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Whatcom County Council Office
311 Grand Avenue; Suite 105
Bellingham, WA 98225

DOCUMENT TITLE:

Development Agreement between Whatcom County and Wes and Diane Herman

Reference number(s) of documents assigned or released:

Resolution Number:

Grantor(s) (land name, first name and initials):

Whatcom County

Grantee:

Wes and Diane Herman

Abbreviated Legal Description:

PTN of NE1/4 of the SE1/4 of S34, T39N, R3E

Parcel Numbers:

390334 202205

DEVELOPMENT AGREEMENT

This Development Agreement (the "Agreement") is entered into by and between Whatcom County (the "County") and Wes and Diane Herman ("Herman")(the "Applicant") (collectively, the "Parties") pursuant to the authority granted by Title 21, Whatcom County Code (WCC) to promote the development of certain real property located within the County upon the following terms and conditions.

WHEREAS, the Applicant owns certain property identified in Exhibit "A" ("Property") and legally described in Exhibit "B." The Property is located off of Zander Drive, approximately ½ mile south of E Smith Rd, in north Bellingham, WA. The Property is square in shape and is approximately 40 acres in size. The Property is located within Section 34, Township 39 North, Range 03 East, W.M. The Property is zoned Rural 1 Unit/5 Acres (R5A) and has a Comprehensive Plan designation of Rural. The Property is located in an area that is considered an Agriculture Protection Overlay Zone (APO) due to soil types present on the Property; and

WHEREAS, the Property is currently undeveloped with predominantly flat and gently rolling topography. The western half of the Property is pasture grass, and the eastern half is predominantly forested, with a larger forest block extending southeast off site. The western portions of the Property are currently and have been historically farmed as a pasture and as a part of the adjacent dairy to the south. There are multiple Category III and IV pasture wetlands scattered across the Property, with several larger Category III forested wetlands concentrated in the south and east portion of the Property; and

WHEREAS, A Critical Areas Assessment Report was completed by Northwest Ecological date stamped February 1, 2017 and an Impact Assessment and Mitigation Report Revision 1 dated September 12, 2018 identifying the size, location and category of the wetlands and proposed conceptual mitigation; and

WHEREAS, the Applicant submitted a preliminary long plat application ("Preliminary Long Plat") on March 8, 2017 (LSS2017-00002) to subdivide the 40-acre parcel into 7 clustered residential building lots and one reserve tract with a residential building site, for a total of 8 densities; and

WHEREAS, the Current Application will meet zoning and subdivision ordinances in effect at the time of it being deemed a complete application, except as specifically modified by this Agreement; and

WHEREAS, the legislature of the State of Washington has adopted the Growth Management Act (RCW 36.70A) to ensure that various State-wide growth and planning Goals and Policies are implemented by local jurisdictions; and

WHEREAS, the County has adopted various Comprehensive Plan Chapters related to Land Use, Housing, Economics, Resource Lands and the Environment, which contain Goals and

Policies that promote the development of housing where public utilities are present, preservation of agricultural areas, and preservation of environmental areas; and

WHEREAS, the County has adopted various land use ordinances intended to regulate rural development (WCC 20.36 and 21), preserve and protect critical areas (WCC 16.16), and preserve and protect agriculture (WCC 20.38) ; and

WHEREAS, inherent conflicts exist in the implementation of these various planning goals and policies; and

WHEREAS, the County has identified that a balance between these competing interests should be established in the design of development projects; and

WHEREAS, the proposed mitigation meets the mitigation ratio standards in the existing code as well as provides greater protection of higher functioning critical areas onsite; and

WHEREAS, the location of adequate soils for onsite sewage systems and stormwater management systems reduce the ability of the remaining agriculture land areas to be economically viable; and

WHEREAS, a total of 19.938 acres will be permanently removed from potential agricultural lands; and

WHEREAS, the applicant has designed the subdivision to maintain some agricultural lands and/or fields in pasture, however, the core block of agricultural land would be eliminated and only smaller areas would remain available for agricultural purposes; and

