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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' REPLY BRIEF

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I. Neither *Stafne* Nor The Growth Board Decisions Hold That A County's Decision Not To Docket Is Always Discretionary.

The issue presented by appellants Wright's Crossing, LLC, and its Manager Scott Thompson (collectively "Wright's Crossing") is stated at page 5 of their opening brief:

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?

Island County does not even address the language set forth in Section 1.5.1.2.3 of the Land Use Element of its Comprehensive Plan, much less whether this Section created a self-imposed a duty to docket Wright's Crossing's proposed amendment. Instead, Island County presents a novel argument that goes beyond the Washington Supreme Court's decision in *Stafne v. Snohomish County*, 174 Wn.2d 24, 28, 271 P.3d 868 (2012), and beyond the holdings of the Growth Management Hearings Board. The County argues that, irrespective of any mandatory language in its own Comprehensive Plan, the decision whether to docket a proposed Plan amendment is *always* discretionary. The County reasons that, even if

there is a “self-imposed” duty created by the local comprehensive plan, the GMA provides no remedy.

Perhaps recognizing that its argument goes far beyond the analysis presented in any court of board decision, the County both embraces and is simultaneously critical of the *Stafne* decision. Ultimately, the County concludes:

To summarize, to the extent that *Stafne* teaches us that the GMA on its face imposes no duty to docket, and therefore a petitioner’s remedy for a grievance from a docketing decision is through a ballot box or resubmission of its application at a riper time, it is correct and controls the outcome of this case on all four legs. To the extent that it suggests a county can impose a “duty to docket” a proposed comprehensive plan amendment upon itself that would be enforceable under the GMA, this overstatement of the rule must be severely limited by jurisdictional and remedial constraints placed upon the GHMB by the legislature.

(County’s Brief at p. 34.)

Wright’s Crossing agrees that the Growth Management Hearings Boards’ authority are limited by the Growth Management Act and that *Stafne* controls. But neither *Stafne* nor the Board decisions stand for the position the County advocates. *Stafne* does not hold that all decisions not to docket are discretionary. Rather, *Stafne* directs:

Absent a duty to adopt a comprehensive plan amendment pursuant to the GMA or other law, neither the board nor the court can grant relief (that is, order a legislatively discretionary act).

Id. at 38.

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 held "that a party challenging a decision related to a comprehensive plan must seek review before the growth board first and cannot seek relief in superior court under LUPA."¹ *Id.* at 34. The *Stafne* Court provided the following framework for cases in which a docketing or plan amendment denial challenge is made: (1) It was incumbent upon the landowner to make the challenge by petition to a growth management hearings board, not under LUPA; (2) this prerequisite to appeal to a growth board will not be excused on the grounds of futility; and (3) for such a challenge, a growth board only has authority to grant relief if the petitioner can demonstrate that the local jurisdiction had a duty to docket a proposed plan amendment – in the absence of such a duty such a local decision to docket (or not docket) is discretionary. But *Stafne* did not hold that all docketing decisions are discretionary as the County argues.

¹ The County claims that this primary holding from the *Stafne* court is "a gross overstatement of the rule." (County's Brief at p. 32.)

As the *Stafne* Court was focused on the proper forum in which a challenge to a decision not to docket or amend a comprehensive plan should be made, it did not analyze the merits of *Stafne*'s specific challenge and there was no discussion of the relevant comprehensive plan provisions that could have served to create a duty to for Snohomish County to act on specific proposal. Thus, 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. But, as evidenced by the Growth Board's decision below (and the board cases cited therein), the growth boards have created a framework under *Stafne* in which they look not just to the provisions of the GMA, but to the local plan policies and development regulations to determine if a duty exists.

Though Wright's Crossing disagrees with Board's interpretation of Section 1.5.1.2.3 of the County's Plan, appellants fully agree with the framework in which the Board made its decision. Before addressing the various GMA and Comprehensive Plan provisions cited in appellants Petition, the Board explained the framework:

The Petitioner correctly poses the question before the Board: "Thus, the sole question is whether the GMA requires action." Similarly, the County observes that ". . . the Growth Board only has authority to grant relief if Wright's Crossing can make a showing that its requested amendment is required by the Growth Management Act or other law." 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. (Emphasis added.)

