THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioners,

v.

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

Respondents.

RESPONDENT WHATCOM COUNTY'S ANSWER TO PETITION FOR REVIEW

DAVID S. McEACHRAN
Whatcom County Prosecuting Attorney
By KAREN N. FRAKES
Civil Deputy Prosecutor
Attorney for Whatcom County
WSBA #13600
311 Grand Avenue, Suite 201
Bellingham, WA 98225
(360)676-6784

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

State Statutes

State Rules

State Regulations

Other Authorities

A. IDENTITY OF RESPONDENT

Respondent Whatcom County (hereinafter referred to as "Whatcom County" or "County") seeks the relief designated in Part B.

B. DECISION AND RELIEF REQUESTED

Whatcom County asks this Court to deny Appellants Concrete Nor'West's and 4M2K, LLC's (hereinafter collectively referred to as "CNW") Petition for Review of the Court of Appeals decision affirming the decision of the Western Washington Growth Management Hearings Board ("Board") issued on September 25, 2012 under Case No. 12-2-0007. A copy of the Court of Appeals opinion is attached hereto as Appendix A.

C. ISSUE PRESENTED FOR REVIEW

Applying this Court's decision in Stafne v. Snohomish Cnty., 174 Wash. 2d 24, 271 P.3d 868 (2012), did Whatcom County have a duty under RCW 36.70A.120, the Whatcom County Comprehensive Plan or the Whatcom County Code to amend its plan as requested by CNW during the County's annual review process pursuant to RCW 36.70A.130(2)?

D. STATEMENT OF THE CASE

1. GMA Planning Background

In May of 1997, Whatcom County adopted its comprehensive plan as required by the Growth Management Act ("GMA"). Pursuant to RCW 36.70A.170, the comprehensive plan contained specific provisions regarding mineral resource lands and included the required designation of mineral lands of long-term commercial significance ("MRLs"). At that time, the County also adopted development regulations to assure the conservation of those lands as required by RCW 36.70A.160(1). After a challenge to those provisions, the board found the mineral resource provisions to be in compliance with the GMA. *Wells v. Whatcom County*, WWGMHB Case No. 97-2-0030c (Final Decision and Order, 1/16/1998).

In 2005, the County completed the first periodic review of its comprehensive plan required by RCW 36.70A.130(1). This review, consistent with RCW 36.70A.131, specifically included the mineral resource provisions in the comprehensive plan, including designations. As a result of the review, the county council made several changes to the mineral resource provisions with its adoption of Ordinance No. 2005-024. This ordinance was challenged and upheld by the board in *Franz v.*

Whatcom County, et al., WWGMHB Case No. 05-2-0011 (Final Decision and Order, 9/19/2005).

The County is currently under no obligation under the GMA to review its plan, including its MRL policies, goals, and designations, until the next mandatory review, due next year in June, 2016. *See* RCW 36.70A.130(5)(b). The mineral resource provisions in the plan are currently compliant with the GMA.

2. County's Annual Review Process

Between the reviews required by the GMA, the County considers proposed amendments of its comprehensive plan on an annual basis. It is important to emphasize that the GMA authorizes a local government to amend its comprehensive plans annually; it does not require such amendments. RCW 36.70A.130(2). During the annual review, all proposed amendments are processed under chapter 2.160 of the Whatcom County Code ("WCC"). AR 1011-1017. Pursuant to WCC 2.160, the county council first reviews all of the proposed amendments and then decides which of those proposals will be docketed for further review. The council has full discretion to decide whether a proposal is docketed. AR 1012-1014 (WCC 2.160.050).

If a request is docketed, the proposed amendment is processed first through the planning commission and then through the county council. AR 1015-1016 (WCC 2.160.090-.100). At the end of this legislative process, the county council makes the final decision to adopt or deny a proposal. In making this decision, the council must decide whether the proposed amendment is in the public interest. AR 1015 (WCC 2.160.080(3)).

3. Specific Facts of the Present Case

In December of 2008, CNW submitted an application requesting an amendment to the County's comprehensive plan which was processed as part of the County's annual review of proposed amendments. Specifically, CNW requested that the county council re-designate 280 acres of their property from Commercial Forestry to MRL.

