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March 9, 2007

Martin Blackman
Designated SEPA Official
Whatcom County Planning & Development Services
5280 Northwest Drive
Bellingham, WA 98226

Re: Balfour Village

Dear Mr. Blackman:

Thank you for the opportunity to respond to Mr. Lackey's December 15, 2006 letter regarding your SEPA threshold determination.

One of the fundamental flaws in Mr. Lackey's analysis relates to his assertion that the project is wholly governed by RCW 36.70B.040. That section establishes protocols for determining whether a project is consistent with existing development regulations. Mr. Lackey states that "the County does not have the authority to revisit planning decisions" reflected in the existing development regulations. He continues, "[t]he SEPA process cannot be used for the purpose of reanalyzing the appropriateness of the existing Comprehensive Plan and zoning." In broad strokes, Mr. Lackey's letter then goes on to assert that mitigation imposed pursuant to those regulations will address whatever adverse impacts the project may have and, therefore, a DNS is inevitable.

The first and most fundamental flaw in this argument is that the project is not consistent with the current zoning code. The applicant has acknowledged this inconsistency and seeks an amendment to the zoning designation for the property to cure that defect. That rezone request is not subject to the project-specific consistency requirements in RCW 36.70B.040. The rezone request is a "planning decision." It is the applicant who is asking the County to "revisit" that prior planning decision. It is the applicant who is asking the County to "reanalyz[e] the appropriateness of the existing . . . zoning."

This request for a rezone eliminates entirely the issue of whether the project is consistent with the existing development regulations. If this project gets that far, the County Council will be called upon to decide whether to change the zoning for this property. That is a policy-laden, discretionary

decision. The County Council must have the best environmental information available to it when it makes that decision. It will not be sufficient for the County Council to be informed that the project meets various development regulation requirements. The policy level decision the Council must make requires that the Council have the benefit of a full Environmental Impact Statement. Only an EIS can inform the County Council as to the full sweep of the environmental impacts of the project.

In particular, an Environmental Impact Statement provides the County (including the County Council) with two types of information that no amount of code compliance analysis can provide: an assessment of alternatives to the project and an analysis of cumulative effects. SEPA requires that an EIS address alternatives to the project (including the "no action" alternative) to assure that policy level decision makers are presented with a full range of opportunities -- not just a single *fait accompli*. The alternatives analysis is frequently referenced as the heart of the EIS because it is through the examination of alternatives that policy level decision makers can have the greatest impact on achieving SEPA's purposes "to prevent or eliminate damage to the environment;" and "to fulfill the responsibilities of each generation as trustee of the environment for succeeding generations." RCW 43.21C.010(2) and RCW 43.21C.020(2).

Thus, SEPA not only requires that an EIS consider alternatives to the proposal but, separately, SEPA instructs local governments to "study, develop, and describe appropriate alternatives to recommended courses of action and any proposal which involves unresolved conflicts concerning alternative uses of available resources." RCW 43.21C.030(2)(e).

An EIS also provides the County's decision makers with important information regarding a project's cumulative impacts. SEPA defines cumulative impacts to include secondary effects, e.g., additional development in the vicinity that will be spurred by approval and development of this project. No amount of code compliance analysis will provide County decision makers with the important information about the project's long-term cumulative effects. County decision makers are entitled to -- and required to -- have this information available to them before they make decisions like whether to rezone the property.

An EIS provides other benefits to the County, too. Preparation of an EIS should assure that the County decision makers have the benefit of an objective, third-party review of the various environmental issues. Currently, the County is being fed environmental analysis from the applicant's consultants. Not surprisingly, that analysis reflects the applicant's perspective. County decision makers are entitled to an independent analysis and should obtain that through the preparation of an EIS.

Simply holding a public forum or hearing about the current environmental analysis is not an adequate substitute for preparing an EIS. SEPA requires distribution of a draft EIS to the public and agencies with expertise. The public and expert agencies can then review and comment on the

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analysis in the draft document. The final EIS must then include a response to those comments and, hopefully, incorporates some of the suggestions into the final documents. Providing a forum for local residents to be heard regarding the environmental analysis to date is no substitute for the rigorous analytical method which SEPA demands for preparation of an EIS.

Finally, even if the only issue were the impact of code compliance issues upon the SEPA threshold determination, the result would still be the same. An EIS is necessary. The implementing SEPA regulation (WAC 197-11-158) addresses the extent to which compliance with code requirements can be used to avoid an EIS. Basically, a three part analysis is required.

First, the County must determine whether the project has probable significant adverse impacts (without regard to application of code requirements). See WAC 197-11-158(2)(d). Next, the County must determine whether those impacts have been identified in the planning documents (e.g., Comprehensive Plan and development regulations). WAC 197-11-158(2)(b)(i). Third, the County must determine whether the impacts are "adequately addressed" in those planning documents. WAC 197-11-158(2)(b)(ii). If the development code does not "adequately address" all of the significant impacts, an EIS must be prepared.

Mr. Lackey's letter implies that all significant and adverse impacts of a project are automatically mitigated pursuant to SEPA as long as the project is consistent with the County's development regulations. To the contrary, the SEPA regulations state quite the opposite. As mentioned above, WAC 197-11-158 makes it clear that project-specific impacts may not be adequately addressed by the Comprehensive Plan, applicable development regulations, or other relevant laws. Examples of project-specific impacts that may not have been adequately addressed include impacts indicated by new information or impacts that were not contemplated when the planning documents were developed. See WAC 197-11-158(3).

