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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON:
DIVISION TWO

WRIGHT'S CROSSING, LLC and SCOTT THOMPSON, its
Manager/Owner,
Appellant,

v.

ISLAND COUNTY and ENVIRONMENTAL & LAND USE
HEARINGS OFFICE, political subdivisions of the State of Washington,
Respondents;

and

WHIDBEY ENVIRONMENTAL ACTION NETWORK ("WEAN"),
Intervenor/Other Respondent

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Erik D. Price, Judge
Superior Court Cause No. 18-2-01703-34
W. Wash. Growth Management Hearings Board No. 17-2-0011

BRIEF OF RESPONDENT ISLAND COUNTY

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I. INTRODUCTION

“Rights and remedies go together.” *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 386, 241 P.3d 1256 (2010). In this case, Wright’s Crossing (“Wright”) petitioned the Growth Management Hearings Board (“GMHB” or “Board”) for a remedy it had no power to give, to enforce a right the Growth Management Act (“GMA”) does not recognize. Apprehending this, the GMHB for Western Washington dismissed the petition for failure to state a claim for which relief could be granted, and the Superior Court of Thurston County upheld the decision on Administrative Procedure Act (“APA”) review. This court should do the same.

“As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action.” *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 359, 79 S. Ct. 468, 3 L.Ed.2d 368 (1959) (citation omitted). Sometimes, the nearest venue that will accept the filing fee will also be the forum with jurisdiction to hear the causes of action in a complaint, and the competency to offer the remedy sought after. Because this is a notice pleading state, a nearby defendant can often be made to answer a complaint that conflates some of these concepts, or neglects to prove one or more of them up. Other times, lawyers, judges, and

administrators can cause a lot of trouble for ourselves and our clients when we mix them up.

In maritime law, Congress has generally granted state and federal courts with concurrent subject matter jurisdiction to hear maritime cases.¹ But often, whether the key will open the door depends more truly on the remedy sought than the subject matter of the case. Even though Ishmael may sue Captain Ahab for maintenance and cure in any United States forum, only a United States Marshal may arrest the *Pequod* and bring her before a federal judge, a unique *in rem* remedy known only to the admiralty courts.

In Washington, the legislature has also prescribed, and the courts have enforced, a fairly technical and nuanced approach to the litigation of land use disputes between owners of property and their local sovereigns. A plaintiff may be constrained to bring his complaint before a tribunal of administrative experts at one of three offices of the Growth Management Hearings Board of the State; or it may be that the only remedy available is before a judge in the Superior Court, where the plaintiff will require an

¹ See *Dean v. Fishing Co. of Alaska, Inc.*, 177 Wn.2d 399, 405, 300 P.3d 815 (2013). To offer another example, there is an entire substantive body of confusing, inconsistent state and federal law about when and how to enforce a forum selection clause in a contract. In an era of international intermodal transportation, this can make it very difficult for litigants to order their affairs. See Jesse J. Eldred, *A Funny Thing Happened on the Way to the Selected Forum: A Practitioner's Guide to Enforcing or Challenging a Forum Selection Clause*, 28 U.S.F. MAR. L. J. 195 (2016).

entirely different theory of relief. Because of strict timeliness requirements, choosing to pursue the wrong remedy may foreclose any right to relief.

*Stafne v. Snohomish County*² affirms Board precedent that developed and articulated a rule that the GMA contains no general “duty to docket” annual GMA planning document amendment proposals. This general rule does in fact apply in this case. *Stafne* is terribly unhelpful to Wright’s Crossing, for our Supreme Court there affirmed dismissal of a docketing decision just like this one for failure to state a claim for which relief could be granted. Because of this, and hoping the Court will conflate the concepts of subject matter jurisdiction, remedies, and rights of relief, Wright’s Crossing introduces the case dismissively with “a brief discussion of the limits of the *Stafne* decision.” Brief, at 25.

But the court in that case correctly affirmed a bedrock requirement of civil procedure that has never been present in the long history of this litigation:

For a plaintiff to establish a right to relief, it must be *both* in a forum with subject matter jurisdiction over its cause of action *and* equipped with the ability to provide the sought-after remedy. In a recent unpublished opinion, this court affirmed that rule in this context. It held that the GMHB

² 174 Wn.2d 24, 271 P.3d 868 (2012).

may only hear challenges to (or amendments of) comprehensive plans or development regulations, and may not take jurisdiction over a petition unless it contains an allegation that a comprehensive plan or development regulation (or amendment thereto) is not in compliance with the requirements of the GMA.³

Below, the GMHB correctly applied that rule, which it gleaned from *Stafne* and its own precedents, dismissing the petition for failure to state a claim. This court should affirm, and while the County wholeheartedly agrees with the GMHB's disposition of the case, we will take this opportunity to clarify some confusing statements in *Stafne*. Our argument is this:

While the GMHB always had general subject matter jurisdiction over this contest because of the way Petitioner framed its theory for relief, it never had jurisdiction over the decision being appealed, or a remedy to offer even if it did. Hence, the petition never stated a cause of action under any set of facts.

³ *Futurewise v. City of Ridgefield*, No. 50406-5-II, 7 Wn.App.2d 1033, 2019 WL 366838 at *4 (Jan. 29, 2019), *rev. denied*, 193 Wn.2d 1032 (2019).

II. RESTATEMENT OF THE ISSUES

1. Does the general rule that the GMA provides no remedy for a party aggrieved by a legislative docketing decision control the outcome of this matter, and preclude anything more than threshold jurisdictional review of the requested remedy and theory of relief?

2. The process for the annual submission and review of planning docket proposals in Island County is codified at chapter 16.26 Island County Code (“ICC”). When the “triggering” words in the comprehensive plan highlighted by Wright’s Crossing are read in light of these regulations, the words in their surrounding context, and the structure of GMA planning, is it nonetheless clear that the Board of County Commissioners imposed no duty on itself to docket Wright’s proposal on the work agenda for 2018, or re-conduct the just-completed 2016 buildable lands analysis?

III. STATEMENT OF THE CASE

A. GMA Overview

1. Generally.

Island County plans in accordance with the Planning Enabling Act (Ch. 36.70 RCW) and the Growth Management Act (Ch. 36.70A RCW). The GMA requires counties to develop a “comprehensive plan” setting out the “generalized coordinated land use policy statement” of the county’s governing body. RCW 36.70A.030(5). Relevant goals of the GMA that

must be addressed in a comprehensive plan include the encouragement of “development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner;” the reduction of “inappropriate conversion of undeveloped land into sprawling, low-density development;” and the encouragement of “the availability of affordable housing to all economic segments of the population of the” State of Washington. RCW 36.70A.020.

The first step in the process of establishing a comprehensive plan is for a county to adopt county-wide planning policies (C[W]PPs). A C[W]PP is a written policy statement created by county municipalities and used ‘solely for establishing a county-wide framework from which county and city comprehensive plans are developed.’ C[W]PPs ensure that city and county comprehensive plans are consistent with one another with regard to issues of regional significance, and thus C[W]PPs must address policies for designation of U[rb]an G[rowth] A[reas], as well as policies for providing urban services, transportation, housing, and economic development.

King Cty. v. C. Puget Sound Growth Mgmt. Hearings Bd., 138 Wn.2d 161, 167, 979 P.2d 374 (1999).

“Citizens who attend and participate in the comprehensive plan hearings have standing to challenge provisions later adopted in a county’s comprehensive plan. However the GMA does not provide for public challenge to C[W]PPs.” *Id.* Notably, the GMA also does not provide a private, mandamus-like remedy for a local agency’s inaction. As discussed *infra*, the statutory remedies the GMHB is empowered to give are

declarative in nature and must have a nexus to the actual “adoption of plans, development regulations, and amendments thereto.” RCW 36.70A.300. “The GMA was spawned by controversy, not consensus and, as a result, it is not to be liberally construed.” *Thurston Cty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 342, 190 P.3d 38 (2008).

The comprehensive plan must designate UGAs within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature. Cities, of course, must be included in urban growth areas, but UGAs may only include territory located outside a city if that territory is already characterized by urban growth. RCW 36.70A.110.

More specifically, the statute goes on to say:

“Based upon the growth management population projection made for the county by the office of financial management, the county and each city within the county shall 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).

