No. 91378-1

SUPREME COURT OF THE STATE OF WASHINGTON

(Court of Appeals No. 45563-3-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.

CONCRETE NOR'WEST AND 4M2K, LLC'S PETITION FOR SUPREME COURT REVIEW

GORDON THOMAS HONEYWELL LLP
Margaret Y. Archer, WSBA No. 21224
William T. Lynn, WSBA No. 07887
Attorneys for Petitioners Concrete Nor'West and 4M2K, LLC

Suite 2100
1201 Pacific Avenue
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6500

[100105461]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Growth Management Hearings Board Cases

Statutes

Whatcom County Code Provisions

Rules

Secondary Sources

Appendices

A. *Concrete Nor'West v. Western Washington Growth Management Hearings Board,* Case No. 45563-3-II (February 3, 2015)

B. *Concrete Norwest v. Whatcom County,* WWGMHB Case No, 12-2-0007 (Final Decision and Order, September 25, 2013) – This Board Decision is also at Administrative Record ("AR") 1175-1190)

C. *Spokane Rock Products, Inc. v. Spokane County,* EWGMHB Case No. 02-1-0003 (Final Decision and Order, July 19, 2002)

I. IDENTITY OF PETITIONER

Petitioners are Concrete Nor'West, a division of Miles Sand and Gravel Company, and 4M2K, LLC (collectively referred to as "CNW").

II. CITATION TO COURT OF APPEALS DECISION

CNW seeks review of the Published Opinion of the Court of Appeals, Division II filed on February 3, 2015. This decision affirmed the Final Decision and Order ("FDO") of the Western Washington Growth Management Hearings Board ("Board") issued on September 25, 2012 under Case No. 12-2-0007. A copy of Division II's Opinion is in Appendix A at pages A-1 through A-16. A copy of the Board's FDO is in Appendix B at pages B-1 through B-16.[1]

III. ISSUE PRESENTED FOR REVIEW

Did Division II err by concluding that neither the Growth Management Act ("GMA") nor the Whatcom County Comprehensive Plan (the "Plan") impose 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?

---

[1] This is an appeal under the Administrative Procedure Act, chapter 34.05 RCW. If review is accepted, this Court will review the Board's FDO directly. *King County v. Central Puget Sound Growth Mgmt. Hrgs. Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000).

IV. STATEMENT OF THE CASE

CNW is a supplier of aggregate and ready mixed concrete, and operates a sand and gravel mining operation on a 180-acre site in Whatcom County. (AR 222, 239-40, 312, 396-98.) This appeal involves CNW's request to designate an additional 280 acres to Whatcom County's Mineral Resource Lands ("MRL") overlay through an owner application to amend the County's Comprehensive Plan Zoning Map.

The County's goals and policies regarding designation and preservation of natural resource lands, including mineral resource lands, are at Chapter 8 of its Plan. (AR 831-65.) Mineral resource lands are non-renewable resources that are found on a specific site and cannot be moved. Thus, the Plan goals and policies address the substantial public interest to identify such lands and protect them from incompatible land uses so as to sustain and enhance the mineral resource industry that is critical to the local and state economy. This includes the stated policy to designate a 50-year supply of mineral resource lands. (AR 855.) The County does not dispute that it has fallen far short of its goal (AR 461), and that substantial additional designations are required to meet demand (AR 854).

The Plan also acknowledges that there is a public interest to ensure mining is conducted so as to minimize environmental and other impacts. The Plan also includes goals and policies to address these competing

interests. (*See* AR 846-58.)

More specifically, the Plan policies establish a balanced two-step review system. To ensure that MRLs are identified and preserved for future use, the Plan requires only a generalized and top-level scrutiny of environmental and other impacts at the designation stage. Before actual mining may occur, the Plan's second step requires a more rigorous and detailed review in a subsequent public permitting process that includes public participation. (*See* Goal 8P and implementing policies at AR 855.)

In light of this established two-step process, approval of CNW's application would not confer to CNW a right to mine any of the land designated MRL, but would only allow CNW a chance to apply to extract minerals. Actual mining could not occur unless and until a mining permit was issued following detailed, public County review and demonstration that impacts are adequately mitigated.[2] (*See* AR 853-58. *See also* CP 305-15, 338-39, 344-45.)

The Plan includes MRL Designation Criteria that implement the

---

[2] Prior to this appeal, the Board expressly acknowledged the two-step review system established by the County's Plan to address competing interests and goals, and found the bifurcated review to comply with GMA requirements. At the County's urging, the Board has twice interpreted the Plan to defer site-specific environmental review to the public permit process, so that designation decisions – intended only to conserve MRLs, not authorize mining – are based on more generalized criteria and review intended to select and preserve mineral-rich lands. *See Franz v. Whatcom County Council*, WWGMHB Case No. 05-2-0011 (FDO, September 19, 2005) 2005 WL 2458412 (CP 297-322); *Wells v. Whatcom County*, WWGMHB Case No. 97-2-0030c (FDO January 16, 1998) 1998 WL 43206 (CP 330-341).

first phase of the Plan-established bifurcated review process. The criteria set the quantity and quality of mineral deposits required for designation and also set limits to exclude lands within certain proximity to wellhead protection areas and residentially zoned or developed area. (AR 857-58.)

There is no dispute that CNW's application satisfies all the designation criteria stated in Chapter 8 of the Plan.[3] (AR 1183, 1186.) The County's Planning Staff found that all of the criteria were satisfied, that the application was consistent with the County's goals and policies and should be approved. (AR 224-252.) The County Planning Commission then reviewed CNW's application against the applicable criteria, considered community comments in a public hearing and also recommended approval of the MRL designation. (AR 276-79.)

Though the MRL criteria were satisfied, the County Council rejected CNW's application by a 3 to 3 vote. (AR 288-91, 295-96.) Only Council members who voted for the amendment referenced the MRL designation criteria. (AR 289-90.) The three Council members voting against did not discuss, much less apply the MRL designation criteria, and disregarded the Plan's bifurcated review process. Instead, they rejected

[3] Professionally prepared studies demonstrated that the lands contain sufficient quantity and quality minerals of long-term significance for the extraction of minerals, (AR 297-309, 310-356, 377-396, 793-810.) The application was also supported by scientific study evaluating the proximity of groundwater tables to proposed mining, pertinent aquifer characteristics and mitigation measures that may be taken to avoid or minimize impacts to groundwater. (AR 311-18, 363-376, 396-405.)

CNW's application based upon public opposition, speculation about potential impacts and the desire for more detailed environmental review, even though an MRL designation confers no right to mine and all potential impacts would be thoroughly reviewed (and necessarily mitigated) before a mining permit could issue. (*See* AR 289-91.)

CNW appealed to the Board. (AR 1-11.) The County did not claim that the MRL designation were not satisfied, but instead argued that the criteria are irrelevant. (Record of 8/28/12 Board Proceeding ("RP") at p. 55, 88.) The County stated:

> "Even if a site meets all the designation criteria in the CP [Comprehensive Plan], neither the GMA nor the County CP place a duty upon the County to re-designate the land to MRL upon the request of the property owner." (AR 1005.)

The Board accepted the argument stating that "the fatal flaw in Petitioner's argument is the lack of language in any of the cited Goals/Policies or the designation criteria that require the County to designate when the designation criteria are met." (FDO at Appendix B-12; AR 1186.) The Board held that neither the GMA nor the Plan imposed a duty to designate the qualified MRL's identified in CNW's application and, thus, the GMA was not violated.[4] (*Id.* at B-13–B-14; AR 1187-88).)

---

[4] The Board relied on this Court's decision in *Stafne v. Snohomish County,* 174 Wn.2d 24, 271 P.3d 868 (2012), which ultimately held that challenges to a decision rejecting a comprehensive plan amendment may not be had under the Land Use Petition Act

Division II of the Court of Appeals affirmed. The court concluded that the because the GMA goal to sustain and enhance resource industries is only one of 13 competing goals, the GMA imposes no mandate to designate lands with known mineral resource deposits. (Opinion at Appendix A-10, A-14.) Because the Plan similarly contains competing goals (e.g. sustain and enhance mining and protect the environment and surrounding community), the court also opined that the Council retained discretion to defer to proffered environmental and community concerns even though the MRL designation criteria were met, and even though the County's bifurcated review process would ensure that the environmental impacts would be addressed at the permitting stage. (*Id.* at A-8-A-15.) The competing Plan goals and the absence of an affirmative statement that "any parcel satisfying the designation criteria must be designated MRL," served to relieve the Council of any obligation to designate qualified lands. (*Id.* at A-9.)

V. ARGUMENT IN SUPPORT OF REVIEW

This Court should accept review because Division II's decision

---

("LUPA"), but must exclusively be through a timely petition to the Growth Boards pursuant to the GMA. *Id.* at 11. In addressing this question of jurisdiction under LUPA, the *Stafne* Court stated that, absent duty created by the GMA or other law, neither the Board nor a court can grant relief from a discretionary legislative act. 174 Wn.2d at 38.

The *Stafne* Court was not, however, asked to determine if there was a duty to adopt the particular application appealed in light of relevant standards or even to evaluate the merits of the application, nor did it address the GMA mandate at RCW 37.70A.120 that counties perform planning activities in conformance with their comprehensive plans.

conflicts with this Court's decision in *King County v. Central Puget Sound Growth Mgmt. Hrgs. Bd.,* which held that the GMA does create a legislative mandate to conserve natural resource land and thus imposed a duty to designate and conserve such lands to assure the maintenance and enhancement of resource-based industries. 142 Wn.2d 543, 558, 562, 14 P.3d 133 (2000). This GMA mandate was incorporated into the County's Plan. The Council was required pursuant to RCW 36.70A.120 to act "in conformity with its comprehensive plan," but failed when it refused to designate MRL CNW's land with known mineral resource deposits. Review is also warranted because the case presents issues of substantial public interest that should be determined by the Supreme Court.

A. The GMA Imposes A Continuing Mandate To Preserve And Protect Known Mineral Resource Lands.

The GMA was enacted to address public concerns about increasing development pressures, partially caused by rapid population growth, and to provide a mechanism for coordinated land use planning pursuant to common goals "expressing the public's interest in conservation and wise use of land." RCW 36.70A.010; *King County, supra,* 142 Wn.2d at 546. The GMA requires cities and counties to adopt comprehensive plans and development regulations consistent with the GMA's stated goals and requirements. *Id.* at 546. *See also* RCW 36.70A.040, .020.

Through the GMA, the Legislature also made designation of natural resource lands a priority in comprehensive planning. A stated GMA goal is to

> Maintain and enhance natural resource-based industries, including productive timber, agriculture and fishing industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.

RCW 36.70A.020(8). To meet that goal, the GMA directs that counties "shall designate where appropriate" agricultural lands, forest lands and mineral resource lands that "are not already characterized by urban growth and that have long term significance." RCW 36.70A.170. The GMA further requires counties to adopt development regulations that will assure the conservation resource lands designated and assure that uses of adjacent lands do not interfere with continued resource industry use. RCW 36.70A.060(1)(a).

To support its decision, Division II stated that the natural resource goal is only one of 13 GMA goals with no greater priority than any other. (Opinion at Appendix A-5, A-10.) Division II opines that, since the GMA only requires designation of mineral resource lands "where appropriate," the Council is left with discretion to reconcile, weigh and prioritize the competing GMA goals as it chooses. Contrary to Division II's interpretation, the GMA natural resource goal is a legislative priority and

the GMA does impose a duty on a planning county.

In the context of agricultural lands, this Court has construed the natural resource goal and the associated implementing GMA provisions to 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).

> When read together, RCW 36.70A.020(8), 060(1), and .170 evidence a legislative mandate for the conservation of agricultural land.

Id. at 562.[5] *Accord, Yakima County v. Eastern Wash. Growth Mgmt. Hrgs Bd.,* 146 Wn. App. 679, 688, 192 P.3d 12 (2008); *Lewis County v. Western Wash. Growth Mgmt. Hrgs. Bd.,* 157 Wn.2d 488, 504, n. 12, 139 P.3d 1096 (2006).

This Court identified this GMA mandate, noting the GMA "requirements that local governments *designate* agricultural land and *conserve* such land in order to *maintain and enhance* the agricultural industry." 142 Wn. 2d at 558.

> Although the planning goals are not listed in any priority order in the Act, the verbs of the agricultural provisions mandate specific, direct action. The County has a duty to designate and conserve

[5] In *King County,* this Court concurred with the Board's interpretation that these GMA provisions "create an agricultural conservation imperative that imposes an affirmative duty on local governments to designate and conserve agricultural lands to assure maintenance and enhancement of the agricultural resource industry." 142 Wn.2d at 554.

> agricultural lands to assure the maintenance and enhancement of the agricultural industry. (Emphasis added.)

Id. The Legislature used identical language to require designation and protection of mineral resource lands. Thus, there is necessarily the same mandate to designate mineral land.[6]

Consistent with this Court's interpretation of the GMA provisions governing natural resource lands, the Board has stated that "preservation and protection of known mineral resource lands is a primary objective of the Growth Management Act," and the GMA "mandate[s] the protection of known and valuable mineral resources." *Spokane Rock Products, Inc. v. Spokane County,* EWGMHB Case No. 02-01-0003 (FDO, July 19, 2002) at Appendix C-7, 8. The rationale for this mandate is well-founded:

> One critical reason is the fact that resource lands are non-renewable resources. Mineral lands "...cannot be re-created if they are lost to urban development or mismanaged. In addition, "...mineral resources are site-specific and not subject to relocation." The location of these resources is critical [to] the economic viability of mining operations.