With the enormous Balfour Village proposal, there are numerous project-specific impacts that are not adequately addressed by the County's regulations. County staff members have identified probable significant adverse impacts from this project related to, among other things, building in the alluvial fan hazard area; impacting the functions and values of intermittent streams on the slopes; impacting wetlands, including those that are potentially associated with the streams; a significant loss of native habitat for wildlife and displacement of terrestrial wildlife; and a massive introduction of traffic in the area.

Perhaps most obvious at this juncture is that the outdated 1997 Critical Areas Ordinance falls far short of adequately addressing adverse impacts of the project. Mr. Lackey's letter makes repeated assertions that the project is consistent with the 1997 Critical Areas Ordinance. But he ignores that the CAO was substantially revised in 2005. Those revisions were precipitated in large part by recognition that the old CAO did not adequately address various types of critical area impacts. The County's decision to adopt the new CAO in 2005 is "proof positive" that the 1997 CAO (upon

which Mr. Lackey relies) did not “adequately address” the environmental impacts of a project like this. Because the applicant is relying on compliance with an outdated CAO, it cannot make the argument that compliance with that outdated CAO “adequately addresses” environmental impacts and eliminates the need for an EIS.

One specific example of that relates to the CAO’s treatment of alluvial fans. The current CAO properly identifies the serious risks associated with development on alluvial fans and calls for complete avoidance of development on these hazardous areas as the first option. WCC 16.16.320. In contrast, the outdated CAO is ambiguous regarding avoidance as the first option. Ordinance No. 97-056, § 16.16.350. The failure of the old CAO to explicitly call for avoidance of alluvial fans as the first option is one example of the inadequacies of the old ordinance. Compliance with the old ordinance is no substitute for preparing an EIS because risks associated with developing on alluvial fans were not “adequately addressed” in that old ordinance.

With respect to alluvial fans, Mr. Lackey stated that Doug Goldthorp’s “only concern” is the interpretation of the Critical Areas Ordinance. That is not true. Mr. Lackey completely overlooked the central theme of Mr. Goldthorp’s letter in which he repeatedly claimed that this project should not build in the alluvial fans. It is clear from Mr. Goldthorp’s letter that development in that area, as proposed, will have probable significant adverse impacts.

Doug Goldthorp stated:

WCI’s avoidance recommendation supports the concept of hazard avoidance and signals the need to avoid alluvial fan hazards. The fact that WCI characterizes these fans as active and recommends structural control mitigation throughout the alluvial fans involving stream channelization, berms, catchment and infiltration areas, and redundant back up berming, suggests a level of hazard and risk that could substantially and significantly impact the public health, safety, and welfare. Conversely, if the hazard and risk were so insignificant, no mitigation proposal (and cost) would be necessary. In the absence of a legislatively established standard or level of acceptable risk, coupled with the unpredictable nature of debris flows and debris flood events and the improbability of any effective long-term maintenance program, it is advisable to consider the entire alluvial fan geomorphology as a significant risk to the public health, safety, and welfare. It is this administrative opinion that the hazards and risks associated to the entire alluvial fan, including the debris flow, debris flood, and distal flood zones, warrant avoidance.

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Doug Goldthorp makes it clear that avoidance is the policy of the County for division of land such as this. However, contrary to that policy, the proposal is for a massive engineering of the area within the alluvial fan coupled with development.

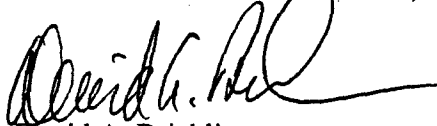
Alluvial fan impacts are just one example of numerous different probable significant adverse environmental impacts of the Balfour Village proposal. In his letter, Mr. Lackey claimed that "if there are specific impacts that generate your general concerns, they need to be specifically identified so the applicant can further study or propose mitigation as appropriate." But that is the precise purpose of an EIS. Once the County has established that the proposal will have probable significant adverse environmental impacts (which County staff have done here), an EIS is required to further study those impacts more specifically and propose mitigation as appropriate. Mr. Lackey's suggestion that the step following the County's identification of significant and adverse impacts is further analysis by the applicant's consultants without an EIS, is a cloak-and-dagger approach to the EIS process that undermines SEPA's purposes of assuring a full airing of environmental issues, with full public and agency participation, so that decisions can be made "by deliberation, not default"¹ and environmental resources protected to the fullest extent practicable.

In light of the above, there can be no doubt that the County must prepare an EIS to fully and openly analyze the probable significant adverse impacts of the project with greater specificity, including cumulative effects; consider different mitigation measures; analyze alternatives to the proposal; and allow proper agency and public input along the way.

Thank you for your consideration of these comments.

Very truly yours,

BRICKLIN NEWMAN DOLD, LLP



David A. Bricklin

DAB:psc

cc: Royce Buckingham, Assistant Prosecuting Attorney
John Everett, Senior Planner, Transportation
Doug Goldthorp, Senior Planner, Natural Resource Specialist
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¹ Stempel v. Department of Water Resources, 82 Wn.2d 109, 118 (1973).

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