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DIVISION II

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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II
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.

BRIEF OF AMICUS CURIAE ASSOCIATED GENERAL
CONTRACTORS OF WASHINGTON

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Amicus Curiae Associated General Contractors of Washington (“AGC”) respectfully submits this brief in support of the appeal presented by Concrete Nor’West, a division of Miles Sand & Gravel Company and 4M2K, LLC (collectively referred to as “CNW”). AGC concurs with CNW that the Western Washington Growth Management Hearings Board (“Board”) erroneously upheld the Whatcom County Council’s refusal to approve a private application to designate mineral resource lands, even though (1) the proposed mineral resource lands satisfy all designation criteria stated in the County’s Comprehensive Plan, and (2) the County has a shortage of mineral resource lands and the designation would alleviate that shortage.

I. IDENTITY AND INTERESTS OF AMICUS CURIAE

Formed in 1922, AGC is the state’s largest trade association, representing and serving the commercial, industrial and highway construction industry. This professional association of commercial contractors is comprised of more than 600 members who have joined together to enhance the performance of its industry and build a better climate for construction.

The construction industry’s contribution to the state’s economy is significant. A 2012 University of Washington annual study revealed that, in 2011, more than 192,800 workers were employed by contractors,

construction services and material suppliers in the state. The workers in the construction industry comprised 8.3% of the state's private sector workforce; and the total payroll for construction industry jobs exceeded \$10.5 billion, which is 9.1 % of the state's non-government payroll. When the construction industry grows, the state's economy exponentially grows with it. For each dollar invested in new construction, an additional \$1.97 in economic activity is generated throughout the state and the earnings of all households are increased by 64 cents.

The construction industry, however, is an aggregate dependent industry. Sand, gravel and crushed bedrock produce the raw materials (aggregates) necessary to manufacture concrete, cement, asphalt and other similar products. These products are the building blocks upon which the state's and Whatcom County's homes, roads, bridges and businesses are constructed. Administrative Record ("AR") 640. The availability of high quality, economical and local construction aggregates in every county is thus a fundamental resource to support not only the private construction industry, but also Washington State, its local and regional economies, and its public works projects. As stated in a December 2003 Report to the Legislature Regarding Construction Aggregates:

Aggregates are literally the foundation of our economic and community infrastructure. Aggregates are used in almost every construction project whether

it is new construction, rehabilitation of an existing structure or infrastructure. As 51.8% of construction aggregates are consumed in transportation and related projects, they become the foundation of state's economy to move and transport goods, people, and other services. . . .

AR 767.

Aggregate used in construction projects make up the majority of the mineral industry in Washington. *Id.* If aggregate is not available locally, it must be transported, usually by truck or barge. *Id.* Since the cost of transportation has steadily increased (AR 771), the cost to the construction industry (and ultimately the consumers) is greatly increased if construction aggregate is not available locally.¹

Here, despite the above availability concerns, the Board erroneously upheld the decision to deny CNW's valid and fully compliant application to designate mineral resource lands. Because the private and public construction industry is dependent upon mineral aggregates, this appeal challenging the Board's decision could profoundly affect the industry. The challenged Board decision, if affirmed, provides local governments with unfettered discretion to refuse to designate lands with known mineral deposits that are identified through private applications and meet all stated designation criteria. Of course, if the ability to even

¹ Increased importation and exportation of aggregate is also accompanied by more heavy trucks on the road and an increase in wear and tear on highway surfaces. AR 771.

designate mineral resource lands is jeopardized, the availability of economical aggregates will significantly decline and the impact on the construction industry and the state's economy could be devastating.

The collective experience of AGC enables it to provide a unique perspective regarding the legal validity and ramifications of the Board's decision.

II. ISSUES ADDRESSED BY AMICUS CURAIE

This brief addresses the following issues encompassed in the three issues stated in CNW's Opening Brief:

1. Does the GMA and the County's Comprehensive Plan require the County to apply the MRL designation to lands with known mineral deposits of long term commercial significance that were identified through a private application to amend the Comprehensive Plan?

