

Brooke Sullivan

From: Barnaby Zall <bzall@aol.com>
Sent: Thursday, June 16, 2022 11:56 AM
To: Brooke Sullivan
Subject: Re: Comments on Docket Application 22-0005, Landuse Docket 22-0045 GTB Farms/Dancing Seed Farm, Hearing Friday, June 17

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Hi, Brooke. Thanks for your note.

If you don't mind a supplement to my already-lengthy comment on the GTB/Dancing Seeds Farm application (it likely won't come up at the Commission level), but you probably need to be prepared to discuss a unanimous U.S. Supreme Court decision that was handed down yesterday that may have some application to this and other regulatory matters. I had actually intended to wait until that decision came down to send my last set of comments, but gave up waiting, and, then, as you can imagine, the decision came down the NEXT DAY.

The decision is [American Hospital Ass'n v. Becerra, No. 20-1114, June 15, 2022](#). AHA had long been expected to affect courts' deference to expertise of regulatory agencies (*Chevron* deference), which, as you know, has long been foundational to zoning decisions. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926) ("commissions and experts[] ... reports ... bear every evidence of painstaking consideration").

The first question the Supreme Court chose to review in *Amer. Hospital Ass'n* echoes the data question I pointed to in my comments two days ago: "whether Chevron deference permits HHS to set reimbursement rates based on acquisition cost and vary such rates by hospital group if it has not collected adequate hospital acquisition cost survey data." (emphasis added). The Court said no, because deference does not protect an agency which depends on guesses (even educated or experience-based speculation) instead of data.

The statute expressly authorizes HHS to vary rates by hospital group if HHS has conducted such a survey. But the statute does not authorize such a variance in rates if HHS has not conducted a survey. ...But absent that survey data, as Congress determined, HHS may not make billion-dollar decisions differentiating among particular hospital groups."

Slip op., at 10 (cleaned up).

Or in GTB Farms' terms, can DCD consider potential adverse consequences of the proposal if it has not collected adequate data? There are likely different ways that *Amer. Hospital Ass'n* can be applied to the specific facts of the GTB/Dancing Seeds proposal. But surely one of the clearest and most consistent with recent Supreme Court decisions is to interpret the provisions I outlined two days ago consistent with their text and intent.

Barnaby Zall
Davison Head

-----Original Message-----

From: Brooke Sullivan <brookes@sanjuanco.com>
To: Barnaby Zall <bzall@aol.com>

Sent: Thu, Jun 16, 2022 12:44 pm

Subject: RE: Comments on Docket Application 22-0005, Landuse Docket 22-0045 GTB Farms/Dancing Seed Farm, Hearing Friday, June 17

Thank you Barnaby. I will send this along to the commission for review prior to the public hearing tomorrow.

Regards,

Brooke

From: Barnaby Zall <bzall@aol.com>

Sent: Tuesday, June 14, 2022 6:28 PM

To: Brooke Sullivan <brookes@sanjuanco.com>

Subject: Comments on Docket Application 22-0005, Landuse Docket 22-0045 GTB Farms/Dancing Seed Farm, Hearing Friday, June 17

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Re: GTB Farms, Docket Application 22-0005, Hearing Friday, June 17

Comment Questioning Staff Recommendation, and Suggesting That County Policy Unambiguously Requires DCD to Exercise Leniency, Not Unsupported Speculation

Brooke:

I am not representing anyone in this matter, though I know the Barkers personally as active members of the San Juan Island community, including from their service with a variety of SJI organizations. Nor am I an expert in agricultural commerce or farming in general, although my brother and his wife run a personal, non-commercial farm on San Juan Island. But I am interested in consistency in zoning decisions and exceptions, both formal and informal, especially in rural areas, and this one looked intriguing. So, I looked up the record in this matter, pending before a hearing on June 17. Given the public record and the facts of this case, I was surprised at the staff recommendation, which I found inconsistent with past practice, the current dire state of agriculture on SJI, and long-standing County public policy goals. Indeed, the staff recommendation seems to be unsupported by the record, which, in the absence of evidence that the staff's concerns are anything more than conjecture, should tilt the balance sharply toward permitting the proposed approach.