CNW's application was docketed and processed in accordance with the requirements of WCC 2.160. At the hearing before the county council on February 14, 2012, the adoption of the ordinance failed, with a 3-3 vote. AR 1043-1054 (Minutes, 2/14/12). Exercising their legislative discretion, the council members who voted against the adoption of CNW's proposal expressed their views that the re-designation of this property from Commercial Forestry to MRL was not in the public interest.

The council decision was supported by hundreds of public comments urging it not to adopt the proposed amendment for this scenic, pastoral area located on a ridge between the South Fork Nooksack and Samish Rivers. A large portion of those comments came from members of the public, including those who reside in the area and those who make their living as farmers in the area. Many of the concerns expressed were backed up with real life experiences with the existing CNW mine. *See, for example,* AR 1020-1023, 1027-1033, 1044, 1050-1054, 1058, 1063, 1068-1071, 1075-1100, 1102-1157.

Specifically, organic farmers in the area expressed their concerns that gravel mining would impact their livelihood due to its impact on the overall quality of the environment, including the quality and quantity of the water upon which they rely. *See, e.g.*, AR 1058, 1063, 1068, 1128-30. Other comments concerned impacts to water resources in the area, including the threat posed by mining to the extensive restorative efforts that had already been made to protect threatened fish habitat. The Lummi Tribe, the Nooksack Tribe, the Whatcom Land Trust, and the Evergreen Land Trust Association all expressed opposition to the proposed amendment on these grounds, as did a licensed hydrogeologist. AR 1064-1067 (Lummi Tribe correspondence); 1061-1062 (Nooksack Tribe

correspondence); 1072-74 (Whatcom Land Trust correspondence); 1101 (Evergreen Land Trust Association correspondence); 1075-81, 1102-13, 1148-50 (Peter Willing, Ph.D., Water Resources Consulting LLC).

On April 12, 2012, CNW filed a petition for review with the Board challenging the County's failure to adopt its proposed amendments, presenting the following issues for the Board's review:

1. Did Whatcom County's action rejecting CNW's application and the corresponding proposed ordinance violate RCW 36.70.120 since the County failed to apply the 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?

(Prehearing Order, pp. 1-2)AR 100-101 (Prehearing Order, pp. 1-2). The Board considered the issues raised by CNW and issued its decision denying the appeal on September 25, 2012. *Concrete Nor'West, et al. v. Whatcom County*, WWGMHB Case No. 12-2-0007 (Final Decision and Order, 9/25/2012).

In its decision, the Board, consistent with the Supreme Court's decision in Stafne, 174 Wash. 2d, 38, held that the county council, the

local legislative body, had the discretion to adopt or reject a proposed comprehensive plan amendment in the absence of a GMA or comprehensive plan mandate. The Board, after a careful review of the cited violations of the GMA and the County's comprehensive plan, found that CNW had failed to establish the existence of such a mandate and therefore concluded that they had failed to demonstrate the decision of the County was a clearly erroneous violation of RCW 36.70A.120, RCW 36.70A.020(8), WCC 2.160 and the County's MRL goals and policies. *Id.*, at 11-14.

The Board's decision was appealed to the Thurston County Superior Court. On October 16, 2013, Thurston County Superior Court Judge Erik D. Price denied the appeal and affirmed the Board's decision. CP 425-26. CNW then appealed the matter to Division II of the Washington Court of Appeals. On February 3, 2013, the Court of Appeals, in a very thorough and well-reasoned opinion, issued its decision denying the appeal and affirming the Board's decision. Appendix A.

Significantly, the Court of Appeals refused to consider amici's argument that, in addition to the periodic reviews required by the GMA, there is some additional "continuing" GMA mandate to designate lands with known mineral resource deposits arising from RCW 36.70A.130(1).

The Court of Appeals directly addressed this untimely attempt to expand the issues on review, stating:

> 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 Cnty.*, 162 Wash. 2d 597, 614-15, 174 P.3d 25 (2007). We therefore do not consider amici's argument.

Appendix A, p. 8, FN 2.

CNW did not allege before the Board, or in its briefing before the Superior Court or the Court of Appeals, that the County's comprehensive plan was out of compliance with the GMA for failing to designate their land based on an any "continuing" GMA duty to designate MRL under RCW 36.70A.130(1) during the annual review process. This new issue is now the misplaced focus of CNW's argument before this Court.