Id. at C-7, *quoting* Spokane County Comprehensive Plan.

A county's obligation does not end with the initial designation. The GMA directs comprehensive review of prior designations and

[6] The Board has held that the GMA goal to maintain and enhance natural resource-based industries applies with equal force to the mineral resource industry and mineral resource lands and that RCW 36.70A.020(8) cannot be construed to provide agriculture and forestry a superior position relative to mining. *See Wells, supra,* at CP 338.

implementing development regulations at specific time intervals, RCW 36.70A.130, .131. The obligation to review and revise is not limited to those set review periods. The GMA directs that the initial designations and other plan provisions "shall be subject to continuing review and evaluation" and, if necessary, revised. RCW 36.70A.130(1). The GMA also authorizes municipalities to amend their adopted comprehensive plans annually (though annual amendment is not required) and directs local governments to adopt a public process for the consideration of proposed amendments. RCW 36.70A.130(2)(a). The GMA mandated "continuing review and evaluation" of previously adopted plan provisions is inherently required in this annual process, at least with regard to the specific plan provisions for which amendment is proposed.

The Legislature did more than impose a mandate to preserve and protect resource lands. It directed Washington's Commerce Department to adopt guidelines to help counties achieve the GMA mandate. RCW 36.70A.050. The legislature provided that these guidelines "shall be the minimum guidelines that apply to all jurisdictions, but shall allow for regional differences." RCW 36.70A.050(3). The guidelines have thus been construed to set the minimum standards to be applied by local governments. *Friends of Pierce County v. City of Bonney Lake,* CPSGMHB Case No. 12-2-002c (FDO, July 9, 2012), 2012 WL 3060647

17, *citing Lewis County v. Western Wash. Growth Mgmt. Hrgs. Bd.*, 157 Wn.2d 488, 139 P.3d 1096 (2006).

The Department minimum guidelines for mineral resource lands are at WAC 365-190-070. They do not distinguish owner-initiated requests from other review[7] Regardless of the manner or time in which resource designations are proposed, the minimum guidelines provide that "[c]ounties and cities must identify and classify mineral resource land from which extraction of minerals occurs or can be anticipated." WAC 365-190-070(2). 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, the GMA makes designation mandatory.

B. The GMA Mandate Is Acknowledged and Incorporated Into The County's Comprehensive Plan and the Plan Provisions Must Be Construed In The Context Of That Mandate.

The County addresses mineral resource lands in Chapter 8 of its Plan. AR 831-65. Division II focused upon the existence of competing

[7] 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.

goals to conclude there was no mandate to designate lands that satisfy the MRL criteria.

But, judicial interpretation of this Chapter should be conducted in light of the GMA mandate to conserve and protect resource lands and to maintain and enhance resource-based industries, especially considering the expressly stated purpose the Plan's Resource Lands Chapter:

> This Chapter contains goals and policies designed to identify and protect important natural resources lands found in Whatcom County as defined in RCW 36.70A. The development of these goals and policies is necessary to ensure the provision of land suitable for long-term farming, forestry and mineral extraction so the production of food, fiber, wood products, and minerals can be maintained as an important part of our economic base through the planning period. 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. (Emphasis added.)

(AR 831.) Further, the resource lands goals and policies were developed:

- to be consistent with and help achieve the state-wide GMA goals to "maintain and enhance" natural resource-based industries
- to implement County-Wide Planning Policies which express a desire for the county to become a government of rural lands and sustainable resource based industries
- to fulfill the citizens' vision of Whatcom County where resource based industries are widely practiced and encouraged."

(*Id.*) Thus, the Plan states that its goals and policies support the GMA goal to maintain and enhance resource based industries (RCW 36.70A.020(8)) "by identifying, designating, and protecting productive resource lands from incompatible uses, thereby helping to maintain the county's important natural resource based industries." (AR 832.)

The Plan acknowledges the GMA requirements for mineral resource lands at AR 846:

> One of the goals of the Growth Management Act is to maintain and enhance resource based industries, including the aggregate and mineral resource industries, with the purpose of assuring the long-term conservation of resource lands for future use. The goals and policies in this section support that goal. In addition, the Act mandates that each county shall classify mineral resource lands and then designate and conserve appropriate areas that are not already characterized by urban growth and that have long-term commercial significance.

Finally, the Plan acknowledges and incorporates the minimum guidelines. The mineral resource designation criteria in the County's Plan (at AR 857-58) 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 854.) The County's MRL criteria encompass the minimum guidelines and refines for local circumstances.

C. Contrary To The GMA And The Plan, Whatcom County

Failed To Protect And Preserve Known Mineral Resource Lands When It Denied CNW's Application. Division II And The Board Erred When It Sustained The Council's Action.

Judicial scrutiny of the County's denial of CNW's application must be made in light of the GMA mandate to conserve and protect resource lands, but also the GMA mandate that "each county ... that is required or chooses to plan under RCW 36.70A.040 shall perform its activities ... in conformity with its comprehensive plan. RCW 36.70A.120 (emphasis added).

This is a broad mandate, one that applies on an ongoing basis, not just to initial adoption of the Plan. A jurisdiction's activities must be in conformity with the plan. Black's Law Dictionary (6th Ed., 1990) defines conformity to mean "corresponding in form, manner or use; agreement; harmony, congruity." Webster's Ninth New Collegiate Dictionary (1987) defines conformity as "action in accordance with some specified standards or authority." These definitions indicate that RCW 36.70A.120 requires the County to conduct its planning activities, which includes review and consideration of proposed plan amendments and actions to reject amendments, in harmony or in congruity with the Plan's specified goals, policies and criteria.

The County's actions here were not in harmony with the Plan. When the County rejected the proposed designation even though the lands

met all of the established criteria, it acted contrary to the Plan, not in harmony with it. When it based its "first step" designation on impacts that were to be considered in the second more detailed review step, its actions were not at all in congruity with the Plan.

Faced with an admitted shortage of mineral resources, the Council failed to protect lands with significant known mineral resources. In violation of RCW 36.70A.120, the Council failed to act in conformity with the policies established in it own comprehensive plan and failed to further its own stated goals.

Division II concluded that because the County's Plan included conflicting goals, there was no mandate to designate. (*Id.* at A-10; *see also,* A-12.) But this construction of the GMA conflicts with this Court's interpretation in *King County*, as well as the stated purpose of the Resource Lands Chapter to comply with GMA requirements and conserve resource lands.

There is certainly tension between the natural resource goal and policies – resource protection versus protecting the environment and quality of life. The Council (as well as the Board and Division II) was required to harmonize these competing interests. The County was obligated to give effect to each of the GMA and Plan goals to the extent possible. But

> "the overriding purpose of the designation of resource lands is their conservation and protection. While the County may give high priority to other goals, there must be a showing that the competing goals are mutually exclusive and cannot be accommodated."

Spokane Rock Products, supra, at Appendix C-10, *quoting Ridge v. Kittitas County,* EWGMHB Case No. 94-1-0017 (FDO, July 29, 1994) at 7. *See also, Save Our Butte Save Our Basin Society v. Chelan County,* EWGMHB Case No. 94-1-0001 (FDO, July 6, 1994) at 6; *King County, supra,* 142 Wn.2d at 562.

The Council could and should have harmonized the competing goals by following the Plan-established two-step process. If it had designated the qualified lands MRL, the Council would have effectively preserved these resources lands, yet still retained, protection against impacts. No mining would occur on the designated unless and until all potential impacts were reviewed and adequately mitigated. Both competing goals would be advanced. Instead, the Council wholly abandoned the two-step process and abandoned its goal to designate a 50 year supply of aggregate. It left lands with known mineral deposits of long-term commercial significance unprotected. This was contrary to the Plan and contrary to the GMA mandates.

D. Whatcom County's Action Was Contrary To The Local Public Interest As Defined By The GMA and the County. Division II's

Decision To Uphold This Action Endangers Future MRL Designations Statewide Is Contrary To The Significant Public Interest in Protecting Non-Renewable Mineral Resources.

Though the Council made no mention of the public interest criterion from the general plan amendment criteria at WCC 2.160.080, Division II and the Board held this provision allowed the Council to ignore its MRL designation criteria. But, this very section mandates that the Council consider the impact of its decision on mineral resources lands. WCC 2.160.080(3)(c) provides:

> ...In determining whether the public interest will be served, factors including but not limited to the following shall be considered:
>
> * * *
>
> Anticipated impact upon designated agricultural, forest and mineral resource lands. (Emphasis added.)

Relevant to mineral resources, the Plan has a stated policy to seek designation of a 50-year supply of mineral resource lands (AR 855); and admits it has fallen far short of this goal (AR 461). The Plan itself acknowledges that additional designations, beyond those originally made, are required to meet demand. (AR 854.) To the extent the Council's decision may be deemed to be based upon the public interest element of the general amendment criteria, there is nothing in the record to evidence that the Council gave the required consideration of the impact on mineral resources lands. Instead, it focused exclusively on the neighbors' voiced

concerns that were speculative in nature and, regardless, would have been satisfactorily addressed in the subsequent permitting phase of the Plan-established two-step process.

Moreover, Division II's decision to sustain the County's improper action obstructs the GMA mandate to preserve and enhance the mineral resource industry. "Aggregates are literally the foundation of our economic and community infrastructure." (AR 767.) This undeniable fact has been formally recognized by Washington's Legislature, when it expressly found 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.

Aggregates and the lands upon which they are deposited are non-renewable; unlike agriculture and forest lands which can be sustained, mineral resource lands cannot be re-created, nor can they be relocated.

> "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).

Division II's decision could have a devastating impact on the

aggregate, construction industry and this State's economic well-being. Though critical to our economy, surface mining is controversial and often politically unpopular. It has been determined that, state-wide, "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). If affirmed, the decision will only embolden local governments to disregard the GMA mandate in the face of political pressure and refrain from further MRL designations, even when aggregated-rich lands at stake.

VI. CONCLUSION

For the foregoing reasons, CNW requests that this Court grant discretionary review of Division II's decision and the Board's FDO.

Dated this 5th day of March, 2015.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By _____

Margaret Archer, WSBA No. 21224
William T. Lynn, WSBA No. 07887
Attorneys for Petitioners

APPENDIX A

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, Respondent.	No. 45563-3-II PUBLISHED OPINION

BJORGEN, J. — Concrete Nor'West, a division of Miles Sand and Gravel Company, and 4M2K LLC (collectively, CNW) appeal a superior court's affirmance of a final decision and order from the Western Washington Growth Management Hearings Board (the Board). The Board found no violation of Washington's Growth Management Act (GMA), chapter 36.70A RCW, in Whatcom County's denial of a proposed amendment to its comprehensive plan and zoning map designating certain property as mineral resource land (MRL). CNW argues that the GMA, Whatcom County's comprehensive plan, and the Whatcom County Code (WCC) collectively required adoption of the amendment. Because we agree with the Board that they did not, we affirm.

FACTS

Concrete Nor'West operates a gravel mine on land in Whatcom County. Pursuant to the WCC, CNW applied to amend Whatcom County's comprehensive plan and its zoning map to expand a MRL overlay onto a parcel adjacent to its mine and to re-designate that parcel from commercial forestry land to MRL.[1]

Staff at Whatcom County Planning and Development Services (planning staff) processed CNW's application and determined that the parcel at issue satisfied the MRL designation criteria found in the County's comprehensive plan. After analyzing the criteria prescribed in the WCC for considering an amendment to the comprehensive plan and determining that the amendment satisfied them, the planning staff recommended approving CNW's request. After a hearing, Whatcom County's Planning Commission concurred with the planning staff, recommended adopting the proposal, and forwarded CNW's application to the Whatcom County Council for consideration.

CNW's proposal did not command a majority of the Council. Three members voted to pass the proposed amendment, three voted to reject it largely based on concerns about water quality and the effects of future mining on nearby agricultural lands, and one abstained. Because the proposed amendment failed to garner a majority of the Council, it was not adopted.

---

[1] The planning staff phrase CNW's request as one to "[a]mend the Comprehensive Plan Map and Zoning Map to expand the existing Mineral Resource Land (MRL) overlay by an additional 280 acres over the existing Commercial Forestry zone, and change the Commercial Forestry designation to a MRL designation." Administrative Record (AR) at 32. The Planning Commission characterizes it as one to "amend the Whatcom County Comprehensive Plan map from Commercial Forestry to Mineral Resource Lands (MRL) and the zoning map to create an MRL Overlay for 280 acres located on the northern slope of Eddys Mountain." AR at 276.

CNW petitioned the Board for review of the Council's failure to pass the proposed amendment. CNW argued that because RCW 36.70A.120, part of the GMA, requires counties and cities to "perform [their] activities . . . in conformity with [their] comprehensive plan[s]," and because the parcel met the comprehensive plan's criteria for designation as MRL, the Council had a duty under the comprehensive plan and the GMA to pass the proposed amendment and re-designate the land. Administrative Record (AR) at 9-10. The Board disagreed, stating that "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 land as MRL when the designation criteria are met." AR at 1186 (footnote omitted). Because the Council had no duty to designate the land by adopting the amendment, the Board held that no violation of the GMA had occurred and that it lacked the power to grant CNW relief. Therefore, it dismissed CNW's petition for review with prejudice. AR at 1187-88 (citing *Stafne v. Snohomish County*, 174 Wn.2d 24, 37-38 & n.5, 271 P.3d 868 (2012) (citing *SR9/US 2 LLC v. Snohomish County*, No. 08-3-004, 2009 WL 1134039 at *4 (Cent. Puget Sound Growth Mgmt. Hr'gs Bd. Apr. 9, 2009) and *Cole v. Pierce County*, No. 96-3-009c, 1996 WL 678407 at *7-8, 10 (Cent. Puget Sound Growth Mgmt. Hr'gs Bd. July 31, 1996))).

