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NO. 91378-1

SUPREME COURT OF THE
STATE OF WASHINGTON

CONCRETE NOR'WEST, a division of MILES SAND & GRAVEL COMPANY and 4M2K, LLC,

Appellants,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD; WHATCOM COUNTY; and FRIENDS OF NOOKSACK SAMISH WATERSHED

Respondents.

AMICUS CURIAE MEMORANDUM

Nancy Bainbridge Rogers, WSBA No. 26662
CAIRNCROSS & HEMPELMANN, P.S.
Attorneys for Washington Aggregates & Concrete Association, Inc.
524 Second Avenue, Suite 500
Seattle, WA 98104-2323
Telephone: (206) 587-0700

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I. INTRODUCTION

The Washington Aggregates & Concrete Association, Inc., a Washington non-profit corporation ("WACA") submits this Amicus Curiae Brief in support of the Petition for Review filed by Concrete Nor'West and 4M2K, LLC ("CNW").

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The identity of WACA is further described in the accompanying Motion to File Amicus Curiae Brief. WACA members include over 65 percent of the Washington State families and businesses that produce sand, gravel, rock, and construction aggregate products such as concrete.

This case involves the question of whether Whatcom County has a duty under the State Growth Management Act, Ch. 36.70A RCW ("GMA") and Whatcom County's Comprehensive Plan to conserve mineral resource lands of long term significance, by designating those lands for conservation and protection from conflicting uses. WACA was actively involved in crafting the relevant sections of the GMA and the GMA's implementing regulations.

Mineral resources form the foundation of public and private construction, economic growth and stability for the State of Washington. Whatcom County (the "County"), the Growth Management Hearings Board (the "Board" or "GMHB") and Division II all decided that there is

no mandatory duty to designate mineral resource lands for conservation. The consequence of the determination that there is no mandatory duty to designate known mineral resource lands is that existing locally-sourced sand and gravel resources, will be depleted without additional and protected new resource lands to take their place. That outcome negatively impacts WACA members and the State's economy.

III. ISSUES ADDRESSED BY AMICUS CURIAE

Did Division II and the GMHB err by concluding that neither the GMA nor the Whatcom County Comprehensive Plan (the "Plan") imposed a duty to designate lands as Mineral Resource Lands under an owner-initiated amendment application where (a) the lands satisfy all the Plan's designation criteria and further Plan goals, and (b) the annual amendment process established that the lands have known mineral resources of long-term commercial significance?

IV. STATEMENT OF THE CASE

WACA concurs with and adopts by reference the Statement of the Case provided in the CNW Petition for Review.

V. ARGUMENT

Designation of resource lands is vital to the economic stability of the State of Washington. Mineral resource lands cannot be re-created, nor can they be relocated away from neighboring incompatible uses.

> Natural resource lands are protected not for the sake of their ecological role but to ensure the viability of the resource-based industries that depend on them. Allowing conversion of resource land to other uses or allowing incompatible uses nearby impairs the viability of the resource industry. (Citation omitted.)

Redmond v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd., 136 Wn.2d 38, 47, 959 P.2d 1091 (1998). Review is warranted both because of a conflict between the Division II decision and *King County v. Central Puget Sound Growth Mgmt. Hrgs. Bd.*, 142 Wn.2d 543, 558, 562, 14 P.3d 133 (2000), and because the case presents issues of substantial public interest that should be determined by the Supreme Court.

Contrary to footnote 2 of the Division II decision, and the County's arguments to this Court, CNW's challenge to the denial of CNW's proposed amendment to the comprehensive plan, as well as the amicus arguments to Division II, are not a collateral attack on the County's pre-existing comprehensive plan. Whatcom County's Comprehensive Plan is, by definition, presumed valid upon adoption. RCW 36.70A.320. All parties to this litigation and the undersigned amicus understand well that "absent a duty to adopt a comprehensive plan amendment pursuant to the GMA or other law," the County Council has legislative discretion to decide whether or not to amend its comprehensive plan. *Stafne v. Snohomish County*, 174 Wn.2d 24, 38, 271 P.3d 868 (2012). But, the

GMA also authorizes CNW to challenge the County's denial of its proposed amendment, including arguing that adoption of the amendment to designate CNW's lands as protected mineral resource lands was mandated by the GMA and the comprehensive plan. *See* RCW 36.70A.290, and *Stafne*, *supra*. Notably, unlike the other Board cases cited and relied upon by the County, the Board affirmatively held it has jurisdiction to hear this appeal. AR 166-70.

WACA's arguments do not rely on a determination that the County's existing comprehensive plan is non-compliant with the GMA. Our position is that the County's plan[1] must be read in the context of the myriad of GMA and regulatory provisions evidencing that the County "must designate known mineral deposits"[2] for protection when the applicable designation criteria are met. Those criteria were met by CNW's request for designation (AR 1183, 1186) and, therefore, the GMA and existing County comprehensive plan mandated designation.

