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Via E-mail to: sallyr@sanjuanco.com
c/o Sally Rogers, Clerk of the Council
SAN JUAN COUNTY COUNCIL
350 Court Street, No. 1
Friday Harbor, WA 98250

Re: Comprehensive Plan Map Amendment; Docket No. 23-0003 (Southwell)

Dear San Juan County Council:

I represent Linda Southwell. Linda has applied to amend the San Juan County Comprehensive Plan Map to allow for one additional dwelling unit on her 2.53-acre property located at 3101 Fisherman Bay Road on Lopez Island. The Department of Community Development ("DCD") briefed the Council on DCD's recommendation regarding Linda's application at the Council's August 8, 2023, meeting. Since then, the Planning Commission voted to recommend **approval** of Ms. Southwell's application, and DCD then briefed the Council on the Planning Commission's recommendation of approval on September 12, 2023. I understand the Council will hold a public hearing on the Comprehensive Plan Map Amendments (including Ms. Southwell's application) on October 17, 2023.

I offer this letter in advance of the Council's October 17th meeting to address several points that have been raised throughout this process, including at the Council's August 8th and September 12th meetings, and to highlight why the Council should follow the Planning Commission and approve Ms. Southwell's Comprehensive Plan Map Amendment application.

1. Approving Ms. Southwell's Application Will Not Constitute Spot-Zoning.

"Spot zoning" is when a smaller area is singled out of a larger area and specifically *zoned* for a *use* classification totally different from and inconsistent with the classification of surrounding land uses. Ms. Southwell is not proposing to change the land use of her property in any way. Ms. Southwell is simply asking for the ability to develop another single dwelling unit on her 2.53-acre property. Even if it were appropriate to conflate zoning and density, which it is not, then Ms. Southwell's request is not "totally different from" or "inconsistent with" the existing density of the surrounding properties. So, even if the concept of "spot zoning" could be applied in this case, which it should not be, then this cannot be "spot zoning" because Ms. Southwell's application brings her property into conformity with the surrounding properties. Arguably, Ms. Southwell's application accomplishes the exact opposite of "spot zoning"!

"Spot zoning" has been described by the Washington Supreme Court in *Lutz v Longview*, 83 Wn.2d 566, 520 P.2d 1374 (1974) as follows:

> Spot zoning has come to mean arbitrary and unreasonable zoning action by which a smaller area is singled out of a larger area or district and specially zoned for a use classification totally different from and inconsistent with the classification of surrounding land, and not in accordance with the comprehensive plan. Spot zoning is a zoning for private gain designed to favor or benefit a particular individual or group and not the welfare of the community as a whole. *See* C. Rhyne, *Municipal Law* § 32-3, at 825 (1957). The vice of a spot zone is its inevitable effect of granting a discriminatory benefit to one or a group of owners and to the detriment of their neighbors or the community without adequate public advantage or justification. *Thomas v. Town of Bedford,* 11 N.Y.2d 428, 184 N.E.2d 285 (1962). Zoning merely for the benefit of one or a few, or for the disadvantage of some and with no substantial relationship to the public health, safety, general welfare or morals, in conflict with either the comprehensive zoning plan or ordinance is arbitrary and capricious and unlawful. *Eckes v. Board of Zoning Appeals of Baltimore Cy.,* 209 Md. 432, 121 A.2d 249 (1956).

The Court in *Bassani v. Board of County Commissioners for Yakima County*, 70 Wn. App. 389, 853 P.2d 945 (1993) stated that the "well-recognized test for illegal spot zoning has been set forth as follows:

> Spot zoning is zoning action by which a smaller area is singled out of a larger area or district and specially zoned for a use classification **totally different from, and inconsistent with, the classification of surrounding land** and not in accordance with the comprehensive plan. *Save a Neighborhood Env't v. Seattle*, 101 Wn.2d 280, 286, 676 P.2d 1006 (1984); *Murden Cove Preservation Association v. Kitsap County*, 41 Wn. App. 515, 520, 704 P.2d 1242 1985). *See Save Our Rural Env't v. Snohomish County*, 99 Wn.2d 363, 368, 662 P.2d 816 (1983); *Smith v. Skagit County*, 75 Wn.2d 715, 743, 453 P.2d 832 (1969).
>
> A comprehensive plan is only a general blueprint; it generally proposes rather than disposes. *Buell v. Bremerton*, 80 Wn.2d 518, 526, 495 P.2d 1358 (1972). Deviation from a comprehensive plan does not necessarily render a rezone illegal; only general conformance is required. *Cathcart-Maltby-Clearview Comm'ty Coun. v. Snohomish County*, 96 Wn.2d 201, 212, 634 P.2d 853 (1981). Moreover, [d]eviation from a comprehensive plan by increasing the area in which particular use is permitted is not automatically spot zoning. Each case must be decided on its own facts. *Buell*, 80 Wn.2d at 526. (Emphasis supplied).

More recently, the Court of Appeals in *Willapa Grays Harbor Oyster Growers Assn v. Moby Dick Corporation*, 62 P.3d 912, 115 Wn. App. 417 (2003), echoed the definition set forth in *Lutz* and opined:

> Spot zoning is zoning action by which a smaller area is singled out of a larger area or district and specially zoned for a use classification totally different from and inconsistent with the classification of surrounding land and is not in accordance with the comprehensive plan. *Smith v. Skagit County,* 75 Wn.2d 715, 743, 453 P.2d 832 (1969); *accord Lutz v. Longview*, 83 Wn.2d 566, 573-74, 520 P.2d 1374 (1974); *Chrobuck v. Snohomish County*, 78 Wn.2d 858, 872, 480 P.2d 489 (1971). The main inquiry is whether the zoning action bears a substantial relationship to the general welfare of the affected community. *See Parkridge v. City of Seattle*, 89 Wn.2d 454, 460, 573 P.2d 359 (1978). **Only where the spot zone grants a discriminatory benefit to one or a group of owners to the detriment of their neighbors or the community at large**

without adequate public advantage or justification will the county's rezone be overturned. *See Anderson v. Island County*, 81 Wn.2d 312, 325, 501 P.2d 594 (1972) (emphasis supplied).

Indeed, Courts will not second guess the well-reasoned and thoughtful decisions of a County legislative authority unless there is a manifest abuse of discretion. *Smith v. Skagit County*, 75 Wn.2d 715, 453 P.2d 832 (1969) ("Zoning is a discretionary exercise of police power by a legislative authority. Courts will not review, except for manifest abuse, the exercise of legislative discretion . . . manifest abuse of discretion involves arbitrary and capricious conduct. Such conduct is defined to be without consideration and in disregard of the facts . . . One who asserts that a public authority has abused its discretion and is guilty of arbitrary, capricious and unreasoning conduct has the burden of proof . . .. If the validity of the legislative authority's classification for zoning purposes is fairly debatable, it will be sustained. . ..").

As an initial matter, San Juan County does not even have "zoning." San Juan County assigns land use designations and density separately. The application does not seek to change the land use designation (read: zoning) assigned to the property, which will remain identical to surrounding properties. Moreover, the uses that will occur on the property will fully comply with all Rural Farm Forest requirements set forth in the Comprehensive Plan and the Unified Development Code – just like all properties in the vicinity. The benefit conferred by granting the application can be said to support the general health and welfare of the public, since: (i) it brings the property into conformity with the existing pattern of development, (ii) it creates more housing inventory within walking distance to the Village, and (iii) it will prevent yet another person from having to complete for limited housing inventory on Lopez Island. Also, since there is no discriminatory benefit conferred upon Ms. Southwell, and since there is no detriment to Ms. Southwell's neighbors (or the community at large) because those in the vicinity already benefit from significantly more intense density, approving Ms. Southwell's application cannot be characterized as "spot zoning." The benefit arguably conferred upon Ms. Southwell's property is still less than that which is already enjoyed by every neighboring property.[1] Therefore, under these specific and unique circumstances, approval of Ms. Southwell's application will not be "spot zoning." The Council should honor the Planning Commission's thoughtful recommendation and approve Ms. Southwell's application, which if approved for one or more of the reasons set forth above will survive a challenge.

2. The Council Should Approve Ms. Southwell's Application and Then Consider an Area-Wide Re-Designation or Map Amendment, if Appropriate or Otherwise Desired.