CNW petitioned for superior court review of the Board's decision under the Administrative Procedure Act, chapter 34.05 RCW (Act). The superior court affirmed the Board, and CNW appealed.

ANALYSIS

I. THE STANDARDS OF REVIEW

The legislature has charged the Board "with adjudicating GMA compliance, and, when necessary, with invalidating noncompliant comprehensive plans and development regulations."

King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd., 142 Wn.2d 543, 552, 14 P.3d 133 (2000). By statute, the Board's review is deferential and it must

> "find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]."

King County, 142 Wn.2d at 552 (quoting RCW 36.70A.320(3)) (alteration in original). An action by a state agency, county, or city is clearly erroneous if "the Board . . . [is] 'left with the firm and definite conviction that a mistake has been committed.'" *King County*, 142 Wn.2d at 552 (quoting *Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993)).

We review a Board decision by applying the standards of chapter 34.05 RCW directly to the record before the Board, sitting in the same position as the superior court. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998). We "review[] the Board's legal conclusions de novo," but, because of its expertise in administering the GMA, we accord substantial weight to the Board's interpretation of its provisions. *King County*, 142 Wn.2d at 553. CNW bears the burden of showing the invalidity of the Board's decision, and thus, as relevant here, the burden of showing that the Board "erroneously interpreted or applied the law." *Feil v. E. Wash. Growth Mgmt. Hr'gs Bd.*, 172 Wn.2d 367, 376-77, 259 P.3d 227 (2011) (citing RCW 34.05.570(1)(a), (3)(d)).

II. THE GMA

Among the GMA's core requirements is the mandate that counties and cities subject to it "adopt comprehensive growth management plans and development regulations in accordance with the Act's provisions." *King County*, 142 Wn.2d at 546. Whatcom County is subject to the GMA. *See* RCW 36.70A.040(1). For jurisdictions subject to it, the GMA requires periodic

reviews and updates to comprehensive plans and development regulations and authorizes the consideration of comprehensive plan amendments no more than once a year, with exceptions. RCW 36.70A.130.

The GMA prescribes 13 exclusive goals that cities and counties must use "for the purpose of guiding the development of comprehensive plans." RCW 36.70A.020. Two of these goals are especially pertinent to the present appeal: to "[m]aintain and enhance natural resource-based industries," RCW 36.70A.020(8), and to "[p]rotect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water." RCW 36.70A.020(10).

As CNW notes, the GMA sets out specific procedures for accomplishing its goal of maintaining and enhancing natural resource-based industries. First, the Act requires cities and counties to designate "where appropriate . . . [m]ineral resource lands that are not already characterized by urban growth and that have long-term significance for the extraction of minerals." RCW 36.70A.170(1)(c). Next, RCW 36.70A.060 (1) requires cities and counties within its scope to "adopt development regulations . . . to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170." The GMA further requires that cities and counties operating under its strictures periodically review their mineral resource designations in light of new information concerning mineral deposits and certain new or modified model regulations. RCW 36.70A.131.

III. Whatcom County's Comprehensive Plan and County Code

The Whatcom County comprehensive plan sets out eight goals and associated policies for "guid[ing] Whatcom County in land use decisions involving lands where mineral resources are present." AR at 144. Of these, Goal 8J states an intent to

> [s]ustain and enhance, when appropriate, Whatcom County's mineral resource industries, support the conservation of productive mineral lands, and discourage incompatible uses upon or adjacent to these lands.

AR at 146. Goal 8K contains the County's aspiration to

> [e]nsure that mineral extraction industries do not adversely affect the quality of life in Whatcom County, by establishing appropriate and beneficial designation and resource conservation policies, while recognizing the rights of all property owners.

AR at 146. Goal 8L declares Whatcom County's intent to

> [a]chieve a balance between the conservation of productive mineral lands and the quality of life expected by residents within and near the rural and urban zones of Whatcom County.

AR at 147. Goal 8N contains Whatcom County's aim to

> [m]aintain the conservation of productive mineral lands and of productive forestry lands within or near the forestry zones of Whatcom County.

AR at 149. Finally, Goal 8P expresses the County's intent to

> [d]esignate Mineral Resource Lands [MRLs] containing commercially significant deposits throughout the county in proximity to markets in order to avoid construction aggregate shortages, higher transport costs, future land use conflicts and environmental degradation. Balance MRL designations with other competing land uses and resources.

AR at 149. Goal 8P is implemented by Policy 8P-1, which states:

> Seek to designate 50 year supply of commercially significant construction aggregate supply to the extent compatible with protection of water resources, agricultural lands, and forest lands.

AR at 146-53.

After setting out these goals and policies, the comprehensive plan prescribes criteria for designating property as MRL. The criteria for nonmetallic MRL are, in relevant part:

> 1. Non-metallic deposits must contain at least one million cubic yards of proven and extractable sand, gravel, or rock material per new MRL Designation.
> 2. Minimum MRL Designation size is twenty acres.

> 3. Expansion of an existing MRL does not need to meet criteria 1 or 2.
> 4. MRL Designation status does not apply to surface mines permitted as an accessory or conditional use for the purpose of enhancing agriculture or facilitating forestry resource operations.
> 5. All pre-existing legal permitted sites meeting the above criteria will be designated.
> 6. The site shall have a proven resource that meets the following criteria; Sand and gravel deposits must have a net to gross ratio greater than 80% (1290 cy/acre/foot).
> 7. MRL Designations must not be within nor abut developed residential zones or subdivisions platted at urban densities.
> 8. MRL Designations must not occur within the 10 year zone of contribution for designated wellhead protection areas. . . .
> 9. MRL Designation should not enclose by more than 50% non-designated parcels.

AR at 155-56.

Equally applicable to the designation of mineral lands are the procedures for amending the comprehensive plan, codified in WCC 2.160. These specify that a proposed amendment may be approved only if the Council finds that all of five listed criteria are met. Of these, the third criterion specifies that

> [t]he public interest will be served by approving the amendment. In determining whether the public interest will be served, factors including but not limited to the following shall be considered:
>
> a. The anticipated effect upon the rate or distribution of population growth, employment growth, development, and conversion of land as envisioned in the comprehensive plan.
>
> b. The anticipated effect on the ability of the county and/or other service providers, such as cities, schools, water and/or sewer purveyors, fire districts, and others as applicable, to provide adequate services and public facilities including transportation facilities.
>
> c. Anticipated impact upon designated agricultural, forest, and mineral resource lands.

WCC 2.160.080.

IV. THE COUNTY COUNCIL DID NOT HAVE A DUTY TO DESIGNATE THE PROPERTY AS MRL

We turn now to the issue raised by CNW's appeal: whether or not Whatcom County's comprehensive plan imposes a duty on the Council to adopt an amendment and designate land as MRL if it satisfies the plan's designation criteria.[2, 3] We conclude that it does not.

A. The Comprehensive Plan's Goals, Policies, and Designation Criteria

Once a comprehensive plan is in place, the GMA gives effect to the plan's provisions by requiring that "[e]ach county and city that is required or chooses to plan under RCW 36.70A.040 shall perform its activities . . . in conformity with its comprehensive plan." RCW 36.70A.120. This provision thus turns the failure to conform to a comprehensive plan into a GMA violation that the Board may remedy.

Any duty in the comprehensive plan to designate mineral lands would be extracted either from its relevant goals and policies or its designation criteria. Goals 8J, 8K, 8L, and 8N, set out

---

[2] We note here what is *not* before us. CNW's briefing to the Board and our court argued only that Whatcom County violated the GMA because the denial of the proposed amendment was not in conformity with the comprehensive plan. CNW's argument presumes that the plan itself complies with the GMA, but that the Council violated RCW 36.70A.120 when it acted inconsistently with that plan. CNW's supporting amici argue that other provisions of the GMA and implementing Washington Administrative Code provisions required the adoption of CNW's proposed amendment, and CNW echoed these contentions at oral argument. Amici's argument, thus, asserts that the comprehensive plan itself violates the GMA because it does not designate the property at issue as MRL. As such, it is the type of "disguised challenge to the adequacy of the comprehensive plan itself" that the parties must first present to the Board, which has exclusive jurisdiction over such claims. *Woods v. Kittitas County*, 162 Wn.2d 597, 614-15, 174 P.3d 25 (2007). We therefore do not consider amici's argument.

[3] In support of its argument that the Board erred, CNW contends the Board misapplied *Stafne*. In *Stafne*, our Supreme Court held that absent a duty to adopt a comprehensive plan amendment pursuant to the GMA or other law, neither the Board nor a court can order the legislative discretionary act of adopting the amendment. *Stafne*, 174 Wn.2d at 37-38 & n.5 (citing *SR9/US 2 LLC*, 2009 WL 1134039 at *4 and *Cole*, 1996 WL 678407 at *7, 10). Here, we hold that the Council was under no duty to adopt CNW's proposal. Therefore, the holding in *Stafne* directly supports our upholding the Council's action.

above, fix the two central and often contentious ends of maintaining the supply of productive mineral lands while protecting the quality of life, other resources, and the rights of all property owners. These goals are made more corporeal by Policy 8P-1, which states that the County will "[s]eek to designate" a 50-year supply of construction aggregate to the extent compatible with protection of water resources, agricultural lands, and forest lands. AR at 153. Nowhere do these goals and policies state that any parcel satisfying the designation criteria must be designated as MRL. Nowhere do they impose a duty to designate a specific level or amount of MRLs. In fact, their closest approach to any specific duty, the 50-year supply policy of Policy 8P-1, requires the County to "[s]eek to" designate only if compatible with the protection of water and other resources. AR at 153.

In sum, the goals and policies of the comprehensive plan recognize the importance of MRLs, state the clear goal and policy of fostering them and the industries they support, but also make clear that this must be accomplished in a way compatible with the protection of other resources and the quality of life. In fact, Goal 8P ends its description of the goal of designating MRLs with the directive: "Balance MRL designations with other competing land uses and resources." AR at 153. These goals and policies create the breathing space of judgment, not the chains of duty. They do not require the County to designate the parcel at issue as MRL.

We turn next to the MRL designation criteria of the comprehensive plan, set out above in pertinent part. Of these, criteria 1, 2, 6, 7, and 8 on their face impose necessary, but not sufficient conditions for designation. In other words, a parcel must meet these conditions to be designated, but meeting the conditions does not require designation. Some of the criteria, such as numbers 4 and 9, are not classifiable from their terms as either necessary or sufficient. The only designation criterion expressly describing a sufficient condition is number 5, stating that

"[a]ll pre-existing legal permitted sites meeting the above criteria will be designated." AR at 155. This criterion, however, is not relevant to the case before us, because the record does not show that the property at issue is a legally permitted mining site.

Turning to the purpose of the designation criteria, both the GMA and the goals and policies of the comprehensive plan make clear that the criteria, other than number 5, should not be read to announce any duty to designate MRLs. First, the GMA requires cities and counties to designate MRLs only "where appropriate." RCW 36.70A.170(1). The flexibility inherent in that exercise gives jurisdictions the room to reconcile the easily conflicting GMA goals of enhancing natural resource-based industries and protecting the environment and the quality of life. RCW 36.70A.020(8), (10); RCW 36.70A.3201.

Second, the goals and policies of the comprehensive plan require the Council to make comparative judgments about the effect of designation on Whatcom County's environment, quality of life, and mineral, agricultural, and forestry industries. The concerns involved with these comparative judgments are many and involve a multitude of issues. However, the designation criteria touch but a few of the issues involved in a determination that designation is appropriate. If the designation criteria were truly meant to divest the Council of its discretion in making the determination of where designating a parcel as MRL is appropriate, the criteria would be much more exhaustive in their examination of the effects of the designation. To be consistent with the plan's goals and policies, as well as the text of the designation criteria themselves, we cannot read those criteria to compel the designation of property meeting their terms.

Following the designation criteria in the comprehensive plan is the mineral resources selection method, which states:

MINERAL RESOURCES - SITE SELECTION METHOD
1. Sites meeting Mineral Resources Designation Criteria 1 -4 (and areas enclosed by these sites greater than 50 %).
2. Sites requested by owner or operator meeting designation criteria.
3. Sites that are regionally significant meeting designation criteria.
4. Sites adjacent to both roads and other proposed MRL sites meeting designation criteria.

AR at 881. The text is silent as to the role of these four categories. What remains clear, though, is that reading the four categories to create a duty to designate the land they describe would bluntly contradict the balancing approach of the comprehensive plan's goals and policies, for the reasons already rehearsed.

Such a reading would also oppose the general criteria for amending the comprehensive plan, found in WCC 2.160.080. As noted above, WCC 2.160.080 sets out five criteria, each of which must be met before a comprehensive plan amendment may be approved. The third criterion requires that the amendment serve the public interest. WCC 2.160.080(A)(3). Similarly to the goals and policies discussed above, WCC 2.160.080(A) does not require the designation of any specific parcel as MRL, but does require the consideration of the public interest in its third criterion. Interpreting the mineral resources selection method to require designation of any parcel falling within its four categories would ignore the elements of the public interest which WCC 2.160.080(A) demands be considered. To avoid these conflicts with both the comprehensive plan's goals and policies and with WCC 2.160.080, the mineral resources selection method in the designation criteria cannot be read as imposing a duty to designate all parcels falling within its categories.