CNW's petition, this amicus argument, and the amicus arguments below, also are not the first time that the issue was raised that the County failed to meet a GMA mandate to designate CNW's lands. As described

[1] The County plan included policies to designate a 50-year supply of mineral resource lands (AR 855), as well as the concession that the County's current designated lands fall short of that 50-year supply (AR 461), and the direct re-statement of the GMA mandate that the plan "goals and policies [are] designed to identify and protect important natural resource lands found in Whatcom County as defined in RCW 36.70A" (AR 831).
[2] *See, e.g.*, WAC 365-190-070(4)(a).

by the Board itself – and never challenged by Whatcom County – the issues raised in the CNW Petition for Review to the Growth Management Hearings Board were "broad enough to include an allegation of a failure to comply with a duty to adopt a comprehensive plan amendment pursuant to the GMA or other law" under *Stafne*. AR 1176.

Unfortunately, the Board, the Superior Court, and Division II all determined there was no mandate in the GMA or other law that required Whatcom County to adopt the CNW amendment to designate mineral resource lands for protection. That decision conflicts with this Court's decision in *King County v. Central Puget Sound Growth Mgmt. Hrgs. Bd.*, 142 Wn.2d 543, 558, 562, 14 P.3d 133 (2000).

The *King County* case was decided in the context of agricultural lands. The Court held that the natural resource goal and the associated implementing GMA provisions including RCW 36.70A.020(8), .060(1), and .170 impose "a duty to designate and conserve agricultural lands to assure the maintenance and enhancement of the agricultural industry." *King County, supra*, 142 Wn.2d at 558 (emphasis added).

Agricultural lands and mineral resources lands are two different types of natural resource lands that are regulated identically under the GMA. Thus, the holding of *King County*, 142 Wn.2d at 558, that the GMA imposes a duty on planning jurisdictions to conserve agricultural

lands, applies equally to the mineral resource lands at issue in this case.[3]

The County, the Board and Division II disavow any such duty, focusing on the supposed lack of a duty to designate mineral resources lands while processing CNW's proposal during only an annual amendment cycle. Like the amendments at issue in this case, the amendments in the *King County* case were not part of the initial adoption of the County's comprehensive plan or a scheduled periodic update, but rather were part of an annual update. *See, King County*, at 546 – 48.

The King County amendments would have undone the protections provided by an existing agricultural designation, by allowing soccer fields, parking lots and restrooms on designated farmland. Here, CNW sought amendments to protect newly discovered mineral resource lands and to assure that any permits for other projects issued within 500 feet would come with the warning of proximity to those new mineral resource lands. While the nature of the amendments sought by CNW is slightly different than the amendments reviewed in *King County*, the ultimate issue is the same: does a County have a continuing duty to protect known natural

[3] The County repeatedly notes that the CNW lands are already protected forest lands and need not also be protected and preserved as mineral resource lands. The County's glib assurance that the nature of the designation does not matter ignores both that a mining permit cannot be sought on lands designated only for forestry uses, such that access to aggregates is denied, and that the mandatory warning on permits in proximity to natural resources lands may have a different effect on the recipient based on whether it discloses proximity to forest or mineral resource lands.

resource lands, even in an annual amendment process, or can the County simply "un-do" the protections mandated for resource lands in the GMA? As described by the Court in *King County,* the answer is that the County cannot "un-do" the mandate to protect known resource lands, because "the verbs of the agricultural provisions mandate specific, direct action. The County has a duty to designate and conserve agricultural lands to assure maintenance and enhancement of the agricultural industry." The verbs that mandate specific, direct action as to agricultural lands are identical as to mineral resource lands. Thus, under *King County*, even in an annual amendment process, and where there was no dispute that CNW's newly discovered mineral resource lands met the specific, detailed designation criteria set forth in the Whatcom County comprehensive plan, the County was required to designate and conserve CNW's land.

The duty to designate is echoed in RCW 36.70A.130(1)(a) which provides for both a scheduled review cycle and an independent, and mandatory, obligation to subject the County's comprehensive plan to "continuing review and evaluation." This section supports the continued duty described in *King County,* by requiring that when they become known, natural resources lands must be designated and protected by the County, even in an annual amendment process.

The duty to designate, even in an annual update cycle, is further supported by planning guidelines adopted under RCW 36.70A.050(1), by the State Department of Commerce (formerly, the Office of Community Trade and Economic Development or CTED). These guidelines are found in WAC 365-190-020, -030, -040, and -070. The designation procedures plainly state that the County "must designate known mineral deposits" so that access to the limited resource is not "knowingly precluded." WAC 365-190-070(4)(a). There is no distinction made between annual updates and periodic or major amendment procedures for a comprehensive plan.

Next, RCW 36.70A.120 mandates that the County "shall perform its activities . . . in conformity with its comprehensive plan." Division II and the Board erred in their itemized review of the County's plan policies concluding the policies contained no mandate. In particular, the County, the Board and Division II focus on similar language from RCW 36.70A.170(1), and the County plan that mineral resource lands need only be designated "where" or "when" "appropriate." The where or when "appropriate" language applies to all natural resources lands, including agricultural lands, under RCW 36.70A.170, and also applies to all lands of all types and all uses under RCW 36.70A.070. Thus, every land use on every square inch of land in Whatcom County must be deemed "appropriate" before any use designation is assigned.

