No. 45563-3-II

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

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

Appellants,

v.

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

Respondents.

BRIEF OF RESPONDENT WHATCOM COUNTY

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I. Introduction

In this appeal, Appellants Concrete Nor'West and 4M2k (collectively referred to as "CNW") challenge an order issued by the Growth Management Hearings Board ("Board") affirming a planning decision made by Respondent Whatcom County ("County") in the context of Whatcom County's annual review process adopted pursuant to RCW 36.70A.130(2). *Concrete Nor'west, et al. v. Whatcom County*, GMHB Case No. 12-2-0007 (Final Decision and Order, 9/25/2012) ("Decision"). A copy of the Decision is attached and marked as Appendix A.

In December, 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. After significant input from the public, the vast majority of whom were directly affected by and opposed to the proposal, the County Council took a final vote on the proposed amendment on February 14, 2012. The request failed to receive support from the majority of the County Council and therefore was not adopted. Administrative Record (AR) 1044, 1050-1054 (Minutes, 2/14/12).

Specifically, CNW requested that the County Council re-designate 280 acres of their property from Commercial Forestry to Mineral Resource Land ("MRL"). The 280 acres at issue is adjacent to approximately 180

acres of property already designated as MRL. Once property is designated and zoned as MRL, surface mining pursuant to the Washington State Surface Mining Act is permitted upon administrative approval under Whatcom County Code (WCC) 20.73.131.

In its review of the County's action, the Board began its analysis with a quote from *Stafne v. Snohomish County*, 174 Wn.2d 24, 271 P.3d 868 (2012):

> 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. (emphasis added)

Decision, p. 11, *quoting Stafne*, at 37. In other words, a local government legislative body has discretion to adopt or reject a particular proposed comprehensive plan amendment in the absence of a mandate under the GMA or other law. Accordingly, the Board held that it lacked the authority to grant relief to CNW as they failed to meet their burden of proof to establish that the GMA, the County's comprehensive plan, or other law mandated the adoption of the proposed MRL amendment. Decision, p. 13-14.

The County Council's decision to retain the existing designation and zoning for this scenic, pastoral area, located on a ridge between the South Fork Nooksack and Samish Rivers, was well within its legislative discretion and must be upheld. The Council was elected by the citizens it represents to decide where surface mining, an activity that undeniably changes the character of an area, is appropriately allowed.

As stated by the Court in *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 821 P.2d 1204 (1992):

> If the actions before us are legislative in nature, great deference should be afforded them. It is not our role to substitute our judgment for that of duly elected officials. Moreover, the separation of powers doctrine is implicated in this determination. . . . In addition, the appropriate remedy when legislative action is considered unjust is political.

Raynes, at 243 (citations omitted). In short, neither the Board nor the Court can order the Council to perform this legislative discretionary act. CNW's remedy is thus not through these proceedings, but rather through a "proposal at the County's next docketing cycle or mandatory review or through the political or election process." *Stafne*, 174 Wn.2d at 38.

II. Counterstatement of the Issues

The following issues are presented for review:

1. Did the Board correctly interpret the GMA, including RCW 36.70A.120, when it found that the County had no duty under the GMA or its comprehensive plan to amend the plan as requested by

CNW during the County's annual review process pursuant to RCW 36.70A.130(2)?

2. Did the Board correctly conclude that no other law stripped the County Council of its legislative discretion to decide where surface mining is appropriately allowed in its jurisdiction?

III. Counterstatement of the Case

A. GMA Planning Background

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

Following initial GMA comprehensive plan adoption and natural resource designation, the GMA requires periodic reviews of adopted plans and development regulations. In 2005, the County completed the first review of its comprehensive plan required by RCW 36.70A.130(1). This review, consistent with RCW 36.70A.131, specifically included the mineral resource provisions in the comprehensive plan. As a result of the review, the County Council made several changes to the mineral resource

provisions with its adoption of Ordinance No. 2005-024. This ordinance was challenged and upheld by the Board in *Franz v. Whatcom County, et al.,* WWGMHB Case No. 05-2-0011 (Final Decision and Order, 9/19/2005).

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

B. County's Annual Review Process

Between the reviews required by the GMA, the County, consistent with RCW 36.70A.130(2), considers proposed amendments of its comprehensive plan and zoning ordinances on an annual basis. It is important to emphasize that the GMA authorizes a local government to amend its comprehensive plans annually; it does not require such amendments. RCW 36.70A.130(2). Specifically focusing on the mineral resource provisions, there is nothing in the GMA that requires the County

to amend its compliant comprehensive plan to designate any new mineral resource land between mandated reviews.

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

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

C. Specific Facts of the Present Case

In this case, CNW's application was processed in accordance with the requirements of WCC 2.160. The County Council agreed to docket the proposed amendments and they were then reviewed by the Whatcom County Planning Commission. AR 1020-1023 (Minutes, 6/9/11). The matter was forwarded to the County Council and a public hearing was held on July 26, 2011. AR 101027-1033 (Minutes, 7/26/11). On August 9, 2011, by a 4-3 vote, the proposal was forwarded to the concurrency hearing. At the concurrency hearing on February 14, 2012, the adoption of the ordinance failed, with a 3-3 vote (1 abstention) of the Council. AR 1043-1054 (Minutes, 2/14/12).

It must be emphasized that the decision here was split and thus it was not possible for findings to be adopted by a majority vote. This is not an issue, though, as the county code only requires that findings be made "in order to approve an initiated comprehensive plan amendment." WCC 2.160.080. If, after considering the amendment, the Council does not amend the comprehensive plan and maintains the plan as is, there is no requirement for it to document its decision or support it with findings. Consistent with the code and common sense, it has always been the Council's practice to only enter findings when it adopts an ordinance

changing the comprehensive plan, not when it is maintaining the status quo.

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

IV. Argument

A. Standard of Review and Burden of Proof

When reviewing a Board decision, it is important for the Court to understand the strong deference that the Board must give to a local jurisdiction's decisions. In a Board proceeding, the burden is on the petitioner to demonstrate that any county action is not in compliance with

the GMA requirements and the board shall find compliance unless it determines that the action by the county "is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." RCW 36.70A.320 (2) and (3). To find an action clearly erroneous, the Board must have a "firm and definite conviction that a mistake has been made." *Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson County*, 121 Wn. 2d 179, 201, 849 P.2d 646 (1993).

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

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

RCW 36.70A.3201 (in part). This deference to the County "supersedes deference granted by the APA and courts to administrative bodies in

general." *Quadrant Corporation v. State Growth Management Hearings Board*, 154 Wn.2d 224, 238, 110 P.3d.1132 (2005).

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

Issues of law are reviewed de novo. *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 8, 57 P.3d 1156 (2002). However, while the Court determines the law independently, the Court is to give substantial weight to the Board's interpretation of the GMA. *Lewis County*, at 498, 513; *King County*, at 543. In discussing the significance of a Board decision in the precise context of this case, the Washington State Supreme Court stressed that such a decision is important "given the deferential standard of review under the GMA and the expertise of the Board." *Stafne v. Snohomish County*, 174 Wn.2d at 37.

B. <u>The County had no duty under the GMA or its comprehensive plan to adopt the proposed amendments.</u>

Growth management hearings boards are statutorily created and their jurisdiction is limited by the GMA. *Skagit Surveyors & Eng'rs, LLC*

v. Friends of Skagit County, 135 Wn.2d 542, 565, 958 P.2d 962 (1998) (citing RCW 36.70A.280(1) and .290). Under RCW 36.70A.280(1)(a), boards shall hear and determine only those petitions alleging:

> That a state agency, county, or city planning under this chapter **is not in compliance with the requirements of this chapter** . . .(emphasis added).

A long line of growth board cases have found that the 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, p. 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 have 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 v. Snohomish County*, 174 Wn.2d at 38, the Washington Supreme Court discussed 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 reaching this conclusion, the court specifically agreed with the board's 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).

