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Supreme Court No. 84894-7

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Court of Appeals No. 62843-7-1

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SUPREME COURT
OF THE STATE OF WASHINGTON

SCOTT E. STAFNE,

Petitioner

vs.

SONOHOMISH COUNTY AND
SNOHOMISH COUNTY PLANNING DEPARTMENT

Respondents

ANSWER TO MEMORANDA FROM WASHINGTON
ASSOCIATION OF PROSECUTING ATTORNEYS AND
WASHINGTON STATE ASSOCIATION OF MUNICIPAL
ATTORNEYS IN SUPPORT OF SNOHOMISH COUNTY'S
PETITION FOR REVIEW

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ANSWER

Stafne has no objection to The Washington State Association of Municipal Attorneys and Attorneys for Washington Association of Prosecuting Attorneys obtaining amicus status in this case. Certainly, municipalities have an interest in the issues which would be decided if the Supreme Court grants review. Stafne would point out, however, that the State of Washington and its citizens might have different interests with regard to how this case is resolved. This is because this suit is about which branch of government and which level of government is responsible for determining the consequences of final land use decisions under LUPA. This is not a case where a failure to appeal is determinative of the consequences of land use legislation under the GMA or a land use decision under LUPA.

As is pointed out in Stafne's reply brief to the Court of Appeals:

The following chart shows when relevant land use decisions in this case were made and whether they were timely appealed pursuant to the GMA or LUPA.

<u>DATE</u>	<u>LAND USE ACTION</u>	<u>APPEAL</u>
1992	GMA Designation of TFE ¹ as Interim FL ²	yes
1994	GMA Classification of TFE as rural settlement	no
1995	Creation of FTA ³ designation in Comp Plan	no

¹ TFE refers to Twin Falls Estates rural settlement

² FL refers to "forest land".

³ FTA refers to Forest Transition Land, which has a density of 1 house per twenty acres. CFL, which refers to Commercial Forest Land has a density of one house per 80 acres.

<u>DATE</u>	<u>LAND USE ACTION</u>	<u>APPEAL</u>
1998-2009	LUPA ... BLAs reconfiguring TFE	no
2007	LUPA BLA of Stafne's residential parcel	no
2009	Denial of Stafne's GMA citizen proposal	not allowed

Stafne Court of Appeals Reply Brief, p. 7

This Court has found the State has a strong interest in the finality of land use decisions⁴. The legislature has implemented this policy by providing short limitations periods for land use decisions⁵ and GMA Comprehensive Plans and development regulations⁶. This policy makes little sense unless citizens, municipalities, and the State have a means of determining what the consequences of final land use decisions are.

This appeal presents the question as to which level of government (state or municipal) and which branch of government (executive, legislative, or judicial) is responsible for determining the consequences of final land use decisions which

⁴ See e.g. *James v. Kitsap County*, 154 Wash.2d 574, 589, 115 P.3d 1 (2005) (citing *Chelan County v Nykreim*, 146 Wn. 2d 904, 931 - 932, 52 P. 3d 1 (2002); see also *Habitat Watch v. Skagit County*, 155 Wash.2d 397, 421, 120 P.3d 56 (2005) (Chambers, J., concurring) (observing that " the overwhelming purpose of LUPA was to unburden land use decisions from protracted litigation").

⁵ RCW 36.70C.040 (2) (A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served...)

⁶ RCW 36.70A.290(2) (All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter or chapter 90.58 or 45.21C RCW must be filed within sixty days after publication by the legislative bodies of the county or city.)

have been ministerially determined to be generally consistent with Snohomish County's Comprehensive Management Plan and development regulations⁷.

Although Stafne agrees that the importance of the issues being litigated to municipalities makes participation by municipal attorneys important, he also believes that if review is accepted this Court should solicit the view of The State Attorney General on these issues because the State's interests may be adverse to municipal interests. In this regard it is worth considering Justice Chambers observations in his concurring opinion in *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005):

"I feel like a little boy painting a floor only to discover he has painted himself into a corner. I fear now, only the legislature can rescue me from this corner. Changing analogies, we can go methodically from tree to tree and just get lost deeper in the forest. In this analogy, the trees are precedents and the forest is the legislative purpose in adopting the Land Use Petition Act (LUPA), chapter 36.70C RCW.

