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VIA E-MAIL and FIRST CLASS MAIL

City of Lynden
Attn: Ms. Heidi Gudde
Planning and Community Development Director
300 4th Street
Lynden, WA 98264
guddeh@lyndenwa.org

Re: Planning Commission Hearing

Dear Ms. Gudde:

Stoel Rives, LLP has been engaged to represent Fishtrap Creek, LLC ("Fishtrap Creek") in connection with its rezone application for the 5-acre property located at 8035 Guide Meridian Road in Lynden, WA. Ashley Gosal, on behalf of Fishtrap Creek, has requested a modest rezone of the property from CSR (Commercial Services Regional) to CSL (Commercial Services Local) zoning, which would reduce commercial use intensity and permit residential uses to foster community-oriented, mixed use development on the site.

As you are aware, Fishtrap Creek's rezone request received a positive recommendation from your Department after a thorough review by City Staff and the City's Technical Review Committee. Despite this positive recommendation, at a January 28, 2021 City of Lynden Planning Commission hearing, the Planning Commission opted to forward a recommendation of denial to the City Council.

After a thorough review of the hearing tape, our office has grave concerns about the procedure and substance of the Planning Commission hearing, which are detailed below. In summary, the Planning Commission hearing was improper, arbitrary and capricious and failed to comply with both Washington's Appearance of Fairness Doctrine ("AOFD") and Washington's prohibition against arbitrary interpretations of land use regulations. For these reasons, we request that this letter be provided to the City Attorney for legal review and analysis, and that the letter be included in the packet forwarded to City Council as part of its independent deliberation on the rezone application.

A. Washington's Appearance of Fairness Doctrine Requires Procedurally Fair Hearings Conducted by Impartial Decision-makers.

When reviewing a site-specific rezone, the Lynden Municipal Code ("LMC") 17.03.040.3 requires that the Planning Commission "conduct an open record hearing, review, enter findings and make recommendations to the City Council." The Planning Commission's open-record hearing must comply with Washington's Appearance of Fairness Doctrine ("AOFD"), which is codified at RCW 42.36.010.

The AOFD requires that government decision-makers conduct non-court hearings and proceedings in a way that is fair and unbiased in both appearance and fact. To satisfy the AOFD, quasi-judicial public hearings must meet two requirements: 1) the hearings must be procedurally fair, and 2) the hearings must appear to be conducted by impartial decision-makers.

In *Smith v. Skagit Cty.*, 75 Wn.2d 715, 453 P.2d 832 (1969), the Washington Supreme Court explained the AOFD as follows:

> In short, when the law which calls for public hearings gives the public not only the right to attend but the right to be heard as well, the hearings must not only be fair but must appear to be so. It is a situation where appearances are quite as important as substance.

Smith, 75 Wn.2d at 733.

Thus, to preserve public confidence in governmental processes which bring about zoning changes, the AOFD requires that hearings be conducted in an impartial, even-handed manner. *Swift v. Island Cy.*, 87 Wn.2d 348, 361, 552 P.2d 175 (1976). In *Swift*, the test for whether the appearance of fairness doctrine has been violated was stated as:

> Would a disinterested person, having been apprised of the totality of a board member's personal interest in a matter being acted upon, be reasonably justified in thinking that partiality may exist? If answered in the affirmative, such deliberations, and any course of conduct reached thereon, should be voided.

The January 28, 2021 Planning Commission hearing fell well short of both AOFD standards. First, the Lynden Municipal Code ("LMC") required the Planning Commission to take testimony and evidence so that it could "consider facts germane to the proposal." LMC 17.09.040.B. However, at the hearing, the Planning Commission did not ask for, or allow, public testimony despite the presence of several members of the community, including adjacent property owners, who had called in to comment in favor of the proposal.

Instead, Planning Commission Chair Diane Veltkamp stated that there was opposition to the proposal but did not solicit or give an opportunity for any of said opponents to provide testimony, nor was the floor opened for public comment for any community members who had called in to testify in favor of the proposed rezone.

Failure to treat all parties equally and accept relevant testimony from both sides at an open record public hearing violates the AOFD. Additionally, the Planning Commission did not focus on the rezone application before it, and instead asked Fishtrap Creek several questions that related to specific development of the property, which was not germane to its rezone request. For example, the Planning Commission inquired about soil types, the floodplain level and whether the applicant would construct storage units on the site. Following these limited, off-topic questions, the Planning Commission closed the public testimony and during its closed deliberations opined that "they did not have sufficient answers from the Applicant."

As to the second AOFD requirement, the AOFD requires disclosures of potential conflicts of interest or other facts that may be indicia of partiality. For example, the courts found AOFD violations when a planning commission chairman owned property adjacent to the property that was subject to a rezone application (*Buell v. Bremerton*, 80 Wn.2d 518, 495 P.2d 1358 (1972)) and when planning commission members were active in a civic group that was promoting a proposed rezone (*Save a Valuable Environment v. Bothell*, 89 Wn.2d 862, 576 P.2d 401 (1978)).