E. ARGUMENT IN OPPOSITION TO DISCRETIONARY REVIEW

CNW's Petition for Review fails to offer adequate grounds and supporting argument to justify discretionary review under RAP 13.4(b). Under RAP 13.4(b), this Court will grant review only:

> (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) if the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

CNW asserts two bases for acceptance of review: 1) that the Court of Appeals decision affirming the Board's decision is in conflict with the Supreme Court's decision in *King Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.,* 142 Wash. 2d 543, 14 P.3d 133 (2000); and 2) that it presents issues of substantial public interest.

At the outset, it is important to place this case in the proper context. This case involves the annual review of amendments to the County's comprehensive plan. Throughout its argument, CNW confuses the County's obligations during the initial designation and periodic

reviews of MRLs, under RCW 36.70A.170, RCW 36.70A.130(1) and RCW 36.70A.131, with its obligations after the comprehensive plan is in place and compliant with the GMA.

At this latter point, there is no weighing of GMA planning goals or any requirement for additional designation under the MRL provisions in the GMA. Instead, the issue during the annual review is very straightforward and focused. The question is simply whether the comprehensive plan language contains a mandate or a duty to take the requested action. *See*, *Stafne*, 174 Wash. 2d at 38.

CNW compounds this confusion by interjecting issues into its arguments that were not raised before the Board. CNW had the obligation to frame its issues and allege specific violations of the GMA when it filed its petition before the Board. RCW 36.70A.290(1). It cannot now introduce new issues and allege new violations of the GMA that it did not raise before the Board. RCW 34.05.554; *Wells v. W. Washington Growth Mgmt. Hearings Bd.*, 100 Wash. App. 657, 683-84, 997 P.2d 405 (2000); *See*, RAP 2.5. Its argument that there is a "continuing" duty to designate all land with known mineral resource deposits "inherently required in this annual process," based on RCW 36.70A.130(1) and the guidelines in the WAC, in addition to being meritless, was never raised before the Board

and cannot be raised now. Furthermore, any issue of whether the County's comprehensive plan somehow adopted this non-existent mandate was likewise not before the Board and cannot be raised for the first time in this proceeding.

1. The Court of Appeals decision does not conflict with *King County v. Central Growth Management Hearings Board.*

The Court of Appeals decision does not conflict with *King Cnty. v. Central Growth Mgmt. Hrgs. Bd.*, 142 Wash. 2d 543, 14 P.3d133 (2000).[1] In *King Cnty.*, the Supreme Court addressed the issue of whether "active recreational facilities" could be legally allowed on GMA designated agriculture land. In reaching its decision, the court compared the GMA provisions relating to agriculture to those relating to recreational land. Id. at 556-558. The court concluded that, unlike the recreational land provisions, the obligation to designate agricultural land under RCW 36.70A.170(1)(a), the duty to adopt development regulations to assure the conservation of designated lands, and the goal to conserve agricultural land under RCW 37.70A.020(6) together mandate specific, direct action. Id. at 558. With this background, the court held that, after properly designating agricultural lands, King County could not then undermine the

[1] It is very telling that CNW never relied on this case in its substantive arguments in any of the multiple proceedings below.

Act's agricultural conservation mandate by adopting amendments that allow the conversion of entire parcels of prime agricultural soils to an unrelated recreational use. *Id.* at 561.

King County has no bearing on the issues in this case. The present case does not involve the County's duty to designate MRLs under RCW 36.70A.170(c) or the County's duty to adopt development regulations under RCW 36.70A.060(1), and it certainly does not involve a net loss of designated MRL. Instead, it involves the County's obligation to act in conformity with its comprehensive plan during the annual review of proposed comprehensive plan amendments. The decision that is in fact pertinent to the issues in this case is *Stafne v. Snohomish County*, 174 Wn.2d 24, 271 P.3d 868 (2012). The present case is simply an application of *Stafne* to a very specific set of facts pertaining only to Whatcom County.

