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

NO. 53363-4-II

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

Appellants,

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

RESPONSE BRIEF OF WHIDBEY ENVIRONMENTAL ACTION
NETWORK

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. OVERVIEW OF THE CASE	3
A. The GMA’s Periodic Review Process and Island County’s 2016 Comprehensive Plan Update	3
B. The Annual Docket Process for Comprehensive Plan Amendments	6
C. Wright’s Crossing’s Proposal and the County’s Decision	12
D. Wright’s Crossing’s Appeal to the Growth Management Hearings Board	16
E. Superior Court Proceedings	18
III. STANDARD OF REVIEW	19
IV. ARGUMENT IN RESPONSE.....	21
A. This Court Should Not Consider Wright’s Crossing’s New Arguments on Appeal.....	21
B. Wright’s Crossing Has Failed to Identify a Clear Duty Requiring the County to Place Its Proposed UGA Expansion on the Final Docket	25
1. The triggering language of Section 1.5.1.2.3 of the Comprehensive Plan does not impose a mandatory duty to place Wright’s Crossing’s proposal on the final docket.....	26

2.	2.Nor does the final paragraph of Section 1.5.1.2.3 of the Comprehensive Plan impose a mandatory duty on the County	29
V.	CONCLUSION.....	36

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Bowers v. Pollution Control Hearings Bd.</i> , 103 Wn. App. 587, 13 P.3d 1076 (2000).....	22
<i>Citizens of Mount Vernon v. City of Mount Vernon</i> , 133 Wn.2d 861, 947 P.2d 1208 (1997).....	23
<i>City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 136 Wn.2d 38, 959 P.2d 1091 (1998).....	20
<i>Dep’t of Ecology v. Pub. Util. Dist. No. 1 of Jefferson County</i> , 121 Wn.2d 179, 849 P.2d 646 (1993)	20
<i>Devore v. Dep’t of Social and Health Services</i> , 80 Wn. App. 177, 906 P.2d 1016 (1995).....	22
<i>Diehl v. Mason County</i> , 94 Wn. App. 645, 972 P.2d 543 (1999).....	20
<i>Freeman v. Gregoire</i> , 171 Wn.2d 316, 256 P.3d 264 (2011).....	27
<i>King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 142 Wn.2d 543, 14 P.3d 133 (2000).....	20
<i>King County v. Washington State Boundary Review Bd. for King County</i> , 122 Wn.2d 648, 860 P.2d 1024 (1993).....	23
<i>Manor v. Nestle Food Co.</i> , 131 Wn.2d 439, 932 P.2d 628 (1997)	7
<i>Pacific Land Partners, LLC v. State Dep’t of Ecology</i> , 150 Wn. App. 740, 208 P.3d 586 (2009).....	22

<i>Port of Seattle v. Pollution Control Hearings Bd.</i> , 151 Wn.2d 568, 90 P.3d 659 (2004).....	7
<i>Spokane County ex rel. Sullivan v. Glover</i> , 2 Wn.2d 162, 97 P.2d 628 (1940).....	30
<i>Stafne v. Snohomish County</i> , 174 Wn.2d 24, 271 P.3d 868 (2012).....	9, 15, 31
<i>State v. Krall</i> , 125 Wn.2d 146, 881 P.2d 1040 (1994).....	30
<i>State v. Rice</i> , 174 Wn.2d 884, 279 P.3d 849 (2012).....	30
<i>Streng v. Clarke</i> , 89 Wn.2d 23, 569 P.2d 60 (1997).....	8
<i>Whatcom County Fire Dist., No. 21 v. Whatcom County</i> , 171 Wn.2d 421, 256 P.3d 295 (2011)	3

<u>State Statutes and Regulations</u>	<u>Page</u>
RCW 24.05	19
RCW 34.05.554	22
RCW 34.05.570(1)(a)	19
RCW 34.05.570(3).....	19
RCW 36.70A.....	1
RCW 36.70A.010.....	3
RCW 36.70A.020.....	4

RCW 36.70A.030(4).....	3
RCW 36.70A.110(1).....	4
RCW 36.70A.120.....	34
RCW 36.70A.130.....	4
RCW 36.70A.130(1)(a)	33
RCW 36.70A.190(5).....	7
RCW 36.70A.320(2).....	19
RCW 36.70A.320(3).....	19
RCW 36.70A.470.....	6
RCW 36.70A.470(2).....	6, 16
RCW 36.70A.470(4).....	7
WAC 365-196.....	7
WAC 365-196-020(6).....	17
WAC 365-196-020(6)(b)	13
WAC 365-196-020(6)(d)	8, 9, 10, 13, 15, 31
WAC 365-196-310(2)(3)	4
WAC 365-196-310(4)(e)(i).....	15, 16, 17, 31
WAC 365-196-640(6)(b)	8, 31

<u>Island County Regulations</u>	<u>Page</u>
ICC 16.26	28, 33, 34, 35, 36
ICC 16.26.060.....	10, 31
ICC 16.26.060, Table A.....	11
ICC 16.26.060.D.....	11
ICC 16.26.060.D.2.....	12, 13
ICC 16.26.060.E.....	13
ICC 16.26.060.E.1–6	11, 30
ICC 16.26.080, Table B.....	12
ICC 16.26.080.D–F.....	12
ICC 16.26.080.G.....	12

I. INTRODUCTION

In this appeal, appellant Wright's Crossing, LLC, challenges a ruling by the Washington Growth Management Hearings Board ("GMHB") upholding Island County's decision to not expand the urban growth area ("UGA") associated with the City of Oak Harbor. Under Washington's Growth Management Act ("GMA"), Chapter 36.70A RCW, a UGA is part of the local comprehensive plan, and marks the dividing line between areas zoned for urban and rural development. Wright's Crossing requested that the UGA be expanded to accommodate a new 1,000- to 1,500-unit housing development, on actively farmed land currently zoned for rural and rural agricultural use. To our knowledge, "this would be the largest single development ever proposed or developed in Island County, either before or after adoption of the GMA." AR 145.