CP 45.

The Board certainly did not apply the analysis advocated by the County; and the cites no court or board cases that analyzes the question presented as advocated.

Moreover, the County incorrectly reads the GMA when it argues that the GMA does not provide a remedy through which the growth boards may grant relief.

Hearings boards are charged with adjudicating GMA compliance. The hearings boards conduct hearings and issue findings of compliance or noncompliance.

Miotke v. Spokane County, 181 Wn. App. 369, 377-78, 325 P.3d 434 (2014)(citations omitted). In docketing cases, if a Board concludes that the local comprehensive plan policies impose a duty to docket, the Board is authorized to find that a county is not in compliance with the GMA if it fails to act in accord with that duty. The GMA provides that authority in RCW 36.70A.280 through RCW 36.70A.340.

RCW 36.70A.280 (1)(b) provides broad authority to the growth boards to hear and decide petitions that allege noncompliance under the GMA:

(1) The growth management hearings board shall hear and determine only those *petitions alleging* either:

(a) *That*, except as provided otherwise by this subsection, *a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter*, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW. Nothing in this subsection authorizes the board to hear petitions alleging noncompliance with RCW 36.70A.5801. (Emphasis added.)

The burden of proof imposed on petitioners is consistent with this broad grant. RCW 36.70A.320(2) provides that “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.” Following a hearing, the Board is directed to “issue a final order that shall be based exclusively on whether or not a state agency, county or city is in compliance with the requirements of this chapter.” RCW 36.70A.300(1). If, ultimately, a local jurisdiction fails to come into compliance, the Board may then recommend to the Governor that sanctions are appropriate. RCW 36.70A.330; 340.

While the growth boards may not have authority to issue the types of relief listed by Island County, such as a mandate or injunctive relief, the boards do have authority to issue an order finding that a local jurisdiction is not in compliance with the GMA, which is another form of relief. An order of noncompliance is a remedy available to petitioners challenging a docketing decision, assuming, of course, that a duty to docket is created by some specific plan policy of development regulation of the local jurisdiction.

Again, the *Stafne* Court held:

Absent a duty to adopt a comprehensive plan amendment pursuant to the GMA or other law, neither the board nor the court can grant relief (that is, order a legislatively discretionary act).

174 Wn.2d at 38. But, if a duty is presented, in this case through Island County Comprehensive Plan Section 1.5.1.2.3, then a remedy is indeed available under the GMA.

RCW 36.70A.120 provides:

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.

If this Court finds that Section 1.5.1.2.3 of the County's Comprehensive Plan created a self-imposed duty to docket Wright's Crossing proposed amendment, then the County's decision to exclude the proposed

amendment from the docket did not comply with the County's Comprehensive Plan and, further, it did not comply with the GMA as directed by RCW 36.70A.120.

The County elected not to address Section 1.5.1.2.3, arguing only that no duty is imposed by any specific provisions of the GMA or by Chapter 16.26 of the Island County Code ("ICC"). Even its analysis regarding Chapter 16.26 is limited to arguing the application on its merits. Of course, Wright's Crossing's appeal was dismissed based upon an asserted failure to state a claim upon which relief may be granted. All facts alleged in the petition must be assumed true. Moreover, the inquiry as to the existence of a duty does not end with analysis of the GMA provisions and the development regulations. Even in the absence of a duty from a GMA provision of Chapter 16.26 ICC, a duty may still be created by a GMA policy. The County cannot simply ignore the plan provisions.

The Board certainly considered the Comprehensive Plan provisions relevant to the issue of whether a duty to docket is present in this case, and it specifically considered Section 1.5.1.2.3 of the County's Comprehensive Plan in its decision. CP 48-50. Wright's Crossing and the Board disagree as to the meaning of Section 1.5.1.2.3, but there is no disagreement between the appellants and the Board that provisions is relevant to the question of duty.

