



Skagit County Planning & Development Services

DALE PERNULA, AICP *Director*

JACK MOORE, CBCO *Building Official*

Supplemental Staff Report

From: Dale Pernula, AICP, Director

Re: Bayview Ridge Subarea Plan + Development Regulations and Airport Environs Overlay

Date: October 15, 2014

This memo addresses public comments received during the written comment period between September 9 and October 9, and testimony received at the public hearing on October 7.

Public Comments

The written comments below were received at the public hearing or during the public comment period and are available on the proposal website at www.skagitcounty.net/bayviewridge.

<i>Name</i>	<i>Organization</i>	<i>Method</i>
Ellen Bynum	Friends of Skagit County	Testimony + email (10/9/14)
Carol Ehlers	n/a	Testimony + map and note (10/8/14)
Patrick Fraser	n/a	Testimony
Patrick & Linda Fraser	n/a	Email (10/9/14)
Gordon Henderson	n/a	Testimony
Larry & Ray Jensen	n/a	Letter (10/7/14)
Larry Jensen	n/a	Testimony
Dale Jenkins	n/a	Email (9/14/14)
Kim Smith Johnson	n/a	Email (10/9/14)
Thomas Johnson	n/a	Email (10/7/14)
Thomas Johnson	n/a	Email (10/9/14)
Bill Knutzen	Knutzen LP	Testimony + letter (10/9/14)
Roger Knutzen	Knutzen LP	Testimony + handout
Kim Lien	Knutzen LP	Testimony
Bruce Lisser	Knutzen Family + himself	Testimony + letter (10/8/14)
Tom Moser	Knutzen Family	Testimony
Tim Rosenhan	n/a	Testimony + email (10/8/14)
Jon Sitkin	John Bouslog, Bouslog Investments LLC, JBK Investments LLC	Testimony + letter (10/7/14)
Lisa Soneda	n/a	Testimony + email (10/9/14)

Responses to Public Comments

🗨️ **General opposition to urban residential at Bayview Ridge.**

The proposed amendments are responsive to this concern. The proposal retains some limited opportunity for infill development near the existing residential development but would re-designate undeveloped BR-R to BR-LI, or exclude it from the UGA and re-designate to Rural Reserve, which allows low-density residential development, does not require provision of expensive sewer infrastructure, and does not require master planning or a PUD ordinance to proceed with development.

🗨️ **Concern about buffer between existing residential development and BR-LI. Suggestion: retain BR-CC and use a community park as buffer between BR-LI and existing residential development.**

Significant forested buffer currently exists on the east side of the existing residential development. The proposal requires retention of much of that mature vegetation as BR-LI is developed.

The proposal allows parks and public spaces in BR-LI. While the proposal requires trails and small pocket parks to support the commercial/industrial development and its workers, the County can only *require* the provision of community or neighborhood parks to serve residential uses when large-scale residential development occurs that creates those needs. The County cannot require new neighborhood parks to serve *existing* residential development. The County could purchase land, develop a park, and operate it as part of the County Parks Department, but that is not currently planned, funding sources are unknown, and such parks would not be necessary to serve the proposed *new* development.

At the community meeting, many residents expressed a desire for an indoor pool or other recreation facility at Bayview Ridge. Staff suggested that the community could create a parks and recreation special purpose district to fund and operate such a facility, which is how the only other publicly owned pool in the County (Fidalgo Pool and Fitness Center) is managed.

🗨️ **This proposal was developed without the support of elected officials, i.e., by planning department staff.**

On January 10, 2014, the Port of Skagit Commissioners adopted [Resolution 14-01](#) endorsing airport protection measures, encouraging expansion of light industrial opportunities, and supporting retaining the UGA status of the subarea. On March 18, 2014, the Board of County Commissioners directed the Planning Department by motion to prepare a plan to reconfigure the Bayview Ridge Subarea to implement the Port of Skagit's recommended changes to the Airport Environs Overlay, move industrial zoning to the eastern portion of the subarea, reduce the residential zoning, and shrink the urban growth area boundary. The Board confirmed that action on May 19, 2014, as part of the 2013 Comprehensive Plan Amendments docketing resolution (Resolution R20140139) which directed Planning and Development Services to develop the current proposal for consideration as part of the docket. The Board's action in requesting a plan for a light industrial-focused UGA is also consistent with Envision Skagit recommendations and WSDOT Aviation Guidelines.