At the Council's August 8, 2023, meeting, the Council raised the notion of re-designating an area of properties (presumably including Ms. Southwell's property) in the vicinity. But this is beyond the scope of Ms. Southwell's application. Ms. Southwell has applied to amend the Comprehensive Plan Map to change the assigned density, not to change the assigned density or land use for the area. While the Council may consider re-designating the land use of the affected area, this is likely to generate a strong reaction from the public. The whole reason for Ms. Southwell having to make her application is because the Council tried to extend the Lopez Village Urban Growth Area south of the property. While this area-wide re-designation was being challenged, the Growth Management Hearings Board

[1] The property to north is 3.43 acres with 5 residences; the property to the east is 1.31 acres with 2 residences; the density of the properties to the south are as follows: 0.77 acres with 1 residence, 0.55 acres with 1 residence, and 0.45 acres with 2 residences.

allowed those in the contested area to benefit from UGA-level densities (then, two dwelling units per acre). In order to comply with the Growth Management Hearing Board's decision on remand, the County had to extend public utility services to the southern limits of the expanded Lopez Village UGA boundary. While the exact reason this re-designation was abandoned is unknown, the expansion of public utility services to the limits of the new UGA boundary would require significant capital improvements and may not have been possible, given other applicable development and permitting regulations, so the Council ultimately abandoned the UGA-expansion. But, instead of considering the level of development that had occurred and had been permitted while the applicable density was two dwelling units per acre, the Council simply elected to apply the one dwelling unit per five acres density and Rural Farm Forest designation to this entire area. A renewed effort to expand the Lopez Village UGA to this area will likely face similar challenges and outcome.

The notion of an area-wide redesignation or change to the assigned density was also entertained by the Planning Commissioners. Commissioner Smith remarked that the proper course of action was to recommend the approval of Ms. Southwell's application, and then consider whether an area-wide re-designation or change to the assigned density might be a proper long-range solution. Again, if the Council is interested in an area-wide re-designation or changing the assigned density for multiple parcels in the vicinity, then it might make sense to add this to DCD's ever-growing list of long-range planning tasks; but, this should not inform or otherwise affect the Council's decision on Ms. Southwell's application.

Respectfully, Ms. Southwell's application satisfies all of the required elements for the Council to amend the Comprehensive Plan Map. The Planning Commission agreed that Ms. Southwell's application should be approved. To the extent the Council is concerned about DCD's erroneous conclusion that the Council can never increase the assigned density for Ms. Southwell's property (and despite overwhelming support from the neighboring property owners) under these unique circumstances, then the Council should consider that this conclusion arguably violates the Growth Management Act, which requires flexibility and a variety of rural densities for rural lands. RCW 36.70A.070(5)(b) ("Rural development. The rural element shall permit rural development, forestry, and agriculture in rural areas. The rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses. To achieve a variety of rural densities and uses, counties may provide for clustering, density transfer, design guidelines conservation easements, and other innovative techniques that will accommodate appropriate rural economic advancement, densities, and uses **that are not characterized by urban growth and that are consistent with rural character**.").

Comprehensive Plans must allow for a variety of rural densities and a density greater than 1 unit per 5 acres may still be considered rural, depending on the circumstances. In *Thurston County v WWGMHB*, the Court of Appeals faulted the Board for adopting a bright line rule (the same rule advanced by DCD in its staff report):

> Since 1995, GMHBs have utilized bright-line standards to distinguish between urban and rural densities. *Thurston County,* 137 Wn. App. at 806, 154 P.3d 959 ("[t]he Board considers a density of not more than one dwelling unit per five acres to be rural."). The GMHB, as a quasi-judicial agency, lacks the power to make bright-line rules regarding maximum rural densities. *Viking Props.,* 155 Wn.2d at 129-30, 118 P.3d 322. We hold a GMHB may not use a bright-line rule to delineate between urban and rural densities, nor may it subject certain densities to increased scrutiny. The legislature did not specifically define what constitutes a rural density.