2. Is the County Councils' refusal to apply the MRL designation to lands with known mineral deposits of long term commercial significance contrary to the public's interests as stated in the County's Comprehensive Plan and the GMA?

III. STATEMENT OF THE CASE

AGC adopts the Statement of the Case as presented by CNW in its Opening Brief. The following facts were included in CNW's Statement of the Case, but are particularly relevant to this amicus brief.

The Whatcom County Comprehensive Plan addresses identification, designation and protection of mineral resource lands in Chapter 8. AR 143-56.² The Resource Lands section of the Plan, including its policies, goals and designation criteria, “is designed to identify and protect important natural resources lands found in Whatcom County as defined in RCW 36.70A.” AR 143. The Plan expressly acknowledges:

Without protection of these resource lands, some of the land could be inappropriately or prematurely converted into land uses incompatible with long-term resource production. The premature conversion of resource lands into incompatible uses places additional constraints on remaining resource lands and can lead to further erosion of the resource land base.

AR 143.

Relevant to mineral resources, the Plan has a stated policy to seek designation of a 50-year supply of mineral resource lands. AR 153. The County does not dispute that it has fallen far short of its goal. AR 461. In fact, in the Plan itself, the County acknowledges that additional designations, beyond those originally made, are required to meet demand.

AR 152.

This appeal involves a request to designate 280 acres of land as mineral resource lands through a private application to amend Whatcom

² The relevant excerpts of Chapter 8 of the Plan are attached to CNW’s Opening Brief as Appendix C.

County's Comprehensive Plan. There is no dispute that the application satisfies all the designation criteria stated in Chapter 8 of the Plan. AR 1183, 1186. There is likewise no dispute that designation of CNW's 280 acres as requested would have served to lessen the shortage of mineral resource lands that Whatcom County is currently experiencing.

IV. ARGUMENT

A. The GMA And The Whatcom County Comprehensive Plan Impose A Duty On The Whatcom County Council To Designate Lands With Known Mineral Deposits.

Whatcom County has consistently acknowledged that the land proposed to be designated meets all the mineral resource land designation criteria set forth in its Comprehensive Plan. Yet the County states in its Response Brief:

While it is true that the Whatcom County comprehensive plan set forth designation criteria that must be met prior to MRL designation and recognizes that one method for site selection is through requests from property owners who have sites meeting the designation criteria, nowhere does the GMA or comprehensive plan require that all property meeting the MRL designation criteria must be designated upon request of the property owner. Even if a site meets all of the designation criteria in the comprehensive plan, neither the GMA nor the County Comprehensive plan place a duty upon the County to re-designate the land to MRL upon the request of the property owner.

County Brief at p. 14.

The Board accepted this analysis, founding its decision on *Stafne v.*

Snohomish County, 174 Wn.2d 24, 271 P.3d 868 (2012). AR 1185-188.³

The Board extended and applied *Stafne* to conclude that the County had no obligation to approve a private application to designate mineral resource lands, even though (1) the application established that the land proposed to be designated met all the designation criteria set forth in the Comprehensive Plan, and (2) the County has a shortage of mineral resource lands. However, the Board's reliance on *Stafne* was misplaced, especially in the context of a request to designate new resource land; and its decision is contrary to the GMA.

AGC concurs with and adopts CNW's argument that RCW 36.70A.120's directive for the County to perform planning activities in conformity with its Comprehensive Plan mandated approval of CNW's application. Since the application satisfied all the designation criteria stated in the Comprehensive Plan and furthered the Plan's mineral resource policies and goals, the only available action that would conform to the Plan was approval of the application. However, the GMA mandates to designate and conserve resource lands also creates a duty for the County to approve the designation application together with the duty created by RCW 36.70A.120.

³ The Board's decision is also attached to CNW's Opening Brief as Appendix A.