At the Planning Commission hearing, no Commission member disclosed any potential conflicts-of-interest or offered to recuse themselves from hearing the matter. Fishtrap Creek has since learned that Commissioner Karen Timmer is the Managing Director of a realty office that recently represented an unsuccessful prospective purchaser in connection with an attempted purchase of the property that is the subject of the rezone, and that this prospective purchaser is also an employee in Commissioner Timmer's realty office. It is Fishtrap Creek's understanding that the unsuccessful purchaser, bought property across the street from the rezone site, and remains interested in purchasing it should Fishtrap Creek fall out of contract.

This potential conflict-of-interest was not disclosed at the hearing, and Commissioner Timmer did not offer to recuse herself. Additionally, during the hearing, Commissioner Timmer was the lead and most vocal opponent to the rezone, and improperly opined on the potential financial considerations to the property seller from holding onto the property rather than completing its sale to Fishtrap Creek, which again was not a proper topic for consideration under the applicable decision criteria.

Additionally, Commissioner Timmer made the motion to deny Staff's recommendation for approval of the rezone, citing arbitrary reasons such as the seller's financial interests, insufficient project information, and city-wide planning matters – none of which are the Code's decision-making criteria for evaluating a rezone. Fishtrap Creek is left to ponder Commissioner Timmer's motives for injecting a discussion of the relative financial merits of a property sale into this rezone hearing, but the comments demonstrate potential bias and a conflict-of-interest that warranted disclosure and possible recusal under the AOFD.

B. Washington Law Requires Adherence to Codified Decision-making Criteria.

Application of subjective standards that are not established in City's Municipal Code leads to arbitrary decision-making that is prohibited by Washington law.

As stated previously, in this case, Fishtrap Creek is proposing a relatively modest rezone from Regional Commercial Services (CSR) to Local Commercial Services (CSL). The main differences between the CSR and CSL zones are that the CSL zone would reduce the commercial intensity from large format retail and regional commercial to local-scale retail and would allow for residential uses to facilitate the possible creation of a pedestrian-oriented, mixed-use area. Thus, the requested rezone was a down-zone of commercial use intensity that would reduce auto-oriented, large format retail uses and would allow for the creation of transit-oriented, in-fill, community-oriented, mixed-use development (including residential) which is encouraged by the Growth Management Act and the City's comprehensive plan.

Per LMC 17.19.050, the Planning Commission was charged with evaluating Fishtrap Creek's rezone application "for consistency with the city's development code, adopted plans and regulations" using the following criteria:

A. The current zoning was either approved in error or that a significant change in circumstances since approval of the current zoning warrants reclassification of the subject property as proposed;

B. The proposed site-specific rezone is consistent with the city's comprehensive plan and applicable subarea plan(s);

C. The project proposal is consistent with the city's development codes and regulations for the zoning proposed for the project;

D. The proposed site-specific rezone is compatible with existing uses and zoning in the surrounding area; and

E. The proposed site-specific rezone will promote the health, safety and general welfare of the community.

Instead of reviewing Fishtrap Creek's rezone request for consistency with the above criteria, the Planning Commission undertook a subjective analysis that led it to reject the Planning Staff's conclusion that changed conditions warranted the rezone and that the rezone was consistent with City's comprehensive plan and development regulations and should be approved.

The Planning Commission also did not consider the Fishtrap Creek's reasoning or responses. Instead, the Commission discussed their personal opinions about the merits of the rezone. Direct quotes from the Commission hearing include the following:

- "I don't know if we want to see downzoning";

- "I hate to see downzoning to where we put housing there"
- "Will we be sorry if we change this to local?"
- "I don't personally feel Guide is the right area";
- "That is my personal opinion, maybe not just personal. But that it needs to stay that way."
- "How much of the property is in the flood plain? What is the flood plain level?"
- "Do you know anything about the soil type? Or you don't know that?"
- "Why has development thus far not been financially or economically feasible?"
- "Septic systems in this area –why is City doing it now to benefit this property?"
- I would rather see our downtown area… that we could have this elsewhere" "I don't personally feel Guide Meridian is the area to do this"
- "I do think that once they get sewer there on the property they're going to get their money because it's going to be much more valuable"
- On Commissioner recommended denial of the rezone because the "residential aspect in this area will not only not promote the health, safety and general welfare of the community – but may hinder it."

The bulk of the Commission's deliberations focused on the first criteria regarding the extent of changed conditions. Commissioner Veltcamp then said that she would "buzz through the next criteria" simply reading these criteria out loud to the Commissioners. No discussion was had on the application's compliance with the criteria , and the Applicant's responses and City Staff analysis were not reviewed.

As demonstrated by the quotes above, following prompting from Commissioner Timmer, the Planning Commission improperly discussed and considered the economic benefit to the seller of potentially holding onto the property and selling it at a later date after the City had completed installing sewer infrastructure. Commissioner Timmer stated, "I do think that once they get sewer there on the property they're going to get their money because it's going to be much more valuable." This statement is particularly concerning given Commissioner's Timmer's representation of an unsuccessful prospective purchaser of the property, that may have a continued interest in purchasing it should Fishtrap Creek fall out of contract.