B. The Role of Community Displeasure in the Council's Decision

CNW contends that the failure to designate the property at issue as MRL cannot be justified under WCC 2.160.080(A)(3)'s "public interest" criterion, because the Council

confounded the public interest with community opposition. In support, CNW cites a number of cases which overturned permitting or quasi-judicial decisions due to overreliance on community attitudes or displeasure.

The rule governing this issue was set out in *Sunderland Family Treatment Services v. City of Pasco*, 127 Wn.2d 782, 797, 903 P.2d 986 (1995): "[w]hile the opposition of the community may be given substantial weight, it cannot alone justify a local land use decision." Whether or not the Council's failure to designate is the sort of action to which this rule has been applied, the Council's action here does not offend its terms. The record does disclose substantial opposition to the proposed MRL designation. The record also discloses, though, that council members voting against the designation did so with a view to serving the public interest, which they were required to take into account. To prohibit local officials from considering elements of the public interest simply because those elements were strongly argued to them is to plunge deeply into absurdity. The record shows that community opposition alone did not justify the Council's decision. Therefore, the Council's decision does not offend the rule in *Sunderland.*

C. The Consideration of the Public Interest at the Designation Stage

CNW also contends that the Council's consideration of elements of the public interest was improper because Whatcom County's system of phased project review demands that those elements be considered only during project permitting. In support, CNW cites board decisions in *Franz v. Whatcom County Council*, No. 05-2-0011, 2005 WL 2458412 at *1 (W. Wash. Growth Mgmt. Hearings Bd. Sept. 19, 2005) and *Wells v. Whatcom County Council*, No. 97-2-0030c, 1998 WL 43206 at *1 (W. Wash. Growth Mgmt. Hr'gs Bd. Jan 16, 1998), as well as a hearing examiner decision in an earlier phase of CNW's application, *Concrete Nor'West v. Whatcom*

County, No. SEP2009-00132 and PLN 2009-0013 (Whatcom County Hr'g Exam'r July 16, 2009). For a number of reasons, we disagree with CNW's reading of these cases.

Wells and *Franz* each involved challenges to prior designations of MRLs by Whatcom County. The challenge in *Wells* rested on the argument that the designation resulted in prohibited impacts to residential uses. The Board spurned this argument, holding that the record lacked evidence that the designation created any "prohibited impacts on residential uses," *Wells*, 1998 WL 43206, at *10, and that "[s]pecific conflicts are appropriately addressed in a site-by-site permitting and review process." *Wells*, Order on Reconsideration, 1998 WL 312640 at *2 (W. Wash. Growth Mgmt. Hr'gs Bd. Feb. 19, 1998). The Board also pointed out that Policy 8P-4 of the comprehensive plan specifies that mining will be allowed in MRLs through an administrative permit process, requiring environmental review and application of appropriate site-specific conditions. *Wells*, 1998 WL 43206 at *10.

The petitioner in *Franz* contended that an MRL designation was flawed, because it did not consider the likely impacts to groundwater, wetlands, and habitat and because it was not consistent with the adjacent rural residential area. The Board rejected this position, holding that

> [l]ikely impacts on water and critical areas of any specific mining operation are dealt with and used as constraints and conditions at the time of evaluating a request for an administrative permit for mining in Whatcom County; not in comprehensive plan amendments about natural resources . . . nor in designations of MRLs.

Franz, 2005 WL 2458412, at *9.

Wells and *Franz* rebuff a challenge to an MRL designation based on the failure to consider certain impacts. Crucially, the impacts that each decision holds must be considered at the permit stage are "[s]pecific conflicts" appropriately addressed at permitting, *Wells*, Order on Reconsideration, 1998 WL 312640 at *2, and the impacts "of any specific mining operation." *Franz* 2005 WL 2458412, at *9. These decisions, in other words, stand for the common sense

notion that when making an MRL designation, the County is not required to consider the sort of site-specific environmental or other impacts that must await a specific proposal for realistic consideration.

In contrast, WCC 2.160.080(A)(3), the public interest criterion for comprehensive plan amendments, and the plan's goals and policies discussed above, require at the designation stage a broad consideration of the public interest and a balancing of the need to preserve mineral resources with the need to protect water and other resources and the quality of life. This is precisely what those Council members voting against the designation did. The County's failure to adopt the proposed designation offends neither *Wells* nor *Franz*.[4]

The County's action is also consistent with the GMA itself. As noted, among its goals guiding the development of comprehensive plans, the GMA lists both the goal of maintaining and enhancing natural resource-based industries and the goal of protecting the environment and enhancing the state's high quality of life, "including air and water quality, and the availability of water." RCW 36.70A.020(10). The GMA's command in RCW 36.70A.170(1) to designate MRLs "where appropriate" is informed by these goals. Thus, consideration of the public interest and balancing of competing interests lies at the heart of deciding whether a designation is "appropriate." That, again, is what the three council members did. Nothing in that consideration involved the sort of specific and proposal-bound evaluation that must await a permit application.

In the iterative progress of land use regulation and approval, the phasing of project review can be both a delicate and consequential matter. If potential impacts are considered too early, the absence of a specific proposed use may turn their consideration into a vague and

[4] The hearing examiner's decision on which CNW also rests its argument relied heavily on *Wells* and *Franz*. Thus, our analysis of those two cases adequately addresses the examiner's decision.

superficial exercise. If considered too late in the process, project momentum may cloud adequate scrutiny of a project's effects. *See, e.g.*, *King County v. Boundary Review Bd.*, 122 Wn.2d 648, 664, 860 P.2d 1024 (1993); *Lands Council v. Washington St. Parks & Recreation Comm'n*, 176 Wn. App. 787, 803, 309 P.3d 734 (2013). Late consideration may also threaten principled review if impacts cannot be considered at the plan- or policy-making stage, but those plans or policies are then used at the permitting stage to conclude that the impacts are allowable.

The goals and policies of the Whatcom County comprehensive plan, together with the criteria in WCC 2.160.080 for amending that plan, chart a sound course through these shallows. As concluded above, these provisions apply at the designation stage. They state the clear goal and policy of fostering MRLs and the industries they support, but also make clear that this must be accomplished in a way compatible with the protection of other resources, including water and the quality of life. In doing this, Goal 8P sums up the designation process with the directive: "Balance MRL designations with other competing land uses and resources." AR at 153. The record, although arguably thin, shows that those council members voting against the designation followed this course. The Council's consideration of the public interest was proper.

CONCLUSION

The comprehensive plan does not require the County to designate the property at issue as MRL. Therefore, the failure to designate this property did not violate the requirement of RCW 36.70A.120, that jurisdictions subject to the GMA perform their activities in conformity with their comprehensive plans. For these reasons, the decision by Whatcom County not to

designate the property as MRL was consistent with both the GMA and the comprehensive plan.

We affirm.

Bjorgen, J.
BJORGEN, J.

We concur:

Johanson, C.J.
JOHANSON, C.J.

Melnick, J.
MELNICK, J.

APPENDIX B

RECEIVED
SEP 26 2012

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

CONCRETE NOR'WEST AND 4M2K, LLC,

Petitioners,

v.

WHATCOM COUNTY,

Respondent,

and

FRIENDS OF NOOKSACK SAMISH WATERSHED,

Intervenor.

Case No. 12-2-0007

FINAL DECISION AND ORDER

I. PROCEDURAL BACKGROUND

Petition for Review

On April 12, 2012, Concrete Nor'West, a division of Miles Sand & Gravel Company and 4M2K, LLC (Petitioners or CNW) filed a Petition for Review (PFR). The PFR challenges Whatcom County's denial of a requested Ordinance amending the Comprehensive Plan and zoning map to create a Mineral Resource Lands (MRL) designation and zoning overlay on approximately 280 acres of Petitioners' property. The PFR alleges the denial resulted in violations of RCW 36.70A.120 and contravenes RCW 36.70A.020(8), Whatcom County Code (WCC) 2.160 and the County's Comprehensive Plan MRL goals and policies.

Growth Management Hearings Board
1111 Israel Rd SW, Ste 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170

Motions

An order was entered upon stipulation[1] of the parties authorizing intervention by Friends of Nooksack Samish Watershed, a Washington non-profit corporation (FNSW or Intervenor) to intervene on behalf of Whatcom County.[2]

Hearing on the Merits

The Hearing on the Merits (HOM) was held on August 28, 2011 in Bellingham, Washington. Board members Raymond L. Paolella, Nina Carter and William Roehl participated with Board member Roehl presiding. The Petitioners were represented by Margaret Y. Archer and William T. Lynn. Karen N. Frakes represented Whatcom County. Intervenor FNSW was represented by David S. Mann.

II. JURISDICTION AND STANDARD OF REVIEW

A. Board Jurisdiction

The Board finds the Petition for Review was timely filed, pursuant to RCW 36.70A.290(2).[3] The Board finds Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2).[4] The Board finds it has jurisdiction over the subject matter of the petitions pursuant to RCW 36.70A.280(1).[5]

B. Presumption of Validity, Burden of Proof, and Standard of Review

Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations, and amendments to them, are presumed valid upon adoption.[6] This presumption creates a high

---

[1] Stipulation for Order Granting Intervention, filed May 14, 2012.
[2] Order Granting Intervention dated May 16, 2012.
[3] The County's decision to deny occurred on February 14, 2012 and the PFR was filed on April 12, 2012.
[4] The Record establishes participation standing as the action was initiated by the Petitioners and those entities were involved throughout the process.
[5] In the Board's Order on Motion to Dismiss, the Board found that its jurisdiction was invoked based on the Petitioners' allegation of a failure "to follow [an] established process and apply the adopted criteria." That statement, together with the specific language of the PFR's Issue Statements, was determined to be 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." *Stafne v. Snohomish County*, 174 Wn.2d 24, 38.
[6] RCW 36.70A.320(1) provides: "[Except for the shoreline element of a comprehensive plan and applicable development regulations] comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption."

Growth Management Hearings Board
1111 Israel Rd SW, Ste 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

threshold for challengers as the burden is on petitioners to demonstrate that any action taken by the County is not in compliance with the GMA.[7]

The Board is charged with adjudicating GMA compliance and, when necessary, invalidating noncompliant plans and development regulations.[8] The Growth Management Hearings Board is tasked by the legislature with determining compliance with the GMA. The Supreme Court explained in *Lewis County v. Western Washington Growth Management Hearings Board*:[9]

> The Board is empowered to determine whether [county] decisions comply with GMA requirements, to remand noncompliant ordinances to [the county], and even to invalidate part or all of a comprehensive plan or development regulation until it is brought into compliance.

The scope of the Board's review is limited to determining whether the County has achieved compliance with the GMA only with respect to those issues presented in a timely petition for review.[10] The GMA directs the Board, after full consideration of the petition, to determine whether there is compliance with the requirements of the GMA.[11] The Board shall find compliance unless it determines the County's action is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA.[12] In order to find the County's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been committed."[13]

In reviewing the planning decisions of cities and counties, the Board is instructed to recognize "the broad range of discretion that may be exercised by counties and cities" and

---

[7] RCW 36.70A.320(2) provides: [Except when city or county is subject to a Determination of Invalidity] "the burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this chapter is not in compliance with the requirements of this chapter."
[8] RCW 36.70A.280, RCW 36.70A.302.
[9] 157 Wn.2d 488 at 498, n.7, 139 P.3d 1096 (2006).
[10] RCW 36.70A.290(1).
[11] RCW 36.70A.320(3).
[12] RCW 36.70A.320(3).
[13] *Lewis County v. WWGMHB ("Lewis County")*, 157 Wn.2d 488, 497-98, (2006) (citing *Dept. of Ecology v. PUD District No. 1 of Jefferson County*, 121 Wn.2d 179, 201, (1993); See also, *Swinomish Tribe, et al. v. WWGMHB*, 161 Wn.2d 415, 423-24, (2007).

Growth Management Hearings Board
1111 Israel Rd SW, Ste 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

to "grant deference to counties and cities in how they plan for growth."[14] However, the County's discretion is not boundless; its actions must be consistent with the goals and requirements of the GMA.[15] As to the degree of deference to be granted under the clearly erroneous standard, the Supreme Court has stated:

> The amount [of deference] is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the [jurisdiction's] actions a "critical review" and is a "more intense standard of review" than the arbitrary and capricious standard.[16]

Thus, the burden is on the Petitioners to overcome the presumption of validity and demonstrate the challenged County decision is clearly erroneous in light of the goals and requirements of the GMA.

III. ISSUES AND DISCUSSION

The Challenged Action

The "action" challenged was the decision of the Whatcom County Council to deny a requested Ordinance amending the Comprehensive Plan and zoning map which would have designated Petitioners' property as Mineral Resource Lands (MRL) and amended the zoning accordingly.

The Petitioners raise the following two issues:

1. Did Whatcom County's action rejecting CNW's application and the corresponding proposed ordinance violate RCW 36.70A.120 since the County failed to apply the

---

[14] RCW 36.70A.3201 provides, in relevant part: "In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to 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."

