

Response to Council's Questions Pertaining to the Re-conveyance of Lands Within the Lake Whatcom Watershed

1. Legal Issues - There have been a variety of veiled legal threats if we proceed with the re-conveyance. Have we done our legal due diligence regarding:

* Will the DNR decision makers accept our plans for an undeveloped forest reserve as sufficient to meet the "park" requirements of re-conveyance? Can we get an answer to this from DNR before we spend lots of money on the land swap assessments?

Yes, The MOA essentially moves the proposal past this point with the recognition by DNR that the use will be for park purposes. (The Recreation and Conservation Office was also contacted at an early date to confirm that the proposal would meet the definition for park purposes and the SCORP. Although not part of the re-conveyance process, this agency maintains the statewide plan and definitions).

- Whatcom County's title 20 zoning does not allow "parks" in the commercial forestry zone, yet in our re-conveyance MOA we refer to the re-conveyed lands as parks. Does our referencing these lands as future parks in a commercial forestry zone provide a potential legal challenge to either the re-conveyance or to force us to change the underlying zoning?

Parks in fact are allowed as a conditional use in the commercial forestry zone. The proposal calls for a passive low impact nature based park with activities that are consistent with the current CF zoning. The Council could designate the area as a forest reserve and still allow the proposed park activities without a conditional use permit as long as the activities and any developments are in compliance with the CF zoning. Existing county park areas will provide the support facilities such as restrooms, parking and other trailhead amenities for the re-conveyed areas. It should also be noted that we currently have several park areas that have portions of or are entirely zoned Commercial Forest including Canyon Lake Community Forest, North Lake Whatcom Park and Hertz Trail, the Chuckanut Recreational area and South Fork Regional Park containing the Nessel Farm. Based on our current proposal, there would be no reason to request a change in zoning. Please see the following response from Planning Director David Stalheim pertaining to the proposed use.

“Until you have some specific plans for the proposed Lake Whatcom land trade, we couldn't make a land use determination. However, the following permitted uses are allowed outright in the Commercial Forest Zone. I have attached definitions.”

Permitted uses allowed in Commercial Forest Zone:

.056 Public forest preserves, wildlife reserves, natural systems education, and/or interpretive areas.

.060 Trails, trailheads, restroom facilities and associated parking areas for no more than 30 vehicles.

Conditional uses allowed in Commercial Forest Zone:

.154 Operation of dispersed, primitive recreational facilities including tent campgrounds, game reserves, developed trailheads with parking for more than 30 vehicles, but excluding uses such as community centers, riding academies, off-road vehicle parks, parks, marinas, camping clubs, institutional camps and recreational vehicle and travel trailer parks.

20.97.285 Park.

“Park” means private or public areas of land with or without buildings, designated for active or passive recreational uses. This includes unlit athletic fields with no more than one baseball diamond, soccer or football field, unenclosed spectator seating facilities and nor more than 30 parking spaces.

20.97.435.1 Trailheads.

“Trailheads” are areas used for access to trails. Trailheads may include parking areas, restrooms and garbage collection facilities. (Ord. 2004-026 § 1, 2004).

20.97.435.2 Trails.

“Trails” mean areas used for walking and hiking. Where these are adequately constructed, then they may be used for bicycling and may meet ADA standards for wheelchair accessibility. Trails may also be used for mountain biking, cross-country skiing and horseback riding where appropriate. (Ord. 2004-026 § 1, 2004).

Is a SEPA review required?

A SEPA review will be required at a later date for development, but is not necessary for the re-conveyance. An Environmental Impact Statement may be required as part of the SEPA review. I’ve listed the response from Planning Director David Stalheim to this question.

“Below is the provision under SEPA rules that provides an exemption from SEPA review for purchase or sale of property. This exemption would apply to the proposed transfer of land from DNR to Whatcom County that is being considered.”

WAC 197-11-800 CATEGORICAL EXEMPTIONS

(5) Purchase or sale of real property. The following real property transactions by an agency shall be exempt:

- (a) The purchase or acquisition of any right to real property.**
- (b) The sale, transfer or exchange of any publicly owned real property, but only if the property is not subject to an authorized public use.**
- (c) The lease of real property when the use of the property for the term of the lease will remain essentially the same as the existing use, or when the use under the lease is otherwise exempted by this chapter.**

* If past DNR forest practices have left potential liabilities (failing roads, plugged culverts, potential for mass wasting, etc.) will Whatcom County inherit more of these potential liabilities and costs if we gain title to the land?