The proposal follows the Port of Skagit's January 2014 resolution, which expressly provided:

3. The Port Commission respectfully suggests that Skagit County review land use within the Bayview Ridge UGA and, where appropriate, adopt additional industrial land use designations for land in the UGA between Skagit Regional Airport and existing urban density residential development on Baview Ridge.

🗨️ **Undeveloped BR-R should be developed at one dwelling unit per acre density.**

One commenter desired a density of one dwelling unit/acre. One dwelling unit/acre is neither urban nor rural density, and is contrary to the goals and policies of the Growth Management Act (GMA) and is illegal under statute, GMHB decisions, and case law. However, landowners in Rural Reserve could create one-acre residential lots using the CaRD cluster subdivision process in SCC 14.18.300, but the remaining acreage would need to be reserved to maintain an average maximum density of 1 unit per 5 acres.

🗨️ **The Port of Skagit supports urban residential in Zone 6.**

On January 10, 2014, the Port of Skagit adopted [Resolution 14-01](#) endorsing airport protection measures, encouraging expansion of light industrial opportunities, and supporting retaining the UGA status of the subarea. The Port resolution expressly acknowledges that urban residential density is likely not feasible or appropriate within the UGA. *See* Recitals N-T, and Resolution paragraph 3. The continued support for UGA status is not the same as continued support for urban-level residential. *See* Resolution paragraph 4.

The subsequent letter from the Port to the County Commissioners (June 2, 2014, included in the public comments) indicates the Port thinks that some properties “along the north side of Bayview Ridge” are logical for residential uses. Their letter does not advocate BR-R urban residential zoning or any particular density; it does advocate “find[ing] an appropriate level of residential use compatible with Skagit Regional Airport.”

🗨️ **Airport Zone 6 is not unsafe.**

Zone 6 is the least restrictive of the Airport Compatibility Zones. Despite the relative unlikelihood of an accident within this zone, WSDOT recognizes it as an area potentially affected by airport activities and appropriate for more restrictive use regulations. In developing this proposal, the County relied heavily on the Port and WSDOT guidelines; they are the experts in airport land use safety and compatibility, not the County.

🗨️ **WSDOT Aviation guidelines are not regulatory.**

The County has never asserted the WSDOT Airport and Compatible Land-Use Program Guidebook is a regulatory document but they are important guidance prepared by experts regarding appropriate land uses near an airport. RCW 36.70A.510 and 36.70.547 require the County to “through its comprehensive plan and development regulations, discourage the siting of incompatible uses adjacent to...general aviation airport[s].”

🗨️ **The WSDOT Aviation guidelines, page F-3, allows up to 12 units/acre in zone 6.**

The [WSDOT 2011 Airport and Compatible Land Use Guidebook](#), Appendix F, provides that “rural centers” with single-family residential up to 12 units per acre should be “Limited” in zone

6. The reader should refer to the more specific residential density table on page F-1, which clearly provides that residential density in zone 6 should be 1 unit per 5 acres outside a UGA, or high density mixed use development (15+ units per acre) inside a UGA.

🗨️ **The Airport Environs Overlay does not extend to the northeast.**

Incorrect. The AEO does follow the runway to the northeast. The AEO map lines were drawn by an engineering firm hired by the Port and follow the WSDOT guidelines for how the lines should track the runways and airport environs.

🗨️ **Federal road classification maps has errors.**

Friends of Skagit County cites a federal road map that allegedly has errors. Staff is not familiar with that map. The map is not included in the subarea plan; any errors in the map are therefore irrelevant for the purposes of consideration of adoption of the subarea plan.

🗨️ **Ovenell Road is not appropriate for trucks**

Planning and Public Works staff agree. The subarea plan does not intend for Ovenell to be a significant truck route, and staff does not see a need to make it one.

🗨️ **Criteria for excluding parcels from the proposed UGA boundary is unclear.**

The September 9 staff report explains:

The new UGA boundary is based on a combination of current parcel boundaries and slope contours. Flat undeveloped areas suitable for industrial development are retained inside the UGA and designated BR-LI. Sloping undeveloped areas that are unsuitable for industrial development are excluded from the UGA and designated Rural Reserve.

Higher-density residential within the UGA would not conform to WSDOT guidelines unless greater than 15 dwelling units per acre. See above discussion.

