

MEMORANDUM

TO: Skagit County Commissioners

CC: Rich Weyrich

FROM: Jay P. Derr and Tadas Kisielius

DATE: June 21, 2013

RE: Anacortes UGA Amendment Docket Proposal

I. Introduction and Summary.

You asked us to assess a 2012 docket proposal that the City of Anacortes submitted as part of the County's annual consideration of comprehensive plan amendments. In particular, you asked us to evaluate whether relevant state and local requirements either require or prohibit the County from docketing the City's request for further consideration. In its proposal, the City asks the County to expand the Anacortes UGA to include six parcels ("Subject Property") currently zoned rural reserve. If the proposal is approved, the Subject Property will also be designated and zoned for industrial use. The application initially disclosed that a private company seeks to construct a beverage bottling facility on portions of the Subject Property. However, the City amended its application to remove the project-specific aspects of the proposal.

As explained further below, the County's docketing decision of the City's proposal is a legislative decision that is subject to a high standard of deference. Given the facts of this proposal, either decision to docket or not docket the application is within the County's discretion and, in our opinion, would be legally defensible, when accompanied by appropriate findings and explanation. The County's code criteria do not mandate an outcome and there does not appear to be a more general GMA mandate that requires the proposal to be considered now, outside of the regularly scheduled 7-year GMA comprehensive plan amendment process. As such, the County has the legislative discretion to make either choice. For that reason, this memorandum includes proposed findings supporting a decision to docket as well as findings supporting a contrary decision to reject or defer the proposal. It is up to the County Commissioners to evaluate these alternative findings, supplement or revise as you deem appropriate, and make a decision.

II. Docketing Decision is Subject to a High Deferential Standard.

A decision whether to docket a proposed comprehensive plan amendment is a legislative discretionary act. While a county may consider amendments annually, the GMA does not

require jurisdictions to review and amend their plans annually. RCW 36.70A.130(2)(a). As such, the docketing decision is subject to a high level of deference when appealed.¹ Absent a duty to adopt a comprehensive plan amendment pursuant to the GMA or other law, the Growth Management Hearings Board does not typically have authority to grant relief to parties appealing docketing decisions.²

In this case, there is nothing in the information submitted that demonstrates that Anacortes' proposal to expand the UGA is mandated by the GMA and, as such, the County's decision on the proposal (to docket, reject or defer) would be afforded significant deference by the Board and a reviewing court. Even if the County was to accept the City's assertion that additional industrial land is needed to accommodate existing growth projections, that fact might support but will not require docketing outside the standard update cycle.

III. County Code Governing Docketing Decisions.

The County's decision to include a proposal as part of the current year's docket of amendments rests with the Board of County Commissioners with a recommendation by the County staff. SCC 14.08.030. Two code sections include criteria by which the County evaluates its decision to defer, reject, or include a proposal as part of the current year's docket of amendments. First, SCC 14.08.030(3) includes specific criteria that guide the staff recommendation whether to include a proposal as part of the current year's docket. In addition, SCC 14.08.090(6) expressly authorizes the Board of County Commissioners to defer action on any specific comprehensive plan amendment in certain circumstances.

In general, many of the criteria in SCC 14.08.030(5) and SCC 14.08.090(6) reflect the broad discretion available to the County in choosing whether to reject, defer or include a proposal in the docket. For example, the assessment in SCC 14.08.030(5)(a) of whether the Department can reasonably review the proposal in light of staffing issues and allocated budget as well as the determination in SCC 14.08.030(5)(c) of whether a proposal would be "more appropriately addressed" during the regular review cycle, require the County to balance and weigh its resources, the scope of the proposed amendment, and policy considerations. Similarly, all of the criteria in SCC 14.08.090(6) give a broad range of reasons why the County could choose to defer action on a proposal that that would be given significant deference.

¹ *Stafne v. Snohomish County*, 174 Wn.2d 24, 38, 271 P.3d 868 (2012). The Board has indicated that a GMA mandate that could overcome the general rule must be an "expressed, explicit mandate." *Cainion v. Bainbridge Island*, CPSGMHB No. 10-3-0013 Order on Motions to Dismiss (Jan. 7, 2011) at 2.

² *Stafne*, 174 Wn.2d at 37-38. See also *Concrete Nor'West v. Whatcom County*, WWGMHB 12-2-0007 Order Denying Certificate of Appealability (Dec. 12, 2012) at 4 ("Rather than establishing a new interpretation, *Stafne* and this Board's decision in the present matter merely restated what has long been the Board's GMA interpretation. Local jurisdictions generally have the discretion to reject proposed comprehensive plan amendments absent GMA or comprehensive plan duties, GMA statutory amendments, or appellate court decisions that require a jurisdiction to amend its comprehensive plan.")