> Instead, it provided local governments with general guidelines for designating rural densities. A rural density is "not characterized by urban growth" and is "consistent with rural character." Former RCW 36.70A.070(5)(b). Whether a particular density is rural in nature is a question of fact based on the specific circumstances of each case. In this case, the common rural residential density in the county is one dwelling unit per five acres or less according to the comprehensive plan. Higher densities may be present "where there are existing clusters of half-acre lots or in higher density resort-residential areas adjacent to water bodies." Densities of four dwellings per acre are allowed only where such densities already exist. Only 5.5 percent of rural acreage is designated at densities higher than one dwelling per five acres. The comprehensive plan explains the purpose, definition, characteristics, and local guidelines for each zoning density. The Board should not have rejected these densities based on a bright-line rule for maximum rural densities, but must, on remand, consider local circumstances and whether these densities are not characterized by urban growth and preserve rural character.
>
> Finally, the GMA does not dictate a specific manner of achieving a variety of rural densities. *Whidbey Envtl. Action Network,* 122 Wn. App. at 167, 93 P.3d 885. **Local conditions may be considered and innovative zoning techniques employed to achieve a variety of rural densities.** Former RCW 36.70A.070(5)(b). In this case, the Court of Appeals reversed the Board's holding that the County's innovative techniques did not achieve a variety of rural densities. The use of innovative techniques may be sufficient, regardless of the underlying zoning classifications, to achieve a variety of rural densities. Even if the Board determines, on remand, that the County failed to provide for a variety of rural densities through its various zoning classifications, the County may have achieved a variety of rural densities through the use of innovative zoning techniques. We remand this issue to the Board for a determination of whether the County's innovative zoning techniques as set forth in its development regulations provide for a variety of rural densities.

Thurston County v. WWGMHB, 164 Wn.2d 329, 190 P.3d 38 (2008) (internal citations omitted) (emphasis supplied). In this case, the density that will be allowed after approving Ms. Southwell's application will not only be brought into conformity with the existing pattern of development in the vicinity, which is an important land use planning goal and a benefit to the public health and welfare, but it will also still be a "rural" density, since it will not be characterized by urban growth and will preserve a rural character appropriate for this particular area.

Since San Juan County offers no innovative zoning techniques (like a transfer of development rights program) the only way to maintain the rural density flexibility required by state law is to consider and allow applications to amend the Comprehensive Plan Map, like that presented by Ms. Southwell. The density sought by Ms. Southwell's application maintains a rural character (since it is still significantly less dense than urban growth) and it brings the property into closer conformity with the existing pattern of development.

DCD is advocating for an interpretation of the Comprehensive Plan that violates state law. DCD interprets the Comprehensive Plan as requiring a maximum density of 1 unit per 5 acres for all Rural Farm Forest designated land (Comp Plan 2.5.1.4). But this means there can never be a variety of rural densities, which state law defines as "not urban growth." If the Council accepts DCD's interpretation then that means that the Council can never increase the density outside of activity centers, LAMIRDS, and Master Planned Resorts. Comprehensive Plans are general planning guidelines designed to

coordinate development; not to prohibit the County legislative authority from making decisions that are appropriate under the circumstances and that will benefit the welfare of the community.

3. This is the Legislative Process Designed to Effectuate These Kinds of Changes.

At the Council's August 8, 2023, meeting, Council Member Wolf commented that to make a change such as that proposed by Ms. Southwell, the Council should go through a legislative process to amend the Comprehensive Plan; but, that is exactly what is occurring here and now. The Comprehensive Plan Map amendment process is a public legislative process that allows the Council to make changes to the assigned density. The public has been duly noticed of the requested amendment, and so far, the requested change has received overwhelming support from those members of the public who live in the vicinity. The strong support from members of the public who would be most affected by the Council's approval of Ms. Southwell's application should not be ignored. Quite simply, there is no other mechanism in the County Code to increase the assigned density for Ms. Southwell's property aside from this Comprehensive Plan Map amendment process. As long as the Council can justify approving Ms. Southwell's application as a benefit to the public, then it will be extremely difficult for any challenger to demonstrate that the decision was "arbitrary or capricious." *See Lutz v. Longview* (the enactment of zoning regulations is a discretionary exercise of police power by the legislative authority and cannot be reviewed by the courts except for **a** manifest abuse of discretion, which is usually characterized as arbitrary and capricious.).

