SUBJECT: City/ County Memorandum of Understanding (MOU): Whatcom County Jail SEIS

DATE: May 6, 2013

FROM: Jori Burnett

PRESENTATION BY: Jori Burnett, Greg Young

RECOMMENDATIONS: Authorize the mayor to enter into a Memorandum of Understanding (MOU) with Whatcom County related to collaboration on the preparation and review of a Supplemental Environmental Impact Statement (SEIS) for a potential Whatcom County Jail facility.

BACKGROUND: Whatcom County has established the need for a new Whatcom County Jail and has identified a site within the City of Ferndale as the preferred location for the new facility. Should a jail be formally proposed, the City would be responsible for reviewing and approving construction. However, Whatcom County retains its authority as a lead agency in the environmental review that is associated with such a facility.

The City of Ferndale and Whatcom County have agreed that the jurisdictions should share “lead” status, as both parties have overlapping responsibilities. Both jurisdictions also recognize that there is the potential for disagreement.

The MOU attached to this staff report is intended to address the manner in which the City and County will work together through the SEIS process.

ANALYSIS: The MOU is not intended to identify specific impacts, areas of focus, or to obligate the City to approve or support a future jail in Ferndale. Instead, it simply clarifies the responsibilities of each party through the SEIS process.

From Staff’s perspective, the MOU’s goal of establishing agreement through consensus is very important, as it demands that the parties work together to find mutually acceptable solutions. Ultimately, the results of the SEIS are expected to be objective and fact-based. The SEIS should be able to stand alone as a document that accurately reflects the potential impacts of a jail while identifying appropriate mitigation measures to address those impacts.

It is also important to remember that the MOU is not the environmental review itself, nor is it intended to foreshadow the contents or conclusions of the environmental review: the MOU should not be read to include or exclude any
areas of study in the SEIS, or to prevent the City from attaching conditions during its separate, subsequent review, should a development be proposed in the City.

From the City’s perspective, co-lead participation in the SEIS process allows Ferndale to not only identify potential areas of study, but to have joint review authority in ensuring that those studies are conducted in a manner that reflects Ferndale’s standards – and touches on areas of concern that may be unique to Ferndale and the immediate area.

From the County’s perspective as both the co-lead and the potential applicant, Ferndale’s participation throughout the process will enable the County to better anticipate the City’s requirements. The vast majority of applicants – and the County is likely no different - wish to understand the full costs of their proposal so that they can plan their financing and make a final decision with regard to property acquisition, facility size, and design. If the City was not involved in the SEIS process, or if the City (even with the MOU) determined that the SEIS was inadequate, Ferndale could require an additional review or even a new review at the time of permit submittal.

ALTERNATIVES CONSIDERED: Aside from grammatical changes, the most obvious potential alternatives related to the designation of “lead” status. The County and City agree that the co-lead status will serve the purposes of each jurisdiction: WAC 197-11-926 (1) establishes that “when an agency initiates a proposal, it is the lead agency for that proposal.” As a result, Whatcom County has a legitimate expectation to act as lead or co-lead.

The City of Ferndale has a legitimate expectation to act as a lead or co-lead as well, since the City is responsible for ensuring appropriate environmental review of projects proposed within its jurisdiction.

Rather than arguing that one jurisdiction should have exclusive lead status, both agencies have agreed that co-lead status, and the draft MOU, are the best mechanisms available to complete the environmental review of the project.

FISCAL REVIEW: The draft MOU is written to ensure that the City’s time is compensated by Whatcom County, and that the City is not financially responsible for subsidizing the costs of the environmental review.

LEGAL REVIEW: Both the County and the City are authorized to enter into Memorandums of Understanding.

CONCLUSION: Staff recommends that the Council authorize the mayor to enter into a Memorandum of Understanding with Whatcom County related to the environmental review (SEIS) of a potential Whatcom County Jail and Whatcom County Sheriff offices.
MEMORANDUM OF UNDERSTANDING
Between
WHATCOM COUNTY
And
CITY OF FERNDALE

REGARDING THE DEVELOPMENT OF AN
SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT
FOR THE WHATCOM COUNTY JAIL and SHERIFF’S ADMINISTRATIVE
HEADQUARTERS

I. PARTIES
This Memorandum of Understanding (MOU) is entered into by and between Whatcom County
(County), and the City of Ferndale (Ferndale), collectively “Parties”.