Toward the end of its deliberations, the Commissioners commented that they did not have enough information about the project, stating "If they came forward with a proposal, and we could see benefit to the City then possibly we could justify it" when, in fact, there was no development

project presented because this application was for a site-specific rezone unrelated to a specific development proposal.

The project-specific information that the Planning Commission requested was inapplicable to the applicable rezone criteria and the Planning Commission's denial based, in part, on a purported lack of project-specific information rendered its decision arbitrary and capricious. The Planning Commission further compounded its error by raising these issues after closing public testimony and entering into the deliberative phase of the proceedings, thereby denying the City, the applicant, or other interested parties the opportunity to respond to its off-topic considerations.

Ultimately, the Planning Commission denied the requested rezone, claiming that the proposal would adversely affect the health and safety of Lynden's citizens. This conclusion was unsupported by factual evidence, and the Planning Commission failed to explain what element of the proposal would adversely impact health and safety or how this alleged impact was likely to occur.

In fact, as acknowledged by City Staff, the requested rezone would incorporate local businesses, residential opportunities and walkability – all of which would improve health, safety and welfare of the community. Instead, as the hearing tape demonstrates, the Planning Commission improperly focused on financial impacts to the potential seller; project-specific development questions that were beyond the scope of a rezone application; and the existence of other residential planning areas within the City of Lynden.

The Planning Commission's reliance on these *ad hoc* decision-making criteria violated Washington's unconstitutional vagueness doctrine. B*urien Bark Supply v. King County*, 106 Wash.2d 868, 871, 725 P.2d 994 (1993). In the area of land use, a court looks not only at the face of the ordinance but also at its application to the person who has sought to comply with the ordinance and/or who is alleged to have failed to comply. *Id*. at 871. An ordinance which forbids an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law. *Grant Cty. v. Bohne*, 89 Wn.2d 953, 955, 577 P.2d 138, 139 (1978). Thus, to limit arbitrary and discretionary enforcement of the law, the unconstitutional vagueness doctrine requires that regulatory decisions be made against ascertainable standards. *Id*.

In *Anderson v. City of Issaquah*, 70 Wn. App. 64, 75, 851 P.2d 744, 751 (1993), the Issaquah development commission rejected an applicant's development application because the members did not like the proposed building color and architectural features, stating that the proposed building was "not compatible" with their conception of the proper image of Issaquah. The Court found that this form of decision-making violated the unconstitutional vagueness doctrine:

> As they were applied to Anderson, it is also clear the code sections at issue fail to pass constitutional muster. Because the commissioners themselves had no objective guidelines to follow, they necessarily had to resort to their own subjective "feelings". The "statement" Issaquah is apparently trying to make on its "signature

> street" is not written in the code. In order to be enforceable, that "statement" must be written down in the code, in understandable terms. The unacceptable alternative is what happened here. The commissioners enforced not a building design code but their own arbitrary concept of the provisions of an unwritten "statement" to be made on Gilman Boulevard. The commissioners' individual concepts were as vague and undefined as those written in the code. This is the very epitome of discretionary, arbitrary enforcement of the law.

Anderson v. City of Issaquah, 70 Wash. App. 64, 77–78, 851 P.2d 744, 752 (1993) (citations omitted); see also, *Hayes v. City of Seattle*, 131 Wn.2d 706, 717–18, 934 P.2d 1179, opinion corrected, 943 P.2d 265 (1997) (conclusory action taken without regard to the surrounding facts and circumstances is arbitrary and capricious).

Here, the Planning Commission did not consider the merits of the requested rezone against the applicable Municipal Code provisions. One Commissioner stated "[a] residential aspect in this area will not only not promote the health, safety and general welfare of the community – but may hinder it." As seen in the *Anderson* case, conclusory action taken without reliance on express code provisions and without regard to the surrounding facts and circumstances is arbitrary and capricious. By deviating from the Code's adopted standards, the Planning Commission engaged in *ad hoc* decision-making that resulted in impermissible discretionary and arbitrary enforcement of the law.

In conclusion, the Planning Commission failed to comply with Washington law, which required a fair and unbiased hearing and application of the facts to Code's decision-making criteria. Here, the Planning Commission excluded testimony from interested parties, raised issues that were not germane to Fishtrap Creek's rezone application, did not disclose potential conflicts of interest, and did not establish a factual and legal basis for ignoring Staff's recommendation of approval. Accordingly, this letter is to put the shortcomings of the Planning Commission's process on record with the City Attorney for evaluation and legal consideration, and to request that the City Attorney advise the City Council of the weight and legal nature of these concerns. We believe that in light of the failures to comply with Washington Law, the Planning Commission's recommendation should be voided, and Fishtrap Creek's rezone application should be reviewed independently by the City Council consistent with the applicable Code requirements and Planning Staff's recommendation for approval.

Sincerely,

Patrick J. Mullaney
Stoel Rives, LLP
Attorneys for Ashley Gosal on behalf of Fishtrap Creek, LLC.

Cc: client