No. 45563-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents.

AMICUS CURIAE BRIEF OF WASHINGTON AGGREGATES & CONCRETE ASSOCIATION, INC.

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I. INTRODUCTION

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

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The identity of WACA is further described in the accompanying Motion to File Amicus Curiae Brief.

This case involves the question of whether Whatcom County has a duty under the State Growth Management Act, Ch. 36.70A RCW ("GMA") and/or Whatcom County's own GMA-adopted Comprehensive Plan to conserve mineral resource lands of long term significance, by designating those lands for protection, allowing a later permit application to be made seeking development of a sand and gravel facility.

WACA members include over 175 primary suppliers of construction aggregates and related businesses located throughout Washington State. WACA members are the principal parties who request that lands that contain mineral resources, due to naturally occurring geological conditions, be designated for conservation and protection as mineral resource lands of long-term commercial significance. If upheld, the decision by Whatcom County (the "County") and the Growth

Management Hearings Board (the "Board" or "GMHB") that there is no mandatory duty to designate mineral resource lands for conservation will negatively impact WACA members across the State. If upheld, the County and Board decisions also will negatively impact the State's economy, as locally-sourced sand and gravel resources which are critical to public and private construction are depleted without new resource lands to take their place.

III. ISSUES ADDRESSED BY AMICUS CURIAE

As stated by CNW, WACA addresses issues 1, 2 and 3:

1. Does RCW 36.70A.120 impose on local jurisdictions a duty to adopt proposed comprehensive plan amendments where the proposed amendment satisfies all applicable criteria stated in the comprehensive plan and furthers comprehensive plan goals?

2. Does Title 2.160 of the Whatcom County Code impose a duty upon the Council to adopt proposed Plan amendments that satisfy the general amendment criteria set forth in WCC 2.160.080 and the MRL designation criteria set forth in Chapter 8 of the County's Comprehensive Plan?

3. Did Whatcom County's action rejecting an MRL designation application that satisfies all adopted MRL designation criteria violate the GMA, specifically RCW 36.70A.120?

IV. STATEMENT OF THE CASE

WACA concurs with and adopts by reference the Statement of the Case provided in the CNW Opening Brief.

V. ARGUMENT

Despite concluding that all criteria had been met such that the CNW property should be designated for conservation as Mineral Resource Lands ("MRL") of long term commercial significance, both the County and the Board decided that the County had no duty under the GMA or the County's Comprehensive Plan to designate the CNW lands, during the annual update process. (Board Decision, Appendix A to the Opening Brief of CNW ("Board Decision"), at 11-13).

The County and the Board erred. The County and Board stretched the holding of the *Stafne* decision too far in support of their argument for broad legislative discretion. When information is presented establishing that lands contain mineral resources of long term commercial significance, and the County does not already have a sufficient land base designated for conservation, then the new lands must be designated.[1]

[1] While this case involves Whatcom County's obligation to protect and preserve a 50 year supply of mineral resource lands, it is also true that the GMA does not require exclusion of new mineral land designations that would protect and conserve more than a 50-year mineral supply. Neighbors v. Skagit County, WWGMHB Case No. 00-2-0047c (FDO, February 6, 2001, 2001 WL 169265) (holding "GMA and CTED guidelines, WAC 365-190-170, encourage counties to designate both actual and potential mineral resource areas to ensure that areas of long-term commercial significance will be protected. Neither the Act nor the guidelines . . . require the designation criteria to exclude lands in excess of a 50-year mineral supply. The County's conservative approach of designating more than a 50-year supply of mineral resource lands complies with the Act.")

The Board began its analysis with the *Stafne* decision. (Board Decision at 11). The Board quotes *Stafne,* which itself quotes prior Board decisions. Using that self-initiated authority, the Board noted that "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." (Board Decision at 11), *Stafne v. Snohomish Cy.*, 174 Wn.2d 24, 37, 271 P.3d 868 (2012). Importantly, the *Stafne* case did not involve a request to designate new mineral resource lands, agricultural lands, forest lands, or critical areas. The *Stafne* case involved a landowner's request to have his property designated for future low density rural residential development. *Id.* at 28.

Under the GMA, the designation of property for potential later use as commercial mineral resource lands, commercial agricultural lands, commercial forest lands, and for protection of critical areas is treated differently than designation for any other purpose. Via the process of glaciation during the last ice age, the fact is that only limited areas of land in Washington State contain commercially significant deposits of sand and gravel, or soils suitable for the commercial production of food, or forests suitable for the commercial production of timber, or critical areas such as wetlands and steep slopes. The GMA acknowledges that fact by treating those lands differently from all others. *See* RCW 36.70A.170.