4. Ms. Southwell's Application Comports With the San Juan County Code and it Will Benefit the Public.

Contrary to DCD's assertions, and consistent with what the Planning Commission found, Ms. Southwell's application satisfies all of the elements under SJCC 18.90.030(F):

- The Change Would Benefit the Public Health, Safety, or Welfare.

  DCD claims that approving Ms. Southwell's application will *only* benefit the property owners. But this is not true, since it will also benefit the public by allowing for the creation of an additional dwelling unit within walking distance to the Village, preventing yet another person from having to compete to find housing on Lopez Island, and by bringing the Property into conformity with the existing pattern of development in the immediate vicinity, which is an important land use planning goal.

- The Change is Warranted because of a Change in Circumstances and to correct a Demonstrable Error on the Map.

  DCD asserts that the pending partition action is the change in circumstances supporting the proposed amendment. While partially correct, the real change in circumstances that should be considered is that for many years the Lopez Village UGA extended south of the Property and the assigned density during that time was two units per acre. While the Lopez Village UGA expansion was being challenged, considered by the Growth Management Hearings Board, and remanded to the County (from around 1998 – 2007), the properties in this vicinity could develop and obtain permits to develop up to two units per acre. As a result, the properties in the vicinity were able to obtain building permits and develop at a much higher

density than one unit per five acres. After the Growth Management Hearings Board remanded the Lopez Village UGA expansion to the County Council to consider expanding public utility services throughout the expanded UGA, the Council ultimately abandoned the UGA expansion and then assigned this area the Rural Farm Forest land use designation. It was the expansion, and subsequent abandonment, of the Lopez Village UGA boundary that is the real change in circumstances supporting Linda's application. Considering the assigned maximum density of one unit per five acres when all adjacent lots have been developed significantly more densely than that threshold constitutes a demonstrable error on the official map, and approving Ms. Southwell's application will help (at least in part) to rectify this error.

- The Change is Consistent **with the Criteria for Land Use Designations** Specified in the Comprehensive Plan.

  DCD asserts that the proposed change contradicts the Comprehensive Plan criteria for the Rural Farm Forest land use designation, but this is wrong. The relevant "criteria" for Rural Farm Forest are set forth in Section 2.5.3(b) of the Land Use Element section as follows:

  > Policies:
  > (1) Areas which are characterized by the following criteria may be designated as Rural Farm Forest lands on the Official Maps:
  >
  > i. The predominant land use is farming and forestry mixed with residential development;
  > ii. Parcels are generally five or more acres in size; and
  > iii. Soils are suitable for small-scale agricultural or forestry uses.

  DCD interprets section (1)(ii) as prohibiting the requested change; however, this simply states that in order for land to be designated as Rural Farm Forest land on the Official Maps, Rural Farm Forest land parcels should be "**generally** five or more acres in size." Ms. Southwell's application does not seek to change the land use designation, but to simply to allow an additional dwelling unit on the Property. If an additional dwelling were allowed, then it would be built in conformity with all existing development regulations and uses on the Property would still be limited to those allowed under the Rural Farm Forest land use designation. Even if the Council approved Linda's application, then Rural Farm Forest designated land in San Juan County will still be "generally five or more acres in size." This "policy" does not set a maximum density, as it simply describes the features regarding parcel sizes that should be present when designating properties as Rural Farm Forest.

  DCD also asserts that the application must comply with the General Rural Goals and Policies set forth in Section 2.5.1 of the Land Use Element, but this too is wrong. First, SJCC 18.90.030(F) only requires "The change is consistent with the criteria for land use designations specified in the Comprehensive Plan." Therefore, the decisionmakers should only consider the policies listed in Section 2.5.3(b) of the Land Use Element, which sets forth the "criteria" for the Rural Farm Forest designation (see paragraph immediately above). While the Comprehensive Plan does include a general goal and policy for all rural lands in San Juan County that encourages establishing density at a maximum of one dwelling per five acres outside of activity centers, LAMIRDs, and master planned resorts, this is not a specific

criterion for Rural Farm Forest designated land that needs to be considered as part of this application. Moreover, DCD's interpretation – that this general policy statement should operate as restricting the density for all rural lands at a maximum density of one unit per five acres – violates Washington State law. (See Section 2, above).

