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No. 53363-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WRIGHT'S CROSSING, LLC; SCOTT B. THOMPSON,
its Manager/Owner,

Appellant,

v.

ISLAND COUNTY, acting through its Board of Commissioners;
Environmental and Land Use Hearings Office acting through the Western
Washington Region Growth Management Hearings Board,

Respondents,

And

WHIDBEY ENVIRONMENTAL ACTION NETWORK ("WEAN"),

Intervenor/Respondent

PETITIONERS' OPENING BRIEF

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I. INTRODUCTION

Appellants Wright's Crossing, LLC, and its Manager Scott Thompson (collectively "Wright's Crossing") submitted an application to Island County to expand the Oak Harbor Urban Growth Area ("UGA") boundary to add approximately 300 acres. Wright's Crossing made this application, with the encouragement and support of the City of Oak Harbor, in response to recently published studies projecting employment and population growth in the relatively immediate future that will substantially exceed, by more than 50%, the County's projections adopted in December 2016 as part of its Comprehensive Plan update. The Whidbey Island Naval Air Station's announced plans to increase the number of uniformed military personnel at the base is a significant contributor to the increase. The Oak Harbor UGA does not provide sufficient housing capacity necessary to support this employment growth and Wright's Crossing's proposed amendment would serve to resolve that deficiency and allow for much needed affordable housing.

Given the circumstances presented, consideration of Wright's Crossing's application in the County's annual planning review process was mandatory under the County's Comprehensive Plan. The Plan provides in relevant part:

Urban Growth Areas may be expanded outside of a GMA mandated periodic update cycle if the expansion is necessary for one of the following reasons.

* * *

B. Employment growth in the UGA since the start of the planning period equals or exceeds 50% of the employment growth allocated to the UGA at the start of the planning period; or

C. Written notification is provided by the Department of Defense, or other reliable and verifiable information is obtained, indicating that prior to the next periodic update cycle, Whidbey Naval Air Station Whidbey staffing will increase in a manner which would result in population growth equal to or exceeding 50% of the population growth allocated to the UGA at the start of the planning period; ...

This same section of the Comprehensive Plan also directs:

If any of these criteria are met, *it will trigger a reevaluation of the population projections*, based on the range of options provided to the County by the Washington State Office of Financial Management. *From there, the allocations and buildable lands analysis will also be reevaluated on a countywide scale.*

* * *

UGA modifications outside of the period update cycle may be proposed by a municipality, the County, or an individual. *Modifications proposed by municipalities or individuals shall be submitted to the County in a manner consistent with the County's procedures for comprehensive plan amendments and placed on the County's annual review docket.* Modifications proposed by individuals

shall not be approved by the County unless the modification is supported by the legislative authority of the affected municipality. For any proposed UGA modification, a current land capacity analysis shall be prepared and shall utilize the procedures described in the CWPPs. (Emphasis added.)

Island County Comprehensive Plan, Land Use Element, Section 1.5.1.2.3 at Clerk's Papers ("CP") 481-82.

Despite the above mandatory language, Island County's Planning Board refused to include Wright's Crossing application on the annual comprehensive plan planning docket. As a result, the application was not even be considered.

Wright's Crossing appealed the Planning Board's decision to the Growth Management Hearings Board as an action in contravention of the County's Comprehensive Plan and, correspondingly, the Growth Management Act ("GMA"), Chapter 36.70A RCW. But the Board also ignored the mandatory language employed in the County's Plan. It erroneously interpreted the Plan to impose no duty on the Planning Board to act and concluded that the Planning Board had unfettered discretion to exclude the application from the annual planning docket, irrespective of whether the County's growth projections were grossly understated, and the stated expansion criteria were satisfied. Based on this interpretation, the

Growth Management Hearings Board dismissed Wright's Crossing's appeal without a hearing on the merits of its challenge.

The Board's decision was in error. This Court should reverse the Board's decision and hold that the County's action excluding Wright's Crossing' application from the annual docket did not comply with its own Plan and, as a result, also did not comply with the GMA. The matter should be remanded to the Board for action consistent with the Court's ruling.

II. ASSIGNMENTS OF ERROR

Wright's Crossing assigns error to the April 23, 2019 Superior Court Order of Dismissal affirming the March 2, 2018 Order of Dismissal issued by the Western Washington Growth Management Hearings Board issued in Wright's Crossing, LLC et al v. Island County, Case No. 17-2-0011. However, this Court applies the standards set forth in the Administrative Procedure Act ("APA"), Chapter 34.05 RCW, directly to the Board's decision and the administrative record created before the Board. *City of Burien v. Central Puget Sound Growth Management Hearings Board*, 113 Wn. App. 375, 382, 53 P.3d 1028 (2002). Accordingly, pursuant to RAP 10.3(h), Wright's Crossing assigns error to the Board's decision as follows:

1. The Board erroneously dismissed Wright's Crossing's appeal without a hearing on the merits for failure to state a claim upon which relief may be granted.