Prior to *Stafne*, a long line of growth board cases found that the growth management hearings board does not have subject matter jurisdiction when a local jurisdiction fails to adopt a proposed amendment during its annual review process because such amendments are not required by the GMA. *See, Chimacum Heights LLC v. Jefferson County*,

WWGMHB Case No. 09-2-0007 (Order on Dispositive Motions, p. 3, 5/20/2009); *SR 9/US 2 LLC v. Snohomish County*, CPSGMHB Case No. 08-3-0004 (Order Granting Motion to Dismiss, p. 4, 4/9/2009); *Chipman v. Chelan County*, EWGMHB Case No. 05-1-0002 (Order of Dismissal, pp. 4-6, 1/31/2006); *Cole v. Pierce County*, CPSGMHB Case No. 96-3-0009c (Final Decision and Order, pp. 9-10, 7/31/1996). In other words, these cases found that a jurisdiction is not out of compliance with the requirements of the GMA, and thus not subject to board jurisdiction, when it does not adopt a proposed amendment during the annual review process.

In *Stafne*, the court was presented with this issue and stated as follows:

> 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. Instead, the remedy is to file a proposal at the County's next annual docketing cycle or mandatory review or through the political or election process.

Stafne, 174 Wn.2d at 38. In reaching this conclusion, the court specifically agreed with the boards' determinations in *Cole v. Pierce County*, CPSGMHB No. 96-3-0009c (FDO, 7/31/1996) and *SR 9/US 2 LLC v. Snohomish County*, CPSGMHB No. 08-3-0004 (Order on Motion to Dismiss, 3/16/2009).

CNW's contention that the Court of Appeals decision is in conflict with *King County* because it did not recognize that the GMA imposes a duty on a county to designate MRLs is wholly unwarranted. While the court did not address the untimely argument regarding a "continuing" duty to designate that CNW improperly asserts, the court did explicitly recognize the County's duties under the GMA:

> 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 reviewed their mineral resource designations in light of new information concerning mineral deposits and certain new or modified model regulations. RCW 36.70A.131.

Appendix A, p. 5. The schedule for these periodic required reviews is found in RCW 36.70A.130(4) and (5).

In support of its argument regarding the GMA duty to designate MRLs, CNW relies on *Spokane Rock Products, Inc. v. Spokane County*, EWGMHB Case No. 02-1-0003 (Final Decision and Order, 2/19/2002). This and all of the other board cases cited on p. 17 of the Petition for Review are in the context of initial designation of MRLs, not the annual

review of amendments. When faced with the issue in the context of the annual review of amendments, the Eastern Board, the same board that decided *Spokane Rock Products, Inc.*, refused to consider a denial of a request for MRL designation because the GMA did not require the amendment. *Chipman v. Chelan County*, EWGMHB Case No. 05-1-0002 (Order of Dismissal, p. 4-6, 1/31/2006).

After describing a county's duties under the GMA, the Court of Appeals went on to discuss the process after a comprehensive plan is in place, as it is in this case:

> 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 the comprehensive plan into a GMA violation that the Board could remedy.

Appendix A, p. 8. The court then carefully analyzed the County's plan and found that there was no duty under the plan to designate CNW's property, even if it met the designation criteria. In addition, the Court of Appeals found that the process for amendments in WCC 2.160 bolstered this conclusion. Appendix A, p. 11. Finally, the court noted that the holding in *Stafne* directly supported its decision. Appendix A, p. 8, FN 3.

Nowhere in its discussion did the Court of Appeals state that "the natural resource goal is only one of 13 GMA goals with no greater priority than any other," as contended by CNW. Instead, as a matter of explaining the purpose of the designation criteria in the County's comprehensive plan, the court noted that there is flexibility in the GMA's mandate to designate resource land "where appropriate," and, at the time of designation, this flexibility gives jurisdictions the room to reconcile the easily conflicting goals of enhancing natural resource-based industries and protecting the environment and quality of life." Appendix A, p. 10. This is an accurate description of the GMA's requirements and is in no way in conflict with the decision in *King County*.

The currently compliant comprehensive plan requires the county council to consider life quality and environmental concerns not only when a permit to mine is issued, but also at the designation stage. As the Court of Appeals aptly noted:

> 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. . . These goals and policies create the breathing space of judgment, not the chains of duty.

Appendix A, p. 9. Significantly, the language in GMA planning goal 10 (Environment) requires that, in adopting its comprehensive plan

provisions, a jurisdiction must affirmatively act to "[p]rotect the environment and enhance the state's high quality of life." RCW 36.70A.020(10).