II. PURPOSE
The purpose of this MOU is to establish and describe a collaborative effort between the Parties
for the development and preparation of a joint environmental document to address the Parties
statutory responsibilities set forth in Washington State Environmental Policy Act (SEPA). This
MOU is limited to the preparation of the Supplemental Environmental Impact Statement for the
Whatcom County Jail and Sheriff’s Administrative Headquarters. Further permit review related
to development applications shall be subject to the regulatory processes of the party with review
authority that are in effect at the time of complete application, and are therefore not included in
this MOU. This MOU establishes the Parties as the co-lead agencies and delineates the duties of
each co-lead agency and how decisions will be made; how conflicts may be resolved and other
terms as outlined.

III. INTRODUCTION AND BACKGROUND
The County prepared a Draft Environmental Impact Statement for the Whatcom County Jail and
Sheriff’s Administrative Headquarters in October 2010. Due to unforeseen circumstances and the
purchase by a third party of one of the alternative sites discussed in the Draft Environmental
Impact Statement, the County is preparing a Supplemental Environmental Impact Statement
(SEIS). One of the new viable sites for the potential location of the Whatcom County Jail and
Sheriff’s Administrative Headquarters is within the jurisdiction of Ferndale. The Parties have
agreed to be co-lead agencies for the purposes of preparing the Supplemental Environmental
Impact Statement.

IV. AUTHORITIES
A. County Authority: The Washington State Environmental Policy Act (RCW 43.21C) and
Whatcom County Code Chapter 16.08.
B. Ferndale Authority: The Washington State Environmental Policy Act (RCW 43.21C) and

The Parties agree to try to make decisions by consensus throughout the EIS process in regards to
scope, content, and timing The Parties further acknowledge that the County has authority to
determine what needs to be included in the SEIS for the no action alternative and any alternative
that is not located within the boundaries of the jurisdiction of Ferndale. Ferndale has authority to
determine what needs to be included in the SEIS for the alternative that is located within the
boundaries of the jurisdiction of Ferndale. In the event one Party disputes the requirements of
the other party, Section VI of this document (Dispute Resolution) shall be implemented.

V. PRINCIPLES OF AGREEMENT

A. The Parties mutually agree to:

1. Work together to ensure consistency and coordination in the development and preparation of
the SEIS.

2. Work together to ensure involvement of other state and federal agencies, local governments
and agencies, Tribes, non-governmental organizations, and other interested parties in public
meetings of benefit to the process of developing and preparing the SEIS.

3. Work together in apprising each other, as far in advance as possible, of any related actions or
problems that might affect the environmental analyses and documentation process or that might
affect any of the Parties.

4. Work together in determining the need for, and hiring of third party professional consultants
as necessary. The Parties shall seek to coordinate comments made during the review of analyses
and documentation, but shall not be limited from requiring additional review or revisions. In the
event one Party disputes the requirements of the other party, Section VI of this document
(Dispute Resolution) shall be implemented.

B. General Duties

1. The Parties will develop and approve an SEIS work plan and schedule describing key dates,
issues, milestones, and process steps that is subject to revision upon agreement by the Parties as
needed to respond to emerging issues.

2. The Parties shall jointly determine which outside studies, consultants, and analysis shall be
necessary and will jointly select or otherwise approve these consultants and/or outside services.
All outside studies, consultants, and analysis that are determined to be appropriate will be
contracted through a separate agreement.

3. Each Party shall review the environmental analysis and documentation prior to issuance of the
draft and final SEIS. As required by SEPA, a responsible official from the County and a
responsible official from Ferndale shall each sign the final SEIS prior to issuance. The signature
of the SEPA responsible officials shall represent approval of the document, including the
adequacy of the environmental analysis it contains.
C. The County agrees to:

1. Act as nominal lead. As nominal lead, the adopted SEPA public notice, public participation plan and hearing procedures of the County shall be used for this EIS.

2. Coordinate with Ferndale to ensure that all Parties are apprised of current events in relation to the alternatives.

3. Coordinate to the maximum extent possible in the development and preparation of the SEPA document, consistent with legal requirements and the County’s’ responsibility as the SEPA co-lead agency.

4. Provide information and analyses as needed in the preparation of the EIS.

5. The County shall establish a Development Review Account with the City of Ferndale, not to exceed $14,999. The City shall debit this account to reflect actual staff cost for the preparation of the SEIS as well as the cost of outside consultants incurred by Ferndale for either amassing required information or reviewing the work of other consultants, and any funds remaining following the issuance of the FSEIS will be returned to the County, unless this MOU is dissolved prior to that date. The County shall be solely responsible for the full cost of the EIS including any subsequent appeal of the document and any other related legal costs.

6. Dedicate sufficient staff and other resources to complete the EIS in an efficient and timely manner.

7. Coordinate with City staff to acquire additional information and analysis from the City’s consultants; reimburse the City for consultant fees resulting from such requests for information. The County reserves the right to challenge reimbursement requests.