2. The Board erroneously concluded that the Island County Comprehensive Plan, specifically, the policies regarding expansion of the UGA set forth in Section 1.5.1.2.3 of the Land Use Element of its Comprehensive Plan, did not create a mandate for the County's Planning Board to include Wright's Crossing's plan amendment application to expand the Oak Harbor UGA on the annual planning docket, where the application established that, since the start of the County's new planning period, staffing at the Whidbey Island Naval Air Station and/or job and population growth in the Oak Harbor UGA equals or exceeds 50% of the population growth allocated to the UGA.

III. ISSUE

Does the UGA expansion criteria set forth in Section 1.5.1.2.3 of the Land Use Element of Island County's Comprehensive Plan impose a duty upon the County's Planning Board to include Wright's Crossing's application to expand the Oak Harbor UGA and for review of the BLA on the County's annual planning docket, where the application established that, since the start of the County's new planning period, staffing at the Whidbey Island Naval Air Station and/or job and population growth in

the Oak Harbor UGA equals or exceeds 50% of the population growth allocated to the UGA?

IV. STATEMENT OF THE CASE

A. Relevant Growth Management Act Framework.

Because this an appeal of a County decision made pursuant to the Growth Management Act, a brief description of the relevant statutory framework is provided to give context for the County's action and challenged decision that will be described below.

Island County is required to plan under the GMA. RCW 36.70A.040; AR 290.¹ County planning pursuant to the GMA should be done with consideration of the cities located within the County. RCW 36.70A.100. The GMA thus requires each county to engage in a collaborative process with municipalities within the county to develop countywide planning policies ("CWPP"). The CWPP is a written policy statement to be used as a guide to the preparation of local comprehensive plans to ensure mutual consistency. RCW 37.70A.210.

A GMA planning County is required to designate urban growth areas ("UGA") within which urban growth is to be encouraged. RCW 36.70A.110(1), (6). Each city within a county must be included in a UGA,

¹ "AR" refers to the Administrative Record assembled, numbered, and certified by the Western Washington Growth Management Hearings Board to the Thurston County Superior Court. (See CP 230-233, 194-198.)

and territory surrounding a city may be included within a UGA if it is characterized by urban growth or adjacent to land characterized by urban growth.² *Id.*

Based upon the growth management population projection made for a county by the office of financial management, each county, and each city within a county, is required to include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period. RCW 36.70A.110(2). The designated UGAs must also be of sufficient area to accommodate the broad range of needs and uses that will accompany the projected urban growth, including medical, governmental, institutional, commercial, service, retain and other nonresidential uses as appropriate. *Id.*

A UGA designation is not static. The GMA requires each planning county to conduct periodic review of and revise its UGAs as necessary to

² The GMA defines “urban growth” as

“growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to RCW 36.70A.170. A pattern of more intensive rural development, as provided in RCW 36.70A.070(5)(d), is not urban growth. When allowed to spread over wide areas, urban growth typically requires urban governmental services. “Characterized by urban growth” refers to land having urban growth located on it, or to land located in relationship to an area with urban growth on it as to be appropriate for urban growth.”

accommodate the urban growth projected in the succeeding twenty-year period. RCW 36.70A.130(3).

In addition to the required periodic review, each planning county is also required to adopt, in consultation with its cities, countywide planning policies to establish a review and evaluation program, also known as a buildable lands program. RCW 36.70A.215. This provision requires planning counties and the cities within them to complete a buildable lands report every eight years. The buildable lands reports are a look back at actual development, as compared to planning assumptions, to determine if cities and counties have designated adequate amounts of residential, commercial, and industrial lands to meet the growth needs incorporated in their comprehensive plans. RCW 36.70A.215(2)(a). Another purpose of the evaluation program is to identify reasonable measures other than adjusting the UGA to meet GMA requirements. RCW 36.70A.215(2)(b).

Ultimately, the GMA requires planning counties to

ensure that, taken collectively, adoption of and amendments to their comprehensive plans and/or development regulations provide sufficient capacity of land suitable for development within their jurisdictions to accommodate their allocated housing and employment growth, including the accommodation of, as appropriate, the medical, governmental, educational, institutional, commercial, and industrial facilities related to such growth, as adopted in the applicable countywide planning policies and consistent with the twenty-year

population forecast from the office of financial management.

RCW 36.70A.115(1).

Relevant to this appeal, the Growth Management Act also requires each county to identify procedures and schedules through which updates, proposed amendments or revisions of the comprehensive plan are considered by the governing body of a county no more frequently than once every year. RCW 36.70A.130(2).

Finally, the GMA directs that when a county or city acts pursuant to the GMA, they must perform all GMA activities in conformity with their comprehensive plan. The GMA provides at RCW 36.70A.120:

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.

Thus, once a comprehensive plan is adopted, subsequent county actions must be in conformance with that plan.

B. Island County's UGA Amendment Process And UGA Designations.

As required by RCW 36.70 A.130(2), Island County has adopted a process for review and amendment of its Comprehensive Plan. That process is codified in Chapter 16.26 of the Island County Code ("ICC"). Outside of GMA mandated periodic reviews, the ICC allows for annual review and amendment of the County's Comprehensive Plan. ICC

16.26.050 provides that amendments may be initiated by the County's Planning Board, Planning Commission or Planning Director, or by applications from members of the public. ICC 16.26.060 provides a general annual docket application review process. Timely applications are submitted to the Planning Commission for review and recommendation and then to the Planning Board for a determination to include or exclude each application on the annual docket, or alternatively to defer the application for consideration on the annual cycle or the next periodic review cycle. ICC 16.26.060(D).