Even those several remaining criteria in SCC 14.08.030(3) that appear somewhat more objective do not necessarily mandate a determination to reject the proposal if they are not satisfied. For example, even if an application does not include sufficient information or provide adequate detail such that SCC 14.08.030(3)(e) is potentially implicated, the County could theoretically choose to docket the proposal and seek additional information from the applicant in the subsequent stages of the application review process.³ Similarly, with the exception of a patently illegal proposal, if there is potential legal inconsistency or procedural flaw in the proposal that could prevent its implementation such that SCC 14.08.030(5)(d) would support rejection, the County could conceivably utilize the ensuing application process to better evaluate the legal flaws or consistency concerns and allow the applicant to reshape the proposal.⁴ And, of course, any decision now to docket does not require subsequent approval. It merely initiates a process of thorough review and evaluation.

Thus, in general, the County's criteria largely leave the County broad discretion to reach a broad range of conclusions. The County could feasibly justify either a decision to reject the docket proposal, defer the proposal or to add the proposal to the docket for further review based on these criteria in SCC 14.08.030(3) and SCC 14.08.090(6).

IV. Findings Supporting a Decision to Docket the City's Proposal.

If the Commissioners decide to docket the City's proposal for further consideration, in our legal opinion, the County will need to analyze known project-specific aspects of the proposal during the substantive review of the legislative proposal on its merits – a process that would occur after docketing, not before.

The County's code indicates that the County should consider the rezone and the UGA amendment together.⁵ Moreover, the Code governing rezones requires some consideration of known project-specific aspects of the proposal, even though project permits will be processed later.⁶ Additionally, it is our opinion that the County code and SEPA likely require the County

³ The Code expressly authorizes the County to seek more information from an applicant, even after the proposal is docketed. *See* SCC 14.08.030(3)(e)(i).

⁴ Both the GMA and the County Code authorize an applicant to revise a proposal under consideration, so long as the public is given adequate opportunity to comment on the revised proposal. *See, e.g.,* RCW 36.70A.035(2)(a); SCC 14.08.090. Implicit in these provisions is the notion that proposals need not be static and can evolve during the public process up until final substantive action on the underlying proposal.

⁵ SCC 14.08.020(7)(a) ("All rezones shall be processed together with a corresponding Comprehensive Plan amendment, except that rezones located wholly within an existing UGA and contemplating no UGA boundary modification shall be considered to stand alone and shall not require a corresponding Comprehensive Plan amendment."). As indicated in SC 14.08.020(1) the phrase "Comprehensive Plan Amendment" includes "map amendments proposing modification of an Urban Growth Area Boundary."

⁶ For example, the Code requires the rezone application to provide a "detailed development proposal that is consistent with the applicable designation criteria." SCC 14.08.020(7)(b). Additionally, code allows the County to condition a commercial or industrial rezone upon construction of a specific project within a 2 year time frame and indicates that "commercial and industrial zoning is not intended for speculative purposes." SCC 14.08.020(7)(c). All of these code provisions imply that some level of project-specific analysis is required in

to also consider known aspects of the specific bottling plant (in addition to more generalized impacts associated with potential industrial development) during the County's environmental review of the UGA amendment.⁷ While the level of detail of the County review at this stage may not require the same level of detailed review associated with a subsequent project permit application, consideration of the known project-specific components of the proposal is appropriate. In particular, the County will likely need to address potential impacts to water, critical areas and traffic resulting from the project in addition to general impacts associated with industrial development, in the abstract. Additionally, the review on the merits will likely involve review of the City's population allocation and commensurate employment needs to support the UGA application. Factors to consider will include assessment of industrial/commercial capacity and assumptions upon which the application is based. In light of the application materials, this will likely require obtaining additional information from the applicant. SCC 14.08.030(3)(e)(i). It is our understanding that, in the past, the County has required a proponent or applicant to provide funds adequate for the County to obtain any necessary consultant assistance to accomplish this review.

Importantly, the need to consider the project-specific aspects of the proposal and the need to get more information from the applicant does not mandate an outcome on the County's docketing decision. Because of the discretion afforded to the County, the full range of decisions on the docketing proposal is legally defensible. The County could arguably reject or defer the proposal due to the need to get more project-specific information, as indicated in Section V, below. The County could also docket the proposal and consider project-specific aspects of the proposal, requesting further information from the applicant through the review process. The decision to proceed, defer or reject the proposal on those grounds is therefore within the County's discretion.

Accordingly, should the County choose to docket the proposal for further consideration, the County's decision should include findings that articulate the need for more information and analysis, similar to the following:

- Decision to Docket and Scope of Review.
The County Commissioners hereby docket the proposal and will proceed to review the proposal on the merits under the following parameters. The County's review of

conjunction with a rezone. The ability to condition the rezone upon a development of a project within two years suggests that some level of uncertainty is not a bar to a successful rezone.