County legal staff answered many questions pertaining to liability at the Natural Resources Committee meeting on 10/7/08. In summary, as the property owner the County will assume additional liability like it does whenever it acquires ownership in lands. On the re-conveyed lands to the County, DNR will continue to maintain, use and be responsible for approximately 7 miles of roadways. DNR will also have completed the maintenance and abandonment work per State Forest Practices standards for all roads within the watershed by November 2008 (Wallace 2/08). The County Parks and Recreation Department will maintain and be responsible for the designated trail system and abandonment of approximately 9 miles of roads that will no longer be required. Whatcom County through the Public Works Department will continue to be responsible for maintenance of the dikes and bridge structure on Smith Creek. Any questions pertaining to on going responsibilities by DNR within the Smith Creek watershed will be dependent upon the final ownership pattern to be determined by the inter-grant process. DNR currently monitors and removes debris dams as needed on this stream corridor. This responsibility may be shifted to Whatcom County if this area is transferred to the County.

* Mr Kirsch makes a legal argument about zoning and GMA which I won't try to explain here. His recent article at: <http://www.nwcitizen.us/entry/still-the-big-hurdle-for-reconveyance> spells it out. Has this been considered, and is there any legal concerns based on this interpretation? **The following response is provided from WC Planning and Development Services. "GMA is not a regulatory statute. We designated CF lands in the comp plan and adopted development regulations. Someone could have challenged the development regulations as being inconsistent with GMA for protection of commercial forest lands, but they didn't. The presumption is that they are valid and can stand scrutiny."**

2. Cost Issues

* We have been told that the ongoing cost of operation and maintenance will be about \$150,000/year. Please provide a breakout of those costs.

An estimated fiscal worksheet was provided to Council members in September showing the breakdown and source for costs. The estimated M&O is based on 1- FTE ranger and 2- .60 FTE seasonal trail rangers. Labor costs are estimated at \$125,000 annually with \$25,000 allocated to miscellaneous costs such as signage, small tools, fuel, aggregate, etc. Additional support needed during storm cleanup or for major repairs will be assigned as needed from existing staff and work crews. The 9/23/08 fiscal worksheet is attached. Under the current schedule, the County would not incur maintenance and operating costs until the 2011 budget cycle.

* Has any analysis been done on the costs of ongoing forest maintenance including such things as thinning and planting to accelerate old growth status, maintenance or rehabilitation of old roads and culverts to prevent failures, control of exotic species, etc? If not, please provide such a cost analysis. Is so are those costs included in the \$150,000/year.

Road and trail costs can be found in the estimated worksheet. DNR will continue to maintain the roads they use. Approximately 9.6 miles of roads will be abandoned at an estimated cost of \$17,500. It is recommended that a forest management plan be developed to identify management strategies for timber and invasive species management. Once a plan is completed, costs can be applied to the specific tasks and practices. This normally would occur after a property is acquired and would be dependent upon what strategies, budget and schedules are approved by the Council. The cost to develop a management plan is estimated at \$10,000 to \$15,000 depending upon scope. The Parks and Recreation Department currently utilizes work crews and volunteers to control exotic species on certain County Park lands but does not budget for any specific control unless grant funds are available. DNR currently does not have program within the watershed to control invasive plant species such as English ivy, blackberry and holly. The Washington State Department of Agricultural is the primary agency that deals with pest and disease infestations of statewide significance. There are no known infestations of any significance within the watershed at this time.

* The advisory committee recommended making the Mount Baker School District whole. We have heard a range of numbers that would accomplish this (\$24,000 - \$100,000/year). Has some sort of analysis been done to give us a number we could hang our hats on? Has a method to provide this money been devised? Where would such funding come from?