Separate from ICC 16.26, however, the County's CWPPs and Comprehensive Plan set forth specific requirements to which the Planning Commission and Planning Board must adhere with regard to designation and amendment of UGAs.

Amendment to the UGAs is addressed in CWPP 3.3. CP 280-283. The CWPPs state that review and possible expansion of a UGA is a "significant undertaking," and, as a result should generally only be enlarged during periodic updates. CWPPs 3.3(1) at CP 280. Nonetheless, the CWPP provides that "UGAs may be modified outside the periodic update process to accommodate major and unanticipated fluctuations in Island County's population, or if necessary to accommodate a large employer or institution which cannot reasonably be accommodated within

and existing UGA.” *Id.* CWPP 3.3(3) provides that UGAs may be expanded outside of a GMA mandated periodic update cycle if the expansion is necessary for one of the following reasons:

A. Population growth in the UGA since the start of the planning period equals or exceeds 50% of the population growth allocated to the UGA at the start of the planning period;³ or

B. Employment growth in the UGA since the start of the planning period equals or exceeds 50% of the employment growth allocated to the UGA at the start of the planning period; or

C. Written notification is provided by the Department of Defense, or other reliable and verifiable information is obtained, indicating that prior to the next periodic update cycle, Whidbey Naval Air Station Whidbey staffing will increase in a manner which would result in population growth equal to or exceeding 50% of the population growth allocated to the UGA at the start of the planning period; or

D. An opportunity is presented to bring a large scale business, industry, institution, or other significant employer to Island County, and the County and municipality agree that due to the facility or institution’s unique characteristics there is no suitable land available inside the current UGA.

CP 280-81. Subsection 13 of CWPP 3.3 provides:

³ The CWPPs provides that, for purposes of interpreting this section, “the start of the planning process’ shall mean the date upon which the most receive periodic update was completed.” CWPP 3.3(3) at CP 280. For purposes of this appeal, the start of the most recent periodic update is December 13, 2016, which the updated Comprehensive Plan was adopted by Ordinance C-139-16. *See* AR 295.

UGA modifications outside of the period update cycle may be proposed by a municipality, the County, or an individual. Modifications proposed by municipalities or individuals shall be submitted to the County in a manner consistent with the County's procedures for comprehensive plan amendments and placed on the County's annual review docket (per ICC 16.26). Modifications proposed by individuals shall not be approved by the County unless the modification is supported by the legislative authority of the affected municipality. For any proposed UGA modification, a current land capacity analysis shall be prepared and shall utilize the procedures described in the CWPPs.

CP 282.

The Island County Comprehensive Plan sets forth UGA expansion criteria at Section 1.5.1.2.3 of the Land Use Element of the Plan. Consistent with and essentially mirroring the CWPPs, section 1.5.1.2.3 provides:

Existing UGAs may be modified (expanded or reduced in size) when it can be demonstrated that the proposed modification is consistent with CWPP Section 3.3. Generally UGAs should only be enlarged or modified during the periodic update process; however, UGAs may be modified outside of the periodic update process if necessary to accommodate major and unanticipated fluctuations in Island County's population, or if necessary to accommodate a large employer or institution which cannot reasonably be accommodated within an existing UGA.

Urban Growth Areas may be expanded outside of a GMA mandated periodic update cycle if the expansion is necessary for one of the following reasons.

A. Population growth in the UGA since the start of the planning period equals or exceeds 50% of the population growth allocated to the UGA at the start of the planning period; or

B. Employment growth in the UGA since the start of the planning period equals or exceeds 50% of the employment growth allocated to the UGA at the start of the planning period; or

C. Written notification is provided by the Department of Defense, or other reliable and verifiable information is obtained, indicating that prior to the next periodic update cycle, Whidbey Naval Air Station Whidbey staffing will increase in a manner which would result in population growth equal to or exceeding 50% of the population growth allocated to the UGA at the start of the planning period; or

D. An opportunity is presented to bring a large scale business, industry, institution, or other significant employer to Island County, and the County and municipality agree that due to the facility or institution's unique characteristics there is no suitable land available inside the current UGA.

CP 481. But the Comprehensive Plan enhances the CWPPs and includes a trigger mandating further County review if the above criteria (A through D) are met. Section 1.5.1.2.3 of the Plan continues:

If any of these criteria are met, it will trigger a reevaluation of the population projections, based on the range of options provided to the County by the Washington State Office of Financial Management. From there, the allocations and buildable lands analysis will also be reevaluated on a countywide scale. (Emphasis added.)

CP 482. Like CWPP 3.3(13), Section 1.5.1.2.3 of the Plan concludes:

UGA modifications outside of the period update cycle may be proposed by a municipality, the County, or an individual. Modifications proposed by municipalities or individuals shall be submitted to the County in a manner consistent with the County's procedures for comprehensive plan amendments and placed on the County's annual review docket. Modifications proposed by individuals shall not be approved by the County unless the modification is supported by the legislative authority of the affected municipality. For any proposed UGA modification, a current land capacity analysis shall be prepared and shall utilize the procedures described in the CWPPs.