RCW 36.70A.020(8) sets forth the GMA goal regarding natural resources industries. It is to “maintain and enhance natural based industries,” encourage conservation of productive resource lands and discourage incompatible uses.⁴ Implementing that goal, the GMA requires local governments to designate mineral resources lands, and then subsequently review those designations. RCW 36.70A.170; RCW 36.70A.130, .131.

Designations must be made with consideration of the guidelines established by Washington’s Commerce Department pursuant to RCW 36.70A.050. *Id.* Relevant to mineral resource lands, those Department guidelines are set forth at WAC 365-190-070 and set minimum standards that must be applied by local governments. RCW 36.70A.050(3); *Friends of Pierce County v. City of Bonney Lake*, CPSGMHB Case No. 12-2-002c (Final Decision and Order, July 9, 2012), 2012 WL 3060647 17, *citing* *Lewis County v. Hearings Board*, 157 Wn.2d 488, 139 P.3d 1096 (2006); *Manke Lumber Company v. Diehl*, 91 Wn. App. 793, 959 P.2d 1173 (1998). The mineral resource designation criteria in Whatcom County’s

⁴ RCW 36.70A.020(8) addresses resource industries but does not specify mineral resources industries. The Board has specifically held: “The mining industry is not excluded by the language of .020(8); mining is among the natural resource-based industries the County must maintain and enhance.” *Wells v. Whatcom County*, WWGMHB Case No. 97-2-0030c (Final Decision and Order, January 16, 1998), 1998 WL 43206 at *10. The Board has likewise held that this goal cannot be construed to mean that the GMA gives priority to designation of agricultural and forest lands over the designation of mineral resource lands. *Id.*

Plan (at AR 155-56) are presented as “a more complete set of designation criteria” than the minimum standards in the guidelines “in order to better define which areas in the county are appropriate for mineral designations.” AR 152. Thus, the County’s MRL criteria encompass the minimum guidelines and are further refined to consider local circumstances.

The County argues that it was only obligated to designate land satisfying its MRL designation criteria when it initially designated mineral resource lands and, in the future, will only potentially be required to do so in the context of a mandatory review. Again, the County asserts: “Even if a site meets all of the designation criteria in the comprehensive plan, neither the GMA nor the County Comprehensive plan place a duty upon the County to re-designate the land to MRL upon the request of the property owner.” County Brief at p. 14.

But the minimum guidelines set forth in WAC 365-190, which are mandatory, make no such distinction with regard to mineral resource land designations requested pursuant to a private application to amend.⁵ Regardless of the manner in which resource designations are proposed, WAC 365-190-170(2) directs: “Counties and cities must identify and

⁵ The only respect in which private amendment applications are treated differently is that, with private applications, the County is not required to approach the request as a county-wide or regional process. WAC 365-190-070. That private applications are noted in this regard, however, confirms that the minimum guidelines are not limited to county initiated designations, but apply to designations by private application as well.

classify mineral resource land from which extraction of minerals occurs or can be anticipated.” (Emphasis added). Even more significant, WAC 365-190-070(4)(a) directs:

Counties and cities must designate known mineral deposits so that access to mineral resources of long-term commercial significance is not knowingly precluded. Priority land use for mineral extraction should be retained for all designated mineral resources. (Emphasis added.)

Once lands are known to have mineral deposits consistent with the guidelines, designation is mandatory.

The GMA mandates that proposed mineral resource land designations be considered in light of the Commerce Department’s minimum guidelines. RCW 36.70A.170(2); RCW 36.70A.150(3). Those minimum guidelines, in turn, mandate the County to “designate known mineral deposits so that access to mineral resources of long-term commercial significance is not knowingly precluded.” WAC 365-190-070(4)(a). The County is not relieved of that duty simply because it is making a decision in the context of a private application to amend the Plan. As lands that satisfy the MRL designation stated in the County’s Plan, CNW’s 280 acres are lands with known mineral deposits. Approval of CNW’s application was mandatory. By refusing to approve a qualified designation application, the County has precluded access to known

mineral deposits in contravention to the GMA. The decisions of the Whatcom County Council and the Board violated the GMA and the Board should be reversed.