WHEREAS, a conservation easement for wetland and buffer protection will be placed on portions of the reserve area tract. The conservation easement will restrict ongoing agriculture in these areas; and

WHEREAS, the Purchase of Development Rights (PDR) Program regularly purchases development rights and enacts easements for the value of the unexercised residential development potential on parcels that include a mix of agricultural, forested and other land uses; and

WHEREAS, the County and the Applicant have agreed that a fee in lieu payment made to the PDR Program is an effective tool in this particular instance to address unavoidable impacts to agricultural lands from the development of the site and the location of adequate soils for on-site sewage systems, which impacts are not adequately mitigated through project design; and

WHEREAS, to facilitate better overall plat design, and an appropriate balance of protection of agricultural and environmental interests on the Property the Applicant proposes to reduce the 100' APO setback in WCC 20.38 and allow installation of onsite sewage system drain fields within wetland buffers on the reserve tract; and

WHEREAS, the proposed deviations from Whatcom County code are the minimum necessary to accomplish the proposed project; and

WHEREAS, the County has determined that the proposed project has been designed to balance project impacts through various efforts, including clustering provisions to reduce development impacts, critical areas impact mitigation sequence, and preservation of agricultural lands; and

WHEREAS, the County issued a SEPA threshold Determination of Non-Significance on June 24, 2019 with a 14 day public comment and 10 day appeal period; and

WHEREAS, on September 3, 2019, the Whatcom County Technical Review Committee issued the Staff Report including code analysis and recommended conditions of approval for the subdivision and development agreement; and

WHEREAS, on September 17, 2019 the Whatcom County Hearing Examiner recommend approval the WD40 Long Plat (LSS2017-00002); and

WHEREAS, following public notice provided in a manner consistent with the County requirements and by law, a public hearing regarding this Agreement was held by the County Hearing Examiner on September 11, 2019 and the Whatcom County Hearing Examiner recommended approval of this Agreement on September 17, 2019; and

WHEREAS, in an open public meeting, the County Council on September 24, 2019 approved this Agreement; and

WHEREAS, on September 24, 2019 the Whatcom County Council issued approval the WD 40Long Plat (LSS2017-00002); and

WHEREAS, the County Council authorizes the County Executive to execute this Agreement on behalf of the County; and

NOW, THEREFORE, the Applicant and the County agree to the proposed development of the Property on the terms and conditions set forth below.

AGREEMENT

1. ***Approval of Property Development.*** The County has determined that, as conditioned, the Preliminary Long Plat is consistent with this agreement and the current development regulations in effect at time of its complete application determination per WCC 22.05.060 and this Agreement. Development of the Property shall be consistent with all provisions of the Whatcom County Code.

2. **Property.** The location of the Property subject to this Agreement is identified in Exhibit A and legally described in Exhibit B, attached hereto.
3. **Terms and Conditions.** The development of the Property is subject to Findings of Fact and Conclusions of Law and decision by the County Council regarding the Agreement. The following specifically negotiated terms and conditions apply to the Property.
 - 3.1 **Agricultural Protection Overlay Setback Areas.** The required 100 foot setback for habitable and 30 foot setback for nonhabitable structures from the reserve tract (WCC 20.38.060(7)) has been reduced for lots adjacent to portions of the reserve tract that will not be farmed as shown on the plat map (Exhibit C). The setbacks will be the side and rear setback pursuant to WCC 20.80.210.
 - 3.2 **Location of Septic Systems within the Agricultural Protection Overlay Setback Areas.** As required by WCC 20.38.060(4), adequate soils for onsite sewage systems were not identified for all lots within the cluster development. Septic drainfields for lots 1, 2, 4, and 5 will be located on easements within the reserve area easement. This area will be excluded from the reserve area calculations. The septic drainfield for Lot 8 may be located on the reserve tract as shown on the plat map (Exhibit C).
 - 3.3 **Wetland.** The Preliminary Long Plat is subject to the 2005 Critical Areas Ordinance. WCC 16.16.260(E) Alternative mitigation approaches and Watershed-based management plans allows approval of alternative mitigation plans for development approved through a Development Agreement. For the 5,227 square feet of direct wetland impact, the approved conceptual mitigation plan (identified in the Impact Assessment and Mitigation Report Revision 1, September 12, 2018 prepared by Northwest Ecological) provides an ecological uplift to the wetland complex to a greater extent than the standard compensatory mitigation in WCC 16.16.680 Standards – Wetland Mitigation. The onsite sewage system drainfields may be located in the wetland buffer as allowed by the current Critical Area Ordinance (2017 WCC 16.16.620(J)). The proposed conceptual mitigation provides a greater ecological uplift to a greater extent than the standard buffer mitigation in WCC 16.16.680 Standards – Wetland. A detailed landscape mitigation planting plan is required prior to Final Plat approval. All mitigation will be required to be installed and inspected prior to Final Plat approval.
 - 3.4 **Fee-in-lieu Mitigation.** As mitigation for reduced reserve tract setbacks and onsite septic system impacts to agricultural lands, the applicant shall pay approximately \$140,000 to the Whatcom County Purchase of Development Rights Program (PDR) prior to Final Plat approval. The funds will be used to purchase agricultural conservation easements consistent with the purpose of the PDR program.