🗨️ **Exclusion of only one landowner is randomly determined and not well justified.**

The premise of this comment from Friends of Skagit County is false. Many landowners inside the existing UGA boundary would be outside the proposed UGA boundary, not just one landowner. See the [comparison of existing to proposed land use map](#) from the initial staff report, and the attached map showing large lot landownership (including outside the proposed UGA boundary).

The proposed UGA boundary is based on the suitability of property for industrial development (principally based on topography) and to follow, when possible, existing parcel boundaries. See above response.

🗨️ **Residential property at BVR has been tied up for 16 years without compensation.**

Properties currently zoned BR-LI may be developed today. Existing code allows division up to four lots, depending on parcel size, and development of each. Under the proposal, Rural Reserve property could be developed at one unit per every five acres and at small lot sizes with a CaRD, and without the need to provide sewer infrastructure.

For further discussion, please see the attached August 22 letter from Civil Deputy Prosecuting Attorney to Tom Moser, attorney representing Knutzen Properties.

Additionally, many properties have been enrolled in the Current Use taxation program which provides significant property tax reductions for maintaining the property in some form of open space. For example, one 60-acre parcel pays \$310 in property taxes annually.

🔊 **Development regs: 250-ft setback from residential should be modified if there is an intervening building.**

Staff agrees with Sitkin's suggested code change.

🔊 **Development regs: Language about uses allowed on Peterson Road should be modified for clarity.**

Staff agrees with the suggested language change.

🔊 **Development regs: Maintenance and repair of utility lines, with no restriction on size of utilities, should be allowed without special use permits.**

Staff agrees with the suggested code change.

🔊 **Development regs: Solid waste handling facilities should not be allowed in BR-LI.**

Staff agrees with the suggested code change. If the Board of Commissioners intends to move this change forward, an additional public comment period will be required.

🔊 **Development regs: Where trails are required, they should be contained within the right-of-way.**

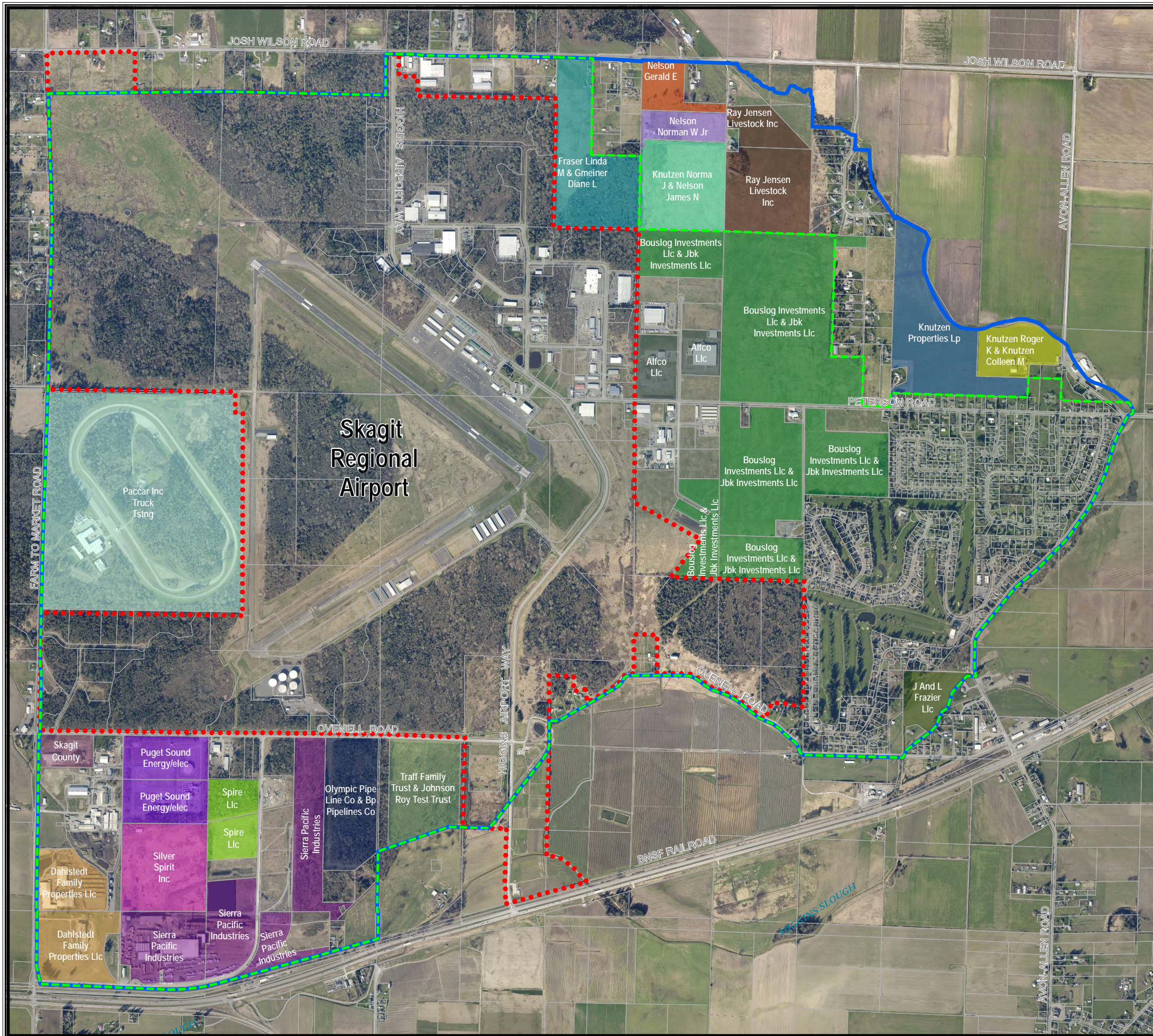
Staff agrees and will suggest language to implement this clarification.

