~not~~ substantial evidence in the record to support the County's designation of agricultural resource 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.~~

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

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March 29, 2016

Mr. Oliver Orjiako, Director
Clark County Community Planning
1300 Franklin Street
3rd Floor
Vancouver, Washington 98660

RE: *Karpinski v. Clark County*

Via pdf and e-mail to Oliver.Orjiako@clark.wa.gov

Dear Dr. Orjiako:

In her March 22, 2016 testimony before the Councilors, CCCU representative Carol Levanen referenced a Final Decision and Order (FDO) from the Western Washington Growth Hearings Board (the FDO can be found here http://www.gmhb.wa.gov/LoadDocument.aspx?did=146). I found it odd that CCCU would rely on that decision because it held that the county placed too heavy reliance on economic development over preservation of agricultural lands of long term commercial significance (ALLTCS). I went back and read the FDO along with the court opinions and the final FDO on Remand. I agree with Ms. Levanen that it is an important case but not for the reasons she may believe. The FDO that she quoted from in her public testimony found that the County's de-designation process for ALLTCS was flawed, and the GHB invalidated the county ordinances that de-designated over 2500 acres of agricultural lands. At bottom, the hearings board and the court chastised the county for failing to protect ALLTCS.

First, this case, like many, has a long history (*see* case details here http://www.gmhb.wa.gov/CaseDetail.aspx?cid=92). The case was originally appealed to the WWGMHB (GMHB) and on May 14, 2008, the GMHB issued the Final Decision and Order (FDO) that Ms. Levanen appeared to reference in her Tuesday comments. The Final FDO On Remand was issued on March 11, 2014.

Second, throughout the entire process, the GMHB and the Courts recognized the importance of designating agricultural lands of long term significance and emphasized that extra scrutiny should be applied to any matrix or formula used to de-designate ALLTCS. In its original FDO the GMHB noted:

> The pressure to convert these lands (ALLTCS), especially in areas impacted by population growth and development, is even more prevalent today. The Board recognizes that the counties and cities of Washington face a multitude of difficult and demanding challenges when determining how their communities will grow. But, these challenges must be addressed within the mandates of the GMA so as to serve the "public's interest in the conservation and the wise use of our lands. ***Washington's limited, irreplaceable agricultural lands are at the forefront of this mandate, with cities and counties discretionary planning choices confined so as to prevent the further demise of the State's ability to provide food for its citizens***.
>
> FDO dated May 14, 2008 at page 33 (emphasis supplied).

After recognizing that the county had adopted a de-designation process "To assist them in their de-designation process the County developed a principle/values statement that put economic development as its primary goal to increase the tax bases of the county, city, and school districts", the GMHB chastised the County for giving equal weight to the economic development Goal in its de-designation formula. The GHB (and subsequently the courts) rejected giving equal weight to the economic development goal and held the following:

> Neither the economic development goal nor the recreational goal direct action as the agricultural conservation goal does. Nor does the economic development goal have any corresponding requirements. Also, the economic development goal stresses that growth should be encouraged in areas "experiencing insufficient economic development growth, all within the capacities of the state's natural resources, public services, and public facilities.
>
> ***Therefore, in using its discretion to balance the agricultural and economic development goals, the County's economic development goals cannot outweigh "the duty to designate and conserve agricultural lands to assure the maintenance and enhancement of the agricultural industry"***
>
> FDO at 36-37 (emphasis supplied)

The GMHB found that "the Supreme Court held that the GMA creates a mandate to designate agricultural lands because the Act includes goals with directive

language and specific requirements. ***The Board finds that the GMA economic development goal cannot supersede the agricultural mandate defined by the Supreme Court."*** FDO at page 2 (emphasis supplied).

Then after the case had gone through the courts, the GMHB relied on the Court of Appeals opinion and the held the following:

> Moreover, the County's overtly heavy reliance on economic factors when deciding whether land has long-term agricultural commercial significance runs afoul of several of the GMA's planning goals – namely, the County's duty to "designate and conserve agricultural lands." *Soccer Fields*, 142 Wn.2d at 558 (analyzing the GMA's "[n]atural resource industries" planning goal – RCW 36.70A.020(8)). In addition, the County's emphasis on economic factors violates RCW 36.70A.020(5), which requires counties to "[e]ncourage economic development . . . *within the capacities of the state's natural resources*, public services, and public facilities" (emphasis added).
>
> Final Decision and Order on Remand Dated March 11, 2014 at page 33.

The GMHB also should be noted that one Councilor has repeatedly stated that if land lies "fallow" then it is not meeting the requirements of the GMA. The FDO completely rejects that idea by stating:

> Petitioners point out, and the Report confirms, that farm income is a measure of owner intent. The Board agrees and recognizes that an owner of a farm that has prime soils or has been historically farmed may have a myriad of reasons for not producing a significant income. Using farm income as a measure of whether agricultural land is primarily devoted to agricultural products speaks to owner intent rather than whether the land is "used or capable of being used for production based on land characteristics". This prong speaks to land characteristics" not economic function. Farm income is not a measure that meets the second prong of the Supreme Court test. While landowner intent can be considered, according to the Supreme Court, as described supra, this factor is not determinative when designating agricultural land.
>
> FDO on Remand at page 47.

Therefore, if a landowner has land that is "used or capable of being used for production based on land characteristics" but does not use/is not using it to generate income, the failure to generate income (i.e. allows the land to lie fallow) the GMA still requires that it protected as agricultural land. The "protection/conservation" thread continues throughout the opinion and the FDO concluded as to another parcel that "de-designating agricultural land to increase the tax base of a city, does not address the needs of the agricultural industry, and ignores the conservation mandate established by the Supreme Court" and "the de-designation of this area...does not comply with RCW 36.70A.170(1) and RCW 36.70A.020 (8)". FDO at p 51.

The end result of *Karpinski v. Clark County* cited by Ms. Levanen is that 1) once lands are designated as agricultural lands, they are to be protected and need to go through an intensive de-designation process before being removed from the agricultural land inventory, 2) population growth is to be centered in urban areas that can more effectively and efficiently provide capital services and not in rural areas and resource lands and 3) when allocating population growth, protection of agricultural lands of LTCS is paramount and not superseded by consideration of economic factors.

Also, there is no evidence that allowing for lower minimum lot sizes in the rural area is necessary or will promote affordable housing as that term has been defined under the GMA and other statutory schemes. *See* MRSC links above.

I hope the Councilors find this of assistance. As always, I am happy to provide any follow-up should anyone have any question regarding the facts and legal analysis set forth in our comments.

Sincerely,

David T. McDonald
Attorney for Friends of Clark County