[15] *King County v. CPSGMHB*, 142 Wn.2d 543, 561 (2000) (Local discretion is bounded by the goals and requirements of the GMA). See also, *Swinomish Indian Tribal Community, et al. v. Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 423-24 (2007).

[16] *Swinomish Tribe*, at 435, n.8.

Growth Management Hearings Board
1111 Israel Rd SW, Ste 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

detailed designation criteria as required by the Whatcom County Comprehensive Plan?

2. Did Whatcom County violate RCW 36.70A.120 and act in contravention of RCW 36.70A.020(8), WCC 2.160 and the MRL policies and goals set forth in Chapter 8 of its Comprehensive Plan when it rejected CNW's application and the corresponding proposed ordinance even though the Property and proposal satisfied the general amendment criteria and all of MRL designation criteria?

Applicable Law

RCW 36.70A.020 (8):

> Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.

RCW 36.70A.120:

> **Planning activities and capital budget decisions — Implementation in conformity with comprehensive plan.**
>
> Each county and city that is required or chooses to plan under RCW 36.70A.040 shall perform its activities and make capital budget decisions in conformity with its comprehensive plan.

Whatcom County Code Chapter 2.160 defines the types of plan amendments and establishes timelines and procedures to be followed when proposals are made for amending or revising the Whatcom County Comprehensive Plan.

Board Analysis and Findings

Initial designation of natural resource lands (and critical areas) was the first task the GMA placed on jurisdictions:[17]

[17] *City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 48: "Thus, GMA required municipalities to designate agricultural lands [as well as forest lands and mineral resource lands] for preservation even *before* those municipalities were obliged to declare their UGAs and adopt comprehensive plans in compliance with GMA. The 'designation and interim protection of such areas [are] the first formal step in growth management implementation ... to preclude urban growth area status for areas unsuited to urban development.'" Richard L. Settle & Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future,* 16 U. PUGET SOUND L. REV. 867 (1993).

Growth Management Hearings Board
1111 Israel Rd SW, Ste 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

RCW 36.70A.170 (in relevant part):
Natural resource lands and critical areas — Designations.

(1) On or before September 1, 1991, each county, and each city, **shall designate** where appropriate:

(c) Mineral resource lands that are not already characterized by urban growth and that have long-term significance for the extraction of minerals;

(emphasis added).

Whatcom County designated its mineral resource lands in 1992 on an interim basis in accordance with RCW 36.70A.170.[18] Additional MRL were designated in 1997 with adoption of Whatcom County's first Comprehensive Plan.[19] Following a jurisdiction's initial GMA comprehensive plan adoption and natural resource land designations, the GMA also requires regular review of adopted plans as well as their implementing development regulations:

RCW 36.70A.130
Comprehensive plans — Review procedures and schedules — Amendments.

(1)(a) Each comprehensive land use plan and development regulations shall be subject to continuing review and evaluation by the county or city that adopted them. Except as otherwise provided, **a county** or city **shall take legislative action to review and, if needed, revise its comprehensive land use plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter** according to the deadlines in subsections (4) and (5) of this section. (emphasis added)

The RCW 36.70A.130 review is specifically required to include consideration of MRL designations and development regulations:

RCW 36.70A.131
Mineral resource lands — Review of related designations and development regulations.

As part of the review required by RCW 36.70A.130(1), a county or city **shall review its mineral resource lands designations** adopted pursuant to RCW

[18] See Whatcom County Comprehensive Plan, Ch. 8, pp. 8-23.
[19] Whatcom County Comprehensive Plan, p. 8-24; Brief of Respondent Whatcom County at p. 2.

Growth Management Hearings Board
1111 Israel Rd SW, Ste 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

> 36.70A.170 and mineral resource lands development regulations adopted pursuant to RCW 36.70A.040 and 36.70A.060. In its review, the county or city shall take into consideration:
>
> (1) New information made available since the adoption or last review of its designations or development regulations, including data available from the department of natural resources relating to mineral resource deposits; and
>
> (2) New or modified model development regulations for mineral resource lands prepared by the department of natural resources, the *department of community, trade, and economic development, or the Washington state association of counties.

(emphasis added)

Whatcom County completed its first RCW 36.70A.130(1)(a) review in 2005.[20] Its next review is required to be completed in 2016.

In addition to the above referenced mandatory requirements, RCW 36.70A.130(2)(a) allows jurisdictions to annually update comprehensive plans:

> Each county and city shall establish and broadly disseminate to the public a public participation program consistent with RCW 36.70A.035 and 36.70A.140 that identifies procedures and schedules whereby updates, proposed amendments, or revisions of the comprehensive plan are considered by the governing body of the county or city no more frequently than once every year....

Jurisdictions typically accept applications for comprehensive plan amendments on an annual basis and then decide whether or not to consider them, a process known as "docketing." Pursuant to RCW 36.70A.130(2)(a), those applications which are "docketed" are then considered concurrently to insure the cumulative effect of the amendments is ascertained.[21] The County has adopted "procedures and schedules" for consideration of plan amendments.[22] In this matter, the County accepted an application from the Petitioners for a comprehensive plan amendment and zoning map change which would create a MRL

---

[20] Brief of Respondent Whatcom County at p. 2.
[21] RCW 36.70A.130(2)(b).
[22] See Whatcom County Code Ch. 2.160.

Growth Management Hearings Board
1111 Israel Rd SW, Ste 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170

and zoning overlay on 280 acres (adjacent to Petitioners' existing MRL) and decided to docket that request. The applicable procedures for review of such proposals[23] were then followed, including SEPA review and preparation of a staff report and recommendation. That analysis was then forwarded to the Planning Commission. The County Code also establishes the processes for review and evaluation of proposed comprehensive plan amendments by the Planning Commission[24] and the County Council.[25] The Code sets forth "Approval Criteria" which the Planning Commission and Council are required to find in order to approve the amendment.[26] Included in the required planning staff analysis and report was a review of the applicable Comprehensive Plan Policies and the specific designation criteria for MRLs.[27]

The designation criteria relevant to the Petitioners' application include the following:

> 6. The site shall have a proven resource that meets the following criteria:
>
> - Construction material must meet WSDOT Standard Specifications for common borrow criteria for road, bridge and municipal construction, or Whatcom County standards for other uses.
> - Sand and gravel deposits must have a net to gross ratio greater than 80% (1290cy/acre/foot).

---

[23] WCC 2.160.070.
[24] WCC 2.160.090.
[25] WCC 2.160.100.
[26] WCC 2.160.080, (in part): "A. In order to approve an initiated comprehensive plan amendment, the planning commission and the county council shall find all of the following:
1. The amendment conforms to the requirements of the Growth Management Act, is internally consistent with the county-wide planning policies and is consistent with any interlocal planning agreements.
2. Further studies made or accepted by the department of planning and development services indicate changed conditions that show need for the amendment.
3. The public interest will be served by approving the amendment. In determining whether the public interest will be served, factors including but not limited to the following shall be considered:
a. The anticipated effect upon the rate or distribution of population growth, employment growth, development, and conversion of land as envisioned in the comprehensive plan.
b. The anticipated effect on the ability of the county and/or other service providers, such as cities, schools, water and/or sewer purveyors, fire districts, and others as applicable, to provide adequate services and public facilities including transportation facilities.
c. Anticipated impact upon designated agricultural, forest and mineral resource lands.
4. The amendment does not include or facilitate spot zoning."
[27] Whatcom County Planning and Development Services Staff Report, Ex. 4 attached to Concrete Nor'West's Opening Brief. The Goals, Policies and designation criteria are set out in the Whatcom County Comprehensive Plan at Chapter Eight-Resource Lands, pp. 8-18 through 8-28.

Growth Management Hearings Board
1111 Israel Rd SW, Ste 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

7. MRL Designations must not be within nor abut developed residential zones or subdivisions platted at urban densities.

8. MRL Designations must not occur within the 10 year zone contribution for designated wellhead protection areas, as approved by the State Department of Health for Group A systems, and by the Whatcom County Health Department for Group B systems, in accordance with source control provisions of the regulations on water system comprehensive planning. MRL designations may be modified if a wellhead protection area delineated subsequent to MRL designation encompasses areas within a designated MRL. If a fixed radii method is used to delineate a wellhead protection area, the applicant may elect to more precisely delineate the wellhead protection boundary using an analytical model; provided, that the delineated boundary proposed by the applicant is prepared by a professional hydrogeologist; and further provided, that the delineated boundary has been reviewed and approved by the Washington State Department of Health for Group A systems, and by the Whatcom County Health Department for Group B systems. The hydrogeologist shall be selected by mutual agreement of the County, water purveyor, and applicant; provided, if agreement cannot be reached the applicant shall select a consultant from the list of no less than three qualified consultants supplied by the County and water purveyor.

9. MRL Designations should not enclose by more than 50% non-designated parcels...

11. Must demonstrate higher value as mineral resource band forestry resource based upon:

- Soil conditions
- Accessibility to market.
- Quality of mineral resource.
- Sustainable productivity of forest resource

The staff analysis concluded that each of the above referenced criteria had been met.[28] Staff recommended approval of Petitioners' request[29] and the Planning Commission concurred, voting to forward the staff recommendation and proposed findings to the County Council for consideration and approval.[30]

---

[28] Ex. 4, pp. 4-8, attached to Concrete Nor'West's Opening Brief.
[29] Ex. 8, p. 1, attached to Concrete Nor'West's Opening Brief.
[30] *Id.*, pg. 3

Growth Management Hearings Board
1111 Israel Rd SW, Ste 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170

The County Council declined to adopt the proposed Ordinance approving the Petitioners' MRL designation request, voting 3-3 with one abstention. The Council made no findings. As Petitioners observe, during the Council's discussion prior to the vote, members who opposed the designation failed to address the designation criteria. Rather, they referred to concerns regarding environmental impacts, including one member's demand that a study of mining impacts on water quality and quantity first be conducted.[31] Petitioners' also accurately assert designation of MRL in Whatcom County does not authorize mining activity. Under the WCC, site-specific environmental review is conducted during the permitting process.[32]

Petitioners observe the County adopted specific criteria to be applied in addressing MRL designation requests. Pursuant to such a request from the Petitioners, they state both the County Planning Staff and Planning Commission concluded the application met all the designation criteria and recommended that the County Council approve the designation. Petitioners argue the ultimate Council denial was not based on consideration of the MRL designation criteria but rather on factors beyond those criteria: response to public opposition and a desire for a site-specific water quantity and quality analysis prior to designation. The underpinning of Petitioners' argument is that RCW 36.70A.120 requires jurisdictions to act in accordance with their comprehensive plans: "Each county... shall perform its activities ... in conformity with its comprehensive plan." They then assert Whatcom County's MRL designation process[33] was adopted to carry out numerous Comprehensive Plan goals and policies, and the application met each and every applicable criterion for designation. The Petitioners assert the Council failed to address or apply the designation criteria, but instead treated the designation request like a site-specific project permit application.

The County's position can be simply stated: In order to prevail, the Petitioners must show the County had a duty to act and they have failed to establish the existence of such a duty.

---

[31] Tab 9 attached to Petitioners' Opening Brief, Document No. 108, pp. 10-12.
[32] Chapter 20.73 WCC.
[33] Set forth at Ex. 34, pp. 8-27 and 8-28.

Growth Management Hearings Board
1111 Israel Rd SW, Ste 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170

Citing the *Stafne* decision, the County asserts Petitioners' remedy lies not with the Board, but through a "proposal at the County's next docketing cycle or mandatory review or through the political or election process."[34]

In this matter, the County observes its Comprehensive Plan "does not mandate that all property meeting the MRL designation criteria must be designated...."[35] Beyond that, the County states a Comprehensive Plan amendment must also meet the approval criteria of WCC 2.160.080, which includes the necessity of a County Council finding that the public interest will be served. In that regard, the County sets out in detail references to concerns of the public related to the proposal.

Intervenor defers to and adopts the County's Brief and restates the argument that Petitioners can prevail only if they establish a duty to act. It argues Petitioners failed to cite any GMA or County legislation imposing such a duty. While not effectively disputing Petitioners' application met the MRL designation criteria, Intervenor, like the County, cites WCC 2.160.080 which allows consideration of the public interest.[36]

With that background, the Board's analysis begins with *Stafne v. Snohomish County* in which the Court stated the following:

> While RCW 36.70A.130 authorizes a local government to amend comprehensive plans annually, it does not require amendments. Moreover, *it does not dictate that a specific proposed amendment be adopted.* [When] the County takes an action pursuant to the authority of RCW 36.70A.130 or fails to meet a duty imposed by some other provision of the GMA, [the petitioner] may have an action that could properly be brought before the Board.[37] (emphasis added)

The Board concurs with the County and Intervenor: The Petitioners can prevail if, and only if, the GMA, the County's Plan or its development regulations impose a duty on the County

---

[34] *Stafne v. Snohomish County*, 174 Wn.2d 24, 38.
[35] Brief of Respondent Whatcom County at 7.
[36] WCC 2.160.080 (A)(3), set out in its entirety at n.26.
[37] 174 Wn.2d 24, 37.