🔊 **Development regs: Street standards for retail along Peterson Road are cost prohibitive.**





Staff agrees and will suggest alternative street standards.

Attachments

- Bayview Ridge Large Lot Ownership Map (including areas outside proposed UGA boundary)
- Letter from Tom Moser to Prosecuting Attorney Rich Weyrich re: Knutzen Properties (July 22, 2014)
- Letter in reply from Civil Deputy Prosecuting Attorney Ryan Walters to Tom Moser (August 22, 2014)

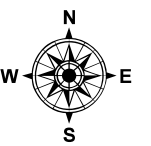
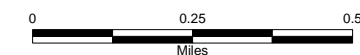


LEGEND

-  Existing Urban Growth Area Boundary
-  Proposed Urban Growth Area Boundary
-  Port of Skagit County Boundary
-  Private Large Lot Ownership
10 Acres or Larger

Aerial Photo 2013

October 9, 2014



BAYVIEW RIDGE SUBAREA PLAN

**Existing UGA
Private Large Lot Ownership**

Figure 1-4b

Advocates Law Group, PLLC

Experience Counts and Cost Matters

C. Thomas Moser • Attorney at Law
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July 22, 2014

Via Email and Hand Delivery

Honorable Richard Weyrich
Skagit County Prosecuting Attorney
Skagit County Courthouse Annex
Mount Vernon, WA

Re: Bayview UGA

RECEIVED
SKAGIT COUNTY
PROSECUTING ATTORNEY
2014 JUL 23 PM 2:13

Dear Mr. Weyrich:

I represent Knutzen Properties, LP owners of approximately 60 undeveloped acres within the Bayview UGA which is designated BR-R “Bayview Ridge Residential”. The Knutzen family has owned the land for three generations. The current proposal by the County is to remove the property from the UGA.

This letter is to advise the County that this proposed action, together with the process that started in 1999 constitutes an unconstitutional takings of the Knutzen property. My purpose is to request that your Civil Division consider the situation my clients are facing within the context of State and Federal law on inverse condemnation by regulatory actions.

I only recently became involved in this process and I’m aware that lawyers in your office are more familiar with the details and history than I am at this time. In addition there are staff members with the Planning and Development Services Department that have worked on this project extensively. Therefore my reference to the history of this project will be brief and not intended to fully detail the several steps that have been taken by the County. The process started in 1999 with the proposal to create the Bayview UGA. After much study and appeals the decision was made to create the UGA, but then put the residential component of the UGA in a “hold” position by requiring that a PUD ordinance be enacted before the owners of residential designated property could develop. The County created a “de factor moratorium¹” on residential development in 2006. SCC 14.16.340(6). This process has essentially deprived the owners of residential UGA property of any meaningful right to develop the land, and has placed what is now a 15 year moratorium on development.

Presently the County has abandoned the effort to enact a PUD ordinance and is moving in just the opposite direction of removing the Knutzen property from the UGA. We understand this to be further

¹ An accurate use of the term was employed by the Planning and Development Service Direct, Dale Pernula at a hearing last year in describing the prohibition on development in the UGA by the SCC provision.

regulatory action to deprive the Knutzen family of economic value. All this time the County put a hold on subdivision with the adoption of the de factor moratorium has kept the property in virtual suspension.

