Planning Commission Workshop

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STAFF REPORT **RURAL HOUSING ALTERNATIVES**

Date: April 3, 2023

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Re: **Growth Management Act and 2.5 Acre Lots**

INTRODUCTION

At the January 10, 2023 Planning Commission meeting there was interest in the possibility of an RDD 2.5 zone (minimum lots size of 2.5 acres) as a means of increasing housing availability and affordability. Subsequent discussions have included expressions of opinion that RDD 2.5 zone would be much less constrained than RDD 5 zone (minimum lot size of 5 acres) and more useful at creating affordable housing than allowing more housing units as proposed under the Rural Housing Alternatives approach proposed by staff.

A separate memo addresses whether an RDD-2.5 zone would produce smaller, less expensive housing stock to address the current housing affordability crises. In contrast, this memo summarizes the Growth Management Act concerns with adopting such a zone. Ultimately, such a zone could be adopted only with measures to protect rural character and prevent sprawl—most likely by limiting it to areas in which the lots are already under five acres—and so it is probably not an effective strategy across the full extent of rural lands.

THE 1-in-5 RULE

The discussion of an RDD-2.5 zone flows logically from information staff have given the Planning Commission, namely that the prevailing view defining maximum rural density as one dwelling per five acres is mistaken and no longer the law. This statement is true. Until 2008, the Growth Management Hearings Board (GMHB) employed a bright-line 1-in-5-acres rule for rural density.

In a series of cases in 2008, 2010, and 2011, the Supreme Court and Court of Appeals held and then re-affirmed that this bright-line rule was beyond the GMHB's power; counties had the power to determine rural densities consistent with local rural conditions, and the GMHB must consider those conditions on a case-by-case basis.[1]

[1] *See Thurston County v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 329 (2008); *Suqamish Tribe, et al. v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 156 Wn. App. 743, 762, 235 P.3d 812 (2010); *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 144 (2011).

While the bright-line rule's demise led to a more nuanced review of rural development, many constraints remain on rural density under the GMA. For example:

- The pre-2008 cases did not go away entirely. The cases reinterpreted as turning on whether the Comprehensive Plan and regulations at issue contained sufficient measures to preserve rural character and prohibit sprawl of urban services. [2]
- The GMA itself requires rural character to let "open space, the natural landscape, and vegetation predominate over the built environment" and "provide visual landscapes that are traditionally found in rural areas and communities." [3]
- Rural land uses must be "compatible with the use of the land by wildlife and for fish and wildlife habitat" and "consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas." [4]
- Rural developments must be at a density that allows "the ability of natural systems to provide [septic and stormwater] services without compromising either public health or the vitality of the surrounding ecosystem." [5]
- Rural development must be "contain[ed] or otherwise control[ed]" to, in addition to the things above, protect critical areas and avoid conflicts with resource lands. [6]

SMALL-LOT GMHB DECISIONS

Multiple counties have tried to enact a rural density of greater than one unit per five acres. Kittitas County proposed a 3-acre-maximum in 2007, and by 2011 had litigated to the Supreme Court to obtain the ruling that bright-line rules were prohibited. Nevertheless, Kittitas County still had to demonstrate how the proposed 3-acre minimum lot size density matched rural character as defined under its specific county circumstances. After extensive public input, by 2013 Kittitas could not establish that a 3-acre minimum lot size would fit their character; it abandoned that lot size in favor of 5-acre to 20-acre rural lots, with smaller lot minimums only in LAMIRDs.[7]

Clallam County and Whatcom County fared better, but only with extensive constraints. Both counties proposed densities greater than one in five acres before 2008 and lost. Both counties returned later, after 2008, to demonstrate compliance by imposing strict measures on their smaller-lot zones to preserve existing rural character. Whatcom's 2-acre-minimum-lot zone survived in 2011 because it narrowly applied to existing areas with small lots, and posed very little prospect for continued development.[8] Clallam County made its density one in five acres, but allowed a tailored overlay of up to

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[2] *See 1000 Friends of Thurston County n/k/a/ Futurewise v. Thurston County,* No. 05-2-0002, Order on Remand Finding Compliance (February 2018) at 11-13 ("[A] review of those decisions discloses that the Board's decisions turned on a lack of RCW 36.70A.070(5)(c) 'measures' to protect rural character.").

[3] RCW 36.70A.030(23).

[4] *Id.*

[5] WAC 365-196-425(4)(d).

[6] RCW 36.70A.070(5)(c).

[7] *Kittitas County Conservation Coalition et al. v. Kittitas County*, Nos. 07-1-0004c and 07-1-0015, Compliance Order [Post Court Remand] (May 31, 2013) at 10-11.

[8] *Futurewise v. Whatcom County et al.,* No. 05-2-00013, Order Following Remand from the Supreme Court (Sept. 9, 2011) at 4-9.

2.4-acre density if 70% of the lots within 500 feet were already less than five acres in size, not including an lots within LAMIRDs or urban growth areas. [9] These small-lot zones had the required "measures to protect rural character" because they mostly reflected existing small lots, rather allowing larger lot areas to yield small lots.