CP 482.

As part of its GMA planning, Island County has designated UGAs around its cities, Oak Harbor, Coupeville and Langley, one non-municipal UGA known as Freeland. AR 291; CP 280. The UGAs were subject to a GMA mandated periodic review that was completed on December 13, 2016, when the County adopted an updated and amended Comprehensive Plan. AR 295.

To analyze if the UGA boundaries needed to be adjusted before the final adoption of the County's amended Comprehensive Plan, the County conducted a Buildable Lands Analysis ("BLA") for each of the County's UGAs, using methodology adopted in the County's CWPPs. AR 290-91. The County estimated population growth through 2036. AR 291. Based upon the BLA and the periodic review, the County concluded that the Oak

Harbor and Coupeville UGAs have adequate land to accommodate 20 years of allocated growth and employment, and the Langley and Freeland UGAs have more capacity than required. AR 291.

C. Wright's Crossing's Application To Expand The Oak Harbor UGA.

Despite the recent review and update, there is a significant shortage of affordable housing in Oak Harbor. Moreover, since the review and update were completed, studies published in 2017 have brought to light that the County's projected population and employment growth is grossly understated. The land capacity within the Oak Harbor UGA is insufficient to meet the needs of this unexpected growth.

Though there is an acknowledged shortage of affordable housing, there has been a decline in building permits in Oak Harbor and the surrounding UGA. AR 11. The Oak Harbor School District has identified affordable housing as the greatest current need in the Oak Harbor community. The increasing military population at the Whidbey Island Naval Air Station ("NAS Whidbey"), which is located on two pieces of land near Oak Harbor, has served to significantly increase that need. AR 11-13, 54-55, 83-87, 90-99.

Prior to adoption of the 2016 Comprehensive Plan amendments, the Navy estimated that uniformed military personnel would grow by

1,000 people over the next 20 years. Subsequent to the County's Plan review process, however, the Navy released a Draft Environmental Impact Statement ("EIS") for planned growth of the EA-18G "Growler" operations. The draft EIS indicates that, under the preferred alternative, 664 new uniformed Navy personnel would be stationed at NAS Whidbey. Applying the Navy's established multiplier (.31 non-uniform jobs for each uniformed job), the presence of the additional uniformed personnel will generate an additional 206 non-uniformed jobs, bringing the total to 870 new jobs. CP 129.

In addition to the expanded Growler operation, the Navy has announced additional operational growth that will bring multiple new squadrons to NAS Whidbey. In combination, the expanded Naval operations are estimated to yield a total of 3,228 new jobs in the early years of the post-2106 planning process. Applying the County Plan assumption of 2.53 persons per household, the associated population growth is estimated to be 8,167 in just the first few years of the post-2016 planning process. CP 129.

The County's Plan assumes that 60% of population growth related to NAS Whidbey will be allocated to the Oak Harbor UGA. The new population growth in Oak Harbor is thus estimated to be 4,901 people, which already exceeds the population growth of 4,118 people projected

through 2036 in the Comprehensive Plan. Even if one deducts the initially projected Navy personnel growth of 1,000 people considered for the County's review and update, the projected job and population growth already exceeds 50% of the job and population growth allocated to the Oak Harbor UGA. CP 129-30. Unanticipated growth has also been seen with regard to civilian job growth. The Oak Harbor Chamber of Commerce released a job growth survey in July 2017. This survey reveals that civilian job growth is also significantly outpacing the County's projections. CP 133.

The impact of the substantially greater than expected job growth on land capacity within the UGA is compounded by apparent flaws in the County's BLA that have been revealed by another post-update study. CP 148-156.

On August 1, 2017, based on the above data, and with the support of published studies, Wright's Crossing submitted a complete application to amend and expand Oak Harbor's UGA. CP 81-145. Wright's Crossing requested to add approximately 300 acres to the Oak Harbor UGA; Wright's Crossing has development rights to 248 acres of the proposed expansion area. Wright's Crossing also requested review of the BLA in light of the post-review data. *Id.*; AR 7. Wright's crossing was complimented by Oak Harbor's request, submitted through Oak Harbor

Resolution 17-11, to expand the area included in the County's Joint Planning Area and Priority Growth Area to include the same property.⁴ CP 135-36, 139. Upon approval of an expanded UGA, Wright' Crossing intended to petition for annexation by the City of Oak Harbor and seek appropriate rezones to allow development for 1,000 to 1,500 single-family homes that would be moderately prices, with a percentage offered as "affordable housing." AR 7-8; CP 87-88.

Wright's Crossing's submittal established that at least two of the alternative expansion criteria set forth in Section 1.5.1.2.3 of the Land Use Element of its Comprehensive Plan were satisfied – since the start of the County's new planning period, staffing at the Whidbey Island Naval Air Station and job growth in the Oak Harbor UGA equals or exceeds 50% of the population growth allocated to the UGA. As a result, the application should have automatically "trigger[ed]" a reevaluation of the population projections, based on the range of options provided to the County by the Washington State Office of Financial Management." The application should also have "triggered" a reevaluation on a countywide scale of the allocations and buildable lands analysis.

⁴⁴ Through subsequently adopted resolutions, the City of Oak Harbor strongly endorsed Wright's Crossing's application. CP 539-42.