There is no dispute in this case that the GMA, specifically section

RCW 36.70A.170, mandated that Whatcom County designate all then-known MRL of commercial significance at the time that Whatcom County adopted its first GMA-compliant Comprehensive Land Use Plan. The County also concedes that, under RCW 36.70A.130(5)(b), the County must "review its plan, including its MRL policies, goals, and designations" during the County's next mandatory review, due in June 2016. County Brief, p. 5. However, the County does not concede that it will be required to designate CNW's lands even during the June 2016 review and, therefore, this Court should not view that possibility as any form of meaningful relief. If the County and Board decisions at issue in this case are not overturned, what is most likely to happen during the June 2016 review, is a repeat of contentious public hearings held below followed by a County decision to deny designation, followed by lengthy appeals essentially identical to this one.

Fortunately, none of that additional process is required. Because what is at issue in this case is whether or not Whatcom County is required to designate CNW's newly discovered Mineral Resource Lands during the County's annual update process. The GMA and Whatcom County Comprehensive Plan mandate that the County do so.

RCW 36.70A.020 sets mandatory planning goals: specifically, goals that "shall be used" for the "purpose of guiding the development of comprehensive plans..." Among the mandatory planning goals is the "Natural resource industries" goal to: "Maintain and enhance natural

resource-based industries, <u>including</u> productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses." RCW 36.70A.020(8).

Conservation of mineral resource lands is included in the natural resource industries goal, as evidenced by the express statement of legislative intent following RCWA 36.70A.030, and adopted by Laws of 1994, ch. 307, § 1 (emphasis added):

> <u>The legislature finds that it is in the public interest to identify and provide long-term conservation of those productive natural resource lands</u> that are critical to and can be managed economically and practically <u>for long-term commercial production of</u> food, fiber, and <u>minerals</u>. <u>Successful achievement of the natural resource industries' goal set forth in RCW 36.70A.020 requires the conservation of a land base sufficient in size and quality to maintain and enhance those industries</u> and the development and use of land use techniques that discourage uses incompatible to the management of designated lands...

On that basis alone, the County is obligated to approve any request for designation of Mineral Resource Lands that meets the County's designation criteria, up until the County has actually conserved a land base sufficient in size and quality to maintain and enhance the mineral resource industry. Whatcom County's Comprehensive Plan frankly concedes that the County lacks sufficient inventory of designated Mineral Resource Lands, and that "meeting the demand for construction aggregate in

Whatcom County requires expansion of the mineral resource land designations and the consideration of the importation of aggregates." (County Comprehensive Plan, p. 8-24). Accordingly, the County and the Board erred in denying the CNW request for designation.

The County and the Board also erred in their additional interpretations of the limits, allowances, and mandatory requirements of the GMA. For example, RCW 36.70A.130(1)(a) imposes two independent obligations on Whatcom County, first:

> Each comprehensive land use plan and development regulations shall be subject to continuing review and evaluation by the county or city that adopted them.

And, second:

> 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.

To date, the parties have focused on the second obligation stated in RCW 36.70A.130(1)(a), which together with RCW 36.70A.131, describes the mandatory, scheduled review of, and potential updates to, mineral resource lands designations. As to Whatcom County, that next review cycle is due in June 2016. The parties have also focused on the requirement of RCW 36.70A.120 that the County "shall perform its activities . . . in conformity with its comprehensive plan."

WACA contends that there is an independent, and mandatory, obligation to subject the County's comprehensive plan to "continuing review and evaluation," that should not be forgotten. Indeed, if this Court was to sustain the County and Board position that review and evaluation of MRL designations need only occur when specifically scheduled by RCW 36.70A.130(4) and (5), the Court would read out of the statute the plainly stated obligation that Whatcom County's comprehensive plan "shall be subject to continuing review and evaluation."

Next, RCW 36.70A.130(2) expressly authorizes the annual update procedures that Whatcom County adopted and CNW followed in this case. Under RCW 36.70A.050(1), the State Department of Commerce (formerly, the Office of Community Trade and Economic Development or CTED) "shall adopt guidelines… to guide the classification of: … mineral resource lands…." These guidelines "shall be minimum guidelines that apply to all jurisdictions," including Whatcom County. RCW 36.70A.050(3). As to the designation of mineral resource lands, these guidelines are found in WAC 365-190-020, -030, -040, and -070. Importantly, the designation standards for amendments affecting mineral resource lands make no distinction between annual updates and scheduled mandatory updates to the County's Comprehensive Plan. Instead, where designation criteria are met, designation of lands must occur.