As discussed below, Island County gave much consideration to Wright's Crossing's requested UGA expansion, but ultimately declined to place it on the final "annual docket" for proposed comprehensive plan amendments. Under the GMA, "docketing" is the name used for the process of formally amending the local comprehensive plan, and is traditionally a matter of legislative discretion. In this case, Island County declined to docket Wright's Crossing's proposal because the change was found to be unnecessary, and also due to limited staff resources to undertake such a

significant task of evaluating potential changes to the county's projected population and UGAs.

Now, Wright's Crossing has argued that Island County self-imposed a mandatory duty—on itself—to fast-track any and all proposed UGA expansions to the final stage of the docketing process, abrogating its traditional legislative discretion, and regardless of the availability of limited county resources. But it failed to cite any provision of the GMA, the Island County Code, or the local comprehensive plan that would impose such a duty. At this late date in the controversy, Wright's Crossing also bases much of its argument on a comprehensive plan provision that was never properly raised or argued below.

Wright's Crossing should not be allowed to raise new issues on appeal. It has failed to cite any regulatory text imposing a clear duty on the county to fast-track its proposed UGA expansion to the final phase of the docketing process. Accordingly, intervenor-respondent Whidbey Environmental Action Network ("WEAN")—a local non-profit organization dedicated to environmental preservation and conservation of the natural Whidbey Island landscape—respectfully asks this Court to deny Wright's Crossing's appeal.

Since the issue in the case concerns the intricacies of the GMA's docketing process, we begin with an overview of that process, and then

discuss the county's denial of Wright's Crossing's proposed UGA expansion and the GMHB's denial of its administrative appeal.

II. OVERVIEW OF THE CASE

A. The GMA's Periodic Review Process and Island County's 2016 Comprehensive Plan Update

The Growth Management Act was enacted in 1990 to prevent “uncoordinated and unplanned growth,” and to prevent land uses that “pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state.” RCW 36.70A.010. To those ends, the GMA requires Washington's largest cities and counties (including Island County) to adopt a “comprehensive plan,” the purpose of which is to provide “a generalized coordinated land use policy” for guiding future development. RCW 36.70A.030(4). *See also Whatcom County Fire Dist., No. 21 v. Whatcom County*, 171 Wn.2d 421, 427, 256 P.3d 295 (2011) (discussing purpose of comprehensive plan). The goal of the GMA is that through planned growth as guided by the comprehensive plan, sprawling, uncoordinated growth will be avoided.

Among the elements that must be included in every comprehensive plan is the urban growth area or “UGA,” the purpose of which is to (a) provide a designated area for urban-level densities of development, and (b) to prevent urban development from unnecessarily encroaching on areas

better suited for rural use. *See* RCW 36.70A.110(1). By statute, the UGA must be large enough to accommodate projected growth over the next 20 years (*see id.* at (2)), but also be small enough to prevent sprawl.¹ By keeping urban-level development within the UGA, these requirements serve the GMA’s goal to “[r]educe the inappropriate conversion of undeveloped land into sprawling, low-density development.” RCW 36.70A.020.

Of course, cities and counties grow and change over time, and so do projections of future growth and employment. Thus, to ensure that local comprehensive plans stay current over time, and that they continue to serve the GMA’s goals as populations change, the GMA establishes a process known as “periodic review,” wherein cities and counties must re-evaluate their plans comprehensively (including UGAs) on an eight-year cycle. *See generally* RCW 36.70A.130.

Most recently, Island County undertook this periodic review process in 2016, as noted in the Island County resolution at issue in this case—Island County Resolution No. C-110-17, which may be found in the Administrative Record at AR 34–47.

¹ *See* WAC 365-196-310(2)(3) (“The urban growth area may not exceed the areas necessary to accommodate the growth management planning projections, plus a reasonable land market supply factor, or market factor.”).

As part of its 2016 periodic review process, Island County considered whether to expand the UGA boundaries in its comprehensive plan, including the UGA associated with the City of Oak Harbor. The county worked with an Intergovernmental Working Group, which consisted of staff from the cities of Oak Harbor, Coupeville, and Langley, including 20 meetings to discuss future population projections. AR 39. The county conducted a Buildable Lands Analysis or “BLA” to determine whether the existing UGA contained enough land to accommodate 20 years of projected growth. *Id.* The county then held 47 community and advisory meetings to discuss the update and its underpinnings, 94 meetings of the Island County Board of Commissioners, 33 meetings of the Planning Commission, and 8 joint meetings of the Board and Commission. AR 40. It was a lengthy, complex, and time-consuming process.

Ultimately, based on the county’s expertise, extensive public and agency involvement, and as an exercise of the county’s legislative discretion, the county declined in 2016 to expand the Oak Harbor UGA. AR 36. The County found that the existing UGA was already sufficient to accommodate future growth and that an expansion was not necessary.

B. The Annual Docket Process for Comprehensive Plan Amendments

In addition to the standard, eight-year periodic review process, the GMA also establishes an annual process for cities and counties to consider comprehensive plan amendments proposed by the public—known as the “annual docket.” This requirement is codified at RCW 36.70A.470, which provides, in part, as follows:

Each county and city planning under RCW 36.70A.040 shall include in its development regulations a procedure for any interested person, including applicants, citizens, hearing examiners, and staff of other agencies, to suggest plan or development regulation amendments. The suggested amendments shall be docketed and considered on at least an annual basis, consistent with the provisions of RCW 36.70A.130.

RCW 36.70A.470(2). As noted at the outset of this brief, this case concerns a request from Wright’s Crossing to place a proposed UGA expansion on Island County’s 2017 annual docket. To put that controversy in the proper context, it is important to understand what the GMA does and does not say about the annual docketing process.

