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RE: November 2015 Draft Comprehensive Plan, Capital Facilities Plan and Supplemental EIS

David,

I am writing to you today to comment on the draft Comprehensive Plan, draft Capital Facilities Plan and draft Supplemental Environmental Impact Statement (DSEIS) released in November, 2015. Because the three were released simultaneously, please consider all my comments to be directed not only to the individual documents, but also as EIS comments for which an agency response in the FSEIS is appropritate.

The process is somewhat unusual in that your department has issued draft plan/CFP/SEIS documents with a fixed public comment window that closes before any public hearings take place. If I read the County's Public Participation Plan and DCD's PowerPoint presentation from the November 23, 2015 joint Board and Planning Commission work study session correctly, there will be further opportunities to comment on and testify about the draft plan once it lands on the Planning Commission's and Board of County Commissioners' public hearing agendas. However, this appears to be the only comment period for the DSEIS.

Because the County has not released draft development regulations (Zoning, Critical Areas and Subdivision codes) which are necessary to implement the plan, my comments will necessarily be directe to an incomplete suite of documents. Also, because the DSEIS lacks a preferred alternative, citizens are left to comment on the full range of alternatives with no clear idea which the professional staff believes will best accommodate growth and comply with the GMA.

Accordingly, my comments today are preliminary and somewhat limited as I do not have the full picture before me.

**Draft Comprehensive Plan (Update)**

The draft Comprehensive Plan, the next RCW 36.70A.130(3) periodic update, appears to be a complete rewrite of the plan. Early in the update process, then Director Larry Keeton stated the intention to excise from the plan policies that were outdated, had been accomplished, were no longer

relevant and particularly those that were aspirational but not practical in their application. Thus a much slimmer plan document is no surprise.

But without the draft development regulations to show how or even if the plan policies will be implemented, the plan consists almost entirely of vague and aspirational policy statements – good intentions but little in the way of a practical mechanism for achieving those policy aims. Some of these policies direct action within the zoning code, etc. but without a draft of that code, the policy statements are no more concrete than those of the current plan.

The Growth Management Act does not specifically require that plan and development regulation amendments be considered and adopted concurrently, but the Hearings Boards have pointed out in several cases that not doing so can introduce inconsistencies between the plan and development regulations – a situation that the GMA prohibits. Thus if a plan amendment renders the zoning code, CAO, etc. inconsistent with the plan, the County must amend these codes concurrently with the plan amendment.

Presumably, when the draft plan update reaches the Planning Commission for public hearings, draft development regulations will accompany it and citizens will be better able to understand and comment upon the proposed planning scheme. So at this point, my comments will be limited to one or two particular issues of specific concern to me and I reserve the right to expand upon them when a complete draft is available.

Urban Growth Areas and Urban Land Capacity

The DSEIS erroneously states that the urban land capacity of the existing urban growth areas is insufficient to accommodate planned growth. The land capacity analysis detailed in the Buildable Lands Report finds not only sufficient residential capacity but a surplus. This should be no surprise as the numerical growth targets are unchanged from those in effect when the 2006 plan was adopted. The end date for those targets was moved out in time from 2025 to 2036 to reflect a slower-than-anticipated rate of growth. But the inconsistent land capacity findings of the Buildable Lands Report, DSEIS and Draft Plan represent a fatal flaw which could result in erroneous land use decisions with regard to UGA sizing.

Because there is no shortage of urban land capacity, there is no reason or justification for a net expansion of urban growth areas. It may be appropriate and desirable to adjust UGA boundaries to "swap" urban-designated lands that are less suitable for urban growth in the coming decade for rural lands that are more suitable, but the net result should not be additional capacity.

Expansion of UGAs to accommodate an unchanged growth target is specifically prohibited, in Kitsap County's case because the County is struggling to correct inconsistencies between actual vs planned growth patterns with reasonable measure which, so far, have proven ineffective. See RCW 36.70A.215(1)(b).