In *Cole*, Pierce County had failed to adopt a comprehensive plan amendment proposed by the petitioner in that case during its annual review under RCW 36.70A.130. The county argued that the GMA did not require the adoption of the amendment and requested that the petition be dismissed. Concluding that the county's failure to adopt the proposed amendment was not subject to the board's jurisdiction under RCW 36.70A.280, the board stated as follows:

> 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. Cole did not point out any other statutorily created duty with which the County has failed to comply. At such time as 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, Cole may have an action that could properly be brought before the Board.

Cole, at 10.

In *SR 9/US 2 LLC,* Snohomish County had removed a proposed amendment from its annual docket review and the proponent of the amendment challenged the county's failure to consider the amendment by filing a petition with the board. The board granted the county's motion to dismiss, articulating its reasoning as follows:

> Absent a duty to amend its Plan or development regulation, such decisions are within a jurisdiction's discretion .... A decision *not to docket* a proposal for further consideration does not result in an amendment to a plan or development regulation falling within the Board's subject matter jurisdiction [See RCW 36.70A.280(1)]. Here the challenged action is such a decision and there is no evidence that the County has a duty to amend its plan to address the Petitioner's proposal.

SR 9/ US 2 LLC, at 5.

In the present case, the Board, consistent with *Stafne* and the line of cases upon which it relied, appropriately decided that the County was not mandated by the GMA, or its comprehensive plan or development regulations, to adopt CNW's proposed amendments. It is important to remember that the County was under no obligation to docket this request in the first place. Simply because the Council decided to process it did not obligate it to forego its legislative discretion to deny it in the end.

CNW challenges the Board's decision, arguing that the GMA, the comprehensive plan, and the county code somehow "collectively" create

this mandate. To establish this alleged mandate, CNW first points to RCW 36.70A.120. This statute requires that the County perform its activities in conformity with its comprehensive plan. The issue, then, is whether there is any provision in the comprehensive plan that mandates the re-designation of property to MRL that meets the stated designation criteria during the annual review process. After a thorough review of the County's comprehensive plan provisions related to mineral resources, the Board correctly concluded that there is not.

While it is true that the Whatcom County comprehensive plan sets forth designation criteria that must be met prior to MRL designation and recognizes that one method for site selection is through requests from property owners who have sites meeting the designation criteria, nowhere does the GMA or the comprehensive plan require that all property meeting the MRL designation criteria must be designated upon request of the property owner. Even if a site meets all of the designation criteria in the comprehensive plan, neither the GMA nor the County comprehensive plan place a duty upon the County to re-designate the land to MRL upon the request of the property owner. A copy of the pertinent comprehensive plan provisions is attached and marked as Appendix C. The issue is not whether a proposed amendment would be consistent with the

comprehensive plan; the issue is whether a proposed amendment is mandated by the plan.

CNW points to a prior Board decision as inconsistent with the decision at issue here. *See*, *Concrete Nor'west v. Whatcom County*, GMHB Case No. 07-2-0028 (Order on Dispositive Motion, 2/28/2008). As the Board in the present case stated, in the earlier case, the Board dismissed CNW's petition as it had failed to assert that the property at issue met the MRL designation criteria and that designation was required. The Board explained that it was the second prong of the Board's ruling in that prior decision that CNW had failed to prove in this case—that the comprehensive plan requires designation. Decision, p. 13.

Unlike the present case in which a decision was made after full briefing and a hearing on the merits, that prior Board decision was made in the context of a prehearing motion to dismiss. While the Board granted the County's motion to dismiss in that case, it dismissed the case on grounds that were not presented or argued in the County's motion. Consistent with the present case, the Board found in that earlier case that, if there is a mandate to act, either in the GMA or in the comprehensive plan, the failure to act in accordance with express requirements of either is subject to Board jurisdiction. In that case, the Board, in dicta, without briefing or argument by the parties on the issue of the existence of "an express

mandate," appeared to assume that the County's plan did include such a mandate.

The dicta in that 2008 decision seemed to be based on the erroneous conclusion that the County's comprehensive plan set out a process for designation on applications from property owners. In fact, the plan sets out designation criteria; it does not set out any kind of process. That process is found in WCC 2.160 and the Board did not even look at that process in the 2008 decision. In contrast, in the present case, the Board reached the conclusion that such a mandate did not exist after giving the parties a full opportunity to be heard on that issue and conducting a careful review of both the comprehensive plan and the code provisions in WCC 2.160. Moreover, the Board had the benefit of the court's analysis in *Stafne* in the current case.

A review of comprehensive plan provisions pertaining to mineral resource lands shows that designation involves much more than a simple application of designation criteria. The comprehensive plan goals and policies are in place to guide the County in making its designation decisions—not to mandate what land is ultimately selected as MRL. Appendix C, p. 8-16 ("The purpose of this section is to guide Whatcom County in land use decisions involving lands where mineral resources are present."); p. 8-24 ("The policies and criteria below are meant to guide

meeting the demand for construction aggregate."). From the outset of this section, there is recognition that strong community opposition to mining near residential, agricultural, or sensitive environmental areas may limit extractive opportunities and that property rights issues exist on both sides of the issues related to mineral extraction. *Id.*, p. 8-17. The right to mine and use the value of mineral resource land is juxtaposed against the right to live in an area with a high quality of life and the right to retain home values. *Id.*

Throughout the MRL section, the Council is directed to make appropriate designations, in light of other competing land uses. For example, Goal 8J directs the County to "[s]ustain and enhance, *when appropriate*, Whatcom County's mineral resource industries . . ." (Emphasis added.). *Id.*, p. 8-18. Then, first recognizing that "[d]etermining which areas are the most appropriate for mineral extraction is a difficult and challenging task," the comprehensive plan includes Goal 8L which directs the Council to "[a]chieve a balance between the conservation of productive mineral lands and the quality of life expected by residents within or near the rural and urban zones of Whatcom County." *Id.*, p. 8-19. In addition, the last sentence of Goal 8P specifically directs that MRL designations should be balanced with other competing land uses and resources. *Id.*, p. 8-25. Finally, Policy 8P-1, upon which CNW places great

significance, is aspirational, not mandatory, as it indicates 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. Id.* (emphasis added). As discussed in more detail later, strong concerns were voiced about the impact of this proposed amendment on water resources and adjacent farming operations.

C. No "other law" stripped the Council of its legislative discretion to decide where surface mining is appropriately allowed within its jurisdiction.

CNW then argues that WCC 2.160 is where this mandate to adopt the proposed amendments is found. Requests for amendments to the comprehensive plan to designate property as MRL are processed no differently than any other requests for comprehensive plan amendments during the annual review cycle. In addition to being required to meet the specific MRL designation criteria in the comprehensive plan and be consistent with comprehensive plan goals and policies, a request for MRL designation must also meet additional approval criteria in WCC 2.160.080. Very significantly, among that approval criteria is a requirement that "the public interest will be served by approving the amendment." WCC 2.160.080 provides as follows:

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.
5. Urban growth area amendments that propose the expansion of an urban growth area boundary shall be required to acquire development rights from a designated TDR sending area. . . . (emphasis added).

CNW asserts that WCC 2.160 required that the County Council approve their proposal because they met the MRL designation criteria in the comprehensive plan. There are no findings by the Council that the MRL designation criteria in the comprehensive plan were met or not, and the County is not arguing that they were or were not met. The fact is, whether the criteria were met or not, there is not a statutory mandate to adopt this amendment simply because it met the designation criteria in the comprehensive plan.

CNW's argument effectively ignores the fact that, in addition to the MRL designation criteria, approval under WCC 2.160.080 requires a finding by the majority of the Council that the proposed amendment would serve the public interest. It is difficult to understand how CNW can argue that there was a GMA mandate to adopt this proposed amendment when the process for approval requires such a clearly discretionary determination by the Council. This is an inquiry that requires the exercise of legislative discretion and it is uniquely in the province of the elected officials of Whatcom County. It is not the role of staff, the non-elected planning commission, the Board, or the Court to second guess the County Council on what is in the public interest of the citizens of Whatcom

County. Each council member had an obligation in this case to decide whether this amendment was in the public interest and vote accordingly.