First, as quoted above, proposed plan amendments must be “docketed and considered on at least an annual basis.” RCW 36.70C.470(2). But the GMA says very little about what the docket consists of and what level of “consideration” must be given. In fact, all the GMA says is that “docketing refers to compiling and maintaining a list of suggested changes

to the comprehensive plan . . . in a manner that will ensure such suggested changes will be considered by the county or city and will be available for review by the public.” RCW 36.70A.470(4). That is all the statute requires—a list of proposed changes, that the changes be available to the public, and a guarantee that at least some consideration (a broad, undefined term) be given to each proposal. The statute does not say that each proposal must receive the same level of consideration, or that any proposal must be considered exhaustively.

Instead, the issue of what constitutes adequate “consideration” is addressed by the GMA’s implementing regulations at Chapter 365-196 WAC, adopted by the Washington Department of Commerce.² As regulations adopted by the agency charged with implementing the GMA, these rules are entitled to substantial deference. *See, e.g., Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004) (agency interpretation must be given “great weight”); *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 445, 932 P.2d 628 (1997) (“[I]t has been established in a variety of contexts that properly promulgated, substantive agency regulations have the force and effect of law.”).

² *See* RCW 36.70A.190(5) (directing the Department of Commerce to “adopt[] by rule procedural criteria to assist counties and cities in adopting comprehensive plans and development regulations that meet the goals and requirements of [the GMA].”).

On this issue, the Commerce rules provide, first, that “a *consideration* of proposed amendments”—as that term is used in the GMA—“does not require a *full* analysis of every proposal within twelve months if resources are unavailable.” WAC 365-196-640(6)(b) (emphasis added). In other words, while the GMA requires proposals to be “docketed and considered annually,” the level and depth of review may vary. This rule makes clear that not every proposed amendment must be fully evaluated when local resources are lacking.

The Commerce rules also provide that the annual docketing process may have two phases—one phase to determine which third-party proposals will receive a detailed evaluation, and then a second phase to more fully consider the proposals that survive the first round of review. This general framework is expressed in WAC 365-196-020(6)(d), which provides that “[o]nce a proposed amendment is received, the county or city *may* determine if a proposal should receive further consideration as part of the comprehensive plan amendment process” (emphasis added). In other words, having “considered” a proposal at the initial stage of the docketing process, and having decided that resources for a more in-depth review are lacking, a city or county may decline to consider the matter further. *See, e.g., Strenge v. Clarke*, 89 Wn.2d 23, 28, 569 P.2d 60 (1997) (“The ordinary meaning of the word ‘may’ conveys the idea of choice or discretion.”).

In 2012, the Washington Supreme Court addressed this two-phase docketing framework in *Stafne v. Snohomish County*, 174 Wn.2d 24, 271 P.3d 868 (2012). In that case, Stafne sought an amendment to Snohomish County’s comprehensive plan to allow him to develop rural lands that he recently acquired, arguing they were mis-classified as “forest lands” under the county’s existing plan, prohibiting urban-level development. *See Stafne*, 174 Wn.2d at 28. In Snohomish County, the annual docket and consideration process had two phases, as envisioned by WAC 365-196-020(6)(d).³ And Stafne was upset that the county had rejected his proposal at the first screening phase, “decid[ing] not to place [his] proposal on the *final* docket.” *Stafne*, 174 Wn.2d at 28 (emphasis added). Later, when Stafne sued the county for not placing his proposal on the “final docket,” the Supreme Court observed that—absent an affirmative duty to act in “the GMA or other law”—the county’s decision to exclude the proposed amendment from further consideration was effectively beyond judicial review. As the Court explained:

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

³ A description of Snohomish County’s two-phase docketing process may be found at CP 411–14, which consists of Snohomish County’s response brief before the Washington Court of Appeals in the *Stafne* litigation.

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 (footnote omitted).

Like Snohomish County, and in the spirit of WAC 365-196-020(6)(d) (referenced above), Island County also has adopted a two-phase annual docketing process. That process is codified at Section 16.26.060 of the Island County Code ("ICC"), which may be found in the record at CP 476-77.

In the first phase of Island County's docketing process, the Planning Commission evaluates each proposal and recommends whether it should be placed on the county's final docket for a full and complete evaluation. In making that recommendation, the Commission considers several factors, including whether it would be "more appropriate" to consider the preproposal during the next periodic review cycle, and whether the county has sufficient staff resources to pursue a more in-depth review:

In making its docket recommendation, the Planning Commission should consider the following:

1. The application is deemed complete;
2. The application, in light of all proposed amendments being considered for inclusion in the year's annual docket, can be reasonably reviewed within the staffing resources and operational budget allocated to the Department by the Board;

3. The proposed amendment would not require additional amendments to the Comprehensive Plan or development regulations not otherwise addressed in the application, and is consistent with other goals, objectives, and policies of the Comprehensive Plan;
4. The proposed Plan amendment raises policy, land use, or scheduling issues, or that the proposal is comprehensive enough in nature that it would more appropriately be addressed as part of a periodic review cycle;
5. The application proposes a regulatory or process change that for which no amendment to the comprehensive plan is required and should be reviewed for potential consideration as a part of the work plan;
6. The application lacks sufficient information or adequate detail to review and assess whether or not the proposal meets the applicable approval criteria. A determination that the proposal contains sufficient information and adequate detail for the purpose of docketing does not preclude the Department from requesting additional information at a later time.

ICC 16.26.060.E.1–6.

Following the Planning Commission’s consideration of these factors, it sends a recommendation to the Island County Board of Commissioners stating whether each proposal should be included in the final docket, excluded from the final docket, or deferred to a later date. *See* ICC 16.26.060.D. The Board of Commissioners must then vote to accept or reject the Planning Commission’s recommendation, though it need not consider any particular factors. *See* ICC 16.26.060, Table A. If the Board

decides to “exclude” a proposal, it is without prejudice; the proposed plan amendment may be resubmitted in any following year. *See* ICC 16.26.060.D.2 (“without prejudice to the applicant or the proposal”).