To achieve this goal, a municipality must include a housing element in its comprehensive plan that includes an inventory and analysis of existing and projected housing needs and a management plan for existing needs and projected growth for all economic segments of the community. *Stickney v. C. Puget Sound Growth Mgmt. Hearings Bd.*, No. 78518-4-I, ___ Wn.App.2d

___, 453 P.3d 25, ¶ 14 (Div. 1, Nov. 25, 2019). The GMA does not require smaller jurisdictions to engage in extensive original research to develop this inventory and analysis. It is permissible for them to rely upon reasonable assumptions derived from available data of a statewide or regional nature or representative of comparative jurisdictions in size and growth rate. *Id.* at ¶ 16.

The GMA also requires Island County to review and (if needed) update its comprehensive plan and development regulations for consistency with these principles every eight years. RCW 36.70A.130. Island County completed its last mandatory review on December 16, 2016, just one year before Wright's Crossing submitted its proposal. AR 274. Wright's Crossing did not challenge the 2016 comprehensive plan update, and it was GMA compliant. CP 47.

As part of the mandatory review/update process, urban growth areas and their limits must be evaluated every eight years as well.

3(a) Each county that designates urban growth areas under RCW 36.70A.110 shall review... its designated urban growth area or areas, and the densities permitted within both the incorporated and unincorporated portions of each urban growth area...

(b) The county comprehensive plan designating urban growth areas, and the densities permitted in the urban growth areas by the comprehensive plans of the county and each city located within the [UGA] shall be revised to accommodate the urban growth

projected to occur in the county for the succeeding twenty-year period.

RCW 36.70A.130.

The GMA requires the five most populous counties in the State to follow the statutory review and evaluation program, or “buildable lands analysis,” codified at RCW 36.70A.215. Island County is not required to, but also “runs” a buildable lands analysis (“BLA”) when and if it considers expanding UGAs during a comprehensive plan amendment cycle.

Island County Planning & Community Development (“Planning Department”) most recently ran a GMA-compliant buildable lands analysis as part of the 2016 periodic update, in coordination with planning officials in the cities of Oak Harbor, Coupeville, and Langley. The BLA methodology was consistent with the Office of Financial Management’s population range as required by RCW 36.70A.130(3)(b). Island County also updated its CWPPs in 2017 to add clarity and to reflect lessons learned in the 2016 BLA and periodic update, specifically related to the future expansion of JPAs and UGAs, and to streamline future BLAs. AR 40–41; *See also* Order of Dismissal, AR 665–668; RCW 36.70A.215(5).

2. *Annual “Docketing” and “Consideration” of Planning Proposals Initiated by the Public.*

To encourage the public participation required by the act, counties planning in accordance with these provisions must also provide 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.470.⁴

Nevertheless, it is well established that the *method* of “docketing” is a matter of legislative discretion, and the *depth* of “consideration” to be given any proposed amendment is not static, and subject to the resources available in the community. There is also no question that “though amendments are *considered* annually, [the GMA] does not require jurisdictions to actually amend their plans annually.” *Stafne*, 174 Wn.2d at 38 fn. 6 (emphasis in original). Additionally, “a consideration of proposed amendments does not require a full analysis of every proposal within twelve months if resources are unavailable.” WAC 365-196-640(6); Order of Dismissal, CP 51.

The annual review process must be consistent with RCW 36.70A.130. So, “any amendment of or revision to a comprehensive land use plan shall conform to the [Growth Management Act],” and “all

⁴ Relevantly, this section warns that the comprehensive plan amendment process should *not* be used to advance individual private projects or in lieu of the comprehensive planning process. Rather, it recognizes that individual project review will organically reveal inconsistencies or deficiencies in the overall community plan.

proposals shall be considered by the governing body concurrently so the cumulative effect of the various proposals can be ascertained.” In this case, the BOCC actively believed that expansion of the UGA would violate the GMA. *See* AR 44 et seq.

Fundamentally, this case does not involve a proposed amendment to a comprehensive plan, it involves a decision not to docket the proposed amendment at all. Interestingly, the same fact pattern led to the *Stafne* decision.

“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 to the public.” RCW 36.70A.470. Obviously, it would be wasteful to devote an excessive amount of time and resources to an individual proposal that is meritless or would lead to results that are contrary to the goals of the GMA or a county’s comprehensive plan. Hence, legislatures are permitted to give proposals a threshold level of review before formal docketing, e.g., *Stafne*, 174 Wn.2d at 29, 31–32 (“The County’s planning department... conducts the initial review and evaluation of docket proposals... The council must consider all proposed amendments in a single public hearing... Following the hearing, the Council determines which

proposals, if any, will be added to the final docket for comprehensive plan amendments.”⁵

Chapter 16.26 Island County Code, entitled “Comprehensive Plan/Development Regulation Review and Amendment Procedures,” governs how this “final docket” is developed in Island County. Its definition of docketing is the same as the statute’s. ICC 16.26.050.B provides that a “[proposed] amendment must be included on a docket before it can be considered by the Board.” Meanwhile, ICC 16.26.060 sets forth the criteria and level of initial consideration given to each proposal before a docketing decision is made. *See* Appx. 1.

This process is consistent with the GMA provisions cited above and WAC 365-196-640(6), the Department of Commerce’s docketing guidelines: “Once 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.” The Growth Boards have universally held that an applicant dissatisfied with a legislative decision not to amend the comprehensive plan, or not to docket a proposal, has no

⁵ Island County’s docketing procedure is exactly the same, except the county Planning Commission makes the initial decision, with the guidance of the planning department, and the Board of Commissioners makes the final decision, Island County not being a charter county. Petitioner’s issue statement (Brief, at 5) suggests the “Planning Board” makes the final decision in Island County.

remedy under the GMA. Therefore, as in this case, the Boards will generally dismiss such claims after a threshold inquiry.

3. Jurisdiction of the Board

For the GMHB to take jurisdiction over and offer a party relief from an adverse land use decision—which must always be of a legislative as opposed to site-specific character—the petition must allege a violation of the GMA (or SEPA, or the SMA) itself, and the decision being appealed must have a nexus to the adoption of plans, development regulations, and amendments thereto. *See* RCW 36.70A.280, .290, .300.

“GMHBs have limited jurisdiction and may decide *only* challenges to or amendments of comprehensive plans or development regulations.” *Schnitzer West, LLC v. City of Puyallup*, 190 Wn.2d 568, 575, 416 P.3d 1172 (2018). The GMHB does not have jurisdiction over a petition unless it alleges that a comprehensive plan or a development regulation, or amendments to either, are not in compliance with the requirements of the GMA. *Futurewise v. City of Ridgefield*, No. 50406-5-II, 7 Wn.App.2d 1033, 2019 WL 366838, at *3 (Div. 2, January 29, 2019) (unpublished).⁶ Where the GMHB *does* have jurisdiction over a claim, it is exclusive. *See Somers v. Snohomish Cty.*, 105 Wn. App. 937, 945, 21 P.3d 1165 (Div. 1, 2001).

⁶ *Rev. denied*, 193 Wn.2d 1032 (2019), *citing Wenatchee Sportsmen Ass’n v. Chelan Cty.*, 141 Wn.2d 169, 178, 4 P.3d 123 (2000).

“A decision not to docket a proposal for further consideration does not result in an amendment to a plan or development regulation falling within the Board’s subject matter jurisdiction... *Denial of a docket request or private comprehensive plan amendment is not appealable under the GMA.*” Order of Dismissal, AR 663 n. 11 (citing sources)⁷ (emphasis added).

In other words, returning briefly to the analytical distinction between extent of jurisdiction and ability to provide a remedy, there are any number of legislative acts that relate to land use planning and theoretically invoke the GMHB’s subject matter jurisdiction to determine compliance with the GMA under RCW 36.70A.280. But the only *remedy* the Board is authorized to give is a declaration that comprehensive plans and development regulations—alone—are either compliant or noncompliant with the GMA.⁸ In fact, it is the *only* adjudicative body with jurisdiction over claims alleging and requesting the same.

⁷ To wit, in the order listed by the Board: *Concrete Nor’West and 4M2K, LLC v. Whatcom Cty.*, GMHB Case No. 12-2-0007 (Final Decision & Order, Sept. 25, 2012) at 11, *aff’d with opinion*, 185 Wn. App. 745 (2015) (discussed *infra*), *rev. denied*, 183 Wn.2d 1009; RCW 36.70A.280(1); *SR9/US2 II*, Case No. 08-3-0004 (Order Granting Motion to Dismiss, April 19, 2009); *Petso II*, Case No. 09-3-0005 (Final Decision and Order, Aug. 17, 2009); *COPAC-Preston Mill, Inc. v. King Cty.*, CPSGMHB Case No. 96-3-0013c (Final Decision and Order, Aug. 21, 1996); *Citizens for Good Governance, et al. v. Walla Walla Cty. et al.*, EWGMHB No. 05-1-0001 (Final Decision & Order, Aug. 10, 2005).