RCW 36.70A.215 – Buildable Lands and Reasonable Measures

As you know, I have challenged the GMA compliance of Kitsap County's 2014 Buildable Lands Report to the Growth Management Hearings Board.[1] The briefing is complete and the hearing on the merits is scheduled for tomorrow. While we do not yet know how the Board will decide this case, some of the issues raised have a direct bearing on the 2016 update to the plan and development regulations regardless of the legal outcome.

One of the issues on appeal is whether or not Kitsap County complied with the requirement of RCW 36.70A.215(4) to annually monitor reasonable measures for effect and to take corrective action should they prove ineffective. The existing plan addresses this requirement in policy LU-11:

> LU- 11 Monitor the effectiveness of adopted reasonable measures in 5-year intervals with the publication of the BLR

Note that while the GMA requires annual monitoring of reasonable measures, Policy LU-11 only commits to monitoring in five-year intervals. Clearly this policy could be improved. But the draft Comprehensive Plan actually drifts further from the statutory requirement:

> Land Use Policy 9: Continue to review and assess data for application of reasonable measures.

Setting aside for a moment my contention on appeal that annual monitoring has not been done and thus there is nothing to "continue", this extremely vague policy does not commit to any sort of schedule, process or even purpose for monitoring reasonable measures.

The GMA requires annual monitoring of reasonable measures "for effect" and corrective action should they prove ineffective.[2] In the current appeal, the County is inconvenienced by a lack of anything in the record to indicate that annual monitoring took place at all, much less triggering any kind of policy decision about corrective actions.

A prudent policy would be to establish an annual monitoring procedure that results in a determination as to whether or not the reasonable measures have been effective in reducing the inconsistencies demonstrated by the most recent Buildable Lands Report. That finding should then be documented and submitted to the annual plan amendment docketing process.[3] A need for corrective action would then be documented, supported by data and part of an established amendment process. A finding that reasonable measures are having the desired effect, and outcome we all hope for, should also be submitted to the docketing process so the County has a documented basis for taking no corrective action.

The other draft reasonable measures policy is even more perplexing:

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[1] CPSGMHB Case No. 15-3-0005 *Harless IV*

[2] See CPSGMHB Case No. 04-3-0031c 1000 *Friends* Final Decision and Order at 24 where the Board explained this requirement.

[3] Some reasonable measures adjustments may require revision to development regulations but not require a plan amendment. Such a finding could also be included in the plan amendment docketing process, but the necessary amendment to development regulations could be handled separately.

Land Use Policy 10: Measure, adopt and implement reasonable measures if the Buildable Lands Report finds inconsistencies in planned growth.

The wording of this policy could be made less ambiguous and better reflect the statute by replacing the phrase "inconsistencies in planned growth" with "inconsistencies between actual and planned growth patterns". But more important is the entirely inappropriate conditional "if" statement. In the current appeal of the BLR, I have alleged and the County's legal counsel has stipulated that the data in the BLR demonstrate inconsistencies between planned and actual growth. We disagree about the adequacy of the BLR's text in explaining those data, but it is an undisputed fact that the BLR has demonstrated inconsistencies. The "if" should be replaced with "that".

The Legislature recently amended the GMA to finally coordinate the schedules of the several plan review and update requirements. Now Buildable Lands Reports and Comprehensive Pans updates must be updated every eight years, with the BLR due one year prior to the plan update. So for this time around as well as for every future plan update, it is known whether or not the Buildable Lands Report has demonstrated inconsistencies in planned vs actual growth when the plan update draft is prepared. Thus the non-committal and conditional language of Land Use Policy 10 is inappropriate and misleading.

**Draft Supplemental Environmental Impact Statement**

The DSEIS appears to be a well-organized and clear document so far as it goes. But the cart seems to have been put before the horse as the development regulations necessary to implement the various plan alternatives have not been completed or released and thus the document cannot evaluate their likely impacts. After all, an EIS is not a time machine.