While it may be within the Board's purview to review whether sufficient land has been designated as MRL by the County at some point in the future, it is not the Board's job to decide whether the designation of a specific parcel should be designated. It is the County's job to determine whether such a designation is in the public interest and that decision is made by the County's elected officials through the legislative process.

D. <u>The record is replete with evidence supporting a conclusion that the proposed amendment is not in the public interest.</u>

While the analysis need not go further as CNW has failed to show that the adoption of their proposed amendments was mandated by the GMA or other law, it is noteworthy that the record shows that there was not a majority of the Council who were satisfied that the amendment would serve the public interest. While perhaps reasonable minds could differ on what is or is not in the public interest, the council members were presented with ample evidence to conclude that this amendment was not in the public interest.

The County received hundreds of comments urging it not to adopt the proposed amendment throughout the course of its proceedings on this matter. 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 expressed their concerns about how 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). In addition, the Washington Department of Archaeology and Historic

Preservation expressed its concern with the proposal. AR 1059-1060 (12/15/09 letter).

CNW argues that the Council should not have given the comments of those directly impacted by this proposal any weight at all because they were "neighborhood specific concerns." Citing no authority, CNW argues that WCC 2.160.080(3) limits the Council's consideration of the public interest to "county-wide" goals and interests. This argument is completely without merit. The county code allows the Council to consider any aspect of the "public interest." The expansive language in this unambiguous code provision ("including but not limited to") places no such limits on what may be considered by the Council.

Moreover, CNW summarily dismisses the multitude of community concerns, discounting 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. They cite *Franz v. Whatcom County, et al.,* WWGMHB Case No. 05-2-0011 (Final Decision and Order, 9/19/2005) seemingly for the proposition that the Council cannot consider any environmental impacts until the permit stage. The question in that case was whether it was permissible to defer consideration of the environmental impacts of a particular mining operation until the permit

stage, not whether it was permissible to consider them in the context of determining the public interest prior to designation. Moreover, as the Board recognized, the decision in *Franz* that an MRL is not a right to mine and that site-specific review is conducted at the administrative level does not lead to a conclusion that the County Council was required to approve the MRL designation request. Decision, p. 13.

Furthermore, environmental review under SEPA only addresses probable significant adverse environmental impacts. WAC 197-11-448(1) recognizes that there are many considerations for decision makers beyond those required to be included in a SEPA analysis:

> SEPA contemplates that the general welfare, social, economic, and other requirements and essential considerations of state policy will be taken into account in weighing and balancing alternatives and in making final decisions. However, the environmental impact statement is not required to evaluate and document all of the possible effects and considerations of a decision or to contain the balancing judgments that must ultimately be made by the decision makers. Rather, an environmental impact statement analyzes *environmental* impacts and must be used by agency decision makers, along with other relevant considerations or documents, in making final decisions on a proposal . . .

To illustrate this, adverse effects such as a reduction in surrounding property value are not a part of the SEPA analysis, but are a legitimate consideration in determining the public interest. *See, SEAPC v. Cammack II Orchards*, 49 Wn. App. 609, 616, 744 P.2d 1101(1987). Many

citizens in this case expressed this very concern. *See, e.g.*, AR 1058, 1068-69, 1088-89, 1134, 1137.

CNW cites a case involving the denial of a conditional use permit for a work release facility as authority for its contention that the Council improperly based its decision on "community displeasure and generalized fears." *See*, *Washington State Department of Corrections v. Kennewick*, 86 Wn. App. 521, 937 P.2d 1119 (1997). That case has no relevance here. The decision under review in that case was a quasi-judicial zoning permit decision, not a legislative decision.

In *Kennewick*, the city planning director had the authority to approve all land use permits and the code established a framework for the planning director's decision. *Id.*, at 524. In the case of applications for conditional use permits, the code stated that the director will issue the permit only if the use will not be materially detrimental to the public welfare or injurious to property or improvements in the vicinity. *Id.* Additionally, in the context of an application for a penal institution located within one-quarter mile of a residential zone or a facility that served children or the elderly, the code required the planning director to make specific findings justifying the location, and to find the location is not detrimental to those uses before granting a permit. *Id.*

After a hearing, the director entered findings and concluded that the proposed conditional use would not be detrimental to uses conducted on surrounding property. This decision was appealed administratively and reversed. The Department of Corrections then sought a writ of review from the court under RCW 7.16.120(5) to review "[w]hether the factual determination [of such officer of body] were supported by substantial evidence." *Id.*, at 529. The substantial evidence test requires the reviewing court to accept the fact finder's views regarding witness credibility and the weight to be given to competing inferences. *Id., citing Freeburg v. City of Seattle*, 712 Wn. App. 367, 372, 859 P.2d 610 (1993). In this quasi-judicial context involving the issuance of a conditional use permit, the court upheld the director's decision finding that unsubstantiated fears of the community were insufficient to find that the use would be detrimental to neighboring uses.

This is not a case involving the review of a quasi-judicial decision and it is not a case requiring proof by substantial evidence that a proposed use is detrimental to surrounding properties. Rather, this case involves a legislative decision. This is a vital distinction. In *Kennewick*, the legislative authority had already determined that certain uses were appropriate in certain locations if they met certain conditions and an administrative body was charged with making permit application

decisions. Here, we are not at that stage. We are at the legislative stage where the legislative body has yet to decide whether this use is appropriate in this area. This is a decision that is indisputably within the Whatcom County Council's legislative discretion.

Moreover, the Council based its decision in this case on much more than community displeasure and generalized fears. However, even if the serious environmental and quality of life concerns could be characterized that way, CNW has not submitted any authority to support its argument that the legislative authority cannot consider such evidence in determining whether a particular comprehensive plan amendment is in the public interest. In fact, that is often what the legislative process is all about—elected officials listening to the concerns of its constituents and deciding how best to exercise its law making authority with those interests in mind.

In *Raynes v. City of Leavenworth*, 118 Wn.2d at 245, the Washington Supreme Court discussed the important distinction between legislative actions and quasi-judicial actions:

> Here, the court could not have adopted the amendments to the Leavenworth zoning ordinance, and courts generally do not perform such duties. Adopting the amendment did not involve the application of current law to a factual circumstance, but instead required the policymaking role of a legislative body. A series of public hearings was held, and a survey of public opinion was conducted.

> Policymaking decisions which are based on careful consideration of public opinion are clearly within the purview of legislative bodies and do not resemble the ordinary business of the courts.

The council members who voted against the adoption of CNW's proposed amendment balanced the possible effects of the proposed amendment and expressed their views that the re-designation of this property from Commercial Forestry to MRL was not in the public interest. The minutes reflect the following summary of Council Member Carl Weimer's comments:

> Weimer stated he is against the motion. There are other places to get gravel. The County must revisit all the MRL designations in the next few years, as part of the Comprehensive plan. The proponents have said that this vote is to protect the reserve. Voting against the designation protects the reserve. Leaving the land in forestry protects the reserve. It comes down to the over-arching belief in society that people have to grow and use more and more energy, homes, roads, pavement, and gravel to survive. However, that leaves them with a lesser quality of life that they all love. People have created an amazing community in the South Fork Valley. That community is threatened by the culture that wants more and more. He doesn't want to be a part of that.

AR 1054. As mentioned previously, one of the comprehensive plan goals directs the Council to achieve a balance between the conservation of mineral lands and the quality of life expected by residents within the rural zones (Goal 8L) and another requires the Council to balance MRL designations with other competing land uses and resources (Goal 8P).