D. The City of Ferndale agrees to:

1. Actively participate in the development of the EIS and serve as co-lead agency with the County.

2. Coordinate with the County to ensure that all Parties are apprised of current events in relation to the development of the EIS in relation to the alternative located within the jurisdiction of Ferndale.

3. Coordinate to the maximum extent possible in the development and preparation of the SEPA document, consistent with legal requirements and the City’s’ responsibility as the SEPA co-lead agency.

4. Dedicate sufficient staff and other resources to complete the EIS in an efficient and timely manner.
5. Accurately track City staff costs for the preparation of the SEIS and costs incurred by outside consultants paid for through the Development Review Account, and provide an itemized accounting of these costs to the County on a regular basis, or at the request of the County.

VI. DISPUTE RESOLUTION

1. The Parties agree to try to make decisions by consensus throughout the EIS process in regards to scope, content, and timing. The Parties recognize that the EIS must contain sufficient environmental analysis for decision-making of all agencies with jurisdiction. Therefore, areas of environmental concern, potential mitigation, and reasonable alternatives as agreed upon by the Parties shall be included in the document. If agreement between the Parties cannot be reached over a matter that is not site-specific, then the County’s view shall be given weight. If agreement between the Parties cannot be reached over a matter that is site-specific, then the City’s view shall prevail.

2. If the Parties cannot agree on an issue that would prevent their approval of the EIS or otherwise prevent them from sharing lead agency duties, any Party may withdraw from this MOU following notification to the other Parties in writing of the issue under dispute, including a suggested resolution.

3. Prior to the formal withdrawal from the MOU, the Parties do hereby agree to meet and discuss any outstanding issues that would prevent the approval of the FSEIS or otherwise prevent them from sharing lead agency duties for not less than eight (8) hours (unless an agreement can be reached in less time) utilizing the services of a mediator mutually agreed to by the Parties. The cost of the mediator shall be shared between the Parties.

4. If at any time the MOU is dissolved, The County shall acquire full responsibility as lead agency for the proposal and shall continue with completion of the SEPA process.

VII. OTHER PROVISIONS

1. Nothing in this MOU shall be construed as limiting or affecting in any way the authority or legal responsibilities of the Parties.

2. Nothing in this MOU binds the Parties to perform beyond their respective authorities.

3. Nothing in this MOU restricts the Parties from participating in similar activities or arrangements with other public or private agencies, organizations, or individuals.

4. Each and every provision in this MOU is subject to the laws of the State of Washington.

5. Amendments or supplements to this MOU may be proposed by the parties and shall become effective upon written approval of all Parties.
6. In addition to the dispute resolution mechanism in Section VI of this agreement, any of the Parties may terminate its participation in this MOU at any time through written notification to the other Parties at least 30 days prior to termination.

7. This MOU shall become effective upon signature by all Parties. This MOU may be executed in one or more counterparts, each of which will be considered an original document.

8. This MOU shall remain in effect until the completion of the EIS or three years after the effective date of this MOU, terminating on the earliest of the two options.

9. Nothing in this MOU restricts the review of a formal development application for work within the City of Ferndale, including staff-level review and the City of Ferndale Conditional Use process. Any additional conditions or mitigation measures identified during the course of these City reviews will be addressed separately from, and in addition to, mitigation measures identified within the SEIS or FSEIS. Nothing shall restrict the County from requesting relief from these additional conditions during either the City’s Conditional Use process, or the appeals process.

10. If at any time the Parties become aware or concerned that a consultant, sub consultant, or an entity preparing a requested outside service, the Parties agree to discuss and resolve such conflict of interest as the Parties deem appropriate.

VIII. CONTACTS
The primary points of contact for carrying out the provisions of this MOU are:

For the County:
Tyler R. Schroeder - Planning Manager
Whatcom County Planning and Development Services
5280 Northwest Drive
Bellingham, Washington 98225
(360) 676-6907 ext. 50202
Tschroed@co.whatcom.wa.us

For City of Ferndale
Jori Burnett
City of Ferndale Planning
2095 Main St
Ferndale, Washington 98248
(360) 685-2367
joriburnett@cityofferndale.org
IX. Signature: The parties hereto have signed this MOU as of the dates shown below. The effective date of this MOU is the date of the signature last affixed to this page.

The County, by and through:

_____________________________ _____________________________
Jack Louws  (DATE)
County Executive

The City of Ferndale, by and through:

_____________________________ _____________________________
Gary Jensen  (DATE)
City of Ferndale Mayor