No. 45563-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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.

RESPONSE OF WHATCOM COUNTY TO AMICUS CURIAE BRIEFS

DAVID S. McEACHRAN
Whatcom County Prosecuting Attorney
Karen N. Frakes, WSBA #13600
Attorney for Respondent Whatcom County

Whatcom County Prosecutor's Office
311 Grand Avenue, Suite 201
Bellingham, WA 98225
(360) 676-6784

Table of Contents

Table of Authorities

Cases

Statutes

Regulations

Administrative Decisions

County Regulations

I. Introduction

In the present case, Whatcom County ("County") did not amend its GMA compliant comprehensive plan when requested to do so by the Appellants Concrete Nor'west and 4M2K (collectively referred to as "CNW") in the context of the County's annual amendment process pursuant to RCW 36.70A.130(2). The issue is whether any provision in the Growth Management Act ("GMA") or the County's comprehensive plan mandated that the County approve CNW's application for mineral resource land ("MRL") designation of its property during the annual review. Absent a duty to amend its plan, this decision is within the County's legislative discretion and must be upheld. *See Stafne v. Snohomish County*, 174 Wn.2d 24, 271 P.3d 868 (2012).

II. Counterstatement of the Issues

1. Did the County have a duty under the GMA or its comprehensive plan to designate the property at issue because it contains a known mineral resource?
2. Did the County properly consider the interests of local residents, farmers, tribes, a state agency, and other concerned county residents in assessing whether this application was in the public interest?

III. Counterstatement of the Case

A. GMA Planning Background

In May of 1997, the County adopted its comprehensive plan as required by the GMA. Pursuant to RCW 36.70A.170, the comprehensive plan contained specific provisions regarding mineral resource lands and included the required designation of mineral lands of long-term commercial significance. After a challenge to those provisions, the Growth Management Hearings Board ("Board") found the mineral resource provisions to be in compliance with the Act. *Wells v. Whatcom County*, WWGMHB Case No. 97-2-0030c (Final Decision and Order, 1/16/1998).

Following initial GMA comprehensive plan adoption and natural resource designation, the GMA requires periodic reviews of adopted plans and development regulations. Contrary to the argument of Amicus Curiae Washington Aggregates & Concrete Association, Inc. ("WACA"), RCW 36.70A.130(1) only sets up one duty to review and that is pursuant to the schedules set forth in RCW 36.70A.130(4) and (5). *Stafne*, at 31. The second sentence of RCW 36.70A. 130(1) clearly modifies the first sentence, telling the reader how the continuing review is to occur.

In 2005, the County completed the first review of its comprehensive plan required by RCW 36.70A.130(1). This review,

consistent with RCW 36.70A.131, specifically included the mineral resource provisions in the comprehensive plan. As a result of the review, the County Council made several changes to the mineral resource provisions with its adoption of Ordinance No. 2005-024. One of the changes made in this ordinance was to Policy 8P-1. Significantly, the County Council amended this provision which previously read, "Designate a 50-year supply of commercially significant construction aggregate," to read, "Seek to designate a 50-year supply of commercially significant construction aggregate supply, to the extent compatible with protection of water resources, agricultural lands, and forest lands." This ordinance was challenged and upheld by the Board in *Franz v. Whatcom County, et al.,* WWGMHB Case No. 05-2-0011 (Final Decision and Order, 9/19/2005).

The County, having already conducted the only mandatory review of its comprehensive plan required by the GMA to date and prevailing on a timely appeal to the adopted amendments, is currently under no obligation under the GMA to review and, if necessary, revise its plan, including its MRL policies, goals, and designations, until the next mandatory review, due in June, 2016. *See* RCW 36.70A.130(5)(b). The mineral resource provisions in the plan are currently compliant with the GMA and, unless they are amended in some way, they will remain

immune from challenge until 2016. In short, the County has a legally sufficient land base of mineral resource land designated for conservation. If someone wanted to challenge the sufficiency of the mineral resource provisions in the comprehensive plan, the opportunity existed when the plan was adopted in 1997 and again when revisions were made in 2005.

B. County's Annual Review Process

Between the reviews required by the GMA, the County, consistent with RCW 36.70A.130(2), considers proposed amendments of its comprehensive plan and zoning ordinances on an annual basis. It is important to emphasize that the GMA authorizes a local government to amend its comprehensive plans annually; it does not require such amendments. RCW 36.70A.130(2). Contrary to the contentions of Amicus Curiae Associated General Contractors of Washington ("AGC") and WACA, the GMA does not distinguish between amendments to natural resource designations and other amendments, and *Stafne* is equally applicable in the context of a private application for mineral resource designation as it is in the context of any other amendment during the annual review. Absent a mandate in the GMA or the comprehensive plan, the Board cannot grant relief to a petitioner.