4. **Notification to County.** Prior to commencement of any activity permitted by this Agreement, the Applicant shall notify the Technical Administrator and County Planning Director in writing of the date of the commencement of any such activity and provide a description and scope of the activity planned.
5. **Reservation of Authority.** The County reserves authority to impose new or different regulations on the Property to the extent required by a serious threat to public health and safety. This reservation is intended to comply with RCW 36.70B.170(4). If such authority is exercised, the remaining provisions of this Agreement shall remain in full force and effect to the extent the new regulations are not inconsistent therewith and do not undermine achievement of the fundamental purposes of this Agreement.
6. **SEPA Review.** The development has been reviewed for SEPA compliance and a SEPA Determination of Non-Significance was issued under SEP2017-00030.
7. **Recording.** The Applicant shall file this Agreement as a matter of public record in the office of the Whatcom County Auditor which shall be in the nature of a covenant running with the Property after approval by the County Council and execution by the Parties hereto.
8. **Dispute Resolution.** In the event of any dispute as to the interpretation or application of the terms or conditions of the Agreement, the Owner and the County, through their designated representatives, shall meet within ten (10) days after the receipt of a written request from any party for the purpose of attempting in good faith to resolve the dispute. Such a meeting may be continued by mutual agreement to a date certain to include other persons or parties, or to obtain additional information.
9. **Mediation.** In the event that such a meeting does not resolve the dispute and prior to commencing any litigation except for a request for a temporary restraining order and preliminary injunction, the Parties shall first attempt to mediate the dispute. The Parties shall mutually agree upon a mediator to assist them in resolving their differences. If the Parties are unable to agree upon a mediator, a list of seven mediators with experience in land use matters and applicable Washington State land use law shall be requested from the Whatcom County Superior Court Presiding Judge. Each party shall take its turn in striking one name from the list until one name remains. A flip of a coin shall determine which party strikes the first name. Any expenses of the mediator shall be borne equally by the Parties. However, each side shall bear their own costs and attorney fees arising from participation in the mediation. Mediation shall take place within sixty (60) days following the failure of the meeting described in Section 8 above to resolve a dispute. This mediation provision may be asserted by any Party as grounds for staying any legal action filed in court.
10. **Applicable Law.** This Agreement shall be governed by and be interpreted in accordance with the laws of the State of Washington. Whatcom County Superior Court shall be the venue of any suit or proceeding brought with respect to this Agreement.