⁸ Under specific circumstances, the Board is also empowered to declare a noncompliant plan or regulation invalid. RCW 36.70A.302. The Board’s declaratory relief remedy is coupled with authority to retain jurisdiction over a case until compliance is reached. RCW 36.70A.330.

Again: “The board shall 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... *as it relates to adoption of plans, development regulations, and amendments thereto.*” RCW 36.70A.300 (emphasis added).

B. Wright’s Crossing’s “Proposal”

On or around August 1, 2017, Wright’s Crossing submitted a “land use request” to the Planning Department, seeking that the Oak Harbor Urban Growth Area be “adjust[ed]” to include within its boundaries 11 parcels, or 247.81 acres, of farm land the LLC has development rights in. The request also encompassed about 50 acres between the existing UGA and the Wright’s Crossing parcels. *See* AR 1–8. Wright’s Crossing apparently also requested a review of Island County’s 2016 Buildable Lands Analysis, which it argued, and continues to argue, would independently support expansion of the Oak Harbor UGA. AR 8. The inclusion of the parcels in a UGA is a prerequisite to Wright’s Crossing’s ultimate goal to develop 1,000–1,500 homes in the area. According to the Intervenor, this proposed urbanization of the Vander Voet farm parcels, currently zoned Rural-agricultural and Commercial-agriculture, would be the largest single development in Island County history. AR 145.

The application materials themselves (Application No. CPA 252/17), do not seem to be in the record. Whatever the exact scope and nature of the specific request, or data offered in support of it, it was apparently met with approval by the City of Oak Harbor, which would have desired to see the Wright’s Crossing parcels included in an expanded Joint Planning Area, a prerequisite of a UGA. AR 8, 44. The application apparently did not result in any site-specific land use decisions by Island County,⁹ but the BOCC seemed to acknowledge it was a complete application for a comprehensive plan amendment. Ultimately, it did not survive threshold evaluation and was excluded from consideration on the 2018 planning work docket, which was created by virtue of Resolution No. C-110-17. AR 34–36 plus exhibits.

⁹ Because of this, we assume that Wright’s Crossing did not have a cause of action under LUPA. *However*, Wright’s Crossing’s proposal appears to be a site-specific rezone request disguised as a proposed comprehensive plan amendment. Wright’s Crossing is a specific party, seeking a classification change, for a specific tract of land. Under *Schnitzer West, LLC v. City of Puyallup*, 190 Wn.2d 568, 576, 416 P.3d 1172 (2018), claims arising from such decisions must be challenged via LUPA. But in the procedural posture of this case, the County must argue that this case involves only a docketing decision for which no cause of action will lie under the GMA. Because of the distinction between “area-wide rezones” and “site-specific rezones” there is some tension between *Stafne* and *Schnitzer West*. It is notable that the appellate court reversed by *Stafne* considered Mr. Stafne’s comprehensive plan amendment to in fact be a site-specific rezone request. *See Stafne*, 174 Wn.2d at 34 n. 4, citing 156 Wn. App. 685, 686 (Div. 1, 2010). This tension is a further example of why the legislature warned against using the annual docket process to advance project permits.

C. The Docketing Decision.

In its resolution establishing the 2018 Docket, the BOCC deferred placing proposed revisions of the Oak Harbor JPA on the agenda, instead putting the issue, for the time being, on the Planning Department's 2018 work plan. It also followed the Planning Commission's recommendation (in addition to making its own detailed findings and conclusions in support thereof) to exclude Wright's Crossing's proposal to amend the Oak Harbor Urban Growth Area. *See* Resolution Ex. B, AR 38–47.

In declining to recommend including the Wright's Crossing proposal on the 2018 docket, the Planning Commission noted that the proposed UGA expansion would require other comprehensive plan amendments, specifically expansion of the JPA, and a formal BLA; that the request would promote the housing goal of the comprehensive plan and the GMA, but would be inconsistent with other goals, such as protection of agriculture, rural character, the avoidance of sprawl, and transportation/infrastructure concurrency. It would raise policy, land use, and scheduling issues and it would take extensive staff effort to re-run studies only one year removed from their evaluation during their last mandatory periodic update. AR 41-43.

The Commissioners separately found that so far from being required by the GMA, the proposal would violate the GMA because it was

inconsistent with the growth management planning projections and land market supply factor, as just evaluated in the recent mandatory evaluation. The GMHB had recently held in a relevant decision that the anti-sprawl/UGA sizing requirements of the GMA trump the economic development goals of a local jurisdiction's comp plan, a precedent it thought might be followed in this matter, if the amendment were adopted and challenged by, e.g., the Intervenor. AR 43.

The Commissioners noted that though there had been more than anticipated job growth in 2017, there was capacity for up to 1,611% of the allocated amount, and that the Navy's projections had not changed since the periodic update. The BOCC also determined that on its face, the application was inconsistent with the CWPPs in the following ways:

- It was proposed outside of the JPA;
- As well as the JPA, UGA expansion involved designation of Priority Growth Areas and Auxiliary Growth Areas, with expansion of a UGA in a PGA first, undesignated lands second, and AGA areas as a last resort;
- The Wright's Crossing parcels would be in an AGA overlay, the least priority area for expansion;
- Based on its last study, all of the PGA areas and undesignated areas around the Oak Harbor UGA would need to be

incorporated into the UGA & JPA before the Wright's Crossing parcels;

- A BLA requires a population projection from the State Office of Financial Management, and given the time and effort required to enlarge a UGA, it was generally not to be undertaken outside of the periodic update process under WAC 365-196-310;
- There were studies and initiatives in progress by the Department of Commerce, the Navy, and the County that would inform the next BLA and periodic update.¹⁰

The Commissioners therefore determined to exclude the application from the 2018 docket for facially failing to comply with the GMA, the Comp Plan, the JPA, the CWPP, and a general lack of evidence to support the proposal. The exclusion was without prejudice. ICC 16.26.060.D.

D. The Appeal

Wright's Crossing challenged the docketing decision in a petition to the GMHB, raising six issues, "all of which are related to the County's decision not to docket the UGA expansion request," and all of which were dismissed either by the Board in response to a dispositive motion to dismiss by Island County, or voluntarily prior to decision on the merits. To make

¹⁰ BOCC Findings of Fact, AR 43-47.

Wright’s Crossing’s “scattershot” litigation strategy possible to analyze, the GMHB highlighted that each issue was premised on Island County’s refusal to docket Petitioner’s application for “a site-specific plan amendment” for further consideration on the full 2018 work docket. *See* AR 660–662.

The GMHB recognized that Wright’s Crossing was casting its net as wide as it could and treated its petition as asking a single question in multiple ways. (“The Petitioner correctly poses the question before the Board: ‘Thus the sole question is whether the GMA requires action.’” CP 45.) Rather than take each issue up, the Board consolidated all the relevant authorities to explore the answer to a single question: *Did Island County have a duty—under any theory—to docket Petitioner’s proposal?* The answer the Board found was “no.”

The Board found that docketing under ICC 16.26.060 was a condition precedent to the “mandatory” “triggering language” in the CWPP and comprehensive plan that Wright principally relied upon in its APA appeal and in its argument to this court. Undoubtedly, had the County *chosen to docket* the proposed UGA expansion, the County would have been obligated to review, and possibly update, its BLA on a county-wide basis and to ‘show its work’ before it could actually expand the UGA. Then, it would have to establish that all UGAs were appropriately sized. The obligation did not arise as the County declined to docket the request, and

the Board adequately observed that this decision is purely discretionary under the GMA and the code, even in light of the CWPPs and the comprehensive plan.

E. Summary

Wright’s Crossing alleges that language in Island County’s GMA-mandated planning documents—that is, its comprehensive plan and CWPPs—created a duty, breach of which is remediable under the GMA, to undergo a countywide buildable lands analysis in support of a decision not to decide whether or not UGA expansion was warranted one year after a countywide comprehensive plan update, which included those same studies. Even if the language could be read to impose such a duty,¹¹ which would frankly be absurd, the GMA offers no private cause of action for a party aggrieved by a docketing decision under RCW 36.70A.470.