There are also errors in the document with regard to land capacity and the analysis of reasonable measures, which still fails to meet the requirements of RCW 36.70A.215

Development Regulations – Is further SEPA Analysis Forthcoming?

It is my understanding that draft development regulations were not released concurrently with the draft plan and SEIS because they were not yet completed and that they will be released after the current public comment period on the DSEIS has closed. Without those drafts before me, I cannot formulate an informed opinion as to whether the DSEIS adequately addresses the likely impacts of those regulations or of the combined regulatory scheme of the plan and development regulations taken together. Assuming that the omission is due to the fact that the DSEIS was prepared before the development regulations, it is a temporal impossibility for the DSEIS to address the impacts of those yet-to-be-drafted regulations.

I do not know if the staff intends to create draft development regulations for all three alternatives, or wait for the appearance of a preferred alternative. Either way, the full impacts of the proposed regulatory scheme cannot be assessed when only the the aspirational "what" and not the "how" of the plan is available.

Urban Land Capacity – Inconsistent Data

While the GMA oddly enough does not require it, Kitsap County has prudently always used an identical land capacity analysis methodology for both its forward-looking UGA sizing analysis (RCW 36.70A.110) and its backward-looking Buildable Lands Analysis (RCW 36.70A.215). Thus the performance and remaining capacity of previously-designated UGAs is evaluated using precisely the same methodology by which those UGAs were sized to begin with.

The Land Use Chapter of the draft Comprehensive Plan states that the urban land capacity analysis used to evaluate existing ("No Action") UGAs as well as the potentially revised UGAs in the other two alternatives is that used in the Buildable Lands Report which was issued on June 30, 2015.[4]

Thus one would expect that the Buildable Lands Report and the DSEIS would agree perfectly as to the available net urban land supply for the No Action Alternative. But they do not. The Buildable Lands Report finds more than sufficient urban land supply:

> Cities and UGA have a combined buildable land capacity sufficient to accommodate approximately 86,237 persons. The planned incorporated city and UGA share of the forecast population growth is 63,800 persons for both 2025 and 2036.[5]

The DSEIS on the other hand, contradicts this statement:

> With the exception of Alternative 1, which does not provide sufficient land capacity for projected urban growth, the alternatives are generally consistent with adopted plans and policies, though some alternatives are more aligned with the goals of particular plans and laws than others.[6]

The details are scattered through numerous tables in both the Buildable Lands Report and the DSEIS, but looking at the data for UGA capacity, it is clear that the two do not agree at the UGA or the aggregate (county-wide) level. Exhibit 2.6-22 of the DSEIS lists population capacity figures for the existing unincorporated UGAs (i.e. Alternative 1 – No Action). Those figures differ significantly from the UGA capacity figures found in Appendix B of the Buildable Lands Report.

So the Buildable Lands Report finds urban land capacity for 35% more population (22,437) than projected, but the DSEIS, using precisely the same land capacity analysis, tabulates different figures to find that the No Action alternative does not have sufficient urban land capacity. Both cannot be true and the inconsistency between them presents a fatal flaw in sizing UGAs for the updated plan.

**This glaring error must be corrected before the three alternatives can be meaningfully evaluated by the public, the Planning Commission or the County Commissioners.**

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<u>Reasonable Measures – Selective Public Participation</u>

The first thing I noticed when reading the reasonable measures discussion in the DSEIS was that a group of "stakeholders" had been assembled and interviewed to evaluate the existing and potential

[4] Draft Comprehensive Plan Update at 9
[5] 2014 Final Buildable Lands Report, Executive Summary at 3.
[6] DSEIS at 1-14.

reasonable measures. What struck me about this group was that it was composed entirely of County employees and members of the real estate and development industries – two groups with a vested interest in the status quo. I suppose that my current litigation may have been reason to exclude the one person in Kitsap County with the most knowledge and direct experience with Buildable Lands issues, not to mention providing some diversity in viewpoint, but isn't that kind of petty? What you have is the illusion of a balanced sounding board for new ideas which is really just an echo chamber for the party line.