- The Change Will Not Result in an Enclave of Property Owners Enjoying Greater Privileges and Opportunities Than Those Enjoyed by Other Owners in the Vicinity.

  Somewhat disingenuously, DCD has asserted that increasing the density for the Property will afford the owners greater privileges and opportunities than others in the vicinity. However, a visit to the Property or looking at any current map of the Property and the surrounding development will quickly confirm that approving the application will not result in the owners enjoying a greater right or privilege than others in the vicinity; in fact, it will accomplish the exact opposite! Approving the application will simply afford the owners of the Property the same privileges and opportunities as those enjoyed by the other owners in the vicinity. Since the application seeks only one additional dwelling unit for a 2.53-acre piece of land, if the application is approved, then the owners of the Property will still enjoy fewer rights and privileges than others in the vicinity, since all adjacent properties will still have higher density than that requested by the application.

- The Benefits of the Change Will Outweigh any Significant Adverse Impacts.

  DCD claims that the proposed change allows more intense development than the current density allows, and the conversion of rural land to higher density development is an adverse impact; but, in this particular case, that is not true. Again, Ms. Southwell is simply asking for one additional dwelling unit for the Property. If the application is approved, then the Property will still be significantly less densely developed than all of the adjacent properties. DCD also ignores other important benefits that will flow from approving the application, which includes without limitation, adding another housing unit that will be within walking distance to Lopez Village, bringing the Property into conformity with the existing pattern of development, and allowing an owner of real property the ability to secure her own home on Lopez and not have to become yet another person competing for housing on Lopez. If the application is approved and another dwelling is built on the Property, then the same will only occur in compliance with all development regulations – including all critical areas and shoreline master program regulations, which are specifically designed to prevent significant adverse impacts resulting from development.

5. The Council Should Not Make Decisions Based Upon Threats of Litigation.

Some have suggested that even if the Council wanted to approve Ms. Southwell's application, the threat of an appeal from special interest groups or other individuals may prevent the Council from approving the application. The Council should not decide this matter – or any other decision it ever makes – based on whether someone or some organization will appeal that decision. Every decision the Council makes is subject to appeal. Letting the threat of an appeal influence Council's decision-making effectively delegates Council's decision-making authority to those who are willing to make such threats. The Council should accept that every decision it makes is always subject to appeal, and it should not let the possibility of an appeal influence its decision in any way. Ms. Southwell's

application comports with SJCC 18.90.030(F), and it would be good for our community. It is this analysis alone that should guide the Council's decision.

6. The Council Should Adopt the Planning Commission's Recommendation and Approve Ms. Southwell's Application.

The Planning Commission, despite DCD's recommendation to the contrary, agreed that Ms. Southwell's application should be **approved**. The Council should rely on the Planning Commission's thoughtful consideration of Ms. Southwell's application and approve Ms. Southwell's application. As shown in the application materials, the requested change is logical, sensible, and reasonable under these unique circumstances. Those living in the vicinity have voiced unanimous support for Ms. Southwell's application.

San Juan County, and Lopez Island in particular, is facing a severe housing crisis. Having a 2.53-acre property located within walking distance to the Village (and which property is also next to a busy hotel/resort, an active gravel quarry, and a variety of short-term vacation rental units) that can never be further developed does nothing to alleviate our County's escalating housing crisis. If the Council really wants to help solve the housing crisis, then it will have to allow there to be additional residential development, and the density, uses, and activities in the vicinity of the Property make the Property a natural candidate for development. If Ms. Southwell's application is denied, then the Property will likely either be subdivided with one lot remaining incapable of supporting a dwelling unit or the Property will be sold at public auction and Ms. Southwell become yet another person competing for housing on Lopez Island, which will unnecessarily add to the already-extreme pressure on a limited housing inventory.

Respectfully, and for all of the reasons set forth in this letter (and in the record to date), the Council should accept the Planning Commission's recommendation, and approve Ms. Southwell's application.

Thank you for your thoughtful consideration of Ms. Southwell's application.

Very truly yours,

The Law Office of James P. Grifo, LLC

James P. Grifo