CNW summarily dismisses the multitude of community concerns in the present case, downplaying the significance of an MRL designation and arguing that these concerns will all be addressed by environmental review at the permit stage. While MRL designation is not a permit to mine, it is a necessary first step for mining to occur. Once property is designated, the permit to mine is issued through an administrative approval process, with limited opportunity for public involvement. *See*, WCC 20.73.130; WCC 20.84.235.[2] While neighboring property owners are notified and given a 15 day period to submit written comments, the permit is issued administratively, without a public hearing. *Id.*

Comprehensive Plan Policy 8P-1, upon which CNW places great significance, is aspirational, not mandatory, as it states that the council should *seek* to designate a 50 year supply of commercially significant construction aggregate supply but only *to the extent compatible with protection of water resources, agricultural lands, and forest lands.* AR 855 (emphasis added). The County's obligation under the GMA is not,

[2] WCC provisions can be found at www.codepublishing.com/wa/whatcomcounty/.

and never has been, to designate all property with known mineral resources or all property that meets the County's designation criteria. Instead, the County is required by the GMA to designate that amount of mineral resource land capable of producing minerals at commercially sustainable levels for at least the twenty-year planning period. *See* WAC 365-190-030(11).

CNW has not offered any credible argument that the present case conflicts with *King County* in any way. Even if CNW had timely argued that the County had an inherent "continuing" duty to designate during its annual review process, such an argument certainly does not find support in *King County*.

The irony of this case is that the County had no obligation to even docket this request. Simply because the Council chose to allow CNW to have its request vetted, it does not make sense that it lost all discretion to deny it. In addition, despite arguments to the contrary, the mineral resources on CNW's property are not threatened by the Council's decision in this case. With its existing Commercial Forestry designation, this land will remain protected from development that would interfere with any future extraction of the mineral resources. *See,* WCC 20.43.

2. The petition does not involve an issue of substantial public interest that should be determined by the Supreme Court.

This case is not about a local jurisdiction's duties to designate MRLs under the GMA. That was the issue when County first adopted its MRL designations and it is an issue when the County is required to periodically review those designations. Rather, this case is about what Whatcom County's duties are in considering a request for designation during the annual review process under its unique comprehensive plan and code provisions. While the decision affects certain citizens in Whatcom County, it certainly does not have the widespread effect necessary to find that it is of sufficient public interest to warrant Supreme Court review.

Moreover, this case does not require the creation of new law; it simply involves the application of already settled principles of law. Three separate tribunals have applied the existing law and, without exception, they have upheld the County's decision, finding that there was no mandate to approve CNW's request under the GMA, the comprehensive plan, or the county code.

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

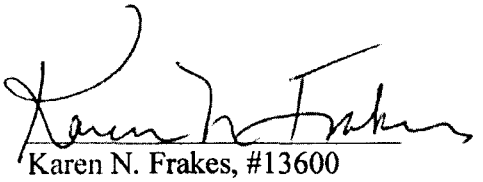
exercised its discretion honestly, consistent with its own comprehensive plan and code provisions, and upon due consideration of the facts before it. The Board, the Thurston County Superior Court, and the Court of Appeals all properly honored that decision.

F. CONCLUSION

Based on the preceding analysis and the Court of Appeals opinion, the Respondent respectfully requests that CNW's Petition for Review be denied.

DATED this 31st day of March, 2015.

Respectfully submitted,



Karen N. Frakes, #13600
Civil Deputy Prosecutor
Attorney for Respondent Whatcom County

CERTIFICATE

I CERTIFY that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificates is attached, to this Court and petitioner's counsel, addressed as follows:

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

Margaret Y. Archer
William T. Lynn
Gordon Thomas Honeywell LLP
PO Box 1157
Tacoma, WA 98401-1157

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

Theresa Lynch 3/31/15
Name **Date**

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.

OFFICE RECEPTIONIST, CLERK

To: Therese Zemel
Subject: RE: #91378-I Whatcom County's Answer to Petition for Review

Received 3-31-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Therese Zemel [mailto:tzemel@co.whatcom.wa.us]
Sent: Tuesday, March 31, 2015 2:21 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: #91378-I Whatcom County's Answer to Petition for Review

Attached.

OFFICE RECEPTIONIST, CLERK

To: Therese Zemel
Subject: RE: #91378-I missing page 16

Received 3-31-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Therese Zemel [mailto:tzemel@co.whatcom.wa.us]
Sent: Tuesday, March 31, 2015 2:49 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: #91378-I missing page 16

Last page of Whatcom County's Response to Petition for Review attached. Thank you sooo much. Terri