Later, in the second phase of Island County’s docketing process (much like the second phase of Snohomish County’s process in *Stafne*), the Planning Commission holds additional public hearings and provides more detailed review of proposals that survive the first phase of the screening process. *See* ICC 16.26.080, Table B; ICC 16.26.080.D–F. The Board of Commissioners must then decide, as a matter of legislative discretion, whether to accept or reject each surviving proposal. *See* ICC 16.26.080.G.

C. Wright’s Crossing’s Proposal and the County’s Decision

On August 1, 2017, Wright’s Crossing submitted a proposal to expand Island County’s UGA for the City of Oak Harbor (the same UGA that the county decided *not* to expand earlier that year during its periodic review cycle), which requires an amendment to the county’s comprehensive plan. The proposed expansion would cover 250 acres of land on which Wright’s Crossing wishes to build a 1,000- to 1,500-unit housing development, plus 50 acres between that project and the UGA’s current boundary. *See* AR 34. The land that would be affected by this proposed change is currently zoned rural-agricultural and rural, which would not allow this project. AR 6-8. In essence, Wright’s Crossing wanted to expand

the Oak Harbor UGA to accommodate a large new housing project—and it wanted the county to expend significant resources in doing so, less than a year after the county determined that the Oak Harbor UGA was sufficient to accommodate projected growth over the next 20 years.

In part, Wright’s Crossing based its request on its own estimate of purported employment growth in Oak Harbor, which, it says, requires a re-evaluation of the county’s prior decision during the periodic review process. Ironically, if Wright’s Crossing felt the county’s original decision was made in error, it could have appealed that decision. But it chose not to. *See* AR 665 (“The Petitioner did not challenge the County’s recent Comprehensive Plan update and . . . it is considered GMA compliant.”).

After a public hearing on September 25, 2017, the Planning Commission considered Wright’s Crossing’s proposal and later recommended that the Board of Commissioners exclude it from the final docket, consistent with ICC 16.26.060.D.2, WAC 365-196-020(6)(d), and WAC 365-196-020(6)(b). The Planning Commission’s findings and conclusions in support of that decision are summarized in the administrative record at AR 38–47, and show clearly that the commission considered the factors at ICC 16.26.060.E for decisions to include, exclude, or defer proposed changes. *See* AR 42–43.

Later, on November 7, 2017, the Board of Commissioners adopted the Planning Commission’s recommendation through County Resolution C-110-17, PLG-012-17, adding additional findings of fact. *See* AR 34–36. Among other things, the Board found that the proposal was premature, that the current UGA is adequate to accommodate projected growth, that (at the time) a number of tentative actions by the Navy and the Department of Commerce made consideration of the proposal difficult or impossible, and that changing the UGA would be a “significant undertaking” for the county’s limited administrative resources. *See* AR 43–47.⁴ Notwithstanding the job growth cited by Wright’s Crossing, the UGA still had more than sufficient capacity to meet the requirements of the GMA.⁵ Even if the UGA were in need of expansion, the specific property owned by Wright’s Crossing would not be a preferred place to expand it.⁶ Finally, the Board

⁴ *See also* AR 46 (“Running a new [buildable lands analysis] is a significant undertaking, and is not a reasonable use of limited staffing resources and operational budget one year into the 20-year planning period”); AR 42 (“staff resources and time needed to re-run the Buildable Lands Analysis (BLA) and evaluate this application would limit the County’s ability to respond to other items on the 2018 work plan and docket, without additional resources”).

⁵ *See* AR 44 (“While the projection allocation may have been too low, the existing capacity is significantly larger than the allocation. The UGA has an employment reserve of 2,690 (1,611% of the allocation), and the employment growth does not create a capacity concern at this time.”).

⁶ *See* AR 44 (“Even if the JPA were expanded to include all of the property in the Wright’s Crossing application, most of the Wright’s Crossing proposal includes property that meets the criteria for the AGA overlay—to be considered last for potential UGA expansions.”).

determined that while the proposed UGA expansion might be consistent with comprehensive plan goals relating to housing, it would still conflict with other goals and elements of the plan, potentially requiring other changes in addition to the UGA.⁷ As the Growth Management Hearings Board would later observe, “the County did not exercise its discretion to deny adding Petitioner’s proposals to the 2018 docket lightly.” AR 668.

In denying Wright’s Crossing’s request, the Board of Commissioners’ decision was consistent with WAC 365-196-020(6)(d), which gives the county discretion to “determine if a proposal should receive further consideration as part of the comprehensive plan amendment process.” The Board’s decision was consistent with *Stafne*, which upheld a similar two-phase process used by Snohomish County. It was consistent with the Island County Code, under which the county has discretion to exclude a particular proposal from that year’s final docket. And it was consistent with WAC 365-196-310(4)(e)(i), which counsels against piecemeal amendment of a county’s UGA, and recommends that counties defer such proposals to the next periodic review cycle:

A modification of any portion of the urban growth area affects the overall urban growth area size and has county-wide implications. Because of the significant amount of resources needed to conduct a review of the urban growth

⁷ See AR 42 (“This is consistent with the additional housing concerns, but is inconsistent with others [of the comprehensive plan] (protection of agriculture, rural character, sprawl, transportation and infrastructure concurrency).”).

area, and because some policy objectives require time to achieve, frequent, piecemeal expansion of the urban growth area should be avoided. *Site-specific proposals to expand the urban growth area should be deferred until the next comprehensive review of the urban growth area.*

WAC 365-196-310(4)(e)(i) (emphasis added).

The one thing that cannot be said of the county's action is that it did not "consider" the proposed UGA expansion, as required by RCW 36.70A.470(2). The county considered the proposal, it just did not decide to carry it forward to the final stage of the docketing process.