Construing the GMA and the County's Plan to impose such a duty is the only way to ensure that the important GMA goal to conserve and protect mineral resource lands and maintain and enhance the mineral resource industry will be achieved. The MRL criteria and the Commerce Department minimum guidelines present objective standards that are designed to further that goal. If a county is allowed to disregard those objective standards in favor of predictable emotion-driven opposition, the detailed goals, policies, process and criteria are reduced to no more than an illusory process. More importantly, to the detriment of all County citizens, construction aggregates critical to both state and local economies will be permanently lost and, without access to reasonably priced aggregate materials, public works infrastructure costs will soar.

AGC concurs with the astute comments made to the County Council by a Whatcom County construction company, Strider Construction Co., Inc., regarding CNW's indisputably qualified application to designate its lands MRL. The comments present the analysis that should have applied first by the Council and then by the reviewing Board:

Aggregate is the key ingredient for construction in the Northwest. Whatcom County is blessed with the resource and if properly managed will continue to get the benefit of lower construction costs (means more opportunity for development and manufacturing growth) and directly creating jobs within the aggregate industry (e.g. precast, crushed rock, concrete and asphalt) for generations to come. The MRL is one way to ensure continuity of this benefit....

The Whatcom County Council has over time painstakingly developed and adopted County Codes, policies, ordinances and laws through the public process. These reflect the consensus of the public, a balance of interests, set forth when cooler heads prevail and a singular project is not in contention. These documents also provide guidance to those wishing to invest in our community and develop its resources. These documents prescribe processes upon which business and investors should be able to rely that, when followed, there will be a predictable and certain outcome. Such certainty is critical to attract and retain investment in our communities. Seemingly, with the course this issue has taken, this trust and ability to rely on following prescribed procedures as sufficient is in jeopardy. If the emotion of the moment can undo the public process, there is no process.

The County's Planning Department has found the CNW application for the MRL compliant with the County's Comprehensive Plan criteria and supports the reserve designation. The County Planning Commission and the Whatcom County Hearing Examiner support and uphold the designation. The "approval" by the Council should be a normal extension of the process, as rules applied to the CNW application also bind the County Council to acceptance. This result is a reasonable expectation on the part of CNW and all those who invest in the

County. In a broader sense, we are just talking about the need for certainty...

Remember, this is an application for a Comprehensive Plan Amendment, not an application for a mining permit. The County and all the interested parties will have ample opportunity to make their case for or against mining, discuss the impacts both positive and negative, and present the science, mitigations and remedies; ALL when (and if) the mining permit is sought. (Underlining and capitalization in original.)

AR 814-15.

B. The Whatcom County Council's Refusal To Designate Lands With Known Mineral Deposits Is Contrary To The Public Interests As Stated In The County's Comprehensive Plan And The GMA.

Though not articulated at the time of the Council's decision, the County, after the fact, argues that the Council's action was justified as furthering the public interest. Of course, the County's Code expressly mandates consideration of the "anticipated impact upon designated ... mineral resource lands" when evaluating the public's interest. WCC 2.160.080(A)(3)(c). The Council did not do so. Its refusal to designate lands that meet all designation criteria in the face of a mineral resource land shortage cannot be defended as done in the public's interest.

AGC again concurs with and adopts CNW's arguments negating the County's after-the-fact attempt to apply the public interest criteria. However, AGC is uniquely qualified to address the significant negative

impact that will inure to the public's interest if the Board's decision is affirmed and local governments are allowed to disregard objective criteria when considering private applications to designate mineral resource lands. Affirmation of the Board's decision will jeopardize the availability of an economically viable supply of construction aggregates that are critical to health of the construction industry and the economy as a whole.