Council Member Barbara Brenner expressed her reasons for opposing the proposed amendment as follows:

> Brenner stated she would like Whatcom County to do its own independent hydrological study to determine whether water quality and water quantity issues can be adequately addressed. This is the biggest expansion since she's been on the Council. She lived across from a gravel pit for over 20 years. They were the best neighbors, and she didn't want the area to turn into developed lots. She's more pro-gravel mining than anti-gravel mining. This is the first one she's not comfortable with moving forward. The County will have to put up money to do this study. It's a public resource. . .
>
> Brenner stated she's not comfortable moving forward with this designation until she's seen a water study. She doesn't want to give anyone a mistaken impression or expectation. . .
>
> Brenner stated over 400 acres total will be mined. Most of the people who lived there didn't have any idea of this kind of expansion. That wasn't part of what they should or would have known. If the Council takes its time to figure this out, the resource isn't going to go anywhere. They aren't going to lose the resource.

AR 1053. Council Member Pete Kremen, the third vote in opposition to the proposed amendment, noted his agreement with the comments of both Weimer and Brenner, and also expressed his concern that the resource would not even end up being used in Whatcom County. AR 1054. According to area residents, the property at issue is located only a few minutes from the Skagit County border, and 45 to 60 minutes from most Whatcom County areas of development. AR 1115.

Merely because the County has not required project specific environmental impacts to be analyzed at the designation stage in the past does not mean that a council member's desire for a basin-wide water study prior to designation is not in the public interest. There were many concerns expressed about water throughout the process from not only property owners, but also from the Lummi Tribe, the Nooksack Tribe, and the Whatcom Land Trust. *See, for example*, AR 1059-1062, 1065-1067, 1072-1086, 1102-1127, 1131-1133, 1148-1150. It was entirely legitimate for a council member to find that the proposed amendment would not be in the public interest without a full, independent study of this important watershed area. Though not legally required under SEPA, there is certainly value in having more analysis of the significant water resource issues raised in this locality completed prior to relying on this area as a future source of mineral resources and perhaps foregoing designation of alternative sites.

Comprehensive plan Policy 8P-1 specifically recognizes the discretion inherent in the MRL selection process. It states that the County will "*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.*" (emphasis added) The public, tribes, and other interested organizations raised issues

regarding the compatibility of the MRL designation with the protection of valuable water resources, including the maintenance of essential fish habitat, and it was entirely legitimate for council members to vote against the proposal if they could not be assured that public interest in the protection of water resources was not furthered by the designation.

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

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

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

V. Conclusion

In this case, the County did not adopt any changes to its GMA compliant comprehensive plan or development regulations, nor was it mandated by the GMA or other law to adopt the proposed amendments.

The decision at issue in this case was discretionary and the Council clearly had no duty to approve it under the GMA, its comprehensive plan or the county code. The County respectfully requests that the Court deny this appeal.

Respectfully submitted this 7th day of March, 2014.

DAVID S. MCEACHRAN
Whatcom County Prosecuting Attorney

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Civil Deputy Prosecuting Attorney
Attorney for Respondent

APPENDIX A

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.

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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

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[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."

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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

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[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).

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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

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[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.

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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]

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[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).

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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.

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> 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.

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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).

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[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.

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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

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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.

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[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.

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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

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[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.

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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

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[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 Nor'West 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.

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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

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[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.

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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.

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[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.

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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.

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APPENDIX B

Chapter 2.160
COMPREHENSIVE PLAN AMENDMENTS

Sections:

2.160.010 Authority.

The Growth Management Act (GMA) requires that an adopted comprehensive plan shall be subject to continuing review and evaluation, any amendments or revisions to the comprehensive plan conform to the requirements of Chapter 36.70A RCW, and that any changes to development regulations or official controls are consistent with and implement the comprehensive plan (RCW 36.70A.130(2)). Additionally, the GMA requires that the county establish procedures whereby proposed amendments or revisions of the comprehensive plan are considered by the county council no more frequently than once every year; except, that amendments may be considered more frequently under the following circumstances:

A. The initial adoption of a subarea plan that does not modify the comprehensive plan policies and designations applicable to the subarea;

B. Adoption or amendment of a shoreline master program;

C. The amendment of the capital facilities element of a comprehensive plan that occurs concurrently with the adoption or amendment of a county or city budget; or

D. To resolve an appeal of the comprehensive plan filed with the Growth Management Hearings Board or court. (Ord. 2008-060 Exh. A).

2.160.020 Purpose.

The purpose of this chapter is to define the types of plan amendments and establish timelines and procedures to be followed when proposals are made for amending or revising the Whatcom County Comprehensive Plan. (Ord. 2008-060 Exh. A).

2.160.030 Definitions – Types of comprehensive plan amendments.

A. "Capital facilities element amendment" means a proposed change or revision to the capital facilities element of the comprehensive plan, including the six-year capital improvement program.

B. "Comprehensive plan amendment" means a proposed change or revision to the Whatcom County Comprehensive Plan, including but not limited to a capital facilities element amendment, text amendment, change to the comprehensive plan designations map or urban growth area amendment.

C. "Text amendment" means a proposed change or revision in the text of any element of the comprehensive plan including revisions to the goals, policies, objectives, principles or standards of the plan.

D. "Urban growth area amendment" means a proposed change or revision to an urban growth area boundary as adopted by the comprehensive plan.

E. "Final concurrent review" means the consideration by the county council of all comprehensive plan amendments that were reviewed and recommended by the council during the previous docket year. This review shall take place on or about February 1st of the year after the previous docket year. (Ord. 2008-060 Exh. A).

2.160.040 Application.

A. Applications for suggested comprehensive plan amendments shall include at least the following information:

1. A description of the comprehensive plan amendment being proposed including proposed map or text changes;

2. An explanation of how the comprehensive plan amendment relates to the approval criteria in WCC 2.160.080, Approval criteria;

3. A complete State Environmental Policy Act (SEPA) environmental checklist; and

4. Name, address, and phone number of the applicant, and, if applicable, assessor's parcel number, section, township, and range.

B. The department of planning and development services may prescribe additional information requirements and shall provide forms for proposed comprehensive plan amendments.

C. Completed applications for comprehensive plan amendments must be received by planning and development services by December 31st to be considered for initiation during the next calendar year. Applications proposed by planning and development services are not subject to the December 31st deadline. (Ord. 2008-060 Exh. A).

2.160.050 Initiation of comprehensive plan amendments.

A. Comprehensive plan amendments shall be initiated by a resolution of the county council adopted by majority vote on or about March 1st each year.

B. Planning and development services may request a comprehensive plan item be initiated at any time during the year. Requested amendments of this type shall be placed on the docket by a majority vote of the county council and will be considered concurrently with other docketed items in accordance with the procedures in WCC 2.160.100.

C. In determining whether to initiate a comprehensive plan amendment, the county council will consider the following factors:

1. If the amendment relates to a site within a city's urban growth area, modification of a city's urban growth area boundary, or amends comprehensive plan text relating to a city's urban growth area, the county shall consult with and consider the comments from the city, including comments relating to the availability of services. Proposed amendments to city urban growth areas shall be processed in accordance with adopted interlocal agreements between the city and county and any subsequent amendments;

2. If the amendment relates to removing designated agricultural, forestry or mineral resource lands, the council shall consider any long-term trends in the loss of resource lands and cumulative impacts of approving such an amendment;

3. Whether the county has already set a future date for examining the area or issue; and

4. Planning and development services' existing work plan and the additional work the amendment would require of planning and development services staff.

D. The following amendment proposals shall be deemed initiated and included in the resolution that initiates comprehensive plan amendments:

1. Amendment proposals that the county council approves for initiation from those applications received within the application period;

2. Comprehensive plan amendments proposed by councilmembers that the county council approves for initiation;

3. Amendment proposals timely submitted by cities and approved by the county council;

4. Amendment proposals timely submitted by the county executive.

E. The resolution setting the list of comprehensive plan amendments initiated for the amendment cycle, the docket, shall be forwarded to the department of planning and development services. Upon receipt of the resolution, the department shall make copies available to the public and begin the process for the review and evaluation of the proposed amendments as set out in WCC 2.160.070.

F. County planning and development staff shall forward a copy of any suggested plan amendment which would modify a city's urban growth area to the appropriate city

staff within 15 days of receipt, and shall notify the city of the date the county council is scheduled to review the proposed amendment at least 10 days prior to consideration by the county council. (Ord. 2008-060 Exh. A).