The Board correctly assumed that the docketing process of ICC 16.26.060 was a condition precedent to full consideration of an amendment with countywide BLA. “Had the County *chosen to docket* the proposed UGA expansion, the County would have been obligated to review, and possibly update, its BLA on a county-wide basis and to ‘show its work’ establishing that all UGAs were appropriately sized. The obligation did not

¹¹ The GMHB found that these documents explicitly did *not* create such a duty. AR 713-714.

arise as the County declined to docket the request.” AR 666. Again, the Board reviewed all the comprehensive plan elements and CWPPs Wright relies upon and found 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.” AR 668.

Noting again the distinction between “docketing” and “considering” missed by Appellant, the Board held: “There are 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.” AR 668.

IV. ARGUMENT

A. Standard of Review

This court sits in the same position as the Superior Court and applies the Administrative Procedure Act (“APA”) standards¹² directly to the administrative record before the Board. *Olympic Stewardship Found. v. W. Wash. Growth Mgmt. Hearings Bd.*, 166 Wn. App. 172, 187, 274 P.3d 1040 (Div. 2, 2012). “The burden of demonstrating the invalidity of agency action is on the party asserting the invalidity.” *Whidbey Envtl. Action Network (WEAN) v. Island Cty.*, 122 Wn. App. 156, 165, 93 P.3d 885 (Div. 1, 2004).

¹² RCW 34.05.570(3).

A correct judgment will not be reversed when it can be sustained on any theory, even though different from the one relied upon by the finder of fact. *Id.* at 168.

This court reviews the *Board's* decision, not the decision of the superior court or Island County's actions in the first instance.¹³ The Court must harmonize competing powers delegated to the growth board and to local governments under the GMA. In doing so, the Court applies a unique standard of review that requires that the growth board defer to the decisions of local governments on matters governed by the GMA, except where the local government has clearly erred. *Spokane Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 173 Wn. App. 310, 321, 293 P.3d 1248 (Div. 3, 2013). The Board's legal conclusions are reviewed *de novo*, giving substantial weight to the Board's interpretation of the statute it administers. *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 424, 166 P.3d 1198 (2007).

Dispositive motions on a limited record to determine the Board's jurisdiction, the standing of a petitioner, or the timeliness of a petition are permitted. WAC 242-03-555. On motion to dismiss for failure to state a claim, the moving party challenges the legal sufficiency of the allegations

¹³ *King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000) (emphasis in original).

in a complaint. *McAfee v. Select Portfolio Serv., Inc.*, 193 Wn. App. 220, 226, 370 P.3d 25 (Div. 1, 2016). The court presumes that the plaintiff's factual allegations are true and draws all reasonable inferences in the plaintiff's favor. If a plaintiff's claim remains legally insufficient, dismissal is appropriate. *Trujillo v. NW Trustee Serv., Inc.*, 183 Wn.2d 820, 830, 355 P.3d 1100 (2015).

B. The legislature offers no private GMA right of action to the GMHB for a party aggrieved by a decision not to docket a proposal.

“Jurisdiction means the power to hear and determine.” *State v. Werner*, 129 Wn.2d 485, 493, 918 P.2d 916 (1996) (citation omitted). A tribunal's jurisdiction is a creature of constitutional and statutory law, and not the result of its own actions; a court cannot create or destroy jurisdiction. *Davis v. Opacki*, No. 41087-7-II, 170 Wn.App. 1049, 2012 WL 5342452 at *4 (Div. 2, Sept. 25, 2012) (unpublished).

Stafne controls the outcome of this case.¹⁴

¹⁴ *Stafne* is the most analogous fact pattern because the petitioner there also challenged a decision not to docket a proposed comprehensive plan amendment for review. *Concrete Nor'West v. W. Wash. Growth Mgmt. Hearings Bd.*, 185 Wn. App. 745, 342 P.3d 351 (Div. 2, 2015) is also helpful, and this board cited the WWGMHB's order of dismissal in that case in support of its own. But that decision stands for the proposition that even if Island County *had* docketed Wright's proposal, and even if the county's BLA *had* proved all of Wright's underlying factual allegations about a housing crisis in Oak Harbor, the county would *still* not have had a duty to adopt the amendment. While this court reached that case on the merits, the Board appears to have recognized that however valid Concrete Nor'West's contentions were, “it lacked the power to grant [the petitioner] relief.” *Id.* at 750.

Mr. Stafne requested an amendment to the Snohomish County comprehensive plan that would have resulted in portions of his property being classified as rural residential instead of forestland. His request came before the County Council at a public hearing where the Council determined how many proposals would move on to the final docket for further consideration. The Council decided not to place Stafne's proposal on the final docket. *Id.* at 28.

The court held that if Stafne had any remedy under the GMA, the Growth Board would have sole jurisdiction over such a claim, which makes sense. LUPA was assuredly not the correct vehicle for a challenge to a decision not to docket a proposed comp plan amendment. But the court also recognized that when confronted with such a challenge, the Growth Boards had determined they did *not* have jurisdiction over such a case. At least, it charged the court of appeals with so deciding.

In this case, the Court of Appeals read the growth board's decisions as consistently holding it 'lacks jurisdiction' over actions like Stafne's, that is, where the party alleges that the failure to adopt a proposed comprehensive plan amendment means the plan is noncompliant with the GMA...

A closer reading of the board's decisions shows it has not simply held it lacks jurisdiction over claims like Stafne's... In each decision, the board reviews the facts and issues specific to the case and *makes a threshold determination on the petitioner's claims*. In those decisions, the board has generally explained its reason for denying relief as follows...

While RCW 36.70A.130 authorizes a local government to amend comprehensive plans annually, it does not *require* amendments. Moreover, it does not dictate that a specific proposed amendment be adopted... [When] the County *takes* an action pursuant to the authority of RCW 36.70A.130 or fails to meet a duty imposed by some other provision of the GMA, [the petitioner] may have an action that could properly be brought before the Board... The board subsequently evaluates the petitioner's claims, explains that the petitioner failed to identify a statutory provision mandating that the county or city council amend the plan as the petitioners claim, and enters a final order... Absent a duty to amend its plan... such decisions are within the jurisdiction's discretion... and there is no evidence that the County had a duty to amend its plan to address the Petitioner's proposal.

Stafne, 174 Wn.2d at 37.

Note, in neither this case nor *Stafne* did the County take an action pursuant to the authority of RCW 36.70A.130, which authorizes amendments of comprehensive plans. Rather, no action was taken on the amendment proposals:

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

Id. at 38.

The court unpacked the bolded words a little more in a crucial footnote:

That the growth board lacks “jurisdiction” over decisions not to adopt proposed amendments is not entirely accurate. Under the GMA, the board’s jurisdiction is over petitions alleging noncompliance stemming from either action or inaction of a local government. Thus, the question is not whether the board has jurisdiction to review claims such as *Stafne*’s—it does; the question is whether the growth board has authority to *grant relief* to parties, like *Stafne*...

Stafne, 174 Wn.2d at 37 n.5.

In other words, the *Stafne* court reiterated Justice Frankfurter’s observation in our earlier maritime case: “As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action.” *Romero*, 358 U.S. at 359. And this was an accurate statement of the law as to both the jurisdiction and remedies statutorily granted to the GMHB. Then, it continued:

...where there has been no showing that the amendment is required by the GMA or other law.

Id. at 37 n.5.

Liberally construed, this last clause poisons the well, for the GMHB has no subject matter jurisdiction to interpret any law other than the GMA. Even if it did, from what other law would a duty to amend a comprehensive

plan or other GMA-mandated document flow? Even as the court (almost) correctly distinguished the difference between *jurisdiction* and *ability to provide a remedy*, it missed the point the GMHBs have been trying to make in their orders of dismissal in all these cases: they lacked any remedy to give, even if such a duty to docket did exist.

First, because they could find no clause in the GMHB that would ever mandate an amendment outside of a mandatory review cycle, and secondly, even if there was, the remedies they are authorized to give relate only to the *actual* adoption of a comprehensive plan or development regulation. There is no private right of mandamus in the GMA.

“GMHBs have limited jurisdiction and may decide *only* challenges to or amendments of comprehensive plans or development regulations. GMHBs do not have jurisdiction over challenges to site-specific land use decisions because site-specific land use decisions do not qualify as *comprehensive plans or development regulations*.” *Schnitzer West*, 190 Wn.2d at 575 (emphasis added).