Growth Management Hearings Board
1111 Israel Rd SW, Ste 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

to designate MRL during an annual update when all applicable designation criteria are met.[38]

Due to the 3-3 tie vote by the County Council on the requested MRL designation ordinance, the County's attorney took no position at the HOM on whether the designation criteria were met, and the record contains no actual findings of fact by the County Council. However, the staff report stated the application met the applicable designation criteria.[39] Assuming *arguendo* that the designation criteria were satisfied, the Petitioners failed to cite any GMA provision that imposes a duty to designate property as MRL when it meets a jurisdiction's designation criteria. However, in light of the RCW 36.70A.120 obligation for a jurisdiction to act " . . . in conformity with its comprehensive plan . . .", the Board's inquiry must necessarily turn to the Comprehensive Plan. Do either Whatcom County's Plan or its development regulations include a duty to designate an applicant's property as MRL during its annual update when the property meets the designation criteria?

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[40] 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.[41] In addition, that

---

[38] The County did not challenge Petitioners' assertion all designation criteria had been met. In a footnote Intervenor did raise an assertion that Criterion 9 had not been met. The Staff Report contradicts Intervenor's argument.

[39] Whatcom County Planning and Development Services Staff Report (p. 32), Ex. 4 attached to Concrete Nor'West's Opening Brief. The Goals, Policies and designation criteria are set out in the Whatcom County Comprehensive Plan at Chapter Eight-Resource Lands, pp.. 8-18 through 8-28.

[40] See also *Concrete NorWest v. Whatcom County*, Case No. 07-2-0028 (Order on Dispositive Motion at 13, February 28, 2008): "Goals 8H, 8K, 8P and 8P-1 state general objectives of the County's mineral resource lands strategy; they do not require any particular action with respect to the Petitioner's application."

[41] The Record, including the Staff Report, supports a conclusion that the County does not currently have a 50 year supply designated.

Growth Management Hearings Board
1111 Israel Rd SW, Ste 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

same Policy is to be pursued to the "extent compatible with protection of water resources...."[42]

Petitioners argue this Board's decision in *Franz v. Whatcom County Council*[43] found an MRL designation in Whatcom County does not constitute a right to mine and that site-specific review is conducted at the administrative level. While Petitioners' argument is accurate, those facts do not lead to a conclusion the Whatcom County Council was required to approve the MRL designation request.

The Board decision in a prior CNW case is also cited by way of support.[44] There the Board dismissed on motion the Petitioner's claim as it had failed to assert the property met the MRL designation criteria and that designation was therefore required. Those assertions were made in this case. However, it is the second prong of the Board's ruling in that prior decision Petitioners have failed to establish; that the County Comprehensive Plan *requires* designation.[45]

The *Stafne* Court quoted the Central Board's decision in *Cole, et al. v. Pierce County* with approval:

> While RCW 36.70A.130 authorizes a local government to amend comprehensive plans annually, it does not require amendments. Moreover, it does not dictate that a specific proposed amendment be adopted.[46]

That observation is similarly appropriate here. A local government legislative body has the discretion to adopt or reject a particular proposed comprehensive plan amendment in the

---

[42] Protection of water resources was one of the concerns raised by those opposed to the MRL designation. See Tab 9 attached to Petitioners' Opening Brief, Document No. 108, pp. 10-11.
[43] Case No. 05-2-0011, (FDO, September 19, 2005).
[44] *Concrete Nor'West v. Whatcom County*, Case No. 07-2-0028 (Order on Dispositive Motion, February 28. 2008).
[45] *Id.* at 2: "We note that a claim that the County failed to follow the criteria and process for a designation change adopted in its comprehensive plan would state a claim upon which the Board could act. However, Petitioner did not allege that its property met the County's designation criteria for mineral resource lands **and that the County's plan required the designation change requested by Petitioner**." (emphasis added)
[46] Case No. 96-3-0009c (July 31, 1996, FDO) at 10.

absence of a GMA or comprehensive plan mandate.[47] The Petitioners have failed to establish the existence of a mandate.[48]

In this matter, the Board lacks the authority to grant relief to the Petitioners as they have failed to meet their burden of proof to establish the GMA or the Whatcom County Comprehensive Plan (or other law) mandates adoption of the proposed MRL amendment.

Conclusion

The Board concludes the Petitioners have failed to meet their burden to establish a violation of RCW 36.70A.120, RCW 36.70A.020(8), Whatcom County Code 2.160 and the County's MRL goals and policies.

IV. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the Growth Management Act, prior Board Orders and case law, having considered the arguments of the parties, and having deliberated on the matter, the Board, having concluded the Petitioners have failed to demonstrate the decision of Whatcom County was a clearly erroneous violation of RCW 36.70A.120, RCW 36.70A.020(8), Whatcom County Code 2.160 and the County's MRL goals and policies, this appeal is denied and Case No. 12-2-0007 is dismissed.

---

[47] *Stafne v. Snohomish County*, 174 Wn.2d 24, 38: "We agree with the board's determinations in cases like *Cole* and *SR 9/US 2 LLC*. County and city councils have legislative discretion in deciding to amend or not amend their comprehensive plans. 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."

[48] The Board observes that this matter involved an RCW 36.70A.130(2)(a) annual review. Whether or not a similar result would be reached had this case been a challenge to an RCW 36.70A.130(1)(a) and RCW 36.70A.131 review remains an open question.

Growth Management Hearings Board
1111 Israel Rd SW, Ste 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170

Entered this 25th day of September, 2012.

William Roehl, Board Member

Nina Carter, Board Member

Raymond L. Paolella, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.[49]

[49] Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-3-830(1), WAC 242-3-840.
A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

Growth Management Hearings Board
1111 Israel Rd SW, Ste 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION

Case No. 12-2-0007
Concrete Nor'West and 4M2K, LLC v. Whatcom County

DECLARATION OF SERVICE

I, LYNN TRUONG, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the Office Assistant for the Growth Management Hearings Board. On the date indicated below a copy of the FINAL DECISION AND ORDER in the above-entitled case was sent to the following through the United States postal mail service:

William T. Lynn
Margaret Y. Archer
Gordon Thomas Honeywell, LLP
1201 Pacific Avenue, Suite 2100
PO Box 1157
Tacoma, WA 98401-1157

David S. Mann
Gendler & Mann, LLP
1424 Fourth Avenue, Suite 715
Seattle, WA 98101

Karen Frakes
Civil Deputy Prosecuting Attorney
311 Grand Avenue, Suite 201
Bellingham, WA 98225

DATED this 25th day of September, 2012.

Lynn Truong, Office Assistant

Growth Management Hearings Board
1111 Israel Road SW, Suite 301
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-9170
Fax: 360-586-2253

APPENDIX C

BEFORE THE EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD STATE OF WASHINGTON

SPOKANE ROCK PRODUCTS, INC., Petitioner, v. SPOKANE COUNTY, Respondent.	)	Case No. 02-1-0003 FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

On January 9, 2002, Spokane Rock Products, Inc., by and through its attorney Brian T. McGinn of Winston & Cashatt, filed a Petition for Review.

On February 7, 2002, Spokane Rock Products, Inc., by and through its attorney Brian T. McGinn of Winston & Cashatt, filed its Amended Petition for Review.

On February 12, 2002, the Board held a Prehearing conference. The Board issued the Prehearing Order on February 13, 2002.

On March 5, 2002, Petitioner filed a Motion to Amend and/or Supplement the Record, seeking to include certain documents in the Index of Records as proposed by Spokane County.

On March 25, 2002, a Motion Hearing was held. The Board granted Petitioner's Motion to Amend and/or Supplement the Record to include all exhibits proposed, except proposed exhibits 7, 22, and 24.

On May 23, 2002, the Board held the Hearing on the Merits. Present were D.E. "Skip" Chilberg, Presiding Officer, and Board Members Judy Wall and Dennis Dellwo. Present for Petitioner was Brian T. McGinn of Winston & Cashatt, and Michael McKinney, in-house counsel of Spokane Rock Products, Inc. Present for Respondent was Robert Binger, Deputy Prosecuting Attorney. On June 21, 2002, the Board issued a Memorandum Decision and now makes the following:

II. FINDINGS OF FACT

1. For approximately the past two years, the Petitioner, Spokane Rock Products, has been working to obtain permits and develop a mining operation on an approximately 50-acre parcel of real property located on the southeast corner of 8th and Havana Street (the "SRP site").

2. The subject property is a portion of the NW1/4 of the SW1/4 of Section 23, Township 25 North, Range 43 East, W.M., Spokane County, Washington. Rocky Top LLC, a Washington limited liability company, owns the real property. Spokane Rock Products holds a long-term lease of the real property, together with a right of first refusal to purchase the property.

3. This property had been zoned mining since April 24, 1959, when the County approved a mining zone classification under Case No. ZE-44-58. Prior to that time, the property was designated as "unclassified." The zone change in 1959 changed the zoning from "unclassified" to "Rock Quarry, Sand and Gravel Pit" zoning.

4. The subject site has supplied aggregate products to the area for approximately 60 years, and was operated at one time as a gravel pit by a local government agency. The physical condition of the site reflects that it has been historically used as an aggregate mine. An aggregate pit is located on the property. No evidence was presented as to the use of the site over the past several years.

5. The Spokane Regional Health District acted as the lead agency in administering the environmental review of the proposed mining operation, which included the waste recycling facility under the Health District's immediate jurisdiction.

6. On October 17, 2000, the Spokane Regional Health District, as the lead agency, issued a Determination of Nonsignificance ("DNS") for the proposed mining operations. The DNS was not appealed, and time for appealing that determination expired on November 1, 2000.

7. On or about January 1, 2001, Spokane Rock Products received its Solid Waste Disposal site and Facility Permit from the Spokane Regional Health District.

8. On or about January 31, 2001, the County approved the surface mining operations, signing the County or Municipal Approval For Surface Mining (Form SM-6) for that purpose.

9. On March 5, 2001, Bryan Westby of Adams & Clark appeared before the Planning Commission on behalf of Spokane Rock Products to request that the property be designated as Mineral Lands consistent with the pre-existing zoning.

10. On March 8, 2001, the Planning Commission recommended denial to the Board of County Commissioners of Spokane Rock Products request that it recommend that the property receive the Mineral Lands designation.

11. On November 5, 2001, the Board of County Commissioners rendered its Findings and Decision No. 1-1-059 adopting the Spokane County Comprehensive Plan. The Board of County Commissioners did not designate the property as mineral resource lands.

12. Spokane County designated the SRP site as Low Density Residential in the Comprehensive Plan. Prior to adoption of the Comprehensive Plan under Findings and Decision No. 1-1059, the SRP site had a comprehensive plan designation of Urban and was zoned mining.

13. On November 10, 2001, Spokane County published the Notice of Adoption and Notice of Time Frame to Appeal Pursuant to RCW 36.70A.290 (the "Notice of Adoption"). The Notice of Adoption states that the deadline for filing an appeal was January 9, 2002.

III. STANDARD OF REVIEW

Pursuant to RCW 36.70A.320, comprehensive plans and development regulations, and amendments thereto, adopted pursuant to the Act, are **presumed valid** upon adoption. The **burden is on the Petitioner** to demonstrate that any action taken by the respondent jurisdiction is not in compliance with the Act.

The Board "shall find compliance with the Act, unless it determines that the [County's] action[s are] **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 (3). For the Board to find the Coounty's actions clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

Pursuant to RCW 36.70A.3201 the Board will grant deference to the County of Spokane in how it plans for growth, consistent with the goals and requirements of the GMA. However, as our State Supreme Court has stated, "Local discretion is bounded, however, by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearing Board*, 142 Wn.2d 543, 561 (2000) (***King County***). Further, Division II of the Court of Appeals has stated, "Consistent with *King County*, and notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent with the requirements and goals of the GMA." *Cooper Point Association v. Thurston County,* No. 26425-1-II (Court of Appeals, Div. II, September 14, 2001), 108 Wn. App. 429 (2001).

IV. LEGAL ISSUES AND DISCUSSION

Issue 1. Whether the County's failure to designate the SRP site as Mineral Lands under the Spokane County Comprehensive Plan violated the goals and requirements of the Comprehensive Plan and the Growth Management Act, including but not limited to RCW 36.70A.050, RCW 36.70A.060, RCW 36.70A.131, and RCW 36.70A.170.

Petitioner's Position:[1]

The Petitioner believes the County violated the Growth Management Act by failing to designate the SRP site as mineral resources lands. Petitioners contend that the County has failed to preserve a valuable, scarce natural resource, and protect it from residential

encroachment.

Petitioner contends that the Growth Management Act places a high priority on the protection of mineral lands, recognizing that such resources are finite, non-renewable, site-specific, and cannot be relocated and that the location of these resources is critical to the economic viability of these kinds of operations, and that the Comprehensive Plan acknowledged this reality. Under 36.70A.060(1), Petitioner maintains, each county is required to assure the conservation of mineral resource lands, and shall adopt regulations that assure the use of lands adjacent to mineral resource shall not interfere with the continued use of mineral lands in the customary manner.

Petitioner notes that it is a primary objective of the GMA and the Comprehensive Plan to protect natural resource lands from irrevocable loss due to incompatible development. Petitioner emphasizes that the County recognized, throughout the Comprehensive Plan, that the greatest threat to natural resource conservation was encroaching urbanization. Rather than protect these valuable mineral lands from encroaching urbanization, the Petitioner asserts, the County erred by attempting to protect urban areas from a pre-existing mining site. The Petitioner maintains that the County's approach is the exact opposite of that which is required by the Growth Management Act.