2.160.060 Docket of initiated comprehensive plan amendments.
A. The department of planning and development services shall keep a docket of initiated comprehensive plan amendments and WCC Title 20 map and text amendments as initiated by the procedures in WCC 2.160.050.

B. The docket shall include the following information:

1. File number;

2. Name and address of the person or agency proposing the plan amendment;

3. Type of amendment being proposed and description of the amendment;

4. Initial year of proposed amendment;

5. Section, township and range of affected area, if applicable.

C. The docket and all application files shall be available for public review at the planning and development services department during normal business hours. (Ord. 2008-060 Exh. A).

2.160.070 Review and evaluation of comprehensive plan amendments – Staff report.
A. The department of planning and development services shall conduct environmental review under SEPA and prepare reports including recommendations on all initiated comprehensive plan amendments and forward both the reports and the result of the environmental review to the planning commission.

B. Reports shall evaluate the merits of each initiated amendment based on the approval criteria of WCC 2.160.080.

C. If a proposed amendment relates to a site within a city's urban growth area, will modify a city's urban growth area or will amend text relating to a city's urban growth area, planning and development services staff shall identify and follow any additional procedures called for in an adopted interlocal agreement between the county and that city. (Ord. 2008-060 Exh. A).

2.160.080 Approval criteria.
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.

5. Urban growth area amendments that propose the expansion of an urban growth area boundary shall be required to acquire development rights from a designated TDR sending area.

a. One development right shall be transferred for every five acres included into an UGA. The county council may modify this requirement if a development agreement has been entered into that specifies the elements of development in the expanded UGA. The development agreement should include, but not be limited to, affordable housing, density, allowed uses, bulk and setback standards, open space, parks, landscaping, buffers, critical areas, transportation and circulation, streetscapes, design standards and mitigation measures.

b. Exceptions to required TDRs include urban growth area expansion initiated by a government agency, correction of map errors, properties that are urban in character, or expansions where the public interest is served.

c. Urban growth area expansion initiated by the county, cities or other agencies shall be subject to review by county and city planning staff, and the appropriate administrative bodies, to determine whether the subject site is appropriate for designation as a TDR receiving area. (Ord. 2008-060 Exh. A).

2.160.090 Review and evaluation of comprehensive plan amendments – Planning commission.

A. The planning commission shall receive the staff's findings and recommendations for the initiated amendments and shall take public comment and hold public hearing (s) on the amendments.

B. At the conclusion of the public hearings and comment period, the commission shall evaluate the merits of each amendment in relationship to the approval criteria of WCC 2.160.080 and shall make a recommendation to the county council as to whether the

amendments should be approved, approved with modifications or denied. The planning commission shall then cause written findings of fact, reasons for action, conclusions and recommendations to be prepared for each amendment. The written findings of fact, reasons for action and conclusions shall be forwarded to the county council in the form of a proposed ordinance(s) for its consideration. (Ord. 2008-060 Exh. A).

2.160.100 Review and evaluation of comprehensive plan amendments – County council.

A. Comprehensive plan amendments, except for amendments adopted by emergency ordinance pursuant to Section 2.40 of the Whatcom County Charter, shall be adopted by ordinance after a recommendation by the planning commission has been submitted to the council for consideration. All initiated amendments to the comprehensive plan with the exception of amendments set forth in WCC 2.160.010 shall be considered by the council no more frequently than once a year and concurrently so the cumulative effect of the various proposals can be ascertained. The council may schedule such additional public hearings as the council deems necessary to serve the public interest.

B. If, after deliberating, the council believes the public interest may be better served by departing from the recommendation of the planning commission on an initiated amendment, the council shall conduct a public hearing on that amendment.

C. The council shall decide to approve, approve with modifications or deny comprehensive plan amendments based upon the approval criteria in WCC 2.160.080. Those amendments may be recommended for final concurrent review throughout the year. Final concurrent review by the county council should occur on or about February 1st.

D. The council shall send recommended comprehensive plan amendments on to final concurrent review by December 31st. Amendments that have not been either recommended or denied by the council by December 31st will be re-docketed for the next amendment cycle with the same number with which they were initially docketed. (Ord. 2008-060 Exh. A).

2.160.110 Fees.

A. Application fees shall not be required for any application submitted by the county council, county councilmembers, county executive, planning commission, and county planning and development services.

B. All other applicants shall pay application fees as specified in the Unified Fee Schedule.

C. Once an amendment is initiated by resolution of the county council, the applicant shall pay the initiation fee within 15 days. The county council may take official action to waive the initiation fee at the time it approves the initiating resolution if it finds the proposed amendment will clearly benefit the community as a whole and will not be for private financial gain. (Ord. 2008-060 Exh. A).

APPENDIX C

Chapter Eight
RESOURCE LANDS

INTRODUCTION

The growth and harvest of farm products, re-generation and harvesting of timber, and excavation of minerals all shape Whatcom County's landscape and strongly influence the economy. Resource lands, which include agriculture, forestry, and mineral resource lands, also largely represent Whatcom County's cultural heritage. These natural resource activities have been major industries since settlement began in the area.

Chapter Organization

This chapter is divided into three sections: Agricultural Lands, Forest Resource Lands, and Mineral Resources. The action plans for all three sections appear at the end of the chapter.

Purpose

This chapter contains goals and policies designed to identify and protect the important natural resource lands found in Whatcom County as defined by 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 lands 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.

Process

Each section of this chapter includes a description of the process followed in creating that section.

GMA Goals, County-Wide Planning Policies, and Visioning Community Value Statements

The following goals and policies in this chapter have been 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 the 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

The Agricultural Lands, Forest Resource Lands, and Mineral Resources sections of this chapter address Goal 8 of the GMA, which reads:

> "**Natural Resource Industries**. Maintain and enhance natural resource based industries, including productive timber, agricultural, and fisheries industries.

MINERAL RESOURCES - INTRODUCTION

Purpose

The purpose of this section is to guide Whatcom County in land use decisions involving lands where mineral resources are present.

Process

To address the mandates of the Growth Management Act, Whatcom County formed a Surface Mining Citizens' Advisory Committee in the 1990s to produce, through a consensus process, the issues, goals, and policies found in this chapter. Planning staff drafted the sub-section on mineral designations following review and comments from the committee. The committee was comprised of a cross-section of community members including mining operators, foresters, farmers, and rural homeowners representing diverse interests and geographic areas in Whatcom County. The County Council adopted the original mineral resource provisions in the 1997 Comprehensive Plan. These provisions were updated in 2004-2005 after reviewing the GMA, Surface Mining Advisory Committee recommendations and new information.

GMA Requirements

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.

MINERAL RESOURCES - BACKGROUND SUMMARY

Mining activities in Whatcom County have taken place since the 1850s, though the nature, scope and extent of such activities has changed considerably through time. These changes have reflected the economics involved at each point in time at least as much as they reflect the geologic character of Whatcom County. Historically, the more important mineral commodities of Whatcom County have been coal, gold (placer and lode), sandstone, clay, peat, limestone, olivine, and sand and gravel aggregate, with the latter three being especially important at present. Many other commodities, however, have been prospected for or extracted.

In 2004, there were 24 Mineral Resource Land (MRL) designations throughout the County, covering 4,204 acres. For planning purposes, the Surface Mining Advisory Committee recommended using an annual demand for sand and gravel of 12.2 cubic yards per capita and annual demand for bedrock of 1.3 cubic yards per capita in the 2004-05 Comprehensive Plan update, consistent with the rates in the 1997 Comprehensive Plan. There were approximately 108 people directly employed by the mining industry in 2000 (Greater Whatcom Comprehensive Economic Development Strategy, p. III-16).