D. Wright's Crossing's Appeal to the Growth Management Hearings Board

After the Board of Commissioners excluded the proposal from the final annual docket, Wright's Crossing filed a petition for review to the Growth Management Hearings Board, the body charged with initial oversight regarding local compliance with the GMA. *See* AR 112–43. Later, Whidbey Environmental Action Network ("WEAN") intervened (*see* AR 241–43, Order on Intervention), and both the county and WEAN moved to dismiss Wright's Crossing's petition for failure to state a statutory basis upon which the GMHB could grant relief. *See* AR 264–86 (county motion); AR 518–28 (WEAN motion). In part, they argued that the decision to exclude a proposal from the final docket is a matter committed to the county's legislative discretion, under *Stafne*. *See* AR 271–72.

Ultimately, the GMHB agreed that the decision to docket (or not docket) a proposal is traditionally a matter of legislative discretion. Thus, “[i]n order to prevail on its claims based on the County’s decision not to docket the proposal, [Wright’s Crossing] must establish a duty requiring the County to do so.” AR 663. After reviewing all authorities cited by Wright’s Crossing—including dozens of provisions within the GMA, the GMA’s implementing regulations, and various local authorities—the GMHB determined that Wright’s Crossing failed in that regard. Wright’s Crossing did not identify any regulatory language that would affirmatively require the county to place its proposal on the final docket. *See* AR 658–71 (GMHB Order of Dismissal dated March 2, 2018).

In making that decision, the GMHB placed special emphasis on WAC 365-196-020(6) and WAC 365-196-310(4)(e)(i), which, as discussed above, give the county discretion to “determine if a proposal should receive further consideration as part of the comprehensive plan amendment process,” and which counsel in favor of deferring piecemeal UGA expansions to the next periodic review cycle. Consistent with these rules, the GMHB held it was within the county’s legislative discretion to exclude the proposed UGA expansion from the final docket.

A local government legislative body has the discretion to docket or not docket a particular proposed comprehensive plan amendment during an RCW 36.70A.130(2)(a) annual

cycle in the absence of a GMA or self-imposed mandate. Here, the Board finds and concludes that the Petitioner has failed to meet its burden to establish the existence of such a mandate.

AR 670.

Later, Wright's Crossing filed a motion for reconsideration, arguing, *inter alia*, that the GMHB ignored mandatory language in the county's comprehensive plan and other local authorities, which, it argued, required the county place its proposal on the final docket. AR 674. Rejecting those arguments, the GMHB denied Wright's Crossing's motion for reconsideration on March 22, 2018. *See* AR 711–14 (GMHB Order Denying Motion for Reconsideration).

E. Superior Court Proceedings

Following the GMHB's denial of its motion for reconsideration, Wright's Crossing filed its petition for review to the superior court, seeking reversal of the GMHB's ruling and an order directing Island County to place its proposal to expand the Oak Harbor UGA on the county's final docket. On April 23, 2019, the superior court denied Wright's Crossing's petition, holding that the county did not have a mandatory duty to do so. *See* CP 613–22 (Order of Dismissal).

This appeal followed, in which Wright's Crossing continues to argue that Island County had a mandatory duty to place its proposal on the

final 2018 annual docket, and to expend limited administrative resources to determine if the UGA should be expanded for Wright's Crossing's massive housing development, only a year after the county determined that no expansion was necessary to accommodate future growth.

III. STANDARD OF REVIEW

As Wight's Crossing states in its brief, its claim is governed by the judicial review provisions of the Administrative Procedure Act ("APA"), Chapter 24.05 RCW. *See* Op. Br. at 23. In turn, the APA provides that a reviewing court may reverse the agency's decision if it finds, *inter alia*, that the decision is arbitrary and capricious or that the agency erroneously interpreted or applied the law. *See* RCW 34.05.570(3). The appellant bears the burden of demonstrating the invalidity of the agency action. RCW 34.05.570(1)(a).

These standards of review are a high burden given the considerable deference accorded to agencies to regulate land use within their jurisdiction in a manner consistent with the GMA. Both the GMA and applicable case law mandate that the GMHB give deference to the county planning process. RCW 36.70A.320(2). The GMHB must find compliance unless it determines that the county's decision 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(3). To find an action "clearly erroneous," the

GMHB must have a “firm and definite conviction that a mistake has been committed.” *Dep’t of Ecology v. Pub. Util. Dist. No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

On appeal, this Court applies the standards of review at RCW 34.05 directly to the agency’s decision, not to the superior court’s decision. *See City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45–46, 959 P.2d 1091 (1998). In doing so, this Court must “accord deference to agency interpretation of the law where the agency has specialized expertise in dealing with such issues.” *Id.* Just as the GMHB is instructed to defer to the County for consistency with the GMA, the GMHB is entitled to deference in determining what the GMA requires. Accordingly, this Court must give “substantial weight” to the GMHB’s interpretation of the law. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000) (citing *Diehl v. Mason County*, 94 Wn. App. 645, 652, 972 P.2d 543 (1999)).

Under these standards of review, this Court should uphold the GMHB’s March 2, 2018 Order of Dismissal (AR 658–71) finding that Wright’s Crossing failed to identify a mandatory duty requiring the County to advance its proposed UGA expansion to the final phase of the 2018 annual docket process. That decision was a matter of legislative discretion and should not be disturbed.

IV. ARGUMENT IN RESPONSE

A. This Court Should Not Consider Wright’s Crossing’s New Arguments on Appeal

In its opening brief, Wright’s Crossing relies on two paragraphs contained in Section 1.5.2.5.3 of Island County’s comprehensive plan—concerning UGA expansions—to argue that the county had a mandatory duty to place its proposal on the county’s 2018 final annual docket. The first can be found at the top of page 32 of the comprehensive plan (Section 1.5.1.2.3), and addresses situations in which certain changed circumstances “will trigger a reevaluation” of the various analyses underlying the current UGA. *See* CP 482; Op. Br. at 2, 13, 21, 31, 32 (quoting provision). The second provision on which Wright’s Crossing relies can be found in the final paragraph of that section, and provides:

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); Op. Br. at 2, 14, 21, 31, 32. Of these two provisions, only the second speaks directly to the annual docketing process.