During the annual review, all proposed amendments are processed under chapter 2.160 of the Whatcom County Code. Pursuant to WCC 2.160, the County Council first reviews all of the proposed amendments and then decides which of those proposals will be docketed for further review. WCC 2.160.050. Property owners can submit applications for suggested comprehensive plan amendments as provided for in WCC 2.160.040; however, whether they are docketed is entirely in the discretion of the County Council.

If a request is docketed, the proposed amendment is processed first through the Planning Commission and then through the County Council. WCC 2.160.090-.100. The County Council reviews each proposed amendment individually and then votes on whether to forward the proposed amendments to a later concurrency hearing. At that hearing, the Council makes the final decision to adopt or deny a proposal. In addition to other required findings, the adoption of all amendments requires a finding by the County Council that the amendment is in the public interest. WCC 2.160.080(3).

C. Specific Facts of the Present Case

In this case, CNW's application was processed in accordance with the requirements of WCC 2.160. The County Council agreed to docket the

proposed amendment and it was then reviewed by the Whatcom County Planning Commission. AR 1020-1023 (Minutes, 6/9/11). The matter was forwarded to the County Council and a public hearing was held on July 26, 2011. AR 101027-1033 (Minutes, 7/26/11). On August 9, 2011, by a 4-3 vote, the proposal was forwarded to the concurrency hearing. At the concurrency hearing on February 14, 2012, the adoption of the ordinance failed, with a 3-3 vote (1 abstention) of the Council. AR 1043-1054 (Minutes, 2/14/12).

On April 12, 2012, CNW filed a petition for review with the Board challenging the County's failure to adopt its proposed amendments. After a hearing on August 28, 2012, the Board issued its decision denying the appeal on September 25, 2012. In its decision, the Board, consistent with prior cases, stated that a local government legislative body has the discretion to adopt or reject a particular proposed comprehensive plan amendment during its annual review in the absence of a GMA or comprehensive plan mandate. The Board, after a careful review of the GMA and the County's comprehensive plan, found that CNW had failed to establish the existence of such a mandate and therefore concluded that they had failed to demonstrate the decision of the County was a clearly erroneous violation of RCW 36.70A.120, RCW 36.70A.020(8), WCC 2.160 and the County's MRL goals and policies. Decision, pp. 13-14.

This decision was subsequently upheld by the Thurston County Superior Court. CP 425-426.

IV. Argument

A. Standard of Review and Burden of Proof

When reviewing a Board decision, it is important for the Court to understand the strong deference that the Board must give to a local jurisdiction's decisions. In a Board proceeding, the burden is on the petitioner to demonstrate that any county action is not in compliance with the GMA requirements and the board shall find compliance unless it determines that the action by the county "is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." RCW 36.70A.320 (2) and (3). To find an action clearly erroneous, the Board must have a "firm and definite conviction that a mistake has been made." *Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson County*, 121 Wn. 2d 179, 201, 849 P.2d 646 (1993).

In addition, the Board must give heightened deference to the County's planning choices:

> In recognition of the broad range of discretion that may be exercised by counties and cities in how they plan for growth, consistent with the requirements and goals

> of this chapter, the legislature intends for the boards to grant deference to the counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

RCW 36.70A.3201 (in part). This deference to the County "supersedes deference granted by the APA and courts to administrative bodies in general." *Quadrant Corporation v. State Growth Management Hearings Board*, 154 Wn.2d 224, 238, 110 P.3d.1132 (2005).

In this case, CNW asserts that the Board erroneously applied the law under RCW 34.05.570(3)(d). CNW has the burden of demonstrating that the Board erroneously applied the law. *Lewis County v. Western Washington Growth Management Hearings Board*, 157 Wn.2d 488, 498, 139 P.3d 1096 (2006); *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000).

Issues of law are reviewed de novo. *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 8, 57 P.3d 1156 (2002). However, while the Court determines the law independently, the Court is to give substantial

weight to the Board's interpretation of the GMA. *Lewis County*, at 498, 513; *King County*, at 543. In discussing the significance of a Board decision in the precise context of this case, the Washington State Supreme Court stressed that such a decision is important "given the deferential standard of review under the GMA and the expertise of the Board." *Stafne v. Snohomish County*, 174 Wn.2d at 37.

B. There is no mandate in the GMA or the comprehensive plan that requires the County to designate any land that meets the designation criteria and has a known mineral deposit as MRL.

The County hereby incorporates by reference Section IV, Parts B and C of the Brief of Respondent Whatcom County addressing whether there was a mandate to approve the request to redesignate CNW's property from forestry to MRL. In addition, the County offers the additional argument below in response to specific issues raised in Amicus Curiae briefs.