The application did not, however, trigger the reviewed contemplated by the County's Comprehensive Plan. Rather, through Island County Resolution C-110-17, the Island County Planning Board excluded Wright's Crossing's application from the annual planning docket, and the application was not considered. CP 65-79;

D. The Board's Dismissal of Wright's Crossing's Appeal.

Wright's Crossing timely appealed the County Planning Board's decision to the Growth Management Hearings Board. AR 2-30. Wright's Crossing's Petition for Review alleged facts as stated in its application as well as facts established through supporting data and facts presented to the Board in the public hearing process. *Id.*

Island County moved to dismiss the appeal on multiples bases, including that, applying *Stafne v. Snohomish County*, 174 Wn.2d 24, 28, 271 P.3d 868 (2012), the County's decision to exclude the application from the annual docket was wholly discretionary and beyond review by the Board. AR 271-86. Accordingly, the County asserted that Wright's Crossing's appeal should be dismissed because it failed to state a claim upon which relief could be granted. The Board accepted this argument as dispositive and dismissed Wright's Crossing's appeal. CP 42, 46

The Board correctly determined:

In order to prevail on its claims based on the County's decision not to docket the proposal, the Petitioner must establish a duty requiring the County to do so. That duty would first arise from a specific provision of the GMA or secondarily from a local regulation or policy. Absent such a duty, the Board has held on numerous occasions that a decision not to docket a proposal lies within the discretion of the jurisdiction.

CP 45. But the Board erred in concluding that the Section 1.5.1.2.3 of the Land Use Element of the County's Comprehensive Plan did not create a duty for the Planning Board to include the application on the annual docket. CP 48-49.

The Board quoted the relevant provision of Section 1.5.1.2.3, but it only discussed and provided analysis based on limited, isolated language. More specifically, the Board highlighted and discussed the individual instances in which the Plan stated that an existing UGA "may be modified" or "may be expanded." Based on that isolated language, the Board construed the entirety of the Plan Section (and the companion CWPP 3.3) to be discretionary. CP 48-50. The Board summarily stated that "there are simply no stated Plan Policies than can be read to mandate docketing the Petitioner's proposal." CP 50.

But the Board offered no analysis or discussion of any kind of that portion of Section 1.5.1.2.3 that includes the following mandatory language:

If any of these criteria are met, *it will trigger* a reevaluation of the population projections, based on the range of options provided to the County by the Washington State Office of Financial Management. From there, the allocations and buildable lands analysis *will also be reevaluated* on a countywide scale. (CP 482. Emphasis added.)

The Board also failed to address the Plan's directive:

UGA modifications outside of the period update cycle may be proposed by a municipality, the County, or an individual. *Modifications proposed by municipalities or individuals shall be submitted to the County in a manner consistent with the County's procedures for comprehensive plan amendments and placed on the County's annual review docket.* Modifications proposed by individuals shall not be approved by the County unless the modification is supported by the legislative authority of the affected municipality. For any proposed UGA modification, a current land capacity analysis shall be prepared and shall utilize the procedures described in the CWPPs. (CP 482. Emphasis added.)

As discussed more fully below, the Board's failure to address this mandatory language and accord the language its plain meaning was error.

Wright's Crossing appealed the Board's dismissal to the Thurston County Superior Court pursuant to the Administrative Procedure Act ("APA"), chapter 34.05 RCW. CP 1-37. The superior court affirmed the Board's dismissal. CP 613-22. Thereafter, Wright's Crossing timely filed a Notice of Appeal to this Court. CP 623-35.

V. ARGUMENT

A. Standards of Review.

Since this is an appeal of a decision by a Growth Management Hearings Board, an understanding of both the Board's role and the court's role is necessary. The Board is charged with adjudicating GMA compliance and invalidating noncompliant plans. RCW 36.70A.280. Legislative actions are presumed valid and the Board will find compliance unless it determines that the legislative action is clearly erroneous in view of the entire record before the Board in light of the goals and requirements of the GMA. RCW 36.70A.320. A Board will find a legislative action clearly erroneous if it is left with a firm conviction that a mistake has been committed. *Lewis County v. Western Washington Growth Management Hearings Board*, 157 Wn.2d 488, 497, 139 P.3d 1096 (2006). While the Legislature has directed the Growth Boards to give deference to the local jurisdiction's decision-making (RCW 36.70A.3201), it also contemplates a diligent review.

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

Swinomish Indian Community v. Western Washington Growth Management Hearings Board, 161 Wn.2d 415, 435, fn. 8, 166 P.3d 1198 (2007).

This Court review's the Board's decision directly pursuant to the standards set forth in the APA, chapter 34.05 RCW.⁵ RCW 36.70A.300(5); *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998). Relevant to this appeal, the APA directs that this court shall grant relief from the Board's decision only if the court determines the Board has erroneously interpreted or applied the law. RCW 34.05.570(3)(d). As the this is an appeal of an order dismissing for failure to state a claim upon which relief may be granted (CP 41, 46; AR 271-86), the facts alleged in Wright's Crossing's Petition for Review to the Board are presumed to be true as with a motion pursuant to Superior Court Civil Rule 12(b)(6).⁶ *Stickney v. City of Sammamish*, 2016 WL 1181814, CPSGMHB Case No. 15-3-00017 (Order Granting Motion to Dismiss Issue 4 and Denying

⁵ Because the Court directly reviews the Board's decision, any findings or conclusions made by the trial court are treated as superfluous. *Adams v. Department of Social & Health Service*, 38 Wn. App. 13, 15, 683 P.2d 1133 (1984).