“A decision not to docket a proposal for further consideration does not result in *an amendment to a plan or development regulation falling*

*within the Board's subject matter jurisdiction [RCW 36.70A.280(1)(a)].*¹⁵

Order of Dismissal, CR 663.

The Boards are continuing to cite this principle as good law after *Stafne* not because they believe they lack subject matter jurisdiction over GMA-premised docketing decisions and comp plan amendment proposals, but because they are noting that as a threshold matter their statutory grant of jurisdiction fails to offer any remedy they can provide in these cases because no duly enacted comprehensive plan or development regulation amendment is under review. “The board shall issue a final order that shall be based *exclusively* on whether or not a... county... is in compliance with the requirements of this chapter... as it relates to adoption of plans, development regulations, and amendments thereto, under RCW 36.70A.040.” RCW 36.70A.300. As the Supreme Court held in *Wenatchee Sportsmen Ass'n v. Chelan Cty.*,¹⁶ “from the language of these GMA provisions, we conclude that unless a petition alleges that a comprehensive

¹⁵ “The [GMHB] shall hear and determine only those petitions alleging... that... a... county... planning under this chapter is not in compliance with the requirements of this chapter... **as it relates to plans, development regulations, or amendments adopted under RCW 36.70A.040...**”

¹⁶ 141 Wn.2d 169, 4 P.3d 123 (2000). In that case, Sportsmen Ass'n filed a LUPA challenging a site-specific rezone. The trial court agreed with Sportsmen and reversed the land use decision on GMA grounds. Because it decided the project was incompatible with restrictions on urban growth outside a UGA, it did not decide other, non-GMA formulated issues raised in the case. *Id.* at 174–75. Builder appealed, arguing that these GMA issues could only be brought before the GMHB. The court disagreed, because a site-specific rezone is not a comprehensive plan or development regulation that can be brought before a GMHB. *Id.* at 178–79.

plan or a development regulation or amendments to either are not in compliance with the requirements of the GMA, a GMHB does not have jurisdiction to hear the petition.” *Id.* at 178.

The incentive for counties to adopt and amend comprehensive plans and enact development regulations in the first instance must spring from a source other than the threat of private enforcement through the GMHB, and it does. Recall, *supra* at 6, that CWPPs may not be challenged before the Board, but that CWPPs are the first requirement for a county planning under the GMA, and must be developed in conjunction with cities in their boundaries prior to development of a comprehensive plan. Agreements to develop CWPPs under RCW 36.70A.210 lead to agreements to implement a comprehensive plan under RCW 36.70A.110. A county must negotiate and coordinate with the cities in its boundaries to develop CWPPs or face the imposition of sanctions by the governor under RCW 36.70A.210.

After the CWPPs are developed, a county can then be sanctioned under RCW 36.70A.345 for failing to adopt a comprehensive plan or development regulations, failure to designate critical areas and conserve other classified lands, and failing to designate urban growth areas. *After* these policy documents and regulations are adopted, the public has a right to challenge their compliance with the GMA before the boards, enforce continued compliance after adoption of every amendment thereafter, and

advocate for how these policies evolve through public participation, which is a prerequisite to standing to bring a GMHB challenge. A private party may not challenge any and every political act its government takes—such as setting a planning department work agenda—for compliance with the GMA.

To the extent *Stafne* can be read to suggest a duty to docket could be self-imposed, the Boards have noticed that they are jurisdictionally limited by statute to only give declaratory remedies with a nexus to the adoption or amendment of comprehensive plans and development regulations, a rule recognized recently by this court in the unpublished decision *Futurewise v. City of Ridgefield*.¹⁷ Read carefully and grasping the

¹⁷ No. 50406-5-II, 7 Wn.App.2d 1033, 2019 WL 366838 at *4 (Jan. 29, 2019), *rev. denied*, 193 Wn.2d 1032 (2019). Citing RCW 36.70A.280(1)(a), RCW 36.70A.290(2), *Schnitzer West*, and *Wenatchee Sportsmen*, the same authorities that the County relies on, that Board found that the GMA provided no relief for a party aggrieved by an ordinance approving an annexation and designating a zoning classification thereon. The decision did not authorize any actual development, and did not amend any regulations or GMA planning documents. It was a political decision, like setting a work docket, that implicates future land use controls but falls neither under the GMA or LUPA, because it was neither a comprehensive plan/development regulation or a land use decision. Though the zoning classification on the property changed, it was not at any person’s request and therefore fell outside LUPA under *Schnitzer West*. It did not meet the statutory definition of development regulation either.

The application of Chapter 16.26 ICC is also not a development regulation that could trigger a remedy under the GMA. A development regulation is a “control placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto.” RCW 36.70A.030. A docketing decision is none of those things. It is merely a housekeeping political tool to avoid expending vital county resources on proposed amendments that are facially inconsistent with a county’s planning goals by keeping them off its annual docket.

distinction between remedies and subject matter jurisdiction, *Stafne* contains a gross overstatement of the rule when it holds that a party challenging “a [that is, any] decision related to a comprehensive plan” must seek review before the growth board first. As we hope is becoming clear, there are many land use decisions that are “related to a comprehensive plan” that will not invoke GMHB jurisdiction and that may even invoke LUPA. Presumably, every site-specific rezone relates to a comprehensive plan. There must be a nexus between the decision and the adoption of a plan or a regulation or an amendment thereto before the Board can issue a remedy.

At any rate, the GMHB is not empowered by the GMA, *Stafne*, or any “other law” to give mandamus relief to force a county to run a buildable lands analysis, outside of a mandatory review cycle, on behalf of a member of the public to advance a private property interest (even one allegedly motivated by good will and the public interest), even if suggested by language in a GMA-planning document.

As the *Coffey*¹⁸ court noted, “it may have been possible for appellants to have pursued a writ” in superior court to force the BOCC to docket the proposal, as “writs still have some role in the overall land use

¹⁸ 145 Wn. App. 435, 442 (2008), cited in *Stafne*, at 30, etc.

process...¹⁹ The division of authority between the GMHB and the courts reflects the different character of decisions being reviewed.” *Coffey v. City of Walla Walla*, 145 Wn.App. 435, 440, 187 P.3d 272 (2008).

Alternatively, Wright could have challenged any actual comprehensive plan amendment that was actually adopted during the 2018 annual cycle,²⁰ and claim it failed to comply with the GMA for the reasons set forth in its petition—it could not force something on the 2018 annual docket in the first place. Perhaps it could also have challenged the validity of the resolution itself for noncompliance with ICC 16.26.060 through RCW 36.32.330.²¹ The relief it sought below from the GMHB—formal review of the Oak Harbor UGA boundaries by the BOCC (which would trigger a “buildable lands analysis,” or “BLA”) outside the eight-year GMA-mandated cycle—is only “through the political or election process.” *Stafne*, 174 Wn.2d at 38.

¹⁹ *Torrance v. King Cty.*, 136 Wn.2d 783, 966 P.2d 891 (1998), does not hold to the contrary. There, the lack of a writ was due to Torrance’s failure to exhaust statutory APA appeals of unfavorable GMHB orders. Relevant to this discussion, in that case the initial decisions under review were actual comprehensive plan amendments, *not a docketing decision declining to make a comprehensive plan amendment at all*, as the *Stafne* court suggested. 174 Wn.2d at 39. The GMHB unquestionably has jurisdiction to offer a (limited statutory) remedy when a GMA action is *taken in fact*. More pedantically, Torrance sought a writ of certiorari over a stale claim, not a writ of mandamus to enforce a “duty.”

²⁰ That is, if any of the items in Exhibit A of Resolution No. C-110-17 resulted in a comp plan amendment.

²¹ As recently affirmed by Division 1, a resolution’s validity is otherwise “beyond challenge” if not appealed to superior court within 20 days. *Yorkston v. Whatcom Cty.*, No. 78530-3-I (Div. 1, Jan. 21, 2020), slip op. at 11. Of course, Wright’s Crossing is thereafter “free to seek a declaration as to the effect of that valid decision” under the UDJA. *See id.*

All this to say, the proposition that any GMA-imposed “duty to docket” outside of a mandatory amendment cycle survives a close scrutiny of *Stafne*, and other authority before and after it, is dubious at best. Wright certainly does not state a convincing claim that one should be found, for the first time in a reported case. Since no “other law” imposes such a duty either, and the GMHB has no authority to construe “other laws” anyway, Wright’s 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.