Not surprisingly, it is on the second that Wright's Crossing now focuses, resting the great weight of its argument on the italicized language in the block-quote above. Op. Br. at 2, 14, 21, 31, 32.

But Wright's Crossing never (not once) cited the italicized language above to the GMHB or to the superior court. It never referenced this language. It never quoted this language. Thus, the Court should not allow Wright's Crossing to rely on it here, on appeal of the GMHB's decision.

Under the APA, “[i]ssues not raised before the agency *may not* be raised on appeal” unless a specific exception applies. RCW 34.05.554 (emphasis added). *See also Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 597, 13 P.3d 1076 (2000) (APA “precludes appellate review of issues not raised below”). This rule reflects the fact that, under the APA, the reviewing court sits in a limited appellate capacity, not in its original capacity. *See, e.g., Devore v. Dep't of Social and Health Services*, 80 Wn. App. 177, 180, 906 P.2d 1016 (1995) (“When a trial court reviews an administrative decision, the court acts in a limited appellate capacity, and all statutory requirements must be met before the court’s jurisdiction is properly invokes.”). Nor is this limitation “simply a technical rule of appellate procedure; instead, it serves an important policy purpose in protecting the integrity of administrative decision-making.” *Pacific Land Partners, LLC v. State Dep't of Ecology*, 150 Wn. App. 740, 754, 208 P.3d

586 (2009) (quoting *King County v. Washington State Boundary Review Bd. for King County*, 122 Wn.2d 648, 668, 860 P.2d 1024 (1993)).

Finally, “[i]n order for an issue to be properly raised before an administrative agency, there must be more than simply a hint or slight reference to the issue in the record.” *Citizens of Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 869, 947 P.2d 1208 (1997) (citing *King County, supra*, 122 Wn.2d at 668). “Our cases require issues to be first raised at the administrative level and encourage parties to fully participate in the administrative process.” *Citizens of Mount Vernon*, 133 Wn.2d at 869.

Applied here, we encourage this Court to review Wright’s Crossing’s petition for review to the GMHB (AR 2–30), its amended petition for review (AR 112–42), its re-stated issues on appeal to the GMHB (AR 155–59), its response to the county’s and WEAN’s motions to dismiss (AR 585–601), its motion for reconsideration before the GMHB (AR 674–81), its petition for review to the superior court (CP 1–37), its opening and reply briefs in superior court (CP 234–59 & 483–500), and the verbatim report of proceedings. The Court will find that in all of these documents—among the many dozens of statutes, rules, comprehensive plan provisions and other authorities cited by Wright’s Crossing in its meandering hunt for a mandatory duty compelling the county to place its proposal on the final docket—not once did Wright’s Crossing cite, quote, or otherwise reference

the italicized language above from the last paragraph of Section 1.5.1.2.3 of the county's comprehensive plan. Yet, it is that very language which it now claims so clearly demonstrates that the GMHB erred. That provision makes its debut appearance in Wright's Crossing's opening brief to this Court. It was never raised or argued below.

Indeed, the only time this language was referenced below was when the superior court raised it *sua sponte* at oral argument, over WEAN's objection. *See* Verbatim Report of Proceedings at 34:1–35:18, 50:21–51:6. But that does not cure Wright's Crossing's failure to raise it before the GMHB itself. As counsel for WEAN explained below, “[i]t doesn't do any good for us to sit here and second guess the GMHB saying, well, look at this other language in the comprehensive plan petitioner could have raised. The GMHB is held to the criteria of answering the petitioner's arguments, not answering arguments that may arise [later].” *Id.* at 33:4–9.⁸ The superior court ultimately addressed this issue on the merits, concluding the italicized language above did not impose a duty on the county to advance Wright's Crossing's proposal to the final stage of the docketing process. *See id.* at 55:9–16, 56:7–13. That ruling was correct. But this Court should not make

⁸ *See also* Verbatim Report of Proceedings at 52:8–10 (arguing that it “would be improper to remand specifically to address arguments that were not made below”).

the same mistake of considering an issue that was never presented to the agency itself.

The simple fact is that Wright’s Crossing never cited or relied upon the final paragraph of Section 1.5.1.2.3 of the comprehensive plan, yet it now places the great weight of its argument on that specific language. Because Wright’s Crossing never raised that issue below, this Court should not consider it now. RCW 34.05.554 (“Issues not raised before the agency *may not* be raised on appeal”) (emphasis added).

B. Wright’s Crossing Has Failed to Identify a Clear Duty Requiring the County to Place Its Proposed UGA Expansion on the Final Docket.

But even if the Court does consider Wright’s Crossing’s belated reliance on the final paragraph of Section 1.5.1.2.3 of the comprehensive plan, still, the appeal should be denied. As noted above, Wright’s Crossing current argument relies entirely on two paragraphs of that section of the comprehensive plan as the alleged sources of a duty requiring Island County to place its proposed UGA expansion on the final annual docket. *See Op. Br.* at 5 (defining issue on appeal); *id.* at 2–3 (quoting provisions in dispute). We discuss these paragraphs in turn below. Neither imposes a duty on Island County to fast-track Wright’s Crossing’s proposal to the final stage of the annual docketing process. The GMHB’s order dismissing Wright’s Crossing’s appeal should be upheld.

1. The triggering language of Section 1.5.1.2.3 of the Comprehensive Plan does not impose a mandatory duty to place Wright’s Crossing’s proposal on the final docket.

The first provision that Wright’s Crossing relies on is the “triggering” language at page 32, Section 1.5.1.2.3 of Island County’s comprehensive plan. This section of the plan begins with a statement that UGAs “should only be modified during the periodic update process,” CP 481, but they “may be modified” outside the standard eight-year review cycle “if the expansion is necessary” due to certain changed circumstances, such as unexpected population growth or the opportunity to accommodate a major new employer. *Id.* A similar rule is stated in Section 3.3 of Island County’s Countywide Planning Policies (“CWPPs”), a document that establishes how the county will coordinate with affected cities on potential UGA expansions. *See* AR 320–21 (copy of CWPPs).⁹ But this authority is discretionary, as indicated by the word “may.”