Petitioner states that the SRP site has provided a reliable and convenient source of aggregate materials for approximately 60 years. Moreover, Petitioner maintains that it has been in the process of obtaining permits and approvals for a long-term mining operation since at least July of 2000. Petitioner noted that the environmental review by the Spokane Regional Health District for Health District permits relative to the proposed operation culminated in a DNS issued in October of 2000, which was not appealed. Petitioner claims it has vested rights, and related environmental approvals, to conduct a 20-30 year, phased mining and reclamation operation at the site.

The Petitioner contends that the SRP site satisfied all the criteria for designation of that property as mineral resource lands. The applicable criteria, it was stated, are enumerated under WAC 365-190-010 et seq. and further refined in the Spokane County Comprehensive Plan.

The Petitioner maintained, after reviewing each of the criteria, that the SRP site qualified as mineral lands. In particular, the Petitioner made the following arguments:

1. Petitioner contends the SRP site is a known aggregate site, approximately 50 acres in size and containing approximately 1.5 million cubic yards of aggregate (approximately 100,000 to 150,000 tons of production annually), and has been historically used as a mine.

2. The SRP site, Petitioner asserts, contains the necessary quality, quantity and commercial accessibility to warrant mineral designation. Petitioner claims that the SRP site is expected, under existing or vested permits, to produce materials for the next 20-30 years. The proximity of the site to its market makes the SRP site a viable competitor in the market.

3. Petitioner points out that the general land use patterns in the area justify designating the site as mineral lands. The land uses nearby the SRP site show a mixture of uses, including Mining, Regional Commercial, Urban Activity Center, Heavy Industrial, as well as Medium and Low Density Residential.

4. Petitioner contends that there is no prohibition against designating mineral lands adjacent to areas designated as low density residential. Physical proximity to populated areas alone does not preclude designation of mineral lands.

5. Petitioner points out that are a number of examples (as revealed by the Land Use Map) of lands that have been designated as mineral lands which are adjacent to low density residential areas, such as those located on Hastings Road, Mount Spokane Park Drive, and Park Road.

6. Petitioner emphasizes that the County designated its own property as mineral lands, and that property is located only blocks away (and to the south) from the SRP site. The County's site is surrounded by low-density residential uses.

7. The SRP site is served by appropriate utilities, water supply, and road access. The site fronts 8th Avenue, an arterial that has been used for transport of materials from the site for many years. Petitioner emphasizes that the SRP site is in close proximity to I-90, and the future location of the north-south freeway, providing convenient access for commercial, industrial and mining uses.

8. Petitioner claims that the site is currently not in any condition to support residential development. In order to develop the property for "urban" uses, the site must be reclaimed as part of a mining operation. This will rehabilitate the property, according to Petitioner, at the appropriate time, for future uses, such as residential development.

The Petitioner made the following additional contentions:

1. Petitioner claimed that the County overlooked the fundamental policy of GMA, namely that natural resource lands should be protected from encroaching urbanization. To the extent the County decided to protect more recently urbanizing areas from an established mining use, Petitioner asserts, the decision was clearly erroneous.

2. The Petitioner contended that the County failed to undertake a good faith consideration of the facts and to make a determination that the effects of proximity to population areas are significant and so unduly burdensome as to preclude designation of the site as mineral lands.

3. Petitioner pointed out that Goal NR.4 of the County Comprehensive Plan calls for the use of all available innovative techniques to protect natural resource lands from incompatible surrounding uses. In addition, Policy NR.4.2 provides that mining operations shall be allowed on natural resource lands when carried on in

compliance with applicable regulations, even though they may impact nearby residences.

4. Petitioner claimed that to the extent there is tension between the uses, the County was obligated to attempt to harmonize the competing interests, and give effect to each of the GMA goals to the extent possible. Petitioner asserted that the SRP site should be designated as mining in the absence of evidence that designation of the SRP site is mutually exclusive with competing goals and policies of the Growth Management Act.

5. The Petitioner contended that the SRP site is compatible with surrounding uses. The uses to the South and West are largely protected from the impacts by a large ridge and mitigation measures planned for the operations. A busy street, historically used for commercial, industrial, and mining-related activities is adjacent to the site to the north. A vocational school is located to the East, and the general land use patterns in the area support a wide variety of uses, including industrial and mining uses.

6. Petitioner emphasized that the County designated its own property, only blocks away and to the South, as mineral lands despite being surrounded by low-density residential uses and being located in the very same neighborhood as the SRP site.

7. The Petitioner contended that the SRP site is a pre-existing mining use, some 60 years old, and was specifically zoned for mining from 1959 until January 2002, when the Phase One Development Regulations took effect.

8. The Petitioner claimed that the proposed mining operation at the SRP site has undergone full project-level review, including an environmental review that culminated in a DNS that was not appealed by neighboring property owners. The neighboring owners, according to Petitioner, therefore had full opportunity to object, comment, or appeal the mining-related permits.

Respondent's Position:

The Respondent contends that the SRP site does not qualify for Mineral Land Designation because it does not meet the designation criteria.

Respondent argues that the SRP site does not meet Goal NR 1.8b of the Comprehensive Plan, providing that Mineral Lands should be located in areas with compatible land uses such as mining, industry, agriculture, forestry, vacant or low density residential (less than 1 unit per 5 acres). The Respondent argues that the SRP site does not meet this designation criteria because the property is located in the UGA, is adjacent to the City of Spokane, and is "surrounded by" low density residential (up to 5 units per acre) uses.

Respondent asserts that the mitigation of adverse impacts on adjacent property is a prime designation criterion. Respondent argues that given the intensity of the proposed use, "... effective mitigation of the adverse impacts on surrounding urban low density residential development would be extremely difficult, if not impossible."

Respondent contends that SRP site does not meet Goal NR 1.8f of the Comprehensive Plan, which provides that mineral lands sites should have adequate access for trucks, and that such access should not be through residential neighborhoods. Respondent claimed that the SRP site did not meet this criteria because it utilizes 8th Avenue, a minor arterial that runs through residential areas.

Respondent argues that the WAC guidelines and GMA requirements under 36.70A.060 were followed in developing the designation criteria and mapped designations and that it followed the appropriate GMA process to designate mineral lands in 1996-1997, and reviewed and updated those designations in 2000-2001, pursuant to RCW 36.70A.131.

Discussion of Issue 1:

Under GMA, each county is required to assure the conservation of mineral resource lands. RCW. § 36.70A.060(1) (Supp. 2001). The development regulations adopted to implement the comprehensive plan "...**shall assure that the use of lands adjacent to... mineral resource lands shall not interfere with the continued use, in the accustomed manner** and in accordance with the best management practices, of these designated lands... for the extraction of minerals." RCW. § 36.70A.060(1) (Supp. 2001) (emphasis added).

The Growth Management Act "...places a high priority on the conservation and protection of resource lands." Ridge v. Kittitas County, EWGMHB Case No. 94-1-0017, at 8 (July 28, 1994). One critical reason for this fact is that mineral resource lands are non-renewable resources. Mineral lands "...cannot be re-created if they are lost to urban development or mismanaged." (See Comprehensive Plan, at NR-1). In addition, "...mineral resources are site-specific and not subject to relocation." (See Comprehensive Plan, at NR-11). The location of these resources is critical the economic viability of mining operations. (See e.g. Comprehensive Plan, at NR 2 ("Mineral resources must meet criteria of quality, quantity, and accessibility for commercial viability. Location of mineral resources is important, since the cost of transporting them adds greatly to cost.").

The Spokane County Comprehensive Plan incorporates the GMA mandate for the protection of mineral lands. Thus, a primary objective of the Comprehensive Plan is to avoid the irrevocable loss of natural resource lands by protecting them for future generations. (See Comprehensive Plan, at NR-1)

> In the past, urban development, especially in the Spokane River Valley, covered both high-quality agricultural land and large deposits of quality sands and gravels. Due to the urbanization, it is unlikely that these resources will be available for future generations. **Designating and protecting the County's remaining resource lands ensures that these remaining areas will not be lost to incompatible development.**

(See Comprehensive Plan, at NR-2 (emphasis added)). The County recognized, in adopting mapping designations (among other matters), that the greatest threat to natural resource conservation was encroaching urbanization. (See BOCC Resolution No. 97-0873, at page 3 of

8); (See also Natural Resource Lands Technical Committee, Final Report, at 13).

Goal NR.3 of the County Comprehensive Plan explicitly commands: **"Land uses shall be consistent with the conservation of designated resource lands and shall not interfere with resource land management practices."** (See Comprehensive Plan, at NR-6 (bold in original)). The policies in support of this goal, such as NR 3.1, NR 3.6 and NR 3.7, encourage the use of zoning requirements, plat requirements, enforcement of grandfather rights, siting and buffering of adjacent uses, and similar methods to protect natural resource areas. (See Comprehensive Plan, at NR-6-7).

The County Comprehensive Plan encourages resolution of conflicts that may arise between urban and resource uses. Goal NR.4 of the County Comprehensive Plan further emphasizes the need to protect natural resource lands through all available innovation. That Goal states:

> **Use best management practices and other innovative techniques in a sustainable and environmentally sensitive manner to protect natural resources from incompatible activities.**

(See Comprehensive Plan, at NR-10 (bold in original)). The policies in support of this Goal compel protection of natural resource lands from surrounding urbanization. Policy NR.4.2 provides that "...mining operations shall be allowed on natural resource lands when carried on in compliance with applicable regulations, even though they may impact nearby residences." (See Comprehensive Plan, at NR-10)

Urbanization has already eliminated many mineral resources from development in the County. (See Natural Resource Lands Technical Committee, Final Report, at 2) Increasing urbanization will continue to eliminate these valuable resources. "[D]ue to conflicts with urban development, it is unlikely that many new sand and gravel mining sites will be permitted in the Spokane Valley or the City of Spokane." (See Natural Resource Lands Technical Committee, Final Report, at 2) In fact, "[n]o new mining sites have been approved in the City of Spokane or the Spokane Valley for ten years." (See Chapter 5, Natural Resource Lands, Preliminary Draft 4/15/99, at NR-9).

The Board finds that the preservation and protection of known mineral resource lands is a primary objective of the Growth Management Act. Both the GMA and the adopted Comprehensive Plan mandate the protection of known and valuable mineral resources.

To assist cities and counties in the designation of mineral lands pursuant to section 36.70A.170, the GMA required the department of community, trade, and economic development to adopt specific guidelines. R.C.W. § 36.70A.050(1) & (3) (1991). Those guidelines have been adopted and promulgated under WAC 365-190-010 et seq.

Specifically, in classifying mineral resource lands, counties shall consider the effects of proximity to population areas and the possibility of more intense uses of the land as indicated by:

(i) General land use patterns in the area;
(ii) Availability of utilities;
(iii) Availability of adequacy of water supply;
(iv) Surrounding parcel sizes and surrounding uses;
(v) Availability of public roads and other public services;
(vi) Subdivision or zoning for urban or small lots;
(vii) Accessibility and proximity to the point of use or market;
(viii) Physical and topographic characteristics of the mineral resource site;
(ix) Depth of the resource;
(x) Depth of the overburden;
(xi) Physical properties of the resource including quality and type;
(xii) Life of the resource; and
(viii) Resource availability in the region.

W.A.C. § 365-190-070(2)(b).

The minimum guidelines recognize the importance of designating natural resource land to assure their long-term conservation. W.A.C. § 365-190-020. Counties are required to identify and classify aggregate and mineral resource lands from which the extraction of minerals occurs, or can be anticipated, to insure future supply of aggregate and mineral resource material. W.A.C. § 365-190-070(1). Areas must be classified as mineral resource lands based on geologic, environment, and economic factors, existing land uses, and land ownership. W.A.C. § 365-190-070(2). Counties should classify lands with long-term commercial significance for extracting at least the following minerals: sand, gravel and valuable metallic substances. W.A.C. § 365-190-070(2)(a).

The Comprehensive Plan further comments upon the criteria for mineral land designation, as follows:

NR.1.8 mineral resource lands of long term commercial significance should be designated pursuant to the following criteria:

a) In Spokane County the commercially important materials are sand, gravel, rock or clay. Mineral resource land designations should be made where these minerals are known to exist. The Spokane County mineral resource map should be used as a tool to help identify additional sites to help meet future demand.

b) Mineral resource land designations should be located in areas with compatible land uses, such as mining, industry, agriculture, forestry, vacate or large-lot residential (less than one dwelling unit per five acres). Mitigation of adverse impacts from mining on adjacent property shall be prime designation criteria.

c) Mineral resource land designations should be 20 acres or more in size.

d) Mineral land designations should have a minimum deposit size of approximately 500,000 cubic yards for sand, gravel and rock, and approximately 200,000 cubic yards for blend sand.

e) Mineral resource land designations shall not occur on lands with wetlands, riparian areas, and geological hazard or threatened or endangered species unless impact can be adequately mitigated.

f) Mineral resource land designations shall have adequate access for trucks. Access shall not be through a residential neighborhood.

(See Comprehensive Plan, at NR-4-5)

With respect to the specific designation standards, the County contends that the SRP site does not meet the designation criteria because the property (1) is located in the UGA; (2) is adjacent to the City of Spokane; and (3) is surrounded by low density residential and (4) utilizes a minor arterial through residential areas for ingress and egress. The Board is not convinced that the county applied these criteria uniformly to the SRP site and other nearby mining sites. The County's own mining site is situated only blocks away from the SRP site, is situated inside the UGA, in the middle of low density residential, and very close to the border of the City of Spokane.

The site fronts 8th Avenue, a minor arterial that has been used for transport of materials from the site for many years.