⁶ Consistent with this CR 12(b)(6) requirement, the Board did assume certain allegations to be true. For example, the Board assumed that Wright's Crossing formally requested review of the County's adopted Buildable Lands Analysis independent of its request for amendment of the UGA, despite that the County disputed the allegation. CP 41, n. 3. The Board likewise assumed the existence of a "housing crisis" as alleged by Wright's Crossing. CP 58.

Motion to Dismiss Issues 5 & 6, March 14, 2016), 2016 WL 1181814, citing *Woodward v. Taylor*, 184 Wn.2d 911, 917 (2016) and *Kinney v. Cook*, 159 Wn.2d 837, 842, 153 P.3d 206 (2007). As a result, this appeal does not seek or require resolution of potential factual disputes.

The question of whether an agency has erroneously interpreted or applied the law is reviewed de novo. *Honesty in Environmental Analysis and Legislation (HEAL) v. Central Puget Sound Growth Management Hearings Bd.*, 96 Wn. App. 522, 979 P.2d 864 (1999); *City of Redmond, supra*. Courts review an agency's interpretations of statutes under the error of law standard, "which allows an appellate court to substitute its own interpretation of the statute or regulation for the [agency's] interpretation." *Seattle Area Plumbers v. Washington State Apprenticeship and Training Council*, 131 Wn. App. 862, 871, 129 P.3d 838 (2006), quoting, *Cobra Roofing v. Dept. of Labor & Industries*, 122 Wn. App. 402, 409, 97 P.3d 17 (2004). While courts will accord deference to the Board's interpretation of the GMA, they retain the ultimate authority to interpret a statute and are not bound by the Board's interpretation of the GMA. *Yakima County v. Eastern Washington Growth Management Hearings Board*, 168 Wn. App. 680, 687, 279 P.3d 434 (2012); *City of Redmond, supra*, 136 Wn.2d at 46. Courts "will not defer to an agency determination which conflicts with the statute." *Waste Management of Seattle v. Utilities and Transportation*

Comm'n, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994). *See also*, *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992).

B. The GMA Does Not Provide That All Local Decisions To Exclude An Application From The Annual Planning Docket Are Discretionary.

Both the County and the Board relied on *Stafne, supra*, to support dismissal of the appeal. Though the Board did acknowledge that, even under *Stafne*, a duty to docket may arise from a local regulation or policy (CP 45), a brief discussion of the limits of the *Stafne* decision is warranted.

In *Stafne*, the landowner requested the county council to “docket” on the council’s comprehensive plan amendment docket his proposal to re-designate his property from forest designations to low density rural residential. *Stafne v. Snohomish County*, 174 Wn.2d 24, 28, 271 P.3d 868 (2012). The council refused to place the landowner’s amendment application on its final docket for consideration. *Id.* The landowner appealed the council’s decision, not to a growth management hearings board, but to superior court under the Land Use Petition Act (“LUPA”), chapter 36.70C RCW.

The primary issue before the *Stafne* Court was whether a municipality’s decision related to a comprehensive plan amendment must

be appealed to the growth management hearings board under the GMA, or whether relief could be sought in the superior court under LUPA. 174 Wn.2d at 30. The Court did not analyze the merits of the challenge and there was no discussion of the relevant amendment criteria. Rather, the focus of the *Stafne* Court was the proper appeal forum for the challenge, even more specifically the scope of a court's jurisdiction under LUPA.

The *Stafne* Court held that appeal may not be had through LUPA, but must exclusively be through a timely petition to a GMA board. *Id.* at p. 11. Trying to avoid the statutory mandate that plan challenges must be made to a GMA board, the landowner next argued that such an appeal would be futile because the boards had consistently held they lacked jurisdiction to hear challenges to municipal decisions rejecting proposed plan amendments. According to the landowner, it was futile to require appeal to a board that would certainly refuse to even hear the appeal. Thus, the *Stafne* Court secondarily addressed whether exhaustion of the board remedy could be excused under the futility doctrine. *Id.* at 34-35. The *Stafne* Court rejected the futility argument.

In refusing to invoke the strictly and narrowly applied futility exception, the *Stafne* Court briefly discussed prior board decisions in which the board held it was without jurisdiction to consider similar appeals. The *Stafne* Court disagreed that the board decisions establish that

the boards are always wholly without jurisdiction to hear such challenges. Instead, the Court concluded that the cited decisions reflected case-by-case decisions based on the facts and issues presented. *Id.* at 37. The primary *Stafne* Court rationale with regard to its futility decision is that courts benefit from the analytical framework presented by agencies with special expertise. *Id.* at 35. Nonetheless, in discussing the futility issue, the *Stafne* Court made the following statement in dicta:

We agree with the board's determinations in cases like *Cole* and SR 9/US 2 LLC.⁷ County and city councils have legislative discretion in deciding to amend or not amend their comprehensive plans. Absent a duty to adopt a comprehensive plan amendment pursuant to the GMA or other law, neither the board nor a court can grant relief (that is, order a legislative discretionary act). In other words, any remedy is not through the judicial branch. Instead, the remedy is to file a proposal at the County's next annual docketing cycle or mandatory review or through the political or election process.