In Whatcom County, sand and gravel mining occurs mainly east of Interstate-5 and north of Bellingham, with some exceptions. The more important areas from east to west include: (1) the Siper and Hopewell Road area two miles north of Nugents Corner; (2) the Breckenridge Road area just east of Nooksack; (3) the Pangborn and Van Buren Road area two and one half miles southwest of Sumas; (4) the Pole and Everson-Goshen Road area to the southwest of Everson;

(5) the Axton Road area one mile east of Laurel; and (6) the Valley View Road area three miles to the east of Blaine. It is estimated that between 1999-2001 approximately 1.73 million cubic yards of sand and gravel from upland pits were excavated annually in Whatcom County (Report Engineering Geology Evaluation Aggregate Resource Inventory Study Whatcom County, Washington (GeoEngineers, Inc., Sept. 30, 2003, p.7).

Limestone has been mined since the early 1900s in Whatcom County. Historically, the main use for limestone was for portland cement manufacturers and pulp and paper industries. Today, limestone is mined in the Red Mountain area north of Kendall and is primarily used for rip-rap to mitigate effects of flooding, for crushed rock, and for pulp mills. Limestone mining has decreased significantly over the years. In 1966, about 500,000 tons of limestone were produced annually from deposits on Red Mountain and from deposits north of Maple Falls. Since then, limestone mining has decreased significantly.

Whatcom County is home to one of the largest known deposits of olivine in the United States, located in the Twin Sisters Mountain. The extraction of high quality Twin Sisters dunite (olivine) by the Olivine Corporation, largely from the Swen Larsen Quarry, has ranged from 400 tons in the early years of operation to a more recent annual average of approximately 70,000 to 80,000 tons.

In the past extraction of river gravel occurred primarily within the banks of the Nooksack River between Deming and Lynden, as determined by aggregate size and composition. As of March, 1993, 34 gravel bars had approved status for extraction. Between 1990 and 1993, an average of 170,000 cubic yards per year of river gravel were removed from the Nooksack River. Between 1960 and 1987, removal rates averaged about 50,000 cubic yards per year. However, because of federal regulations and decreasing seasonal windows in which gravel could be removed from the river, there has not been any river bar scalping on the Nooksack River since 1995.

MINERAL RESOURCES - ISSUES, GOALS, AND POLICIES

General Issues

While urbanization creates demand for sand and gravel resources, it may also encroach upon or build over those same resources, rendering them inaccessible. Strong community opposition to mining near residential, agricultural, or sensitive environmental areas may also limit extractive opportunities. Adequate resource protection could help to assure the long-term conservation of resource lands for future use. It would also help to ensure a competitive market and to guard against inflated land prices by allowing the supply of minerals to respond to the demand of a free market. Helping the aggregate industry and the associated businesses, trades, and export markets creates jobs and stimulates the economy, to the benefit of the county.

Potential conflicts with other land uses, however, may include increased noise, dust, visual blight, traffic, road wear, and neighboring property devaluation. Unreclaimed mines can affect property values while at the same time nearby residents may use the area for shooting, dirt bike riding, and other activities. Controlling trespassing to surface mining can be a significant safety issue for mine operators. Property rights issues range from the right to mine and use the value of mineral resource land to the right to live in an area with a high quality of life and retain home values. Citizens may be generally unaware of the county zoning of surrounding property and the mining uses that are allowed. These and other factors may contribute to a climate of distrust and hostility between the aggregate industry and property owners.

Environmental issues associated with surface mining include groundwater contamination and disruption of fish and wildlife habitat. Surface mines do have the potential, however, if reclaimed properly, to create wetlands and fish and wildlife habitat, possible productive agricultural land for a limited number of crops, or provide land for parks, housing, industrial and other uses.

As a natural result of geologic forces, it is not uncommon in Whatcom County to have excellent mineral deposits located under prime farmland soil and above an aquifer recharge area. Mining in these areas can substantially reduce the productive capacity of the soil and make the underlying aquifer more susceptible to contamination. Removing the soil overburden eliminates the natural filtration system, exposing the aquifer to direct contamination from turbidity, industrial spills, illegal dumping and agriculture products. Removing, stockpiling and spreading soil creates an unacceptable risk of compromising the productive capacity of the most productive and versatile farmland in the County. Another potential problem is that digging out a side hill and/or through a clay barrier could tap the groundwater and suddenly drain an aquifer. This creates a conflict between competing natural resource industries; agriculture and mining. While agriculture is a sustainable industry, mining is an industry that relies on a fixed, nonrenewable resource.

Associated mining activities such as rock crushing on-site can greatly increase the "industrial atmosphere" experienced by nearby property owners. This activity, however, helps to keep material transportation costs down. In addition, accessory uses are a necessary part of most operations, and to carry them out on site is cost-effective.

GOAL 8J: **Sustain 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.**

Policy 8J-1: Conserve for mineral extraction designated mineral resource lands of long-term commercial significance. The use of adjacent lands should not interfere with the continued use of designated mining sites that are being operated in accordance with applicable best management practices and other laws and regulations.

Policy 8J-2: Support the use of new technology and innovative techniques for extraction, processing, recycling and reclamation. Support recycling of concrete and other aggregate materials. Support the efficient use of existing materials and explore the use of other materials which are acceptable substitutes for mineral resources.

Policy 8J-3: Minimize the duplication of authority in the regulation of surface mining.

GOAL 8K: **Ensure 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.**

Policy 8K-1: Avoid significant mineral extraction impacts on adjacent or nearby land uses, public health and safety, or natural resources.

Policy 8K-2: Consider the maintenance and upgrade of public roads. Address all truck traffic on county roads in a fair and equitable fashion.

Policy 8K-3: Avoid adversely impacting water quality. The protection of aquifers and recharge zones should have precedence over surface mining in the event it is determined by the county that adverse impacts cannot be avoided through the standard use of best management practices. Avoid contamination of aquifers by using uncontaminated material for reclamation or on-site storage.

Policy 8K-4: Require, where there exists County jurisdiction, the reclamation of mineral resource lands on an ongoing basis as mineral deposits are depleted. Best Management Practices should be used to achieve this.

Policy 8K-5: Have an ultimate use for land used for mineral extraction which will complement and preserve the value of adjoining land.

Policy 8K-6: Require security to cover the costs of reclamation prior to extraction activity, and insurance policies or a similar type of protection as appropriate to cover other potential liabilities associated with the proposed activity.

Rural and Urban Areas

Many of the rural areas in Whatcom County have been and are being used for mineral extraction. Low density rural areas with potential natural resources such as sand and gravel may be able to accommodate a variety of uses, and surface mining has been a traditional use. Significant mineral deposits occur in certain parts of the rural areas. Some of these areas have higher surrounding residential densities than others, and many rural residents expect less intrusive forms of land uses. Determining which areas are the most appropriate for mineral extraction is a difficult and challenging task.

GOAL 8L: Achieve 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.

Policy 8L-1: Discourage new residential uses from locating near designated mineral deposit sites until mineral extraction is completed unless adequate buffering is provided by the residential developer.

Policy 8L-2: Protect areas where existing residential uses predominate against intrusion by mineral extraction and processing operations.

Policy 8L-3: Allow accessory uses to locate near or on the site of the mineral extraction source when appropriate. Authorize crushing equipment to locate near the mineral extraction source as a conditional use provided that all pertinent regulatory standards are maintained. Site asphalt and concrete batch plants as a conditional use, addressing potential impacts for the site.

Policy 8L-4: Buffer mineral resource areas adjacent to existing residential areas. Buffers preferably should consist of berms and vegetation to minimize impacts to adjacent property owners. Buffers should be reduced for a limited period of time during reclamation if quality minerals are contained therein.

Agricultural Areas

There is considerable overlap between high quality aggregate lands and high quality agriculture lands. Several deposits represent a primary source for sand and gravel and, as well, form the

parent material for prime agricultural soils. Both large, deep, open pit mines and smaller projects removing ridges and high ground have been operating in these overlap areas in the agricultural district. The smaller projects usually occur on dairy farms where corn or grass is cultivated. Potential drawbacks from commercial mining in agricultural areas may include reclamation problems, the loss of scenic terrain, an increased risk of groundwater contamination from future agricultural practices, soil rehabilitation difficulties, negative cost-benefit balance and drainage may also be adversely affected.