Thus, some comments on the proposed staff recommendation (in the interest of brevity, I am assuming, without restating, the facts as set forth in the application and the staff response):

1) A Robust Agricultural Sector That Provides Jobs for Islanders Without Losing Small Scale Is Vital: It is long-standing policy of San Juan County that "We support a pattern of economic growth and development which serves the needs of our community, and which recognizes the ... agricultural ... nature of the islands. Our economy comprises a wide spectrum of stable, year-round activities that provide employment for islanders", and "agricultural ... areas provide for commerce and community activities without losing their small scale and attractive island ambiance." [Comp. Plan, 2010 ed.](#), "Introduction," P. 2. To this end, San Juan County and other agencies and organizations expend significant resources protecting, assisting and nurturing agricultural businesses in the County. [Agricultural Organizations | San Juan County, WA.](#)

2) **The Application Implicates Three of the Four "Overarching Goals" of the Economic Development Element of the Comprehensive Plan:** The [Economic Development Element portion](#) of the Comprehensive Plan sets out "critical," "overarching goals" to "enhance community vitality", including:

- "Create jobs through ... stable, community-friendly industries."
- "Promote tourism and leisure opportunities which preserve islands' natural environment while providing high-quality employment [including] experiential learning for all visitors and the preservation of natural ... ways of life", and,
- "Strengthen traditional industries such as agriculture."

3) **Despite These Goals, Agricultural Employment Remains Very Low in San Juan County:** "Fishing and farming formed the economic mainstay for most inhabitants until the already well-established tourism economy took off in the 1970s." [ESDWAGOV - San Juan County profile](#). That is no longer true. In 2020, WA ESD reported only 42 employees in agricultural jobs in San Juan County (time lags in reporting mean this is the [most current figure available from ESD](#)); in contrast, total SJC jobs in April 2022 were reported as 7,798. This low number of jobs means, in light of the overarching goals set by the County, that every agricultural job in San Juan County matters significantly in achieving the County's goals.

4) **DCD Plays An Important Role in Achieving the County's Goals of Protecting Agricultural Businesses and Employment:** [DCD's role in this County-wide effort](#) is to: "evaluate designated agricultural land during the update to make sure that it is appropriately designated ... [and] to protect agricultural land from being converted to permanent non-farming uses." DCD can do little to change macro-economic conditions relating to agricultural business conditions. But, in light of its responsibilities designated by County policy, DCD can extend every possible advantage to those engaged in what is a difficult industry in the best of times. Even a few jobs in "stable, community-friendly industries ... such as agriculture" can make a big difference in DCD helping to achieve these long-standing County goals.

5) **The Applicant GTB Farms Operates A Farm That Has Had Significant Turnover:** This property is under great pressure. As [recited in the Application](#), when agriculture was dominant on SJI, this farm property was stable for more than 100 years. Addendum, at 1, [P. 5 of .pdf](#). Since 2004, however, the property has turned over rapidly and often. The likelihood of DCD being able to assist in "protect[ing] agricultural land from being converted to permanent non-farming uses," as required under County policy, is diminishing rapidly. Indeed, a public storage facility is next door to the subject property. The County apparently will eventually have to rely on some form of Ponzi scheme based on deep-pocketed or clueless buyers who will continue to purchase agricultural properties that will never be profitable under current zoning practices. Even if successful, such a strategy would be deeply troubling.

6) **DCD can do better than that.** And staff believes it should. As the [staff recommendation notes](#), the blending of agriculture and tourism as the applicant proposes is a worthwhile goal, and DCD should work toward allowing it. "Staff believe amending the RFF designation to allow more flexibility for agritourism activities is desirable" P. 123.