Id. at 38.

⁷ The *Stafne* Court analyzed Board decisions in which the Board held it was without jurisdiction to hear certain specific appeals to plan amendment rejections: *SR 9/US 2 LLC v. Snohomish County*, CPSGMHB Case No. 08-3-0004 (Order Granting Motion to Dismiss, April 9, 2009, 2009 WL 1134039 (CP 324-28)); *Chimacum Heights LLC v. Jefferson County*, EWGMHB Case No. 09-2-0007 (Order on Dispositive Motion, May, 20, 2009) 2009 WL 1716761 (CP 252-55); and *Cole v. Pierce County*, CPSGMHB Case No. 96-3-0009c (FDO, July 31, 1996) (CP 265-84). 174 W.2d at 32. But the Court also concluded that these Board decisions did not represent a blanket rule, but only case-specific threshold jurisdictional rulings based on the specific facts and issues presented. *Id.* at 37. The Board confirmed in each decision that jurisdiction may nonetheless exist depending on the applicable GMA or plan provisions.

The *Stafne* court did not address or define the circumstances in which a local plan will create a mandate or give rise to a duty to implement Plan amendment criteria. The Court simply seemed to confirm that, in the specific cases cited, the boards correctly concluded they had no jurisdiction because, in those specific cases, a duty in those particular cases had not been demonstrated.

The *Stafne* Court did even not conclude that there was no duty to adopt the amendment proposed in the case it addressed. To the contrary, the Court seemed to indicate that circumstances may well exist in which a duty may be found and the board, unlike in the cases cited to the *Stafne* Court, might well accept jurisdiction. The *Stafne* Court simply concluded that, if a plan amendment denial challenge is to be made, it was incumbent upon the landowner to make the challenge by petition to a growth management hearings board. This prerequisite would not be excused on the grounds of futility.

Because there is no automatic or absolute bar to appeal of a decision to exclude an amendment application from the planning docket, such an appeal may only be dismissed if the Comprehensive Plan and associated development regulations provide that all such decisions are purely discretionary.

C. Island County's Comprehensive Plan Imposed A Duty On The Planning Board To Include Wright's Crossing's Application On The Comprehensive Plan Amendment Docket For Consideration In The Annual Amendment Process.

The Board correctly noted that RCW 36.70A.130 authorizes municipalities to amend their adopted comprehensive plans annually but does not require amendments or that all proposals to amend be docketed. CP 47. Rather, this provision requires the County to identify procedures and schedules through which proposed plan amendments may be considered. *Id.* The GMA does, however, direct that, once a plan is adopted, local actions must be in conformity with the adopted plan. RCW 36.70A.120 provides: "Each county ... that is required or chooses to plan under RCW 36.70A.040 **shall** perform its activities ... in conformity with its comprehensive plan."

Notably, the GMA requires that all activities be in conformity with an existing plan; the mandate is not limited only to legislative actions that adopt new plans or affirmatively amend old plans. The GMA mandate is broader. It mandates that a jurisdiction's activities must be in conformity with the plan. Black's Law Dictionary (6th Ed., 1990) defines conformity to mean "corresponding in form, manner or use; agreement; harmony, congruity." Webster's Ninth New Collegiate Dictionary (1987) defines conformity as "action in accordance with some specified standards or

authority.” These definitions indicate that RCW 36.70A.120 requires Island County to conduct its planning activities, which includes review and consideration of proposed plan amendments and actions to exclude applications from the annual planning docket, in a manner that is in harmony or in congruity with the Plan’s specified goals, policies and criteria.

In this case, any County Planning Board action to exclude an application to expand the UGA from the annual planning docket must be performed in conformity with Comprehensive Plan Section 1.5.1.2.3.

Again, this Section provides in relevant part:

Urban Growth Areas may be expanded outside of a GMA mandated periodic update cycle if the expansion is necessary for one of the following reasons.

A. Population growth in the UGA since the start of the planning period equals or exceeds 50% of the population growth allocated to the UGA at the start of the planning period; or

B. Employment growth in the UGA since the start of the planning period equals or exceeds 50% of the employment growth allocated to the UGA at the start of the planning period; or

C. Written notification is provided by the Department of Defense, or other reliable and verifiable information is obtained, indicating that prior to the next periodic update cycle, Whidbey Naval Air Station Whidbey staffing will increase in a manner which would result in population growth equal to or exceeding 50% of the

population growth allocated to the UGA at the start of the planning period; or

D. An opportunity is presented to bring a large scale business, industry, institution, or other significant employer to Island County, and the County and municipality agree that due to the facility or institution's unique characteristics there is no suitable land available inside the current UGA.