To get around this discretion, Wright’s Crossing emphasizes that Section 1.5.1.2.3 of the comprehensive plan goes on to state “[i]f any of these [changed circumstances] are met, it *will trigger* a reevaluation of the

⁹ *See also* AR 666 n.18 (explaining that “a county-wide planning policy . . . is a written policy statement or statements used solely for establishing a county-wide framework from which the county and city comprehensive plans are developed and adopted pursuant to [the GMA]. This framework shall ensure that city and county comprehensive plans are consistent as required in RCW 36.70A.100.”) (internal quotations and emphasis omitted).

[county’s] population projections,”” and that “[f]rom there, the allocations and buildable lands analysis will also be reevaluated on a countywide scale.”” *See* Op. Br. at 2, 14, 21, 31, 32 (quoting provision; emphasis added). According to Wright’s Crossing, this “triggering” language is the first source of the county’s alleged mandatory duty to place its proposed UGA expansion on the final annual docket. *See id.*

But that is not what the quoted provision says. Far from saying that these “changed circumstances” require actual docketing of a project-specific comprehensive plan amendment (such as expanding the UGA in a specific location for a specific housing development), it says only that the changed circumstances—*if* they make a UGA expansion necessary—will trigger a high-level re-evaluation of the Buildable Lands Analysis and growth projections at a “countywide scale.” *See* CP 481. Nor does this provision say when such analysis must begin, provide any timeframe on when the analysis must be completed, or say that these decisions must even be made through the annual docketing process. In short, even if this provision could be read as requiring some type of action on the county’s part, it does not support the specific, mandamus-like relief requested by Wright’s Crossing; *i.e.*, an order directing that this specific UGA expansion, in this specific location, be advanced now to the final stage of the annual docket. *See Freeman v. Gregoire*, 171 Wn.2d 316, 327, 256 P.3d 264 (2011)

(“to compel an action in mandamus, a duty needs to be mandatory and ministerial: the duty must be defined with such particularity as to leave nothing to the exercise of discretion or judgment”).

As the superior court observed, Chapter 16.26 of the Island County Code establishes a two-stage docketing process, whereby the county has discretion to include (or not include) specific proposals based on many factors, including limited staff resources. *See* Verbatim Report of Proceedings at 58:2. *See also infra*, Section II.B (discussing procedure). In turn, this “triggering” language is “too unconnected with the application process to create a specific duty within that application process that pulls it out of the consideration discussed in the code of 16.26.” Verbatim Report of Proceedings at 57:23–58:2. On other words, even if this language could trigger a duty to do something, it does not impose a duty to place any particular proposal on the final docket for any particular year. Thus, it cannot support Wright’s Crossing’s requested relief. *See* CP 503 (requesting a remand with instructions “to docket Wright’s Crossing’s request”).

Because it is too vague to support Wright’s Crossing’s specific argument about the annual docketing process, the Court should deny Wright’s Crossing’s appeal to the extent that it relies on the triggering language in Section 1.5.1.2.3 of the comprehensive plan.

Indeed, even if the county were required to re-evaluate its prior UGA analysis based on Wright’s Crossing’s proposal—and further, to do so in the context of a single year’s annual docketing process—it appears that the county has already done so and determined, even despite the changed circumstances, that a UGA expansion is not necessary. *See* AR 44 (“While the projection allocation may have been too low, the existing capacity is significantly larger than the allocation. The UGA has an employment reserve of 2,690 (1,611% of the allocation), and the employment growth does not create a capacity concern at this time.”); *id.* (finding “[t]he Oak Harbor UGA has additional employment capacity despite faster than anticipated growth in year one, and thus an expansion is not needed at this time”).

2. Nor does the final paragraph of Section 1.5.1.2.3 of the Comprehensive Plan impose a mandatory duty on the County

Next, Wright’s Crossing relies on the final paragraph of Section 1.5.1.2.3 of the comprehensive as the source of a mandatory duty requiring the county to fast-track its proposal to the final stage of the annual docketing process. *See* Op. Br. at 2, 14, 21, 31, 32. As discussed above, the first sentence of that paragraph provides: “UGA modifications outside of the period update cycle may be proposed by a municipality, the County, or an individual.” CP 482 (emphasis added). It goes on to say: “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." *Id.* Wright's Crossing notes that "shall" is typically mandatory. But still, there are many problems with its reliance on this provision as the source of the alleged duty. *See* ICC 16.26.060.E.1–6. These problems extend beyond Wright's Crossing's failure to cite or otherwise raise this language in any of the proceedings below. *See infra*, Section IV.A.

First, the final paragraph of Section 1.5.1.2.3 cannot be read in a vacuum. Instead, it must be read against the backdrop of the GMA and the county's regular process for comprehensive plan amendments. *See, e.g., Spokane County ex rel. Sullivan v. Glover*, 2 Wn.2d 162, 170, 97 P.2d 628 (1940) ("Always, . . . the prime consideration is the intent of the legislature as reflected in its general, as well as its specific, legislation upon the particular subject.").¹⁰

As discussed above, the GMA does not require the county to fully analyze every proposed comprehensive plan amendment in any given year.

¹⁰ *See also State v. Rice*, 174 Wn.2d 884, 897, 279 P.3d 849 (2012) ("In determining whether 'shall' is mandatory, directory, or simply permissive in any given instance, we consider 'all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another.'") (quoting *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994)).