7) **Staff's Hesitation Is Inconsistent With the Facts Here and the General Practices on SJI:** Staff, however, compares improving the RFF designation to increased areas designated for Rural Commercial activities. *Id.* "Staff believe amending the RFF designation to allow more flexibility for agritourism activities is desirable over increased areas designated for Rural Commercial on parcels with working agricultural and forest practices." Note, however, the term "working" in that sentence. "Working" does not mean profitable, sustainable, strengthened. It does not take significant research to indicate that this particular parcel is not "working" in the sense of being profitable, protected or strengthened by its current zoning, which staff believes should be more flexible. Given [the spreading use of farm-to-table dinners](#), Dancing Seeds Farm is not alone in struggling to meld agriculture and tourism. The real concern

with farm-to-table dinners is that they are principally a function of expensive local restaurants [such as Duck Soup](#), which are valuable, but with price points up to \$250, not the same as helping the struggling farms that could do the same at far lower price-points.

8) Staff's Hesitation is Also Based on Unfounded Speculation, While It Does Not Take Into Account the Current Facts of This Particular Parcel and Other Farms' Practices: Staff's concern over inconsistent uses on this property, while theoretically possible, is speculative:

"staff are concerned this change could be seen as providing a real and material benefit and added value to a single parcel owner by providing options to engage in activities that are not farm- or forest-related. The applicant asserts that the RC designation will allow them to support a farm-to-table enterprise for themselves and possibly other farms, but this public benefit cannot be guaranteed on a private parcel. In addition, adverse transportation, noise and other environmental conditions may outweigh perceived benefits." *Id.*, P. 122.

These concerns do not reference anything in the record of this matter. The Supreme Court of the United States, in a 2002 case involving zoning regulations, noted the need for facts or data on secondary or indirect effects of a disfavored zoning change. *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002) (city was entitled to rely on older study to consider indirect effects of activity to be regulated, because no other evidence was offered by the challengers or reviewing courts). The Supreme Court contrasted an earlier case, *Renton v. Playtime Theaters*, 475 U.S. 41 (1986), itself based on a decision of the Washington Supreme Court in *Northend Cinema, Inc. v. Seattle*, 90 Wash.2d 709, 585 P.2d 1153 (1978) which looked at extensive studies of indirect effects: "We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the 'detailed findings' summarized in the Washington Supreme Court's *Northend Cinema* opinion, in enacting its adult theater zoning ordinance." Those were First Amendment-related zoning cases, but here, where a County's "overarching goals" are implicated, similar evidentiary principles should apply.

Perhaps staff has some facts to support its position, but none appears in the record here. There is no indication by the applicant that it contemplates non-farm or non-forest-related activities. Is it DCD's role to look for "guarantee[s]" of public benefit in zoning administration when staff have already acknowledged that "more flexibility for agritourism activities is desirable?" Nor are the possible "adverse" results visible in similar activities around the County, as shown by the many farms who already supplement their revenues with farm-to-table dinners and adjacent property owners who already operate businesses such as public storage facilities. Indeed, some reports indicate that RFF zoning even includes properties such as quarries, whose relationship to farming or forestry seem even more attenuated than those posited by staff. Are such concerns possible? Yes, but are they likely, in light of the fact that no one has reported any actual adverse results? And perhaps most important from a governmental standpoint, are zoning restrictions being used here to limit innovation that everyone seems to think is "desirable," rather than to advance the purpose of the zoning category itself: to protect agriculture as an "overarching" goal of the County?

Conclusion: The staff is correct to consider adverse consequences of what is being requested. That is part of their responsibilities. But it is also part of their responsibilities to protect and nurture agricultural uses which are being overwhelmed by tourism in today's SJI economy. The staff's concerns and recommendation seem to be unsupported speculation. The proposed zoning change seems on its face to be an attempt to blend agriculture and tourism, something that the staff and many others recognize is vital to attaining the County's goals. Surely, in the absence of any concrete indication that the adverse effects that concern the staff will eventuate, there is a way to allow this form of innovation to advance? If so, then DCD should let the proposal play out.

This has been a long email, and I appreciate your attention. DCD's services are very important to the long-term health of the SJI community, and I thank you for your work.

Barnaby Zall
Davison Head