Skagit County is not unfamiliar with the claim of takings and has been involved in extensive litigation of this issue in the past. *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987). In *Orion* the County was eventually successful but the facts involved are significantly different than what is presently involved in the Knutzen property, including the fact that Orion's property was tidelands in Padilla Bay. The *Orion* case can be quoted for many elements for the law on this subject, but the Supreme Court did state:

Police power actions limiting the use of private property can constitute a de facto exercise of eminent domain requiring just compensation.

Orion Corp. v. State, 109 Wn.2d 621, 645, 747 P.2d 1062, 1075 (1987)

More recently the Washington State Court of Appeals restated the elements of an inverse condemnation proceeding stating:

To prevail on an inverse condemnation claim, a party must show that there has been (1) a taking or damaging (2) of private property (3) for public use (4) without just compensation having been paid (5) by a governmental entity that has not instituted formal proceedings. *Fitzpatrick v. Okanogan County*, 169 Wash.2d 598, 605–06, 238 P.3d 1129 (2010).

Wolfe v. State Dep't of Transp., 173 Wn. App. 302, 307, 293 P.3d 1244, 1247 (2013)
review denied, 177 Wn.2d 1026, 309 P.3d 504 (2013)

We believe that what has happened since 1999 is the economic damage to private property without compensation by the County's imposition of development regulations and creating a de factor moratorium pending the creation of a PUD ordinance. All the elements of inverse condemnation are present with the threat that the entire UGA will be removed.

The Bayview UGA was revised and readopted by the Board of Commissioners in December 3, 2013 and the following month the Port of Skagit adopted a Resolution requesting the County adopt new plans and development regulations to comply with WSDOT guidelines². In one month the County has changed direction on fifteen years of work, studies and appeals to remove the Knutzen property from the UGA based on a guideline request from the Port. The County's response to the Port's request effectively shields the Port from the responsibility of paying the landowner for the dramatic loss of economic value and from the responsibility to bring a condemnation action to create easements on the Knutzen property to achieve the goals the Port apparently desires. The Port wants the County to do for it what the Port is unwilling to do for itself by paying the impacted property owners for their economic loss.

It is common that municipal airports pay adjacent landowners for property for aviation and other easements where it is anticipated the property will be effected by airport activity. In fact the FAA has

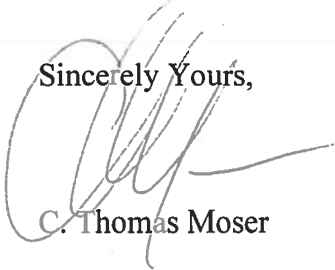
² Memorandum to Board of Commissioners from Dale Pernula, March 13, 2014.

promulgated guidelines on this subject to assist airports in acquiring such property. See *Land Acquisition and Relocation Assistance for Airport Projects*, FAA Order 5100.37B. The Port has put the County to the task of regulating the Knutzen property through development regulations that remove almost all development potential, thereby exposing the County to inverse condemnation claims. Leading Washington cases involving airports and inverse condemnation include *Martin v. Port of Seattle*, 64 Wn. 2d 309 (1964), *Highline School District v. Port of Seattle*, 87 Wn. 2d 6 (1976) and *Robinson v. City of Seattle*, 94 Wn. 2d 479 (1980).

I suggest that the County is better served by maintaining the Bayview Ridge Subarea Plan as it was revised in December 2013 and allow the Port to deal with my client directly in determining how the Knutzen family should be compensated for granting an easement or other device to mitigate any concerns the Port may have for future residential development in the UGA.

Please give me a call if you have any questions.

Sincerely Yours,



C. Thomas Moser

CTM/tr
c: clients



Skagit County Prosecuting Attorney

Richard A. Weyrich

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August 22, 2014

C. Thomas Moser
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tmoser@advocateslg.com

via email

Dear Mr. Moser:

We have received and carefully considered your letter of July 22 regarding your client, Knutzen Properties LP, and its real property interests within the Bayview Ridge Urban Growth Area (“UGA”). Our response follows.

Knutzen Properties LP (“**Knutzen**”) owns parcel P35391, consisting of approximately 60 acres, most of which lies within the Bayview Ridge UGA. A small portion lies outside the UGA and is zoned Ag-NRL.