During the last plan update, citizen advisory groups were composed of people with very divergent points of view. The result, while perhaps less tidy, was a more complete understanding of the various issues and some movement toward compromise solutions rather than zero-sum outcomes.

Reasonable Measures – Nothing found to be "reasonably likely" to increase consistency

One area of contention in the current appeal of the County's 2014 Buildable Lands Report is that the report does not "identify measures reasonably likely to increase consistency during the subsequent five year period" as required by RCW 36.70A.215(4). The County's argument is that this identification of reasonable measures is more appropriate as part of the plan update and associated SEPA process.

Regardless of which side prevails in that argument, the DSEIS contains numerous errors and omissions with regard to the findings of the Buildable Lands Report and does not identify any measures deemed "reasonably likely" to reverse the inconsistent growth patterns demonstrated in all three of Kitsap County's Buildable Lands Reports.

The discussion of reasonable measures on pages 79-80 of the main body of the DSEIS more or less accurately describes the County's Buildable Lands/reasonable measures history up to 2006, but fails entirely to mention that the inconsistencies identified in 2004 have persisted through the period evaluated in the 2014 Buildable Lands Report. How can an EIS adequately evaluate the need for and prospective impact of reasonable measures if it does not acknowledge that those inconsistencies have persisted despite the measures enacted in 2006? It does not as can be seen from the meager list of measures identified in the DSEIS appendix

Discussion on pages 3-92 erroneously states that "Several of the [existing] measures have been effective in redirecting growth, such as increasing allowable densities in UGAs, and particularly minimum densities." One could imply from this erroneous statement that the No Action alternative with only its list of existing reasonable measures will be sufficient to achieve consistency between planned and actual growth. But the Buildable Lands Report tells a much different story.

The Buildable Lands Report documents that rural housing is averaging two, four and eight times the maximum allowed, the urban share target has still not been met – has never even come within 10% of the target, and the actual density of housing in the 5-9 du/acre urban zones has averaged around 3 to 3 ½ du/acre.

The reasonable measures discussion of Alternatives 2 and 3 refer to additional reasonable measures to be found in Appendix G of the DSEIS. But the DSEIS analysis of those measures is rather dismal.

The GMA requirement for reasonable measures is to identify (in the Buildable Lands Report), adopt and implement measures that are "reasonably likely" to increase consistency over the subsequent five years. The areas of inconsistency are too-high rural density, too-low urban density and less growth locating in UGAs than planned (urban share).

The courts have directed counties to base their planning decisions on "local circumstances", rebuking both the Hearings Boards and local governments for past reliance on one-size-fits-all "bright line rules". All three of the County's Buildable Lands Reports have identified a single local circumstance which is causing growth patterns inconsistent with the Plan and CPPs: the large supply of pre-GMA non-conforming lots of record, aka "legacy lots".

To date the County has never identified, much less adopted or implemented measures to counteract the impact of those legacy lots on the pattern of growth. Rather, the County has first pointed to a list of density-targeted measures in effect when the inconsistencies occurred (a response rejected by the courts) and then adopted additional but similarly tangential measures. The result, again, is that these measures have failed and once again additional measures are required.

The experience of twenty years of GMA planning, the language of the GMA and its interpretation by the courts have made the logic inescapable: in order to be "reasonably likely" to be effective against these persistent inconsistencies, policy measures must address the local circumstance that is the root cause – the legacy lots. Kitsap has tried relying on existing but ineffective policies and throwing a long list of minor measures at the problem to no avail. Only by tackling on the legacy lot issue head on will the County's plan be "reasonably likely" to achieve the pattern of growth indicated in the plan and the urban concentration and anti-sprawl goals of the GMA. Everything else is just noise.

Appendix G of the DSEIS identifies exactly three measures that deal with legacy lots, but finds none of them to be reasonably likely to be effective. More imagination, effort and better analysis are clearly in order if the County is not to simply (continue to) surrender to sprawl as an inevitable force of nature.