The term "appropriate" is not defined in the GMA. Here, Whatcom County defined "where" and "when" a mineral resource lands designation was "appropriate" by setting specific criteria that must be met prior to designation, and not limiting the application of those criteria to only certain plan update cycles. AR 155-56. The GMA and comprehensive plan language calling for designation of mineral resource lands only where or when "appropriate" was met via CNW's undisputed compliance with the applicable designation criteria.

The County's attempts to excuse denial of its duty to designate based on an alleged public interest fail. Whatcom County's comprehensive plan plainly sets forth a two-step process. The first step is a designation process. To qualify for designation and conservation, a demonstration is required that a sufficient quantity and quality of mineral resource exists on the property, and that to protect the public interest, the mineral resource land is not in proximity to existing wellhead protection areas or developed or residentially zoned areas. AR 857-58. That public interest determination was met for purposes of the designation criteria, and therefore, was also met as to the procedural criteria for an annual amendment found in Whatcom County Code 2.160.080. The second step is the detailed permitting process -- which can only take place on lands that are designated mineral resource lands -- and which permitting process

will include detailed environmental review under the State Environmental Policy Act, ch. 43.21C RCW. The permitting process includes detailed analysis of whether or not a mine is in the public interest, and in Whatcom County, the permitting process allows copious public participation and expert debate, including the opportunity, if a mine permit is even granted by County staff, to appeal that permit and its conditions to the Hearing Examiner, for review in an extensive public hearing process, for which broad public notice is provided. Whatcom County Code 20.84.240, 20.92.210, and 20.92.215.

As to designation of mineral resource lands, which merely protects the resource and does not permit any mining, the State Legislature determined that "it is in the public interest to identify and provide long-term conservation of those productive natural resource lands that are critical to and can be managed economically and practically for long-term commercial production of . . . minerals." Laws of 1994, ch. 307, § 1 (emphasis added). Therefore, the State Legislature itself confirms the "public interest" is served by approval, not denial, of CNW's designation.

VI. CONCLUSION

This Court should accept review of the CNW Petition so as to confirm the continuing mandatory duty imposed on counties planning under the GMA to designate, protect, and conserve natural resource lands.

DATED this 4th day of May, 2015.

CAIRNCROSS & HEMPELMANN, P.S.

Nancy Bainbridge Rogers, WSBA No. 26662
E-mail: nrogers@cairncross.com
Attorneys for Washington Aggregates & Concrete Association, Inc.

524 Second Avenue, Suite 500
Seattle, WA 98104-2323
Telephone: (206) 587-0700

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I, Kristi Beckham, certify under penalty of perjury of the laws of the State of Washington that on May 4, 2015, I caused a copy of the document to which this is attached to be served on the following individual(s) via email and first class U.S. mail:

Margaret Y. Archer
Gordon Thomas Honeywell, LLP
1201 Pacific Avenue, Ste. 2100
P.O. Box 1157
Tacoma, WA 98401-1157
MArcher@gth-law.com

David S. Mann
Gendler & Mann, LLP
615 2nd Ave., Ste. 560
Seattle, WA 98104-2242
mann@gendlermann.com

Dionne Padilla-Huddleston
Assistant Attorney General
Office of the Attorney General
800 – 5th Ave., Ste. 2000. TB-14
Seattle, WA 98104-3188
DionneP@atg.wa.gov

David S. McEachran
Whatcom County Prosecuting Attorney
Attn: Karen N. Frakes
311 Grand Avenue, Ste. 201
Bellingham, WA 98225
dmceachr@co.whatcom.wa.us

DATED this 4th day of May, 2015, at Seattle, Washington.

Kristi Beckham, Legal Assistant
CAIRNCROSS & HEMPELMANN, P.S.
524 Second Avenue, Suite 500
Seattle, WA 98104-2323
Telephone: (206) 254-4494
E-mail: kbeckham@cairncross.com

OFFICE RECEPTIONIST, CLERK

To: Kristi Beckham
Cc: 'MArcher@gth-law.com'; 'mann@gendlermann.com'; 'DionneP@atg.wa.gov'; 'dmceachr@co.whatcom.wa.us'; Nancy Rogers
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1. Motion to File Amicus Curiae Memorandum; and
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Case No.: 91378-1
Person Filing: Nancy Bainbridge Rogers (Attorney for Washington Aggregates & Concrete Association, Inc.)
(206) 254-4417
WSBA No. 26662
nrogers@cairncross.com

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CH& Kristi Beckham
Legal Assistant
Cairncross & Hempelmann
524 Second Ave. | Ste. 500 | Seattle, WA 98104-2323
KBeckham@Cairncross.com | d:206-254-4494 | f:206-587-2308

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