Some farmers want the freedom of choice to use their land for farming or surface mining, especially in cases where mining income could "save the farm." Others want to preserve farmland. Some questions to consider are the extent to which surface mining should occur on farmland and the extent to which it should be reclaimed back to farmland if it does occur.

The agriculture zone is sparsely populated and there are fewer conflicts between homeowners and mining industries than in urban or rural zones. Nevertheless, mining activities can significantly impact nearby landowners.

GOAL 8M: **Recognize the importance of conserving productive mineral lands and conserving productive agricultural lands within or near the agricultural zones of Whatcom County without jeopardizing the critical land base that is necessary for a viable agricultural industry.**

Policy 8M-1: Allow mining in the agriculture zone that would enhance farming by leveling knolls and ridges when appropriate. In these areas, reclamation of mineral extraction sites should occur in a timely fashion. The site should also be restored for uses allowed in an agricultural zone and blend with the adjacent landscape and contours.

Policy 8M-2: Avoid the use of designated agricultural land for mineral or soil mining purposes unless the soils can be restored to their original productive capabilities as soon as possible after mining occurs.

Policy 8M-3: Allow accessory uses such as washing and/or screening of material to locate near or on the site of the mineral extraction source when appropriate. Within MRL designations, authorize application for mineral processing facilities such as rock crushers and concrete plants through the conditional use process.

Forestry Areas

Surface mining of gravel and rock resources is an integral part of a forest landowner's forest management. Adequate supplies of gravel and rock not only add to the economics of forest management, but also reduce environmental impacts of forest roads. Rock crushing helps conserve a valuable commodity by reducing the amount of material necessary for road construction. The use of crushed rock on roads reduces the amount of sediment developed and better protects water quality.

Zoning densities in the Forestry Districts protect the access to mineral resources in the future. These regions contain most of the county's hard rock reserves, such as olivine and limestone. In some areas, the soils overlaying mineral deposits may have a lower productivity for growing timber compared to the high mineral resource value.

As lowland sand and gravel resources become exhausted or unavailable, the commercial potential of mining in forest zones increases enough to warrant the expense of hauling. While this would increase the potential for impacts, such as heavier truck traffic, land use conflicts may be minimal based on the lack of or low residential densities in these zones.

GOAL 8N: **Maintain the conservation of productive mineral lands and of productive forestry lands within or near the forestry zones of Whatcom County.**

Policy 8N-1: Recognize the importance of forest lands in the county and the importance and appropriateness of surface mining as part of conducting forest practices within the forest zones.

Policy 8N-2: Allow rock crushing, washing and sorting in the forest zones when appropriate as long as conflicts with other land uses can be mitigated.

Policy 8N-3: Allow commercial surface mining operations in the forest zones when appropriate as long as conflicts with other land use zones can be mitigated.

Policy 8N-4: Carefully consider the siting of asphalt and concrete batch plants due to possible adverse impacts.

Riverine Areas

Proponents of river bar scalping support it for both economic and flood control purposes. River bar aggregate supplies high quality rock material (although it produces poor quality sand due to excessive organic material). In addition, if done properly, bar scalping can stabilize a section of the river channel and decrease flood damage immediately downstream.

Although the public believes river bar scalping will significantly reduce flooding along the entire river, in fact its benefits are local and it may have negative effects in areas surrounding the mining site. For example, if done improperly gravel removal can de-stabilize the river channel locally and increase, rather than decrease, flood damage downstream. After intensive bar scalping, floodwater that is normally stored on the floodplain of the mined reach can be concentrated and dumped on the reach immediately downstream. If gravel mining exceeds the rate of replenishment from upstream, the river bed may lower both upstream and downstream; this bed degradation can undermine bridge supports and other structures, cause adjacent banks to erode (or stabilize, depending on how much and where gravel is removed), lower groundwater tables adjacent to the river, and damage riparian vegetation.

Improper mining methods in fish spawning reaches can de-stabilize spawning gravel or clog it with silt, remove cover vegetation or trap smolts during out-migration. Over harvesting of gravel can erode the river bed and expose the underlying substrate, reducing or eliminating pool and riffle habitat for fish and other aquatic animals. Finally, petroleum spills from mining equipment can degrade local surface water quality if not responded to properly.

While river gravel is a renewable resource that could extend the life of other Whatcom County gravel resources, river bars are not a reliable source from year to year. The amount of gravel that can be mined varies with seasonal and yearly rates of gravel deposition; high and low water levels and timing; and fish migration, spawning and out-migration timing. Various costs raise the price of river bar gravel. For example, there are several streams (e.g. Boulder Creek, Porter Creek, Glacier Creek, etc.) which may offer significant quantities of sand and gravel, but which are not currently

being mined due to prohibitive transportation costs. Other factors include the cost and limited availability of access easements to the river, the repeated handling that is necessary for extraction and processing of the material, and the cost of complying with regulations.

Finally, many state and federal regulations restrict scalping locations and practices. The cost and time delay of duplicate regulation, environmental restrictions, royalty charges and the regulatory process are deterrents to river bar mining.

GOAL 8O: **Support the extraction of gravel from river bars and stream channels in Whatcom County for flood control purposes and market demands where adverse hydrologic and other environmental effects are avoided or minimized.**

Policy 8O-1: Designate river gravel as a supplemental source to upland reserves.

Policy 8O-2: Allow, when appropriate, the stockpiling, screening, and washing of river gravel in all zone districts when associated with river gravel extraction as close to the extraction site as possible to keep handling and transportation costs to a minimum.

Policy 8O-3: Design river gravel extraction to work with natural river processes so that no adverse flood, erosion, or degradation impacts occur either upstream or downstream of extraction sites. Base mining extraction amounts, rates, timing, and locations on a scientifically determined sediment budget adjusted periodically according to data provided by a regular monitoring plan.

Policy 8O-4: Locate and operate river gravel extraction to provide long-term protection of water quality and quantity, fish and wildlife populations and habitat, and riparian vegetation.

Policy 8O-5: Plan and conduct operations on rivers and streams so that short- and long-term impacts and hazardous conditions are either prevented or held to minimum levels which are not harmful to the general public. Create as little adverse impact on the environment and surrounding uses as possible.

Policy 8O-6: Fully consider the recommendations of the Flood Hazard Management Committee to encourage gravel bar scalping that decreases the likelihood of flooding and lowers the costs of flood damage and repair, flood management, and emergency services.

Policy 8O-7: Support the use of gravel from tributary streams for flood hazard control, provided environmental impacts are fully addressed.

Policy 8O-8: Support the use of public access easements that exist to allow gravel removal.

Policy 8O-9: Work with other jurisdictions and related agencies to reduce or eliminate redundant regulations, streamline the permitting process, and provide greater opportunities for appropriate river gravel extraction to enhance other important resources, specifically agricultural.

Mineral Designations

Whatcom County's interim designation work, accomplished in 1992, was based upon the following statutory direction:

> "On or before September 1, 1991, each county [required to plan under the Act] shall designate where appropriate: ... Mineral 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).
>
> ""Minerals" include gravel, sand, and valuable metallic substances" [RCW 36.70A.030(11)].

The Growth Management Act also directed counties to:

> "adopt development regulations ...to assure the conservation of... [designated] mineral resource lands..." [RCW 36.70A.060(1)].

Whatcom County responded to the above mandates as follows:

- By adopting interim Mineral Resource Lands (MRL) designations covering 1,250 acres of lowland sand and gravel deposits. All of these areas had existing reclamation permits from the Washington State DNR covering at least twenty acres.
- By restricting density to one unit per twenty acres within MRL designations and, more recently, by requiring disclosure notices on property and development within three five feet of the MRLs.

The GMA goes on to state that counties:

> "shall review these designations...when adopting their comprehensive plans ...and may alter such designations...to insure consistency" [36.70A.060(3)].

This is the most pertinent part of the Act in terms of plan direction.