Appendix G at page 70 discusses the potential of requiring a maximum lot size, compelling a minimum density, for housing constructed in UGAs but makes the rather tepid observation that this would "ensure a more efficient use of land area" and "may be appropriate". As to the statutory test of whether this measure would be "reasonably likely" to increase consistency with the County's urban density and urban share targets, the DSEIS is silent.

The fact that the County currently does not implement its comprehensive plan and zoning density requirements through the building permit review process is a causal factor in the low density of constructed housing in UGAs. Requiring new housing construction, including individual homes, to comply with the minimum density requirements of the plan and zoning code by a measure such as a maximum lot size requirement is not only reasonably likely, but nearly certain to result in higher urban density. The County staff among the "stakeholder" interviewed on this subject should have been able to provide that analysis even if the development interests prefer the status quo.

The second legacy lot measure the DSEIS identifies is rural lot aggregation (pages 71-72). The DSIES notes that "the minimum lot size of the rural or resource zone could be met and create a more consistent rural character" through this measure but then dismisses its likely effectiveness by opining that it could easily be thwarted by landowners.

Again, the DSEIS authors lack imagination and/or experience. Lot aggregation is nothing new to Kitsap County. The zoning codes in the late 1970s and early 1980s included lot aggregation requirements for undersized rural and even some urban lots. The principal driver then was compliance with health regulations for on-site septic systems. Undersized parcels did not need to be in common ownership, if a landowner could not aggregate sufficient lots to satisfy the minimum lot size requirements of the health code, a building permit would not be issued. The same policy is possible, albeit likely controversial, with regard to rural lot aggregation to implement the plan and conform to the anti-sprawl goal of the GMA.

But even with a measure that limited lot aggregation to adjacent lands in common ownership, circumvention could be prevented by tying the requirement to ownership as of the date the regulation becomes effective. Thus arm's length or post-adoption ownership changes would not be effective in thwarting the requirement. This worked 35 years ago and can work again.

The only other measure that addresses legacy lots is discussed on pages 72 and 73. Reconfiguration of rural lots into clusters of smaller lots with the remainder of land consolidated for "conservation uses" may serve some purpose but it will certainly not reduce rural densities or increase the share of growth that locates in urban areas. Rather, it creates smaller urban-sized lots which would be more likely to demand urban services and be even more attractive to growth, thus defeating the urban share target.

The DSEIS falls far short of the statutory duty to identify measures reasonably likely to counter the effect of the local circumstances causing persistent inconsistencies between actual and planned growth patterns and erroneously dismisses the likely effectiveness of the two obvious measure to increase urban density and decrease low density sprawl in rural areas.

**Draft Capital Facilities Plan**

The draft Capital Facilities Plan builds upon prior quality work to produce a well-written document. As you likely recall, the capital facilities topic of greatest interest to me is sanitary sewers as those are the make-or-break service for urban growth.

Appendix B contains a good discussion of the duties and challenges of providing "adequate and available" sanitary sewer services to UGAs that are at the end of the original planning period, when capital improvements necessary to fully serve those UGAs must be in place or fully funded within the six year capital plan.

It is difficult for the average reader to determine from the extensive detail and sometimes technical language of the plan whether this requirement has been met with regard to the original 1998 UGAs. What I can glean from the document is that a) the County is aware of the obligation, b) the County expects much of the existing housing within the UGAs to continue to rely on individual on-site septic systems because the life expectancy of those systems exceeds the planning period, c) there appear to be future funding shortfalls on the horizon (6-year or 20-year is not readily apparent to me) and thus d) the County will need to either adjust levels of service or reexamine the Land Use Element (i.e. possibly contract UGAs).

In other words, the draft capital facilities plan appears to be complete, but it may well document a duty to amend the Land Use Element of the plan to achieve compliance with the capital facilities requirements of the GMA.

Respectfully,

Jerry Harless

Cc: Katrina Knutson, DCD staff
Kitsap County Planning Commission
Kitsap County Board of Commissioners