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 the 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 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 the jurisdictional and remedial constraints placed upon the GMHB by the legislature.²² Like many, many other State laws, the GMA places other incentives on jurisdictions to

²² At the very least, the GMHB would never be in a position to decide whether an “other law” conferred such a duty.

comply with its terms besides just the threat of lawsuit, and declaratory remedies and writs of mandamus are still available for private parties extraordinarily aggrieved by an adverse docketing decision.

C. Chapter 16.26 ICC makes clear that docketing decisions are discretionary and a proposed UGA expansion would have to be docketed before a BLA or other formal review process is undertaken.

Careful scrutiny of *Stafne* leads to the conclusion that the GMA provides no cause of action for breach of a “duty to docket,” and the GMHB has no subject matter jurisdiction to entertain an allegation premised on “other law.” Wright looks to the terms of Island County’s comprehensive plan and CWPPs as the source of a self-imposed duty to docket in this case. There are two jurisdictional flaws here, again, that a docketing decision has no nexus to a comprehensive plan or development regulation; and that CWPPs and comprehensive plans are policies and not laws which confer enforceable legal “duties.”

ICC 16.26.060 however, is at least an “other law” that Island County had to follow when making its docketing decision. Specifically, ICC 16.26.060.E required the Planning Commission to consider whether or not the application was complete; if it could be reasonably reviewed within staffing resources and operational budget; if it would or would not require additional amendments to the comp plan or development regulations and

would be consistent with other planning goals; whether it would be more appropriately addressed as part of a periodic review cycle; and whether or not it contained sufficient information to evaluate. *See* Appx. 1.

Though no combination of factors addressed in the code imposed a non-discretionary duty on the County either, the Board confirmed to its own satisfaction that the County's decision was adequately informed per the above. And though not required, it is clear from the BOCC's more detailed findings of fact that it did not just rubber stamp the Planning Commission's findings but analyzed the application and the ICC 16.26.060.E factors for itself. Most compelling to it appears to have been the realization that expanding the UGA was not a matter of simply confirming Wright's alleged population data and redrawing the UGA boundaries on the map. In actuality, an evaluation of the entire Land Use Element would be required before expansion could be considered, and expansion would require expanding the boundaries of the Joint Planning Areas and Auxiliary Planning Areas. Plainly, the mandatory evaluation language in the comprehensive plan did not contemplate the expenditure of such time and resources at the threshold docketing stage, just because a private party requested it, whether supported by some data or not.²³ AR 43–47. Under Appellant's theory of the case that

²³ Without more information about what was submitted with the actual application, it is impossible to tell much how much of the population statistics that became exhibits in the

these studies and analysis would have to be run at the docketing stage of review, they would need to be done between August 1 and November 30, 2017! Of course, Appellant's real argument is not that the data in its application triggered a BLA and formal review; its real argument is that its application was facially sufficient to trigger automatic docketing on the full review agenda for 2018, without the initial threshold review under ICC 16.26.060.

“The Planning Commission and Board of County Commissioners Findings of Fact attached to Resolution No. C-110-17 set forth with great specificity the factors considered by the County, including consideration of many of the claims raised by the Petitioner in this matter.” Order of Dismissal, AR 668–669. And even though it had been published for more than 60 days and is not itself a plan amendment or development regulation that could be challenged, the Board also confirmed that this section of code was consistent with the Department of Commerce's recommendations for compliance with RCW 36.70A.470.

The Board did not make findings of fact based on Petitioner's allegation that there was a housing crisis in Oak Harbor which would trigger a new BLA and UGA sizing evaluation because it understood that the

GMHB case were actually offered to the Commissioners, or how that data was presented to them. Regardless, it is clear from the findings of fact that the proposal was given sincere threshold consideration.

threshold question of whether or not to docket a proposal for further review is governed by county code, not the comprehensive plan. Due to its perceptive apprehension of its own jurisdictional limits and expert understanding of the law it administers, it was fully aware the GMA provided no duty to docket, and appears to have sensed that even if it found the hypothetical duty suggested by *Stafne*, it would be in vain for lack of a GMA remedy to enforce it.

The issue before the Board was never whether the “trigger” words in the comprehensive plan highlighted by the Petitioner created a duty to formally review and amend the comprehensive plan. The issue was whether the proposal had to be docketed at all in the first place.

The Growth Boards of the State exist to provide a few limited, statutorily-created remedies to the public outside of the courts when local governments fail to plan for growth in accordance with the various goals and requirements of the GMA. In this context, “RCW 36.70A.130(2)(a) merely requires that jurisdictions identify ‘procedures and schedules whereby updates, proposed amendments, or revisions of the comprehensive plan are considered by the governing body of the county or city no more frequently than once every year.’ It does not require a jurisdiction to accept for consideration any, or all, proposed amendments.” Order of Dismissal, AR 665.

V. CONCLUSION

The GMHB only had subject matter jurisdiction of this claim because Wright's Crossing alleged Island County's docketing decision violated the GMA. But it is a well-established rule that the GMA does not provide a remedy for a party aggrieved by a decision not to amend a comprehensive plan, or a decision not to docket a proposed amendment. There is no "duty to docket" to be found in the GMA.

As shown, the "triggering" language that Wright's Crossing relies on in the Comprehensive Plan also does not create a self-imposed duty to docket. Docketing decisions are subject to ICC 16.26.060 and are a matter of legislative discretion. Even if they are construed as mandates instead of permissive directives, the GMA still provides no cause of action to challenge a docketing decision. Because the GMHB had jurisdiction only to administer remedies under the GMA, and because the GMA does not provide a remedy for a party aggrieved by a docketing decision, the GMHB correctly dismissed this action for failure to state a claim for which relief could be granted. The Court should affirm for the reasons stated herein.

Respectfully submitted this 27th day of January, 2019.

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY

By: 

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Appendix

Chapter 16.26 - Comprehensive Plan/Development Regulation Review and Amendment Procedures

16.26.010 - Purpose.

The purpose of this chapter is to establish procedures, pursuant to Chapter 36.70A RCW, for the review and amendment of the comprehensive plan and implementing development regulations found in specific chapters in Island County Code titles 8, 11, 13, 16 and 17.

(Ord. C-135-98 [PLG-041-98], November 9, 1998, vol. 43, p. 62)

(Ord. No. C-49-17 [PLG-006-17], Exh. A, 5-23-2017)

16.26.020 - Applicability.

This chapter shall govern comprehensive plan map and text amendments, excepting revisions which under state law may be adopted out of cycle. Development regulation amendments that are associated with comprehensive plan amendments being processed through this chapter shall utilize the same review process.

(Ord. C-135-98 [PLG-041-98], November 9, 1998, vol. 43, p. 62)

(Ord. No. C-49-17 [PLG-006-17], Exh. A, 5-23-2017)

16.26.030 - Definitions.

Unless expressly noted otherwise, words and phrases that appear in this chapter shall be given the meaning attributed to them by this section, other chapters of title 16, or chapters contained in title 17. When not inconsistent with the context, words used in the present tense shall include the future; the singular shall include the plural and the plural the singular; the word "shall" is always mandatory and the words "may" and "should" indicate a use of discretion in making a decision.

Annual review docket means the annual list of proposed comprehensive plan amendments and related development regulations that the Board of Island County Commissioners determines, after review and consultation with the Planning Director and Planning Commission, to be included for review and consideration for any given year. It excludes items listed on the periodic review docket.

Application , for purposes of this chapter, means the application to amend the comprehensive plan or related development regulations.

Comprehensive plan (plan) means the comprehensive plan adopted to comply with Chapter 36.70A RCW, including all mandatory and adopted optional elements and subarea plans as they exist or hereafter may be amended by the Board of Island County Commissioners.

Comprehensive plan amendment means an amendment or change to the text or maps of the comprehensive plan.

Development regulation means the controls placed on development or land use activities including, but not limited to, zoning ordinances, critical area ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and site plan ordinances, together with any amendments thereto. A development regulation does not include a decision to approve a project permit application, as defined in RCW 36.70B.020. Specific chapters in titles 8, 11, 13, 16 and 17 of the Island County Code include the development regulations that have been adopted expressly to implement the comprehensive plan and are adopted pursuant to Chapter 36.70A RCW.

Docketing refers to compiling and maintaining a list of proposed changes to the comprehensive plan or implementing development regulations either annually or for a periodic update cycle in a manner that will ensure such suggested changes will be considered by the county and will be available for review by the public.