The Washington Legislature has affirmatively recognized that reliable availability of construction aggregate is critical to the state's economic health. Thus, it expressly found in 1992 that "extraction of minerals by surface mining is an essential activity making an important contribution to the economic well-being of the state and nation." RCW 78.44.010. Consistent with that finding, it announced a legislative intent to "to clarify that surface mining is an appropriate land use." RCW 78.44.011.

In conjunction with GMA amendments in 1994, the Legislature again announced the importance of and its commitment to conservation of resource lands:

The legislature finds 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 food, fiber and minerals. Successful achievement of the natural resource industries' goal set forth in RCW

36.70A.020 requires conservation of a land base sufficient in size and quality to maintain and enhance those industries and the development and use of land use techniques that discourage uses incompatible to the management of designated lands. . . .

Washington Laws, 1994, Chapter 307, Section 1.

Recognizing that identification, designation, and preservation of lands with construction aggregates is critical, a committee was later formed, comprised of representatives of the Governor's office, the aggregate industry, local governments and state agencies that either regulate the aggregate industry or consume significant amounts of aggregate resources, to address issues presented to the industry. (AR 762.) The committee made a Report to the Legislature in 2003 that consistent with AGC's experience and concern and is instructive on the public interest question presented. (AR 760 – 792).

The committee found, among other things, that "designation of mineral resources of long-term commercial significance by local governments under the Growth Management Act is not being adequately implemented." (AR 762). Counties have "only minimally implemented meaningful mineral resource designations under the GMA." (AR 764). The committee further found that inadequate mineral resource land designations and poorly coordinated and cumbersome permitting practices, has resulted in "inadequate mineral resources to serve the state's

needs for construction aggregate in the future.” (AR 763.) The Board’s improper extension of *Stafne* to authorize unchecked discretion to reject qualified applications to designate lands with known mineral resources will certainly exacerbate this already significant problem.

Unfortunately, by its nature, the designation of lands for surface mining is controversial. Though surface mining is highly regulated to minimize environmental impacts and ensure that mined properties are appropriately reclaimed, community opposition to proposed designations is almost a certainty. But, the aggregates acquired through surface mining are nonetheless critical to the construction and maintenance of our public road and highway systems, construction of our homes and businesses and the maintenance and creation of jobs.

Affirmation of the Board’s decision will provide a license to local legislative bodies to succumb to political pressure rather than make prudent decisions necessary to protect diminishing mineral resources. Contrary to the goals of the GMA and the County’s Plan, the Board’s decision, if affirmed, will contribute to the current shortage of mineral resource lands, rather than help to resolve it. It is thus critical for the Court to intervene and require Whatcom County and other local governments to comply with the GMA directive to identify, designate and conserve mineral resource lands.

The 2003 Report the Legislature appropriately noted: “The state of Washington needs to make sure aggregate resources are available and sustainable so the state has the ability to remain competitive and viable as a place to do business.” AR 762.

In a sense, construction aggregates take on essential public facility significance and are critical for long-term economic development and public infrastructure investment. They should be designated and conserved appropriately.

AR 770.

The Board’s decision to uphold and condone the Council’s disregard of its own criteria and arbitrary rejection of a qualified mineral resource land designation application was contrary to GMA policies and mandates. Beyond that, the Board’s decision places in further jeopardy construction aggregates that are already in short supply and are of critical importance to the economic health of not only the private construction industry, but also all state and all local communities’ public works projects.

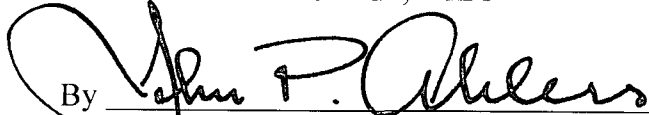
V. CONCLUSION

This Court should reverse the Board and remand to the Whatcom County Council to approve CNW’s application to designate as MRL CNW’s 280 acres of land that meet the MRL designation criteria stated in the County’s Comprehensive Plan.

Dated this 11 day of August, 2014.

Respectfully submitted,

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