The Department of Natural Resources provided information from the Draft EIS for the Landscape Plan based upon modeling and economic assessment. This was reviewed again by DNR staff in March of this year and provided to Council Members. Council Members also received an assessment of the Mt. Baker School Districts estimated impact of timber loss from the landscape plan (S.A. Newman Forest Engineers Inc.) as part of the recent mediated settlement process pertaining to the Lake Whatcom Landscape Plan (*Skagit County v. State and its DNR*). We estimate that the re-conveyance will eliminate approximately \$25,000 a year over the long term from timber generated revenues that would go to the Mt. Baker School District. The School District believes that number is approximately \$100,000 per year. Our figure is based on information provided to us by DNR and analysis done by Newman Forest Engineers Inc. The

School District does not accept the information from DNR as accurate and also relies on a qualified expert. I have attached an explanation of DNR table 11 with a breakdown for your reference. An opinion requested from the Municipal Research and Services Center of Washington indicated that under current law there is no provision or authorization granted that would allow the County to reimburse a taxing district for any lost revenues as a result of re-conveyance.

3. Park Plan & Conservation Easement

* The advisory committee has recommended that we place a conservation easement on the re-conveyed lands to ensure that our plan for an undeveloped forest reserve is not changed by some future Council to some form of recreation that would be harmful to the reservoir.

- What would the enforcement mechanism in such a conservation easement be?

I have included the information Rand Jack provided regarding conservation easements. The County has a long and successful relationship with the Land Trust which holds similar easements on a number of county park properties.

“The conservation easement gives the holder of the easement power to enforce the terms of the conservation easement. Typically our easements provide a series of steps to resolve concerns about compliance with the terms of an easement beginning with informal discussions and ending with legal action if that should be necessary. The dispute resolution framework is spelled out in our easements with the County such as the Lily Point and Point Whitehorn easements. In 25 years the Land Trust has had only two instances where we believed the terms of easements were violated. In both cases the property owner was a timber company and in both cases the owner agreed that there had been a violation and apologized. Both were resolved informally to the satisfaction of everyone. The Land Trust holds conservation easements over, I believe, 14 County properties. We have never has a dispute with the County regarding these easements. The relationship has been constructive and beneficial to everyone involved, including the land. In accepting a conservation easement, we see ourselves as entering into a partnership with the landowner to accomplish the purposes of the easement.”

- Wouldn't we need a clear and defined plan for these lands before we could institute such a conservation easement? Shouldn't that detailed plan be constructed before we spend money on the inter-grant?

While it would be beneficial to have an adopted plan, we have entered into conservation easements in the past before the planning was completed. The key issue is to know what activities and developments are desired so that they will not be restricted by the easement. At present, it would appear that an easement could easily be drafted that would not conflict with the County's vision for park use. Please note that a conservation easement would not be entered into until the County took ownership of the property.

The inter-grant is an internal DNR process to exchange and position trust lands to better facilitate the re-conveyance proposal for both DNR and County Park purposes and has no relationship to the conservation easement. This is the part of the process in which the expenses are incurred for the appraisals, surveys and other necessary items to prepare the re-conveyance and must be paid by the County.

- Some aspects of our current park plan on the reservoir (cabins, lodges, boat launches, docks, etc) have raised concerns by many. The Council tried to remove some of these activities from the Park Plan but because of a error these activities were not removed. Should these concerns be corrected while defining the plan for the reconveyed lands? 6

Leaving these activities and developments in the Comprehensive Parks, Recreation and Open Space Plan was not in error. These items were specifically listed due to public comment, Council discussions, previous planning efforts and in the event existing private recreational facilities in the watershed became available for public acquisition. It is an advantage to have these items listed in the plan to qualify for grant funding. The CPROSP can be modified at any time by the Council. Development of individual park sites is usually determined through a separate and more specific planning process and not the CPROSP which is a general guidance document. Park plans and budget authority are subject to Council approval. Please note that all conceptual proposals for watershed properties listed in the current CPROSP have the following language included: “Lake Whatcom serves as the drinking water supply of over half of the County’s residents and as such, all proposed park activities must be evaluated in the context of their impact on water quality. In addition, parks activities need to be consistent with existing goals and policies of the Joint Lake Whatcom Management Program”. This language was specifically included to address concerns regarding potential developments or actions that may appear to be inconsistent with current or future watershed goals and policies.

- Can parts of the larger park plan within the entire watershed be controlled by inclusion in the conservation easement?