Getting lost was easy. *Cases and controversies are often argued only by parties who simply want to win their case; they are interested only in the next tree (the immediate result) and have little concern for the forest.* It has also been easy because we have often interpreted the plain meaning of the statute section by section, without appropriate

⁷ See e.g. *Woods v Kittitas County*, 162 Wn.2d 597, 613, 174 P.3d 25 (2007) where this Court observed: "Comprehensive plans serve as " 'guide[s]' " or " 'blueprint[s]' " to be used in making land use decisions. [cites] Thus, a proposed land use decision must only *generally conform*, rather than strictly conform, to the comprehensive plan. *Id.* A comprehensive plan does not directly regulate site-specific land use decisions. [cites] Instead, local development regulations, including zoning regulations, directly constrain individual land use decisions. [cites]

consideration for the legislature's overall plan contained within the four corners of the act. *Contra Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 11-12, 43 P.3d 4 (2002). I signed some of the precedents I now lament." *Id.*, at 417.

Certainly, this case presents facts which suggest there is a need for scrutiny of municipal interests versus state interests in determining which governmental entity has the power to ultimately determine the consequences of a municipality's own final land use decisions. This case presents a situation where as part of its legislative process Snohomish County vested unreviewable judicial power into its Planning Department to determine the consequences of final land use decisions made under LUPA with regard to GMA land classifications, but did not give Department any legal resources as to how to make such adjudications. As a result the Planning Official who was supposed to apply existing law to parcels which had been reconfigured as a result of final land use decisions in Stafne's proposal to classify all of Twin Falls rural settlement as being low density rural residential property applied a repealed definition of forest land to those boundary line adjusted lots in Twin Falls.

The definition of forest land which was applicable to Stafne's proposal is set forth in RCW 30.70C.030 (8). That section states:

"Forest land" means land primarily devoted to growing trees for long-term commercial timber production on land that can be economically and practically managed for such production, including Christmas trees subject to the excise tax imposed under RCW 84.33.100 through 84.33.140, and that has long-term commercial significance. In

determining whether forest land is primarily devoted to growing trees for long-term commercial timber production on land that can be economically and practically managed for such production, the following factors shall be considered: (a) The proximity of the land to urban, suburban, and rural settlements; (b) surrounding parcel size and the compatibility and intensity of adjacent and nearby land uses; (c) long-term local economic conditions that affect the ability to manage for timber production; and (d) the availability of public facilities and services conducive to conversion of forest land to other uses.

The Planning Official who was given the task of applying this law to parcels which existed pursuant to the requirements of SCC 30.74.030 (a) and (d) admitted he was not aware this statute or of the supremacy of state statutory law over municipal policies. In regard, to the Planning Department's unawareness that state law controls over the County's policies, the County's 30 (b) (6) designee testified:

5 Q. Are you aware that State law supersedes County
6 ordinances?

7 A. It's not my area of expertise.

8 Q. So you're not aware?

9 A. No.

10 Q. And would it also be fair to say you're not aware
11 of whether State law preempts County policies?

12 A. It's not my area of expertise, no. I am not
13 going --

14 Q. Well, I'm wondering now, after hearing all of the
15 things that are not your area of expertise, how you are able
16 to determine that the proposed amendment is consistent with
17 the countywide planning policies, the GMA, and other State or
18 federal law. How are you able to do that?

19 A. We use the criteria that's in our -- we use our
20 codified criteria. We use the County policies to do that
21 analysis.

22 Q. Okay.

23 A. We look at the Growth Management Act and the

24 policies in -- or, excuse me, the regulations in there, and
25 see if they fit.

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1 Q. Okay. So you primarily used the County policies?

2 A. Mm-hmm. CP, pp. 338

The repealed definition of "forest land" defined forest land as "primarily useful" for growing trees (rather than "primarily devoted" to growing trees). The existing definition requires municipal consideration of factors (a) through (f), while application of these factors were discretionary under the earlier statutory definition. At his deposition, the County's 30 (b) (6) designee⁸ testified that the County did not apply the correct definition of "forest land" to Stafne's proposal and was not willing to state whether the County would apply the correct statutory definition of forest land to any future citizen proposals.:

15 Q. I'm handing you what actually is the statutory
16 definition of forest land. Would you read it, please.

17 A. Certainly. 36.70A.030, Definition 8. Forest land
18 means land primarily devoted to growing trees for long-term
19 commercial timber production on land that can be economically
20 and practically managed for such production, including

⁸ Stafne notice of deposition as Snohomish County and its Planning Department to designate the person who could best testify about "The Planning Department's procedures involving initial evaluation of Docket proposals from citizens pursuant to the Snohomish County Code 30.74.030, including, but not limited to parts "a" and "d" of SCC 30.74.030 generally and with regard to their application to Stafne's Docket proposal." See CP, p.309 – 310 at paragraph 3; CP, pp. 311 – 312 (Notice of CR 30 (b) (6) deposition); CP p. 330 (Cover of "30 (b) (6) deposition of TROY HOLBROOK".