RCW 36.70A.170 required counties to designate, on or before September 1, 1991, mineral resource lands that are not already characterized by urban growth and that have long-term significance for the extraction of minerals "where appropriate." In making the designation, counties were directed to consider the guidelines established pursuant to RCW 36.70A.050.

The County's obligation under the GMA is not, and never has been, to designate all property with known mineral resources or all property that meets the County's designation criteria. Instead, after engaging in an extensive public process, the County was required by the GMA to designate only that amount of mineral resource land capable of producing minerals at commercially sustainable levels for at least the twenty-year planning period. *See* WAC 365-190-030(11). *See also*, *Saddle Mountain Minerals, et al., v. Grant County*, EWGMHB Case No. 99-1-0015 (Final Decision and Order, p. , 5/24/2000); *Neighbors for Reasonable Mining, et al., v. Skagit County*, WWGMHB Case No. 00-2-0047c (Final Decision and Order, p. , 2/6/2001).

The classification and designation of mineral resource land is a complex process requiring much broader questions than simply whether there is a known mineral deposit on a particular parcel of land. As the guidelines state, the classification of mineral lands for designation involves the consideration of "geologic, environmental, and economic factors, existing land uses and land ownership." WAC 365-190-070(3)(a). The County's discretion in choosing which property to designate is reflected in both the GMA and the guidelines which direct the County to designate mineral resource land "where appropriate." RCW 36.70A.170; WAC 365-190-040(5)(a)(ii).

In line with their argument that RCW 36.70A.130(1) sets up two independent duties of review, Amicus Curiae WACA argues that WAC 365-190-040(3) does not distinguish between mandatory schedule and allowed annual updates, and thus requires the County, even in the annual amendment process, to update its natural resource lands designations when needed. In making this argument, they virtually ignore WAC 365-190-040(10) which states as follows:

> (10) Designation amendment process.
>
> (a) Land use planning is a dynamic process. Designation procedures should provide a rational and predictable basis for accommodating change.
>
> (b) **Reviewing natural resource land designation. In classifying and designating natural resource lands, counties must approach the effort as a county-wide or regional process. Counties and cities should not review natural resource lands designations solely on a parcel-by-parcel process. . .** (Emphasis added.)

WACA attempts to get around this by saying that WAC 365-190-070(1) exempts owner initiated requests from the requirement to designate on a county-wide basis. But, this argument ignores the last sentence of WAC 365-190-070(1):

> In designating mineral resource lands, counties and cities must approach the effort as a county-wide or regional process, with the exception of owner-initiated request for designation. **Counties and cities should not review mineral resource lands designations solely on a parcel-by-parcel basis.** (Emphasis added.)

The review of designations referred to in these guidelines is not a review of an owner-initiated request, but rather the mandatory county-wide review of its mineral resource designations that is required according to the schedules in RCW 36.70A.130. Neither RCW 36.70A.130 nor WAC 365-190-040(3) mandate that the County review and update its mineral resource designations in the annual amendment process.

In making all of its planning decisions under the GMA, the Act directs counties to apply and weigh all of the goals in RCW 36.70A.020. There are 13 goals and they are not listed in order of priority, nor is any one goal more important than another. Given this directive, it certainly makes much more sense to review mineral resource land designations comprehensively when the entire plan is under review, rather than on a site by site basis.

Amicus Curiae Associated General Contractors of Washington ("AGC") argues that "[o]nce lands are known to have mineral deposits consistent with the guidelines, designation is mandatory." Brief of Amicus Curiae AGC, p. 10. In support of this contention, AGC cites to WAC 365-190-070(4)(a). In fact, WAC 365-190-070(4)(a) only states that counties and cities "must designate known mineral deposits so that access to mineral resources of long-term commercial significance is not knowingly precluded. . ." It does not state that designation for any particular

property is mandatory under any circumstances. Instead, it merely reiterates the GMA requirement that counties must designate and protect mineral resource lands of long-term commercial significance. Whatcom County has done that.

Neither AGC nor WACA present any viable authority supporting their argument that the guidelines somehow required designation of the property at issue in this case. Under the GMA, there is not a problem with designating more than a fifty year supply; nor is there a problem with designating less than a fifty year supply. It is important to note, as the Board did in this case, that the County's comprehensive plan does not require the designation of a fifty year supply of aggregate:

> The Petitioners cite in support of their argument numerous Comprehensive Plan Resource Lands Goals and Policies as well as the designation criteria. However, the fatal flaw in Petitioners' argument is the lack of language in any of the cited Goals/Policies or the designation criteria that require the County to designate lands as MRL when the designation criteria are met. By way of example, Policy 8P-1 provides the County should "seek" a 50 year supply of aggregate; it does not mandate such a supply. In addition, that same Policy is to be pursued to the "extent compatible with protection of water resources ...."