The County argued that designating the site as mineral lands was not compatible with the surrounding residential uses. However, we agree with Petitioner that physical proximity of resource land to population areas "in and of itself, does not preclude designation." Ridge v. Kittitas County, EWGMHB Case No. 94-1-0017, at 5 (1994).

This Board has recognizes the GMA calls for the protection of natural resources from urban development, not the other way around. Thus, in Ridge, we concluded: "The Board notes that RCW 36.70A.060 requires that resource lands be protected or 'buffered' from the influence of adjacent property, the opposite of the County's approach." Ridge v. Kittitas County, EWGMHB Case No. 94-1-0017, at 7 (1994).

To the extent that there is tension between the natural resource policies and those concerning urban uses, there must be an attempt to harmonize those competing interests. Save Our Butte Save Our Basin Society v. Chelan County, EWGMHB Case No. 94-1-0001, at 6 (July 6, 1994). The County is obligated to give effect to each of the goals to the extent possible. Id. In addition, "[t]he overriding purpose of the designation of resource lands is their conservation and protection. While the County may give high priority to other goals, there must be a showing that competing goals are mutually exclusive and cannot both be accommodated." Ridge v. Kittitas County, EWGMHB Case No. 94-1-0017, at 8 (1994).

The County asserts that effective mitigation of the impacts of the Petitioner's mining operation would be difficult or impossible. The Board rejects this claim. The Board notes that there is nothing in the record to support the claim that mitigation cannot be achieved. Further, there was no evidence presented by the County to establish that inability to mitigate was a

basis for the decision to designate the SRP site as low density residential.

The County contends that the SRP site does not meet certain of the criteria established by RCW 36.70A.050 and WAC 365-190-010. The Board disagrees with the County's assertion, because the criteria were not uniformly applied and the county did not show its work.

For example, on the north side, there are mining properties in the middle of or adjoining land designated as low density residential, both on Hastings Road and Mount Spokane Park Drive. (See Id.). In addition, there is land designated as mining located adjacent to Park Road and Sprague, as well as a nearby mining use off I-90 and Park Road. Both of these sites are near the SRP site and are next to or in the middle of land designated as Low Density Residential.

Further, the County's own site is only blocks away, and to the south, of the SRP site. The County site is surrounded by low-density residential area.

The Board finds that the County failed to uniformly apply the designation criteria. The criteria were not applied equally with other mining sites nearby, including the County's own site, which was designated as a mining site. The Board concludes that County is out of compliance due to the manner in which it applied the criteria for the designation of mineral resource lands.

Issue 2. Whether the County violated the requirements of the Growth Management Act, in particular RCW 36.70A.060 and RCW 36.70A.020(8), by failing to classify, protect, maintain and enhance the SRP site as mineral resource lands and a valuable site for natural resource industry?

Petitioner's Position:

The Petitioner contends that the failure to designate the SRP site as mineral lands violates GMA requirements to maintain and enhance natural resource industries. See R.C.W. § 36.70A.020(8) (1991).

Respondent's Position:

The County contends that Section 36.70A.020(8) seeks to protect "natural resource industries" but that protection does not extend to mineral lands. The County further asserts that the County's 1997 Resolution to designate mineral lands satisfied any applicable GMA requirements.

Discussion of Issue 2:

This issue is moot. The County has designated and protected mineral resource lands, as required by RCW 36.70A.020(8). The only pertinent issue raised by Petitioner is whether the SRP site should have been designated along with other mineral resource lands. That question was addressed in the discussion of Issue No. 1.

Issue 3. Whether the County violated the requirements of the Growth Management Act, in particular RCW 36.70A.100 (requiring coordination and consistency among City and County comprehensive plans), when the County adopted an "urban" land use designation for the SRP

site while the City comprehensive plan recognizes the SRP site as natural resource land.

Issue 4. Whether the County violated the requirements of the Growth Management Act, in particular RCW 36.70A.100 (requiring coordination and consistency among City and County comprehensive plans) by failing to consult and coordinate with the City regarding land use designations for the SRP site.

Issue 5. Whether the County violated the requirements of the Growth Management Act, in particular RCW 36.70A.210(1) (establishing that countywide planning policies are the framework to ensure consistency between County and City Plans) by failing to coordinate plans to classify, designate and protect natural resource lands.

Petitioner's Position:

The Petitioner contends that the inconsistency between the County and City land use maps violates the Growth Management Act.

The Petitioner points out that the County Land Use Map designates the SRP site as "low density residential." The City Land Use Map, by contrast, designates the property "Mining."

The Petitioner argues that the Growth Management Act requires that the comprehensive plan of each county be coordinated with and consistent with the comprehensive plans of other counties or cities, citing in particular to Sections 36.70A.100 and 210(1) of the Growth Management Act. The Petitioner further contends that the Countywide Planning Policies, as required by GMA, mandate consistency between the County and City plans.

Finally, the Petitioner argues that the record does not show that the County and City consulted or coordinated in order to avoid or address the apparent inconsistency between the County and City land use maps.

Respondent's Position:

The County contends that it properly consulted and coordinated with the City of Spokane in developing and adopting the comprehensive plan. The County asserts that the Countywide Planning Policies were developed through a cooperative process, as required by GMA. The County maintains that the record sufficiently demonstrates that the City and County coordinated to ensure consistency between their respective comprehensive plans.

The County further contended that the alleged inconsistency between the land use maps merely reflected the existing zoning of the SRP site.

Finally, the County contended that the SRP site was outside the City, and therefore it was within the County's jurisdiction to determine the proper map designations for the SRP site. The City, the County asserted, could not dictate a different result through its own comprehensive planning process.

Discussion of Issues 3, 4 & 5:

Issues 3, 4 and 5 all address questions of consistency between the City and Count Comprehensive Plans. The Record contains sufficient evidence to conclude that coordination took place, and that the respective plans are consistent. The Petitioner has not overcome the

presumption of validity of the County actions and has not carried its burden of proof on these issues.

Issue 6. Whether the County violated the requirements of the Growth Management Act, in particular RCW 36.70A.050, RCW 36.70A.170 and WAC 365-190-070, by failing to consider, analyze and apply the minimum guidelines enacted to assist counties in classifying mineral resource lands, including whether the SRP site qualifies as a mineral resource of long-term commercial significance.

Petitioner's Position:

Petitioner contends that the County failed to consider, analyze and properly apply the minimum guidelines and plan criteria governing the designation of mineral lands in the County. In particular, the Petitioner maintains that the County clearly erred in application of those guidelines to the SRP site.

Petitioner emphasizes that the SRP site has been mined for aggregate for over 60 years. Petitioner maintains that, while there has been residential development in recent years, the mining use was well established prior to residential uses in the area.

Petitioner contends that the County failed to cite to specific portions of the record showing that it considered, analyzed and then rejected the SRP site for consideration based upon application of the criteria. Petitioner argues that the County's reliance upon a general assertion that it considered the designation for all mineral lands in the County is simply not sufficient. Petitioner maintains that there is no evidence in the record to demonstrate how the County applied the designation criteria to the SRP site.

Petitioner further noted that other mining sites in the County are located in or near low-density residential areas. Petitioner asserted that the existence of other mining sites near low-density residential areas demonstrates how the mining designation criteria are actually interpreted and applied.

Petitioner believes it is noteworthy that the County staff recommended that the SRP site be designated as mineral lands. Petitioner also asserts that the facts before the Planning Commission clearly warranted a mineral lands designation for the SRP site. For example, it was acknowledged that the SRP site was near a vocational school was near the location of the future north-south freeway, the site was zoned for mining, and that the site was obviously an aggregate pit, which contained valuable mineral resources. Moreover, the Petitioner notes, there was no discussion of ongoing project-level review, potential or actual mitigation of impacts, or other factors regarding compatibility.

Petitioner contends that the Planning Commission, while generally discussing some of the relevant factors, failed to review the designation criteria in any detail. Finally, the Petitioner contends that the Board of County Commissioners merely rubber-stamped the conclusions of the Planning Commission, with little to no discussion. Petitioner maintains that there was no substantive discussion by the BOCC of any of the issues involved in designating the SRP site.

Respondent's Position:

The County maintains that it properly applied all administrative guidelines with respect to the SRP site. The County contends that it properly considered the designation criteria for all mineral lands, which would necessarily include the SRP site.

The County maintains that the Planning Commission properly considered the evidence before it, and that additional evidence, if any existed, should have been presented to that body.

The County claims that the SRP site is not compatible with surrounding residential uses and that the Petitioner's arguments related to other mining sites are not on appeal and should not be considered.

Discussion of Issue 6:

The County failed to consider, analyze and properly apply the minimum guidelines and plan criteria to the SRP site. Specifically, the Board finds that the County's criterion was not properly applied in denying the designation of the SRP site as mineral resource land.

The fact that the SRP site has been mined for aggregate for over 60 years strengthens Petitioners position in relation to encroaching residential uses.

The County has not "shown its work" regarding application of the criteria to the SRP site or to other nearby sites which did receive designation as mineral resource lands.

Issue 7. Whether the County violated the requirements of the State Environmental Policy Act ("SEPA"), RCW 43.21C.010 et seq., and its implementing regulations, WAC 197-11-010 et seq., by failing to adequately assess the environmental impacts related to removing the SRP site from the Mining Zone.

The Petitioners abandoned this issue.

Issue 8. Whether the County violated the requirements of the Growth Management Act by failing to consider, analyze, or recognize that the SRP site cannot be developed as "urban" property consistent with the Act without first engaging in a mining rehabilitation of the property.

Petitioner's Position:

The Petitioner contends that the current condition of the SRP site is such that it cannot be used for residential purposes without significant reclamation of the site. The Petitioner asserts that in order to conduct a proper reclamation, the site must be mined, and only after such mining can the property realistically be converted to residential purposes.

Petitioner contends that the physical condition of the site is a factor that must be considered in making a proper land use designation. The Petitioner contends that the County's failure to consider the current condition of the site was clear error in derogation of the requirements of the Growth Management Act.

Respondent's Position:

The County questioned, what if any, section of the GMA Petitioners were alleging a

violation of. The County acknowledged that some form of reclamation of the site would be necessary in order to put the property to residential purposes. However, the County asserted that it properly considered this factor in designating the SRP site as low density residential.

Discussion of Issue 8:

Petitioners contend the site must be further mined before it can be reclaimed for residential development. They contend this argument should be weighed by the County, resulting in a mineral lands designation. The Board disagrees. While a mineral lands designation may make reclamation of the site more practical, we find nothing in the GMA that would require the County to take that into consideration in its action. The Petitioner has not overcome the presumption of validity and has not carried its burden of proof on this issue.

V. INVALIDITY

The Petitioners have requested a finding of invalidity due to the failure of the County to designate the subject property as mineral resource lands in the Spokane County Comprehensive Plan. Under RCW 36.70A.302, the Board has the authority to declare invalidity if it finds the County to be out of compliance with the GMA and that the continued validity of such part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of the GMA. The Board is not convinced the failure to designate this site as mineral resource lands poses such a threat to the GMA. Therefore, the request for a finding of invalidity is denied.

VI. ORDER

1. Spokane County is not in compliance with the Growth Management Act due to its failure to uniformly apply the mineral land designation criteria to the SRP site.

2. Spokane County is not in compliance with the Growth Management Act due to the failure to "show its work" regarding the application of mineral land designation criteria to the SRP site.

3. This matter is remanded to the County for further proceedings to comply with this Order, within 180 days.

Pursuant to RCW 36.70A.300(5), this is a Final Order for purposes of appeal.

Pursuant to WAC 242-02-832, a motion for reconsideration may be filed within ten days of service of this Final Decision and Order.

SO ORDERED this 19th day of July, 2002.

EASTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD

D.E. "Skip" Chilberg, Board Member

Judy Wall, Board Member

Dennis Dellwo, Board Member

[1] Petitioner's and Respondent's positions are more fully set forth in their respective memorandums.

No. _____

SUPREME COURT OF THE STATE OF WASHINGTON

(Court of Appeals No. 45563-3-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.

CERTIFICATE OF SERVICE OF CONCRETE NOR'WEST AND 4M2K, LLC'S PETITION FOR SUPREME COURT REVIEW

GORDON THOMAS HONEYWELL LLP
Margaret Y. Archer, WSBA No. 21224
William T. Lynn, WSBA No. 07887
Attorneys for Petitioners Concrete Nor'west and 4M2K, LLC

Suite 2100
1201 Pacific Avenue
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-650021224

[100105746]

ORIGINAL

THIS IS TO CERTIFY that on this 5th day of March, 2015, I served via the U.S. Postal Service, a true and correct copy of Concrete Nor'West and 4M2K, LLC's Petition for Supreme Court Review by addressing for delivery to the following:

David S. Mann
Gendler & Mann LLP
615 - 2nd Ave, Suite 560
Seattle, WA 98104-2242

Karen N. Frakes
Civil Deputy Prosecuting Attorney
311 Grand Avenue, Suite 201
Bellingham, WA 98225-4048

Dionne Padilla-Huddleston
Assistant Attorney General
Office of the Attorney General
800 - 5th Ave, Suite 2000, TB-14
Seattle, WA 98104-3188

Dated this 5th day of March, 2015.

Frances T. Ostruske

Frances Ostruske
Legal Assistant to Margaret Archer and
William T. Lynn

Gordon Thomas Honeywell LLP
Suite 2100
1201 Pacific Avenue
PO Box 1157
Tacoma, WA 98401-1157
(253) 620-6500