The process for designations is described in WAC 365-190-040. Subsection (3) of the regulation, does not distinguish between the mandatory scheduled Comprehensive Plan updates of RCW 36.70A.130(1) and the allowed annual updates authorized by RCW 36.70A.130(2). Instead the guideline explains that as to all parts of RCW 36.70A.130 (emphasis added):

> Under RCW 36.70A.130, counties . . . must review, and if needed, update their natural resource lands . . . designations. Counties and cities fully planning under the act must also review and, if needed, update their natural resource lands conservation provisions, comprehensive plans and development regulations. Legal challenges to some updates have led to clarifications of the ongoing review and update requirements in RCW 36.70A.130, and the process for implementing those requirements. The process description and recommendations in this section incorporate those clarifications and describe both the initial designation and conservation or protection of natural resource lands and critical areas, as well as subsequent local actions to amend those designations and provisions.

The opening reference instructing that the County "must review, and if needed, update" its MRL designations, as well as the closing reference to "subsequent local actions to amend those designations" does not excuse the County from approving an owner-initiated amendment like CNW's request here. To the contrary, the County is directed in all "subsequent local actions", which include the annual amendment cycle, to update its natural resource lands designations, when needed. Here, again,

Whatcom County has frankly admitted that it does not have a sufficient land base designated as MRL of long-term commercial significance.

The "designation amendment process" is described further in WAC 365-190-040(10). There, the County is directed that "designation procedures should provide a rational and predictable basis for accommodating change."[2] WAC 365-190-040(10)(a). Next, the designation amendment process calls for the approach to be regional, and to be based on consistency with criteria that include changes in circumstances to the Comprehensive Plan or the property, an error or prior failure to designate, new information about natural resource lands related to the classification criteria, or changes in population growth rates, or consumption rates. But the more specific guidelines for classification and designation of Mineral Resource Lands, found at WAC 365-190-070, clarify that "owner-initiated requests," like CNW's here, are exempt from the requirement that the County approach the designation effort as a county-wide or regional process. WAC 365-190-070(1).

Most importantly, the designation procedure again plainly states that the County "must designate known mineral deposits" so that access is not "knowingly precluded." WAC 365-190-070(4)(a) Finally, the

[2] What CNW experienced in this case was neither rational nor predictable.

guidelines restate the Legislative intent behind designation and conservation of Mineral Resource Lands:

> Successful achievement of the natural resource industries [sic] goal set forth in RCW 36.70A.020 requires the conservation of a land base sufficient in size and quality to maintain and enhance those industries and the development and use of land use techniques that discourage uses incompatible with the management of designated lands.

WAC 365-190-070(4)(e).

Moreover, the Whatcom County Comprehensive Plan contains a mandatory directive to designate Mineral Resource Lands. Specifically, Policy 8J-1 opens with the simple direction to "Conserve for mineral extraction designated mineral resource lands of long-term commercial significance." (County Comprehensive Plan, p. 8-18). This is a mandate to conserve, which necessarily requires the affected lands to first be designated. While the County's Comprehensive Plan includes many other provisions with provisos such as "when appropriate," Policy 8J-1 does not. Even the language of Goal 8J, which Policy 8J-1 helps to implement, calls for the County to directly, and without reservation, "support the conservation of productive mineral lands," while separately conditioning any County decision to "sustain and enhance . . . mineral resource industries" on the proviso "when appropriate."

Here, it is undisputed that CNW's designation request met the Whatcom County designation criteria. Yet despite meeting the criteria, the County denied the CNW's owner-initiated Comprehensive Plan amendment. The only path available to the County to assure that it "successfully achieves" the natural resource industries goal is to designate sufficient land area to meet demand. As set forth above, the GMA, the Department of Commerce (formerly CTED) guidelines, and the County Comprehensive Plan mandate that the County accept CNW's application for designation.

Finally, the County's after-the-fact argument that it actually rejected CNW's designation because the request did not serve the public interest, fails. The County's own "public interest" test found at WCC 2.160.080 acknowledges that one factor to be considered when assessing the public interest is the "anticipated impact" on Mineral Resource Lands. Designation and protection of mineral resources is necessary to serve the public interest. For example, public agencies, like Whatcom County, are the largest customers of WACA's members, consuming approximately half of the mineral resources produced in Washington for public transportation and infrastructure projects. And addressing the issue directly before this Court, the Legislature expressly found, that as to the designation of Mineral Resource Lands, "it is in the public interest to

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

VI. CONCLUSION

This Court should reverse the Board's Decision and remand the matter with direction to the County to take action consistent with its Plan and stated criteria.

DATED this 11th day of August, 2014.

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Certificate of Service

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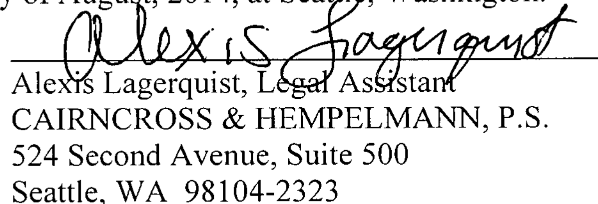

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