Concrete Nor'west, et al., v. Whatcom County, GMHB Case No. 12-2-0007 (Final Decision and Order, p. 12-13, 9/25/2012).

Moreover, merely because the text in the comprehensive plan mentions that more designations are needed to meet the County's policy

"to seek to designate" a 50 year supply does not change the fact that the current plan's designations are compliant with the GMA and no more mineral resource land needs to be designated to maintain compliance with the GMA. Legally, the County has a sufficient land base designated for conservation and in no way does this language in the comprehensive plan create a duty to designate CNW's property.

C. The public interest includes the interests of those who are directly impacted by the proposed mineral resource designation including local residents, tribes, state agencies, and other concerned county residents.

Approval of a proposed comprehensive plan amendment under WCC 2.160.080 requires a finding by the majority of the Council that the proposed amendment would serve the public interest. This is an inquiry that requires the exercise of legislative discretion and it is uniquely in the province of the elected officials of Whatcom County. It is not the role of staff, the non-elected planning commission, the Board, or the Court to second guess the County Council on what is in the public interest of the citizens of Whatcom County. Each council member had an obligation in this case to decide whether this amendment was in the public interest and vote accordingly.

The consideration of the public interest requires a very broad inquiry. The Council, in its policy-making role, was not restricted to

considering only the public interest in construction in assessing whether the public interest was furthered pursuant to WCC 2.160. There are many other aspects of the public interest that were articulated by the residents of the area at issue, as well as by tribes, a state agency, and other concerned county residents and organizations.

The County hereby incorporates by reference Section IV, Part D of its argument in the Brief of Respondent Whatcom County on this issue.

V. Conclusion

Even when faced with competing, but justifiable perspectives on an issue, if the decision is a legislative one and there is no mandate under the GMA or other law to adopt the amendment, then the Board must give deference to the choice made by the legislative body:

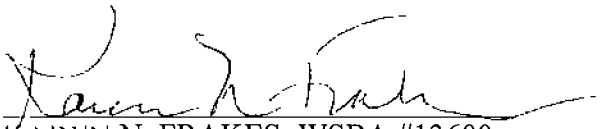
> Absent a duty to adopt a comprehensive plan amendment pursuant to the GMA or other law, neither the board nor a court can grant relief (that is, order a legislative discretionary act). In other words, any remedy is not through the judicial branch. Instead, the remedy is to file a proposal at the County's next annual docketing cycle or mandatory review or through the political or election process

Stafne 174 Wash. 2d at 38. The County Council exercised its discretion honestly and upon due consideration of the facts before it. Its decision must be honored.

In this case, the County did not adopt any changes to its GMA compliant comprehensive plan or development regulations, nor was it mandated by the GMA or other law to adopt the proposed amendments. The decision at issue in this case was discretionary and the Council clearly had no duty to approve it under the GMA, its comprehensive plan or the county code. The County respectfully requests that the Court deny this appeal.

Respectfully submitted this 3rd day of September, 2014.

DAVID S. MCEACHRAN
Whatcom County Prosecuting Attorney



KAREN N. FRAKES, WSBA #13600
Civil Deputy Prosecuting Attorney
Attorney for Respondent

CERTIFICATE

I CERTIFY that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this Certificate is attached to this Court and to the following:

David S. Mann
Gendler & Mann LLP
936 N. 34th Street, #400
Seattle, WA 98103

Diane L. McDaniel
Assistant Attorney General
Office of the Attorney General
P.O. Box 40110
Olympia, WA 98504-0110

Margaret Archer
Gordon Thomas Honeywell LLP
P.O. Box 1157
Tacoma, WA 98401-1157

Nancy Bainbridge Rogers
Attorney at Law
524 Second Avenue, Suite 500
Seattle, WA 98104-2323

John P. Ahlers
Lindsay K. Taft
Ahlers & Cressman, PLLC
999 Third Avenue, Suite 3800
Seattle, WA 98104-4023

DA Stasik
PARALEGAL

9/3/14
DATE

WHATCOM COUNTY PROSECUTOR

September 03, 2014 - 1:31 PM

Transmittal Letter

Document Uploaded: 455633-Response Brief.pdf

Case Name: Concrete Nor'West v. WWGMHB, Whatcom County, Friends of Nooksack Samish Watershed

Court of Appeals Case Number: 45563-3

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Response__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

Response to Amicus Briefs

Sender Name: Brooke N Anderson - Email: banderson@co.whatcom.wa.us

A copy of this document has been emailed to the following addresses:

jahlers@aclawyers.com
ltaft@aclawyers.com
nrogers@cairncross.com
marcher@gth-law.com
mann@gendlermann.com
dianem@atg.wa.gov