11. **Binding Effect.** This Agreement shall be binding upon the Applicant and the County.
12. **Severability.** If any provision of this Agreement is determined to be unenforceable or invalid by a court of law, then this Agreement shall thereafter be modified to implement the intent of the Parties to the maximum extent allowable under law.
13. **Modification.** This Agreement shall not be modified or amended except in writing signed by the Applicant and the County or their respective successors in interest.
14. **Further Good Faith Cooperation.** Each party hereto shall cooperate with the other in good faith to achieve the objectives of this Agreement. The Parties shall not unreasonably withhold requests for information, approvals or consents provided for, or implicit, in this Agreement.
15. **No Presumption Against Drafter.** This Agreement has been reviewed and revised by legal counsel for all Parties and no presumption or rule that an ambiguity shall be construed against the party drafting the clause shall apply to the interpretation or enforcement of this Agreement.
16. **Notices.** All communications, notices, and demands of any kind which a party under this Agreement is required, or desires to give to any other party, shall be in writing and be either (1) delivered personally, (2) sent by facsimile transmission with an additional copy mailed first class, or (3) deposited in the U.S. mail, certified mail postage prepaid, return receipt requested, and addressed as follows:

Whatcom County
311 Grand Avenue, Suite 108
Bellingham, WA 98225-4082

Wes Herman
353 E Wiser Lake Road
Lynden, WA 98244

Notice by hand delivery or facsimile shall be effective upon receipt. If deposited in the mail, notice shall be deemed received 48 hours after deposit. Any party at any time by notice to the other party may designate a different address or person to which such notice shall be given.

17. **Duration.** This Agreement and the rights and obligations set forth in this Agreement shall be valid for the vested time period of the final plat approval in RCW 58.17.
18. **Effective Date.** The Effective Date of this Agreement for the purposes of vesting is the date that Whatcom County and the Applicant execute the Agreement, whichever signature is later in time. Any subsequent adopted zoning ordinance regulation, rule or requirement of Whatcom that is inconsistent with or more stringent than any term or condition of this Agreement shall not apply or bind the Applicant.

19. **Entire Agreement.** This Agreement represents the entire agreement of the Parties with respect to the subject matter hereof. There are no other agreements, oral or written, except as expressly set forth herein. This Agreement supersedes all previous understandings or agreements between the parties concerning the subject matter of this Agreement.

IN WITNESS HEREOF, the Applicant and the County have caused this Agreement to be executed in their names and to be attested by their duly authorized officer(s) this _____ day of _____, 2019.

Applicant

By: _____

Wes Herman

Date: _____

Whatcom County

By: _____

Jack Louws, County Executive

Date: _____

Exhibit A



- Vicinity Map

 Subject Area
APN# 390334 202205

USE OF WHATCOM COUNTY'S GIS DATA IMPLIES THE USER'S AGREEMENT WITH THE FOLLOWING STATEMENT:
Whatcom County disclaims any warranty of merchantability or warranty of fitness of this map for any particular purpose, either express or implied. No representation or warranty is made concerning the accuracy, currency, completeness or quality of data depicted on this map. Any user of this map assumes all responsibility for use thereof, and further agrees to hold Whatcom County harmless from and against any damage, loss, or liability arising from any use of this map.

March 2017
0 125 250 500 750 1,000 Feet



Exhibit B

THE NORTHEAST QUARTER OF THE SOUTHWEST QUARTER OF SECTION 34,
TOWNSHIP 39 NORTH, RANGE 3 EAST OF W.M., EXCEPT THAT PORTION MORE
PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHWEST CORNER OF THE NORTHEAST QUARTER OF THE
SOUTHWEST QUARTER; THENCE EAST ALONG THE NORTH LINE OF THE
NORTHEAST QUARTER OF THE SOUTHWEST QUARTER, 70 FEET; THENCE
SOUTHWESTERLY TO A POINT ON THE WEST LINE OF THE NORTHEAST QUARTER
OF THE SOUTHWEST QUARTER, 70 FEET SOUTH OF THE NORTHWEST CORNER OF
THE NORTHEAST QUARTER OF THE SOUTHWEST QUARTER; THENCE NORTH 70
FEET TO THE BEGINNING, BEING IN SAID SECTION 39.

SITUATE IN WHATCOM COUNTY, WASHINGTON.

Exhibit C