See WAC 365-196-640(6)(b) (“A consideration of proposed amendments does not require a full analysis of every proposal within twelve months if resources are unavailable”). Once a proposal is submitted, the county “may” decide to give it “further consideration as part of the comprehensive plan amendment process,” but is not required to do so. WAC 365-196-020(6)(d). The GMA counsels against piecemeal UGA amendments outside the normal, eight-year periodic review cycle, specifically “because of the significant amount of resources needed to conduct a review of the urban growth area, and because some policy objectives require time to achieve.” WAC 365-196-310(4)(e)(i). *See also* AR 320 (observing “[t]he review of a UGA for possible expansion is a significant undertaking”). Under the *Stafne* decision, docketing decisions are generally left to the legislative discretion of the local city or county. *See Stafne, supra*, 174 Wn.2d at 28. And here, the county has adopted a two-stage docketing process in accordance with these authorities, with discretion to end that process at the first stage based on a number of factors, including limitations on finite agency resources. *See* ICC 16.26.060.

Wright’s Crossing’s interpretation of Section 1.5.1.2.3 of the comprehensive plan cuts against all of these authorities. It would require the county to place *any* proposed UGA amendment on the final docket regardless of its merits and regardless of whether the county’s limited

resources would be better spent on other projects. For this reason alone, this interpretation should be viewed with high degree skepticism.

Second, the final paragraph of Section 1.5.1.2.3 of the comprehensive plan does not clearly imply a duty to fast-track proposed UGA amendments to the second stage of the docketing process. Obviously, it does say that UGA amendments 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.” But this sentence could be read in a number of other ways, too.

For example, it may be read simply as a requirement that the individual proposing the amendment follow the county’s process for the annual docketing process (not some other process). It could be read as referring to the first stage of the annual docket (not necessarily the second, final stage). It could be read as prohibiting the county from blindly deferring any and all consideration until the next eight-year periodic review cycle, requiring at least some consideration during the year it was submitted (clearly met in this case, *see* AR 38–47). The reference to the annual review docket may be read as prohibiting the county from updating its UGA more frequently than once a year (that is why the county “shall” place it on the

“annual” docket).¹¹ Or it may be read simply as requiring the county to consider proposed UGA amendments, if at all, according to the public docketing process (not some other process where the public is excluded). All of these interpretations would be consistent with the plain language of the last paragraph of Section 1.5.1.2.3 of the comprehensive plan. They would also be consistent with the discretion normally afforded counties under the GMA and its implementing regulations, the GMA’s general acknowledgement that UGAs should not be updated more frequently than once every eight years, and the normal annual docketing process at Chapter 16.26 of the Island County Code.

Next, even if the last paragraph of Section 1.5.1.2.3 of the comprehensive plan were interpreted to require the county to place proposed UGA expansions on the final docket, that paragraph should still be read in concert with the “triggering” criteria discussed in the section above. As noted above, Section 1.5.1.2.3 provides that the county will re-evaluate its prior UGA analysis, but only when doing so is found to be “necessary” due to changed circumstances (not any and all times the criteria are found to exist). *See* CP 481. Here, the county did look at how the UGA boundaries were originally calculated, but still determined that a change

¹¹ *See also* RCW 36.70A.130(1)(a) (cities and counties shall amend their comprehensive plans “no more frequently than once every year”).

was not necessary at that time. *See* AR 44 (“existing capacity is significantly larger than the allocation”). Thus, a precondition to the alleged duty was never met.

Finally, the intent behind the final paragraph of Section 1.5.1.2.3 of the comprehensive plan may be gleaned by looking to Section 3.3 of the CWPPs. As the superior court noted, Section 3.3 of the CWPPs is nearly identical, but adds additional detail about the county’s intent. It provides:

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 .

AR 322 (emphasis added).

In this section of the CWPPs—intended to be consistent with the comprehensive plan, not an exception to it¹²—the county has clarified that while individual UGA amendments are to be placed on the “annual review docket,” they are to be done so “per ICC 16.26.” In turn, Chapter 16.26 of

¹² *See* RCW 36.70A.120 (“Each county and city that is required or chooses to plan under RCW 36.70A.040 shall perform its activities . . . in conformity with its comprehensive plan”) (emphasis added); *see also* AR 666 n.18 (explaining that the purpose of county-wide planning policies is to ensure consistency between city and county comprehensive plans).

the Island County Code establishes a two-step docketing process, where the county may decline to advance a proposal to the final stage based on the factors discussed above and in the Island County resolution at issue in this case. *See* AR 43–47 (applying factors). Together, the parenthetical added in Section 3.3 of the CWPPs clarifies that the county did not intend the comprehensive plan to mandate the county to fast-track every proposed UGA expansion to the final stage of the docketing process, but only that it follow the two-stage docketing process in Chapter 16.26 of the Island County Code, and that it do so even when other jurisdictions, with their own codes and comprehensive plans, are involved in the process. As the superior court rightly held:

This informs the Court that the final paragraph of Comprehensive Plan provision 1.5.1.2.3 is not an exception to the evaluation process contained in Chapter 16.26, notwithstanding its reference to proposals being put on the annual review docket. The reference in Chapter 16.26 in the Countywide Planning Policies convinces the Court that the language in the final paragraph of Comprehensive Plan provision 1.5.1.2.3 does not create an exception to the evaluation process of Chapter 16.26.

CP 618, ¶20.

Under the GMA, the GMA’s implementing regulations, the Supreme Court’s decision in *Stafne*, and under the Island County Code and the county’s comprehensive plan, the decision to place a proposed UGA expansion on the final annual docket is a matter of legislative discretion.

The county had no duty—statutory or otherwise—to fast-track Wright’s Crossing’s proposal, to short-circuit the two-stage docketing process at ICC chapter 16.26, or to expend limited administrative resources only a year after the county’s last periodic review cycle. The county evaluated Wright’s Crossing’s proposal, determined that it should not be placed on the final docket for 2018, based in part on limited resources and continued capacity within the existing UGA. That is all the county was required to do.

V. CONCLUSION

For the reasons above, this Court should deny Wright’s Crossing’s appeal and affirm the GMHB’s dismissal of its petition for review.

Dated this 27th day of January, 2020.

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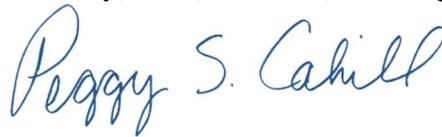
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