Indeed, even Whatcom's 2011 success did not last long. A year later, some of its small-lot zones again landed it in noncompliance due to their failure to adequately safeguard surface and groundwater resources from runoff.[10] This second Whatcom case, which eventually became the now-famous *Hirst* decision on separate grounds, is not directly applicable to Lewis County due to the intense amount of study showing stormwater runoff concerns in the affected area. Nevertheless, it shows that the GMA constraints listed in bullet points above must be addressed through real, effective measures for rural land use regulations to survive.

This lesson applies with special force to constraining "leapfrogging" urban growth outside of urban growth areas. In a 2009 case, the City of Wenatchee took Chelan County to the GMHB, arguing that Chelan County's small-lot zoning and clustering provisions in rural areas near the UGA would prevent the city from being able to properly expand the UGA in the future.[11] Ultimately, the important question was whether Chelan's changes to its rural development regulations would "cumulatively create demands for urban levels of public services and facilities to serve the new 2.5 acre (or smaller) lots."[12] Finding evidence that it would when near UGAs, the GHMB held Chelan to have violated the GMA's goals about limiting spread of urban services in the rural area and reducing sprawl.[13] "[T]he GMA," it concluded, "specifically prohibits urban development outside of the UGA regardless of the County's desire to provide more affordable homes or protect property rights." [14]

At the end of the day, an RDD-2.5 zone that lacked specific constraints to match it to existing small-lot areas, or to prevent doubled density near urban areas so as to permit leapfrogging from UGAs, would be highly suspect under these post-2008 cases (which are not based on the forbidden bright-line 1-in-5 rule). Opponents of small-lot zones would call them the quintessential form of sprawl. Only regulations that had clear, overt, and explicit measures to protect existing rural visual character and prevent sprawl—i.e., regulations that would severely limit the development potential of the regulations—would be able to counteract this criticism and survive. The most common form of such measures would be to follow Whatcom and Clallam's lead, and tailor the RDD-2.5 zone to existing small-lot areas where they would provide little opportunity for future subdivisions.

OPTIONS FOR LEWIS COUNTY

One option would be to follow Whatcom and Clallam's lead, and use a tailored RDD-2.5 zone where there are existing small-lot areas and there would be little opportunity for future subdivisions.

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[9] *Dry Creek Coalition and Futurewise v. Clallam County ("Dry Creek")*, No. 07-2-0018c Compliance Order (LAMIRDs and Rural Lands) (Nov. 3, 2009) at 7-8, 12.

[10] *Futurewise et al. v. Whatcom County*, No. 11-2-0010c, Final Decision and Order (Jan. 9, 2012) at 42-45.

[11] *City of Wenatchee v. Chelan County et al.*, No. 08-1-0015, Final Decision and Order (March 6, 2009).

[12] *Id.* at 23.

[13] *Id.* at 24, 28.

[14] *Id.*

A more effective strategy for existing small-lot areas would be to make sure they are properly defined as LAMIRDs in the 2025 Comprehensive Plan update. This is because, under a new change in the law, infill in LAMIRDs is allowed at any density permitted by the existing government services. [15] It is also possible that Lewis County's clustering provision could be made slightly more generous, to allow some additional small lots in large-lot areas consistent with received GMA practice. [16] Both options will be considered as part of the periodic 2025 Comprehensive Plan update process.

In contrast to an RDD-2.5 zone, the proposed Rural Housing Alternative approach is an innovation that preserves the 5-acre minimum lot size. It has explicit measures within it to preserve rural character and prevent sprawl, despite it being designed to apply in large-lot areas across the RDD zone generally. Indeed, its location in large-lot rural areas is a feature, because it would preserve the open rural feel through clustering. Because it wears its constraints on its face, it is more likely to survive challenge than an RDD-2.5 zone applied in large-lot areas.

STAFF RECOMMENDATION

Based on the analysis, exploring a generally applicable RDD-2.5 zone would likely not be worth legal battle given the past decisions. Staff recommend continuing with the process of vetting the Rural Housing Alternatives with stakeholder groups and the public. Staff also recommend considering options through the 2025 Comprehensive Plan update including properly designating all LAMIRDs.

NEXT STEPS

The engagement and vetting will take place March – May 2023. An update will be provided to Planning Commission at the July 11, 2023 meeting. Staff anticipate bringing draft development regulations forward to Planning Commission at a workshop on July 25, 2023.

Scoping for the 2025 Comprehensive Plan update will begin later this spring and through the summer.

[15] *See* Laws of 2022, Ch. 220, sec. 1 (newly permitting "[a]ny development or redevelopment in terms of building size, scale, use, or intensity . . . subject to confirmation from all existing providers of public facilities and public services of sufficient capacity of existing public facilities and public services to serve any new or additional demand from the new development or redevelopment.").

[16] Clallam County enacted a clustering provision more generous than Lewis County's as part of the case described herein. *Dry Creek*, at 8. The provision applied only in limited zones, however, while Lewis County's applies in all RDD and Agricultural Resource Zones. So, Lewis County's is not necessarily less generous overall.