⁷ See SCC 14.08.040(3) (environmental review "shall consolidate as much as practical, site-specific SEPA review with review of the entire docket of proposed Comprehensive Plan amendments to ensure adequate consideration of cumulative effects of the proposed amendments."). See, generally, WAC 197-11-704(b)(ii) (requiring environmental review of "probable, significant adverse impacts" resulting from amendments to development regulations and comprehensive plan); WAC 197-11-055(2)(County must prepare its threshold determination "at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified."); WAC 197-11-055(2)(a)(i) (The fact that parts of the proposal "may require future agency approvals or environmental review shall not preclude current consideration, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts.")

the UGA amendment and industrial rezone of the property, generally, will take into consideration project-specific aspects of the proposal, to the extent known, consistent with SCC 14.08.020(7)(a), SCC 14.08.020(7)(b), SCC 14.08.040(3). This may include, by way of example only, consideration of potential impacts to water, critical areas and traffic resulting from the project-specific aspects of the proposal in addition to industrial development, generally. Additionally, because the City's proposal is based in part on an assertion of need for additional industrial lands to meet GMA requirements, the City's proposal warrants further analysis of the City's industrial/commercial capacity and assumptions upon which the application is based to better evaluate the proposal against the criteria in SCC 14.08.020(5). The County staff may ask the City, as applicant, to provide additional known project-level information to facilitate the County's review of the proposed UGA amendment and rezone consistent with SCC 14.08.030(3)(e)(i). Applicant shall provide funds for this additional review and analysis.

- **Scope and Staff Resources.**

The proposed amendment is complex and broad in scope and has generated significant public interest and comment. It will involve significant time and staff resources to review and process. Especially in light of the County's budgetary limitations stemming from the recession, Department staffing and operational budget are limited. However, the Board of County Commissioners finds that the proposal can reasonably be reviewed within staffing and operational budget allocated to the Department, especially in light of the County's ability to defray costs by requiring applicant to provide funds for County review, including funds adequate for the County to obtain any necessary consultant assistance to accomplish this review. Accordingly, the County finds that docketing is appropriate pursuant to SCC 14.08.030(3)(a).
- **Additional Information.**

Because the County staff may ask the City to provide additional information to better evaluate the proposed UGA amendment and rezone, the County recognizes that the criteria in SCC 14.08.030(3)(e) and SCC 14.08.090(6)(a) could also support rejecting or deferring the docket proposal. However those criteria do not mandate that the County reject or defer the docket proposal. In fact, the County Code recognizes that County can docket the proposal, even if the County ultimately requests more information from the applicant. SCC 14.08.030(3)(e)(i). Accordingly, the County chooses to exercise its discretion by docketing the proposal, even if more information is required, because the County has the authority to require the City to provide additional information during the County's review process.
- **Seven-Year Update.**

The City's proposal is premised on an asserted deficit of industrial and commercial lands that could be addressed through the County's mandated seven year update.

Accordingly, the criteria in SCC 14.08.030(3)(c) and SCC 14.08.090(6)(a) and (d) could also support rejecting or deferring the proposal. However, the County's code does not mandate that the County defer all UGA amendment requests to the seven-year update. The County therefore exercises its discretion to docket the proposal for further review and evaluation for consistency with the approval criteria, including SCC 14.08.020(5). This review will include further analysis of the City's industrial/commercial capacity and assumptions upon which the application is based.

V. Findings Supporting a Decision to Reject or Defer.

The Commissioners could decide to deny or defer the proposal on any of the following grounds, if the Commissioners support the conclusion with findings similar to the examples provided below. While this is not an exclusive list of the grounds for denial or deferral, these represent the most likely grounds in light of the facts of this specific proposal.

- **Scope and Staff Resources.**

The proposed amendment is complex and broad in scope and has generated significant public interest and comment. It will involve significant time and staff resources to review and process. Especially in light of the County's budgetary limitations stemming from the recession, Department staffing and operational budget are limited. Accordingly, the County rejects [*defers*] the City's Proposal Pursuant to SCC 14.08.030(3)(a) [*and SCC 14.08.090(6)(a)*] because staff cannot reasonably review the Proposal due to the Proposal's scope and complexity, especially in light of limited staffing and the Department's operational budget.
- **Seven-Year Update.**

The City's justification for its proposal is the asserted deficit of industrial and commercial lands, generally, which the City suggests has fallen short of the supply identified in CPP 1.1. Even though the City's current proposal purports to be a stop-gap for the near term, the City acknowledges a broader deficit. The proposal therefore raises policy and land use issues that would be more appropriately addressed as part of the County's mandated 7-year comprehensive update. Accordingly, the County rejects [*defers*] the City's proposal pursuant to SCC 14.08.030(3)(c) [*and SCC 14.08.090(6)(a) and (d)*].
- **Additional Information.**

County Code and SEPA require the County to consider a wide range of potential impacts in a comprehensive analysis of this legislative action. The City's application does not currently have sufficient information to adequately evaluate the impacts of

the proposal. Accordingly, the County rejects [*defers*] the City's proposal pursuant to SCC 14.08.030(5)(e) [*and SCC 14.08.090(6)(a)*].