The Washington State Department of Community Development was required to produce "Procedural Criteria," (Chapter 365-195 WAC), to further assist interpretation of the act by counties and cities. This helped to further elucidate the link between mineral designations and the GMA comprehensive plan. The "Procedural Criteria" provides guidance in Section 400, Natural Resource Lands, as follows:

> Prior to the development of comprehensive plans, cities and counties planning under the Act ought to have designated natural resource lands of long-term commercial significance and adopted development regulations to assure their conservation. Such lands include agricultural lands, forest lands and mineral resource lands. The previous designations and development regulations shall be reviewed in connection with the comprehensive plan adoption process and where necessary be altered to ensure consistency.

Generally, natural resource lands should be located beyond the boundaries of urban growth areas. In most cases, the designated purposes of such lands are incompatible with urban densities.

> The review of existing designations should, in most cases, be limited to the question of consistency with the comprehensive plan, rather than revisiting the entire prior designation and regulation process. However, to the extent that new information is available or errors have been discovered, the review process should take this information into account.
>
> Review for consistency in this context should include whether the planned use of lands adjacent to agriculture, forest or mineral resource lands will interfere with the continued use in an accustomed manner and in accordance with the best management practices of the designated lands for the production of food, agricultural products, timber, or for the extraction of minerals.

If these guidelines are followed, then the comprehensive plan should address mineral designations by asking the following questions: Is there new information that might lead to different designations at this point and have errors been made?

Interim designations, as discussed above, were based upon minimal criteria. A more complete set of designation criteria is necessary in order to better define which areas in the county are appropriate for mineral designations. These designations should also include quarry rock and valuable metallic mineral sites because interim designations did not include these resources.

The interim designations were also based more upon a twenty year planning horizon than a fifty year planning horizon. The Minimum Guidelines to Classify Agriculture, Forest, and Mineral Lands (Chapter 365-190 WAC) state that "the Department of Natural Resources has a detailed minerals classification system counties and cities may choose to use" (section 070(b). This classification system recommends a fifty year planning horizon. The Surface Mining Advisory Committee also has recommended planning for a fifty year supply. Implementing this goal would require the adoption of criteria allowing for additional mineral resource areas.

Additional MRLs were, in fact, designated when the Comprehensive Plan was adopted in 1997 in an attempt to plan for a fifty-year supply of mineral resources. However, in 2004, the Surface Mining Advisory Committee concluded that the existing MRLs do not contain a fifty-year supply of mineral resources. The Surface Mining Advisory Committee estimated that, as of 2005, there will be a supply of approximately 60.7 million cubic yards of sand and gravel and 8.7 million cubic yards of bedrock in existing MRLs that will be available for future use.

The fifty year demand for minerals in Whatcom County is difficult to project and requires many assumptions. Based upon Whatcom County's per capita rate of consumption of 12.2 cubic yards of sand & gravel and 1.3 cubic yards of bedrock that is being utilized for official planning purposes, approximately 174.4 million cubic yards would be required over the fifty year planning period from 2005-2054. The Washington State Department of Natural Resources, however, has recommended a per capita rate that would result in a fifty year demand of approximately 129 million cubic yards in Whatcom County. This estimate assumes that conservation, recycling, increased cost, high density development (which requires less rock per person), and political decisions will result in reduced demand despite continued population growth. Conversely, some factors may increase demand for aggregate such as the construction of mass transportation systems, the possible substitution of masonry materials for wood products, and increased exports to Canada or other United States counties.
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. The policies and criteria below are meant to guide meeting the demand for construction aggregate.

GOAL 8P: **Designate 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.**

Policy 8P-1: Seek to designate a 50 year supply of commercially significant construction aggregate supply to the extent compatible with protection of water resources, agricultural lands, and forest lands.

Policy 8P-2: Ensure that at least 50% of the total areas designated for construction aggregate is within ten miles from cities and urban growth areas where feasible.

Policy 8P-3: Ensure that designations of urban growth boundaries are consistent with mineral designations by considering existing and planned uses for the designated areas and adjacent properties. Intergovernmental agreements should demonstrate how future land uses of mined areas will protect underlying aquifers, given the increased groundwater vulnerability to contamination.

Policy 8P-4: Allow mining within designated MRLs through an administrative approval use permit process requiring:

(1) on-site environmental review, with county as lead agency, and
(2) application of appropriate site specific conditions, and
(3) notification to neighboring property owners within 1,000 feet to insure opportunity for written input and/or appeal, and
(4) access to de novo review by the Hearing Examiner if administrative approval or denial is appealed.

Policy 8P-5: Consider potential resource areas identified in the Report Engineering Geology Evaluation Aggregate Resource Inventory Study Whatcom County, Washington (GeoEngineers, Inc., Sept. 30, 2003) during county review of land development projects in order to avoid development incompatible with mineral resource extraction.

Policy 8P-6: Work with the Port of Bellingham, the City of Bellingham, or waterfront property owners to facilitate the importation of mineral resources necessary to provide County citizens with adequate mineral resources at reasonable prices.

Fish and Wildlife

Utilization of mineral resource lands can impact habitat, including riparian areas, stream flows, channel habitat structure and water quality.

Goal 8Q: **Ensure that mining avoids adverse impacts to the habitat of threatened and endangered fish and wildlife species.**

Policy 8Q-1: Ensure that adequate riparian buffers are maintained along rivers and streams.

Policy 8Q-2: Ensure proper treatment of wastewater prior to discharge.

Policy 8Q-3: Provide and maintain best management practices for erosion control to prevent sedimentation.

Policy 8Q-4: Provide proper storage and containment of hazardous materials, and provide for appropriate on-site spill response and clean-up materials and personnel.

Policy 8Q-5: Avoid surface mining in the floodplain.

Policy 8Q-6: Allow river bar scalping, except where it would adversely affect spawning or critical habitat areas.

Policy 8Q-7: Work with state and federal agencies to develop policies and regulations regarding in-stream gravel extraction to ensure that spawning or critical habitat is not adversely impacted and that flooding or erosion in surrounding areas is not increased.

MINERAL RESOURCE LANDS (MRL) - DESIGNATION CRITERIA

I. Non-Metallic Mineral Deposits

General Criteria

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:

   - 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% (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, 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 a list of no less than three qualified consultants supplied by the county and water purveyor.

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

Additional Criteria for Designated Urban and Rural Areas

10. Abutting parcel size density must not exceed one unit per nominal five acres for more than 25% of the perimeter of the site unless project specific mitigation is created.

Additional Criteria for Designated Forestry Areas

11. Must demonstrate higher value as mineral resource than forestry resource based upon:
    - soil conditions
    - accessibility to market
    - quality of mineral resource
    - sustainable productivity of forest resource

Additional Criteria for Designated Agricultural Areas

12. Prohibit MRL designations in areas designated Agriculture by the Whatcom County Comprehensive Plan that contain "Prime Farmland Soils" as listed in Table 5, Soil Survey of Whatcom County Area, Washington, U.S. Department of Agriculture Soil Conservation Service. A Goldin (1983).

II. River and Stream Gravel

13. MRL Designation status applies to river gravel bars possessing necessary permits and containing significant quality reserves.

14. MRL Designation status may apply to those upland sites located in proximity to river gravel sources and used primarily for handling and processing significant amounts of river gravel.

III. Metallic and Industrial Mineral Deposits

15. For metallic and rare minerals, mineral designation status extends to all patented mining claims.

16. Mineral Resource Designation status extends to all currently permitted industrial mineral deposits of long-term commercial significance.

17. All other non-patented mineral deposits must meet the non-metallic MRL Designation criteria, numbers 6 through 12, as applicable.

MINERAL RESOURCES - SITE SELECTION METHOD

1. Sites meeting Mineral Resources Designation Criteria 1-5 (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.

CERTIFICATE

I CERTIFY that on this date I mailed, or otherwise caused to be delivered, a copy of the document to which this Certificate is attached to this Court and all parties or their counsel of record, addressed as follows:

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3/7/14
DATE