21 Christmas trees subject to the excise tax imposed by RCW
22 84.33.100 through 84.33.140, and that has long-term
23 commercial significance. In determining whether forest land
24 is primarily devoted to growing trees for long-term
25 commercial timber production on land that can be economically

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1 and practically managed for such production, the following
2 factors shall be considered: The proximity of the land to
3 urban, suburban, and rural settlements; surrounding parcel
4 size and the compatibility and intensity of adjacent and
5 nearby land uses; C, long-term local economic conditions that
6 affect the ability to manage for timber production; and, D,
7 the availability of public facilities and services conducive
8 to conversion of forest land to other uses."

9 Q. Assuming that this is actually the statute, would
10 you change any part of Exhibit --

11 A. Thirteen.

12 Q. Is that your memorandum?

13 A. Yes. I would need some time to go over this.

14 Q. Well, let me try to help you because I know you're
15 interested in getting out of here. Would you still continue
16 to tell the Council that RCW 36.70A.030(8) defines forest
17 land as land primarily useful for growing trees?

18 A. Yes.

19 Q. That was bad legal advice, wasn't it?

20 A. Wait a minute. Excuse me?

21 Q. That was bad legal advice. You told them the
22 statute said something that it didn't.

23 A. It's primarily useful for growing trees, and it
24 says primarily devoted to growing trees.

25 Q. Do you know why that came into effect?

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1 A. No.

2 Q. Okay. Well, can you presume the legislature wasn't

3 happy with the earlier definition?

4 A. I'm not going to presume anything.

5 Q. Okay. But, as we sit here today, you realize that
6 you misquoted the statute to the Council?

7 A. It appears so.

8 Q. Okay. Now, those minimum guidelines that you state
9 are discretionary and you don't have to follow in the
10 Snohomish County planning department, would you compare those
11 to the guidelines that you say do not have to be followed?

12 A. I'm sorry. Compare what?

13 Q. Okay. Let's take another part of your legal
14 memorandum. You say, "proximity to utilities." You say that
15 you folks don't have to consider them because of a bunch of
16 legal mumbo-jumbo policies. Do you not see there that the
17 statute requires you to consider them?

18 A. I will stay with what's in the staff report and the
19 memo.

20 Q. You'll say that the staff report and memo are
21 correct notwithstanding that the legislature has enacted
22 something different?

23 A. I'm sorry. You asked me two different questions.

24 Q. You said you'll stay with the memo, that that
25 criteria is discretionary to, I guess you, the person who

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1 applied it so that it was consistent. You're going to stick
2 with the fact that it's discretionary notwithstanding the
3 fact I have presented you a copy of the statute that clearly
4 states you have to consider the availability of public
5 facilities and services conducive to conversion of forest
6 land to other uses.

7 A. Well, I'm not denying that that's true. And it was
8 considered, and the County does not consider that a factor in
9 its policies.

10 Q. I see. The County doesn't consider a statutory
11 definition contained in the Growth Management Act a factor in

12 your performance of your obligations of subpart A where you
13 have to determine the consistency of the application with
14 various laws?

15 A. We use the criteria established in our policies.

16 Q. Okay. Regardless of whether or not it follows
17 State law?

18 A. I'm not going to -- that's a judgment call on your
19 part there, I think.

20 Q. Do you have any reason to believe that you are not
21 looking at State law? And you can consult with your
22 attorney. I mean, I'm about to wind this up. You may want
23 to talk to her to see.

24 MS. KISIELIUS: Sure.

25 Q. I want to know -- you said you're sticking by what

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1 you said there. And you told the County that this was a
2 discretionary thing that they didn't have to consider. And
3 you're sticking by that legal advice?

4 A. That's what was in our staff report, yes.

5 Q. So you're sticking by it?

6 A. That's what we gave to the Council, yes. CP, pp. 354 - 355

State and citizens' interests are implicated when municipal authorities refuse to recognize the supremacy of state law over municipal policies as part of a formal decision-making process where municipal planners are given supposedly unreviewable quasi-judicial authority to adjudicate the consequences of previously made land use decisions as part of a municipal legislative process.

CONCLUSION

Stafne does not object to The Washington State Association of Municipal Attorneys and Attorneys for Washington Association of Prosecuting Attorneys

representing attorneys participating in this case if this Court grants review. However, it is hoped that these associations can approach this case with the best interests of all persons and entities who will be affected by the ruling on the merits. Moreover, if review is granted Stafne asks this Court consider requesting The State Attorney General to weigh in on the issues presented by this case.

Respectfully Submitted,

S/ Scott E. Stafne

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Please find attached for filing Petitioner Stafne's "ANSWER TO MEMORANDA FROM WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS AND WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS IN SUPPORT OF SNOHOMISH COUNTY'S PETITION FOR REVIEW" in Stafne v Snohomish County, Supreme Court No. 84894-7.

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