Findings of fact and legislative intent means the formally adopted document that establishes both the factual basis for the comprehensive plan amendment and amendment to development regulations and serves as the interpretive guide for legislative intent.

Periodic review or update refers to the review and, if needed, resulting revisions to the comprehensive plan and development regulations required at multi-year intervals by RCW 36.70A.130 or other state law.

Periodic review docket refers to the docket developed by the Planning Director and approved by the Board of County Commissioners that includes the proposed periodic review work items that are required at multi-year intervals by RCW 36.70A.130 or other state law.

Planning Director means the person appointed by the Board to fulfill the long range planning duties of the county.

Site specific amendment means an amendment to the comprehensive plan or development regulations that affects one (1) or a small group of parcels, most frequently an amendment to the land use map and/or zoning atlas.

Work plan or work plan items refers to a list of proposed department tasks, maintained by the Planning Director and approved by the Board, that may be related to commitments made during previous updates, review, research, and/or updates to policies and regulations for which no amendment to the comprehensive plan is required. County-initiated plan amendments not a part of the periodic review will also be a part of the work plan, to be evaluated for inclusion on a future annual docket. Work plan items may span multiple years and may be proposed by the Board, Planning Commission, Planning Director, or the Department Director responsible for the administration of a development regulation. Members of the public may also request an item to be placed on the work plan, on the same schedule as plan amendment applications per section 16.26.060(A). Work plan items are exempt from the "once a year" plan amendment adoption requirement.

(Ord. C-135-98 [PLG-041-98], November 9, 1998, vol. 43, p. 62)

(Ord. No. C-49-17 [PLG-006-17], Exh. A, 5-23-2017)

Editor's note— This section, as originally adopted, included a statement that capitalized words and phrases used to identify terms defined in this or other chapters. Because the capitalization convention was applied inconsistently throughout the Island County Code, and to be consistent with the conventions used by other state and local codes, defined terms are no longer capitalized in this Code. This change was authorized on February 26, 2015, pursuant to section 1.04.030.

16.26.040 - Review process and approving authority.

All amendments to the comprehensive plan and development regulations shall be approved by the Board of Island County Commissioners, processed as a Type IV decision pursuant to chapter 16.19. SEPA threshold determinations associated with Type IV decisions that are reviewed under this chapter shall be processed as Type II decisions that may be appealed to the hearing examiner. Appeals or further review of the hearing examiner's written decision shall be by the Growth Management Hearings Board according to the procedures set forth in Chapter 36.70A RCW.

(Ord. C-135-98 [PLG-041-98], November 9, 1998, vol. 43, p. 62; amended by Ord. C-96-06 [PLG-006-06], August 21, 2006, vol. 2006, p. 246)

16.26.050 - General procedures.

- A. Amendments to the Plan text or maps may be initiated by the public, the Board, the Planning Commission, the Planning Director, or the Department Director responsible for the administration of a development regulation.
- B. An amendment must be included on a docket before it can be considered by the Board. Items will first be docketed, followed by review, public hearing, and recommendation by the Planning Commission, and then considered for final approval, denial, or deferral by the Board of County Commissioners.
- C. A rezoning application that requires a Plan amendment shall be treated as a Type IV application, subject to amendment application and docketing procedures under this chapter.
- D. Plan amendments may be considered by the Board no more frequently than once a year and all proposed amendments, as included on the annual docket and periodic docket, shall be considered concurrently so that the cumulative effect of the various amendments can be ascertained, with the exception of the following:
 - 1. The adoption of emergency amendments or interim maps or regulations or moratoria pursuant to RCW 36.70A.390;
 - 2. The adoption of amendments to resolve an appeal of the comprehensive plan or development regulations filed with the Growth Management Hearings Board or with the court;
 - 3. The initial adoption of a subarea plan;
 - 4. The adoption of amendments to the County's Shoreline Master Program under the procedures set forth in Chapter 90.58 RCW;
 - 5. The adoption of amendments to the capital facilities element of the comprehensive plan that occurs concurrently with the adoption or amendment of the county budget;
 - 6. The adoption or amendment of development regulations that implement the comprehensive plan and for which no amendment to the comprehensive plan is required;
 - 7. Amendments to the comprehensive plan that are only procedural in nature or affect only procedural requirements;
 - 8. Amendments to this chapter 16.26; and
 - 9. Amendments to the comprehensive plan that are merely to correct errors.
- E. All Plan amendments adopted by the Board shall be consistent with Chapter 36.70A RCW and shall comply with Chapter 36.70A RCW and Chapter 43.21C RCW.
- F. All development regulations adopted to implement the comprehensive plan and amendments thereto shall be consistent with the adopted comprehensive plan.
- G. Unless specifically authorized by the Board, no docketed Plan amendment application from the public that is denied by the Board may be reinitiated for three (3) years after its consideration by the Board.
 - 1. The Board may approve an earlier reapplication if the applicant demonstrates a substantial change in circumstances. In no case may such a petition be considered in consecutive years.
 - 2. This limitation does not apply to amendments previously proposed by the Board, Planning Commission, Planning Director, or the Department Director responsible for the administration of a development regulation.

(Ord. C-135-98 [PLG-041-98], November 9, 1998, vol. 43, p. 62)

(Ord. No. C-49-17 [PLG-006-17], Exh. A, 5-23-2017)

A. The annual docket application review schedule will occur pursuant to the schedule below:

TABLE A. ANNUAL DOCKET APPLICATION REVIEW

DUE BY	PROCESS
August 1	Applications due
September 1	List of all amendments (public, Board, Planning Commission, or staff requests) presented to the Board and Planning Commission
October 1	Board and Planning Commission review the proposed docket items
November 30	Board determines the docketing request outcomes (include, exclude, or defer)
	Board approval of docket by Resolution no later than the end of November

- B. For inclusion on any given annual docket, applications initiated by the public must be submitted before August 1 of the prior year. Applications received on or after August 1 of each calendar year shall be reviewed during the next annual docket cycle.
- C. The Planning Director shall forward to the Board and Planning Commission a complete listing of all new applications for amendments requested by the public, the Board, Planning Commission, or the Planning Director, no later than September 1 of each year. The list shall also include any applications deferred from a previous docket.
- D. The Planning Director shall review the proposed annual review docket items with the Board and Planning Commission by October 1 of each year. The Board and Planning Commission shall review and consider whether any proposed amendment should be included on or excluded from the annual review docket or be deferred to the next annual cycle or periodic review docket cycle pursuant to section 16.26.090.
 - 1. **Include.** The Board's decision to include an application in the annual docket is procedural only and does not constitute a decision by the Board as to whether the proposed amendment will ultimately be approved.
 - 2. **Exclude.** The Board's decision to exclude an application from the docket terminates the application without prejudice to the applicant or the proposal. The applicant may request a refund of the unused portion of any application fees. The Board's decision to exclude an application from the docket is a discretionary Type IV decision subject to appeal pursuant to section 16.19.205.
 - 3. **Defer.** The Board's decision to defer an application means the application may be considered, as specified by the Board, either for the next annual docket cycle or the next periodic review docket cycle.
- E. 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 develop regulations not otherwise addressed in the application, and is consistent with other goals, objectives, and 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.
- F. The selected proposed amendments collectively shall be known as the annual review docket for the next calendar year, and shall be adopted by Board resolution, preferably by October 31 but no later than November 30 of each calendar year.

(Ord. C-135-98 [PLG-041-98], November 9, 1998, vol. 43, p. 62; amended by Ord. C-153-99 [PLG-052-99], December 13, 1999, vol. 44, p. 217; amended by Ord. C-95-00 [PLG-019-00], November 27, 2000, vol. 45, p. 85, readopted December 11, 2000, vol. 45, p. 115; amended by Ord. C-86-05 [PLG-019-04], July 25, 2005, vol. 2005, p. 237; amended by Ord. C-79-12 [PLG-006-12], July 2, 2012, vol. 2012, p. 98)

(Ord. No. C-49-17 [PLG-006-17], Exh. A, 5-23-2017)

Editor's note— Ord. No. C-49-17, Exh. A, adopted May 23, 2017, changed the title of § 16.26.060 from "Annual review procedures" to read as herein set out.

16.26.070 - Application requirements.