In 1997, the County designated an Urban Growth Area at Bayview Ridge, which was immediately appealed to the Growth Management Hearings Board. The appeal remained pending and open until 2009, when it was dismissed. As part of the long process that eventually led to a GMA-compliant Bayview Ridge Subarea Plan, the Knutzen parcel was zoned Bayview Ridge-Residential (“**BR-R**”).

However, as you are aware, this was a preliminary step in an area-wide planning process. Skagit County’s development code allows 4-6 units per acre in the BR-R zone of single-family dwellings, duplexes, townhouses, apartments, or condominiums.¹ Consistent with the order of the Growth Management Hearings Board, the code requires planned unit development for land divisions into five or more lots.² Regulations to allow planned unit development do not yet exist.³

Recently, Skagit County Planning and Development Services proposed revisions to the Bayview Ridge Subarea Plan that would pull back the UGA boundary. The Knutzen parcel would be one of several rezoned to Rural Reserve, which allows one unit per 10 acres, or two units per 10 acres with clustering. The Department has not yet formally proposed these revisions but expects to release a formal proposal this fall for public comment and review and recommendation by the Planning Commission and eventual decision by the Board of County Commissioners.

Your letter alleges (1) a claim of inverse condemnation in favor of Port of Skagit and (2) that the proposed revisions to the Subarea Plan and development regulations would “remove almost all development potential...”

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To prevail on an inverse condemnation claim, a party must show that there has been (1) a taking or damaging (2) of private property (3) for public use (4) without just compensation having been paid (5) by a governmental entity that has not instituted formal proceedings.⁴ A “taking” is defined as deprivation of economically viable use of their land.⁵

An analogous situation was considered by *Jones v. King County*, in which a landowner alleged that King County, as part of an area-wide rezoning effort, took property by inverse condemnation.⁶ In *Jones*, the landowner purchased property zoned for 1 residence per 35,000 square feet (i.e., roughly 1 house per $\frac{3}{4}$ acre), intending to develop the property consistent with then-existent zoning. As part of an area-wide planning process, King County downzoned the property to 1 residence per 5 acres.⁷ Holding that the landowner had not been deprived of economically viable use of his land, the appellate court rejected the landowner’s takings assertion.⁸

Knutzen is not deprived of economically viable use of its land under the new proposal. Existing code does not prohibit Knutzen from developing its parcel; for example, your client might divide parcel P35391 into four lots and build four single-family dwellings on each of those four lots. Moreover, under the new proposal, Knutzen’s parcel would enjoy the same Rural Reserve development rights as thousands of other acres in the county. Knutzen might then divide parcel P35391 into 12 lots with single-family dwellings on each, and, being outside the UGA, would not have to provide expensive sewer infrastructure.

We understand that your client would prefer to develop at three units per acre with sewer.⁹ But the Growth Management Act prohibits such a development pattern: urban density must be at least four units per acre and rural density may be no more than ~~five units per acre~~ [correction: one unit per five acres] while sewer is required inside the UGA and prohibited outside the UGA.¹⁰

It is also useful to consider that this is still an ongoing legislative land use process, and your client’s claims are therefore not ripe for consideration. Exhaustion of administrative remedies is required before a court may consider a takings claim, which is well established under Washington law.¹¹ Your client is invited to participate in the land use planning process expected to take place before the Planning Commission this fall and argue its case for the best land use plan for Bayview Ridge that will benefit the entire Skagit County community.

Sincerely,



Ryan Walters
Civil Deputy Prosecuting Attorney

cc: Board of County Commissioners
Dale Pernula, Planning Director
Patsy Martin, Executive Director, Port of Skagit

¹ SCC 14.16.340(2).

² SCC 14.16.340(6)(a).

³ SCC 14.18.400.

⁴ *Wolfe v. Dep’t of Transportation*, 173 Wn.App. 302 (2013).

⁵ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

⁶ *Jones v. King County*, 74 Wn. App. 467 (Div. 1, 1994).

⁷ *Id.* at 471-72.

⁸ *Id.* at 478 (“Jones still maintains all the rights of ownership and can still develop the land, even if not to the extent previously desired. Thus, the property still has economic viability.”).

⁹ Letter from Bill Knutzen to Skagit County Commissioners (July 22, 2014)

¹⁰ RCW 36.70A.110(4).

¹¹ *KSLW v. City of Renton*, 47 Wn. App. 587, 591 (1986).