II. 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.

A. Wright’s Crossing properly preserved the issue presented on this appeal.

While Island County does not address the language of Section 1.5.1.2.3 of its Comprehensive Plan, intervenor WEAN does address the Plan policy. But WEAN first argues that the issue raised in Wright’s Crossing’s appeal was not preserved. WEAN alleges that the Board did not consider Section 1.5.1.2.3 so the provision should not be considered now. But the issue was properly raised and there can be no doubt that the Board considered all of the plan provisions argued in Wright’s Crossing’s opening brief.

To begin, Comprehensive Plan Section 1.5.1.2.3 was expressly cited in Wright’s Crossing’s Amended Petition for Review to the Board. (AR 132.) The Section was likewise raised in appellants’ Petition for Judicial Review. (CP 22.)

Intervenors argue that the Board did not have the opportunity to address the issues raised. But the Board decision quotes all of the language addressed in the opening brief in its decision. The Board states at pages 9-10 of the Decision:

Petitioner also suggests that the county’s decision not to docket its proposals was mandated by the County

Comprehensive Plan policies and provision of the Island county County-Wide Planning Policies (CWPPs) The Board agrees with Petitioner when it states that the county’s Comprehensive Plan binds the County to “follow the requirements of the CWPPs” even when considering an “out-of-cycle” UGA alteration. But the question is whether there are any Comprehensive Plan policies and CWPPs that require the action(s) requested by Petitioner. ***Included in the Plan policies and CWPPs cited by Petitioner are the following:*** (emphasis added)

Comprehensive Plan Policy 1.5.1.2.3: 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.

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 48-49. Bold and italics added, underlining in original) .

After quoting the above Comprehensive Plan provisions "cited by Petitioner," the Board stated:

The Board has carefully reviewed all Comprehensive Plan sections and all CWPPs referenced by the Petitioner, That includes consideration of the Comprehensive Plan provisions that states “For any proposed UGA modification, a current land capacity analysis shall be prepared and shall utilize the procedures described in the CWPPs.: The County observes, and the Board agrees, that such a requirement applies only if the county opts to docket the proposal for further consideration. It does not apply until a UGA modification has been docketed.

There is simply no cited Plan Policies or CWPPs that can be read to mandate docketing of the Petitioner’s proposal. None of them are directive in nature so as to require the action requested.

(CP 50. Emphasis added.)

There can be no doubt that the Board considered all of the provisions argued in Wright’s Crossing’s opening brief because the Board expressly stated that it considered the provisions.

B. Section 1.5.1.2.3 of 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.

Again, Comprehensive Plan Section 1.5.1.2.3 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.

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 **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.**” The language is undeniably mandatory.

WEAN, like the Board focuses exclusively 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. It argues that the cited provisions cannot be read in a vacuum and essentially argues that the permissive language in the earlier

sections somehow negates the mandatory language the County employed when the criteria (such as increased population or employment) are met. But WEAN's interpretation fails to give meaning to all words in Section 1.5.1.2.3 without necessity, since the mandatory and permissive language may readily be harmonized. *See, Chelan County. v. Fellers*, 65 Wn.2d 943, 946, 400 P.2d 609 (1965); *Williams v. Pierce County*, 13 Wn. App. 755, 758, 537 P.2d 856 (1975); *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 Plan creates 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.

WEAN next argues that the above Plan section is too unconnected to the docketing process set for the in Chapter 16.26 ICC. But Section 1.5.1.2.3 specifically references the docketing process in its mandatory language: “*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." The Plan creates a duty, and once that duty arises, it is carried out through the docket process.

Finally WEAN essentially argues that the duty imposed by Section 1.5.1.2.3 may be onerous for the County to implement. But the court's duty is to interpret the language employed by the County in its Plan. If Island County determines that the process created by its plan is unwieldy, then it can revise the plan legislatively. Wright's Crossing' application must be reviewed in light of Section 1.5.1.2.3 as it is currently written.

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 23rd day of March, 2020.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP



By _____
Margaret Y. Archer, WSBA No. 21224
Attorneys for Petitioner

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 23rd day of March, 2020, I caused true and correct copies of this document to be served on the parties listed below, via the method(s) indicated:

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DATED at Tacoma, Washington this 23rd day of March, 2020.



Holly Harris, Legal Assistant

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