As the owner, the County can place a conservation easement on any lands that it owns. Each property should be evaluated on its own merits along with an assessment of potential LOS and cost impacts to the County. Several park properties within the watershed are already encumbered by conservation easements held by the Whatcom Land Trust.

- The Whatcom Land Trust said for them to hold such a conservation easement they would like a \$50,000 donation. Are there other entities with an interest in such a conservation easement (City of Bellingham?) who could hold such an easement?

I have included comments by Rand Jack with the Whatcom Land Trust explaining the cost. “The \$50,000 contribution could come out of the conservation futures fund as a cost of the transaction. The money would be put in our Stewardship Fund that is dedicated to monitoring and protecting conservation. The fund now contains well over \$200,000. We will not take on the responsibilities of holding a conservation easement unless we have the resources to monitor and enforce it. That is the commitment we make to the property owner and in this case to the public. As I said at the work session last week, we will search for the money elsewhere if the County is unable to make the contribution. Having a conservation easement on the re-conveyed lands held by someone with resources, commitment and experience is too important to let it not happen.”

While the City of Bellingham could conceivably hold a conservation easement, I believe the Land Trust is in the best position to meet the intent of an easement should the County pursue this course of action. Both the City and County already have an excellent relationship with the Whatcom Land Trust which currently holds conservation easements on properties owned by both governmental entities.

- Are there down sides to having such a conservation easement on this land?

There may be if the easement is structured in such a way that it restricts the intended use. As pointed out in previously, the goal would be to be restrictive enough to assure maximum water quality protection, but not so strict as to hamstring professional judgment in managing the park or resources. It is the Council which will approve the terms and conditions of the easement.

4. Other Issues

* Many people have said the re-conveyance is an important step forward for protection of the Lake Whatcom drinking water and to meet our pending TMDL requirements. Has this program been run through the County Water Resource Integration Project system for rating water related programs? If not, please do so. If so, how did it rate? ,

Per Jon Hutchings, Assistant Director Public Work Dept.: “Water Resources and Parks staff objectively evaluated the benefit of the proposed re-conveyance using the standard Council-approved criteria. The re-conveyance ranks high relative to other water resource investments. This ranking is consistent with other property acquisitions in the Lake Whatcom watershed. A staff report will be transmitted under separate cover.

* The Council has asked the Administration to bring us a budget this fall with a Level of Service (LOS) 4 or 5 for implementation of priority water programs. Is it true that the Administration does not plan to do this, but will bring us a budget based on LOS 2, which would not include funding for implementation of the Lake Whatcom Stormwater Plan? If that is true how can we justify this funding for lower priority reservoir protection than our legally required stormwater plan.

Per Jon Hutchings, Assist Director Public Works Dept.: “The Administration intends to tread responsibly by making formal budget recommendations commensurate with known revenues. The water resource recommendation will be limited to (1) projected FCZD revenues and (2) judicious use of FCZD fund balance. Our FCZD revenue projections for 2009/10 place the budget slightly below Level of Service 2. In other words, we must slim spending compared to 2008 to protect the fund balance during the 2009/10 budget cycle.”

Revenue enhancements like those contemplated by Council for water resource Level of Service 4 or 5 remain highly speculative at this point. We intend to work with Council to explore these possibilities further by presenting enhancement options during budget hearings. We understand, but have not confirmed with you, that Council is considering a property tax increase and a stormwater utility fee to pay for the additional services. Please confirm and we will do our best to provide whatever information we can to inform your deliberations.

The Administration strongly believes that management of stormwater in the Lake Whatcom watershed is a high priority. The question that must be answered is where stormwater activities fall among other funding priorities, particularly in light of the present economic hardship our citizens and government are experiencing. The level of activity in the watershed will ultimately be balanced against our citizens' ability to pay. We intend to begin implement highest priority management actions in the Lake Whatcom Stormwater Plan regardless of additional revenues. That said, the Administration recognizes that more aggressive implementation requires more money and that the Lake Whatcom stormwater program will benefit from a dedicated funding source. Again, we intend to provide as much assistance to Council as we can to inform the difficult fiscal decisions.”

Please provide a 5 year budget for the Conservation Future Fund that shows projected income, the re-conveyance costs to the fund, and other projected expenditures from the fund. **The 2009 and 2010 County Conservation Futures budget information will be provided by the Executive as part of the Executive’s recommended budget document.**