- A. All applications for amendment of the comprehensive plan or development regulations submitted by the public shall, in a format established by the county, contain the following:
 1. Application form signed by the owner(s) of record, address, telephone numbers and agent information;
 2. A description of the proposed amendment including proposed map or text changes;
 3. The location of the proposed amendment shown on an assessor's map dated and signed by the applicant, if the proposal is for a land use map or zoning atlas amendment;
 4. A legal description and a notarized signature of one (1) or more owners, if a change in the zoning atlas is requested by owner(s) concurrent with a requested land use map amendment;
 5. An explanation of why the amendment is being proposed and, if applicable, how or why the map or text is in error;
 6. An explanation of anticipated impacts to be caused by the change;
 7. An explanation of how the proposed amendment is consistent with GMA, the county-wide planning policies, the comprehensive plan and adopted findings of fact and legislative intent;
 8. An explanation of how the change affects development regulations or how the amendment brings the development regulations into compliance with the plan;
 9. If applicable, an explanation of why existing comprehensive plan language should be added, modified, or

deleted;

10. A SEPA checklist, if required; and

11. Fees as set by the board.

B. The County may prescribe additional application requirements.

C. Persons wishing to initiate an amendment are encouraged, but not required, to use the preapplication procedures of section 16.19.050.

(Ord. C-135-98 [PLG-041-98], November 9, 1998, vol. 43, p. 62)

(Ord. No. C-49-17 [PLG-006-17], Exh. A, 5-23-2017)

16.26.080 - Plan amendments—Review and public notice procedures.

A. Review of annual docket items shall occur pursuant to the schedule below:

TABLE B. REVIEW OF DOCKETED PROPOSED AMENDMENTS

DUE BY	PROCESS
November 30 of prior year	Docket approval, per <u>section 16.26.060</u> and posted to web site
Throughout the year	Planning Commission to hold public hearing(s) on proposed amendment(s)
No later than November 30	Board to review and make a decision to approve, deny, or defer action on each item on the docket (may include identification of items that will be continued into next docket cycle)

B. Public Notification. Information regarding any proposal pursuant to this chapter shall be broadly disseminated to the public at minimum as provided in subsection 1 below, as well as by any of the other following methods as determined to be appropriate by the Planning Director.

1. Publishing a paid public notice at least ten (10) days prior to a public hearing in the official county newspaper;
2. Distributing a press release;
3. Emailing to a distribution list;
4. Posting notice on the Department's website;
5. Sign posting on the impacted property for a proposed Type IV rezoning.

C. Public Notification - Site-specific comprehensive plan map and zoning atlas amendments. Where public notice is otherwise required by this chapter, such notice shall be mailed directly to the owners of the affected properties, and to all property owners within 300 feet of the subject property.

D. Public Participation. In addition to public notice as otherwise required by this chapter, the public shall have the opportunity to participate in the county legislative matters via public hearing before the Planning Commission, via public hearing before the Board if the Board opts to hold its own public hearing, by written comment, and

by other forums as appropriate (per RCW 36.70A.140).

- E. The Planning Commission shall evaluate the proposed amendments as follows:
1. Does the proposed amendment or revision maintain consistency with other plan elements or development regulations. If not, are amendments or revisions to other plan elements or regulations necessary to maintain consistency also under annual review by the Planning Commission and the Board;
 2. Do all applicable elements of the comprehensive plan support the proposed amendment or revisions;
 3. Does the proposed amendment or revision more closely meet the goals, objectives and policies of the comprehensive plan;
 4. Is the proposed amendment or revision consistent with the county-wide planning policies;
 5. Does the proposed amendment or revision comply with the requirements of the GMA; and
 6. Are the assumptions underlying the applicable portions of the comprehensive plan or development regulations no longer valid because new information is available which was not considered at the time the Plan or regulation was adopted.
- F. The Planning Commission shall hold at least one (1) public hearing on the proposed amendments and shall forward to the Board its recommendations and findings of fact and legislative intent.
- G. Upon receipt of a recommendation on all or any part of a plan, plan amendment or development regulation from the Planning Commission, the Board shall schedule review of the proposal to consider and take action on the proposed amendments. The Board's decision to either approve, deny, or defer action on each item in the annual review docket concludes that year's annual docket cycle, which should occur no later than November 30 of each calendar year.
- H. With each adopted amendment the Board shall also adopt findings of fact and legislative intent to support the change in the comprehensive plan and/or development regulations. The Board may choose to incorporate by reference the findings of fact and legislative intent prepared by either the Department or the Planning Commission if the Board so agrees and desires. The Board may also decide to adopt its own findings of fact and legislative intent.
- I. Findings shall identify, as applicable, the following:
1. The local circumstances, if any, that have been relied on in reaching a decision on the proposed amendment; and
 2. How the planning goals of Chapter 36.70A RCW have been balanced in the decision on the proposed amendment.
- J. The Planning Director shall notify the State of Washington pursuant to RCW 36.70A.106 prior to the adoption of comprehensive plan amendments, development regulations or annual review amendments.
- K. Within ten (10) days of adoption, the Planning Director shall transmit the adopted Plan amendment(s) to the state and publish notice of the adoption in the official county newspaper.

(Ord. C-135-98 [PLG-041-98], November 9, 1998, vol. 43, p. 62)

(Ord. No. C-49-17 [PLG-006-17], Exh. A, 5-23-2017)

Editor's note— Ord. No. C-49-17, Exh. A, adopted May 23, 2017, changed the title of § 16.26.080 from "Public notice and comment" to read as herein set out.

16.26.090 - Periodic review and update procedures.

- A. The periodic review cycle is established in accordance with RCW 36.70A.130. The periodic review docket shall

include:

1. A comprehensive review to provide for a cumulative analysis of the twenty-year plan and its implementing regulations based upon official population growth forecasts and other relevant data in order to consider substantive changes to planning policies language, and changes to the urban growth areas;
2. Items deferred by the Board of County Commissioners in a prior year to be placed on the periodic review docket;
3. County priority review and update items that can be reasonably reviewed within the staffing resources and operational budget allocated to the Department by the Board; and
4. Items identified for review and updates due to legislative changes, as identified on the Department of Commerce periodic review checklist.

B. The periodic review docket shall be separate from the annual review docket; the dockets may, however, be considered concurrently as per section 16.26.050(D).

(Ord. C-135-98 [PLG-041-98], November 9, 1998, vol. 43, p. 62; amended by Ord. C-95-00 [PLG-019-00], November 27, 2000, vol. 45, p. 85, readopted December 11, 2000, vol. 45, p. 115; amended by Ord. C-86-05 [PLG-019-04], July 25, 2005, vol. 2005, p. 237; amended by Ord. C-79-12 [PLG-006-12], July 2, 2012, vol. 2012, p. 98)

(Ord. No. C-49-17 [PLG-006-17], Exh. A, 5-23-2017)

Editor's note— Ord. No. C-49-17, Exh. A, adopted May 23, 2017, changed the title of § 16.26.090 from "Eight-year review procedures" to read as herein set out.

16.26.100 - Appeals.

Appeals of decisions to amend the comprehensive plan or development regulations shall comply with the procedures set forth in Chapter 36.70A RCW.

(Ord. C-135-98 [PLG-041-98], November 9, 1998, vol. 43, p. 62)

16.26.110 - Severability.

If any provision or provisions of this chapter or its/their application to any person or circumstance is held invalid, the remainder of this chapter and the application of such provision or provisions to other persons or circumstances shall not be affected.

(Ord. C-135-98 [PLG-041-98], November 9, 1998, vol. 43, p. 62)

16.26.120 - Reserved.

Editor's note— Ord. No. C-49-17, Exh. A, adopted May 23, 2017, repealed former § 16.26.120 which pertained to effective date, and derived from Ord. C-135-98[PLG-041-98], adopted Nov. 9, 1998, vol. 43, p. 62.

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Court of Appeals
Division II
State of Washington
1/28/2020 10:18 AM

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

WRIGHT'S CROSSING, LLC, et)	NO. 53363-4-II
al.,)	
Appellants,)	(Thurston County Superior Court
)	Cause No. 18-2-01703-34)
vs.)	
)	DECLARATION
ISLAND COUNTY, et al.,)	OF SERVICE
)	
Respondents.)	
_____)	

I, Helen L. Tan, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the 28th day of January, 2020, the Brief of Respondent Island County and this Declaration of Service was served on the parties designated below as indicated:

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Helen L. Tan

January 28, 2020 - 10:18 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53363-4
Appellate Court Case Title: Wright's Crossing, LLC, et al., Appellants v. Island County, et al., Respondents
Superior Court Case Number: 18-2-01703-1

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