If any of these criteria are met, *it will trigger a reevaluation of the population projections*, based on the range of options provided to the County by the Washington State Office of Financial Management. *From there, the allocations and buildable lands analysis will also be reevaluated on a countywide scale.*

* * *

UGA modifications outside of the period update cycle may be proposed by a municipality, the County, or an individual. *Modifications proposed by municipalities or individuals shall be submitted to the County in a manner consistent with the County's procedures for comprehensive plan amendments and placed on the County's annual review docket.* Modifications proposed by individuals shall not be approved by the County unless the modification is supported by the legislative authority of the affected municipality. For any proposed UGA modification, a current land capacity analysis shall be prepared and shall utilize the procedures described in the CWPPs.

CP 481-82.

The above language clearly imposes a mandatory duty to act. In adopting the above Plan language, Island County has made an intentional

decision to require review and reevaluation of its projections and capacity analyses if any one of the four expansion criteria are met. The Plan directs that such circumstance “will trigger” the requisite reevaluation. Moreover, the plan requires that the reevaluation shall be conducted by placing proposals to modify the UGA on the annual planning docket. The Plan directs: “Modifications proposed by ... individuals shall⁸ be submitted to the County in a manner consistent with the County’s procedures for comprehensive plan amendments and placed on the County’s annual review docket.” The language is undeniably mandatory.

The Board ignored this mandatory language and instead focused exclusively and myopically on instances in which Section 1.5.1.2.3 provides that a UGA “may be modified” or “may be expanded” to interpret all of Section 1.5.1.2.3 to be wholly discretionary and permissive. But the Board did so at the exclusion of the mandatory trigger and docketing language that was also employed in this section of the Comprehensive Plan, giving those words no meaning.

Such an interpretation is contrary to the long-established rules of statutory construction that require each word and phrase of the above provision be given meaning and effect. *Chelan County. v. Fellers*, 65

⁸ Notably, ICC 16.26.030 provides that the word “shall” is always mandatory. *See also, Planned Parenthood of Great NW v. Bloedow*, 187 Wn. App. 606, 622, 350 P.3d 660 (2015).

Wn.2d 943, 946, 400 P.2d 609 (1965). Provisions should be harmonized, and no words or phrases should be rendered superfluous or meaningless. *Williams v. Pierce County*, 13 Wn. App. 755, 758, 537 P.2d 856 (1975). In fact, the legislative or rule making body “is presumed to have used no superfluous words.” *West Am. Ins. Co. v. Buchanan*, 11 Wn. App. 823, 827, 525 P.2d 831 (1974). *See also, Sammamish Community Council v. City of Bellevue*, 108 Wn. App. 46, 54, 29 P.3d 728 (2001).

The mandatory trigger and docketing language can readily be harmonized with the permissive language focused upon by the Board, especially when considered in conjunction with CWPP 3.3. Recall that the CWPPs state that review and possible expansion of a UGA is a “significant undertaking,” and, as a result should generally only be enlarged during periodic updates. CWPPs 3.3(1) at CP 280. But CWPP 3.3 still allows that “UGAs *may* be modified outside the periodic update process to accommodate major and unanticipated fluctuations in Island County’s population, or if necessary, to accommodate a large employer or institution which cannot reasonably accommodated within and existing UGA.” *Id.*

The permissive language employed in Section 1.5.1.2.3 of the Plan simply provides that, despite the general directive to avoid expansion of a UGA outside the GMA mandated periodic review process, there are

nonetheless exceptions in which UGA expansion is allowed to be accomplished in the annual planning process. And, in fact, the Plan provides that certain circumstances are of such import that, if present, they will not only warrant consideration of a proposed UGA amendment in the annual planning process, they will require it.

The Board erroneously interpreted the County's Comprehensive Plan. The Plan does, in fact, create a duty for the Planning Board to place a proposed UGA expansion on the annual planning docket when the applicant establishes that, since the start of the County's new planning period, staffing at the Whidbey Island Naval Air Station and/or job and population growth in a UGA equals or exceeds 50% of the population growth allocated to the UGA.

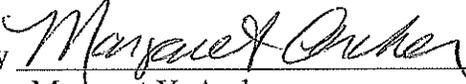
VI. CONCLUSION

The Board erred when it summarily dismissed Wright's Crossing's Appeal without the opportunity to establish at a hearing on the merits that Whidbey Island Naval Air Station and/or job and population growth in the Oak Harbor UGA equals or exceeds 50% of the population growth allocated to the UGA. This Court should reverse the Board's dismissal and remand the matter with direction to take action consistent with its Plan and stated criteria.

Dated this 22nd day of November, 2019.

Respectfully submitted,

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WRIGHT'S CROSSING, LLC; SCOTT B. THOMPSON,
its Manager/Owner,

Appellant,

v.

ISLAND COUNTY, acting through its Board of Commissioners;
Environmental and Land Use Hearings Office acting through the Western
Washington Region Growth Management Hearings Board,

Respondents,

And

WHIDBEY ENVIRONMENTAL ACTION NETWORK ("WEAN"),

Intervenor/Respondent

PETITIONERS' OPENING BRIEF

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the 22nd day of November, 2019, I caused true and correct copies of this document to be served on the parties listed below, via U.S. Mail. On Monday, November 25, 2019 I electronically served the following:

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DATED at Tacoma, Washington this 25th day of November, 2019.



Kristin Larkin, Legal Assistant

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