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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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SCOTT E. STAFNE,

Appellant/Petitioner

vs.

SONOHOMISH COUNTY AND
SNOHOMISH COUNTY PLANNING DEPARTMENT

Appellees/Respondents

APPEAL FROM THE SUPERIOR COURT
FOR SKAGIT COUNTY
THE HONORABLE JOHN M. MEYER

APPELLANT/PETITIONER'S OPENING BRIEF

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MEDICAL MARIJUANA DOCUMENTATION

I have advised my patient, Scott E. Stafne, that in my professional opinion as a physician licensed to practice medicine in Washington that he may benefit from the medical use of marijuana with regard to his treatment for a "terminal or debilitating medical condition", as that term is defined at RCW 69.51A.010 (4).

Dr. Thomas J. Smith

VALID IDENTIFICATION

I, Scott E. Stafne, declare under the penalty of perjury for the state of Washington that the above copies are true and correct copies of the front and back side of my current Washington State Drivers License.

APPOINTMENT OF JAN EVERIST AS DESIGNATED PROVIDER
AND AGREEMENT OF JAN EVERIST TO ACT AS DESIGNATED PROVIDER

Scott E. Stafne hereby appoints Jan Everist as his designated provider pursuant to RCW Chapter 60.51A.

Jan Everist accepts her appointment as a designated provider and certifies that she is over eighteen years of age and is familiar with or will become familiar with RCW Chapter 60.51A. Jan Everist agrees that during the performance of duties as a designated provider she will comply with the provisions of RCW Chapter 60.51A.

INTRODUCTION

Washington land use law is often decided by issues involving statutory limitations periods and exhaustion of remedies rather than the merits of substantive law. For example, in *Chelan County v Nykreim*, 145 Wn.2d 904, 52 P.3rd 1 (2002) the Supreme Court held the Land Use Petition Act's (LUPA's) 21 day limitation period (RCW 36.70B.040 (2) & (3)) precluded Chelan County from revoking a Boundary Line Adjustment (BLA) notwithstanding that the BLA decision violated substantive law.

This appeal involves the legal ramifications of a series of **unappealed** Snohomish County BLAs that reconfigured land (which previously had been designated by Snohomish County as forest land) into less than 40 acre parcels within the Twin Falls Estates rural settlement. Clerk's Papers (CP) 428 – 439. One of the BLAs reconfigured a few acres of previously owned DNR land into Stafne's residential parcel. (*id. See also* CP 698 – 724 and 556 - 557) As a consequence of this final land use decision the few acres incorporated into Stafne's rural residential parcel lost all previous characteristics of designated forest land. (*id. See also infra.*) Stafne's first contention on appeal is that under *Nykreim* and LUPA the County cannot avoid the consequences of its final land use decision granting a BLA.

County officials told Stafne that in order to remove any land from forest land designation, Stafne would need to file a “citizen participation” docketing proposal under SCC Chapter 30.74. (CP pp. 433 – 434, paragraph 18) Stafne asserts in the second part of this appeal that under the circumstances set forth below the Superior Court should have granted Stafne a judicial writ preventing Snohomish County from applying, among other things, a legislatively repealed definition of forest land to his citizen public participation docketing proposal.

Among the considerations Stafne contends justified the issuance of a judicial writ is the unconstitutionality of SCC 30.34.030 (a) and (d), both facially and as applied. A basis for this contention on appeal is that SCC 30.74.030 (a) and (d) mandate the Planning Department (Department) perform what is essentially judicial review to determine whether a citizen proposal complies with state, federal, and municipal law. This review is done by the municipality’s executive branch of government with the expectation the judicial branch of the State government cannot review Department determinations of fact and law applicable to citizen proposals. (CP pp. 313 - 329)

**ASSIGNMENTS OF ERRORS AND ISSUES RELATING
THERE TO**

ASSIGNMENT OF CPROR 1:

Stafne's less than 40 acre residential parcel in Twin Falls Estates rural settlement was reconfigured pursuant to a BLA constituting a final land use decision under LUPA. No one appealed this decision. The Superior Court erred by not granting Stafne's motions for summary and declaratory judgments that after the final land use decision granting the BLA no part of Stafne's reconfigured parcel constituted forest land.

ISSUES RELATING TO ASSIGNMENT OF CPROR 1:

- A.) Did the recording of the BLA of Stafne's residential parcel (Twin Falls Estate Lot 11) constitute a final land use action under LUPA, which must be appealed within 21 days?;
- B.) Did the final decision approving the BLA which reconfigured several acres of previously owned state DNR land (which was designated as forest land) into Stafne's less than 40 acre residential parcel in the Twin Falls Estates rural settlement (which was classified as low density rural residential land) change the forest land character of the incorporated acres?;

C.) Does any portion of Stafne's residential parcel as it was reconfigured pursuant to the recorded BLA meet the statutory definition of forest land under the GMA?;

D.) Does any portion of Stafne's residential parcel as it was reconfigured pursuant to the recorded BLA meet Snohomish County's mandatory criteria for designating forest land under its comprehensive plan?;

ASSIGNMENT OF CPROR 2:

The Superior Court erred in not granting Stafne an extraordinary writ requiring Snohomish County to apply the applicable statutory definition of forest land and municipal criteria for designating forest land to his proposal to remove any forest land designations from all parcels within Twin Falls Estates rural settlement.

ISSUES RELATING TO ASSIGNMENT OF CPROR 2:

A.) Did the Superior Court have jurisdiction to issue a constitutional writ of certiorari or a statutory writ of mandamus or a statutory writ of prohibition under the circumstances of this case?

B.) Did the Superior Court err by not granting a judicial writ to prevent Snohomish County from applying a legislatively repealed definition of forest land to Stafne's

proposal under SCC Chapter 30.74 to remove all parcels in Twin Falls Estates rural settlement from any forest land designation?

C.) Did the Superior Court err by not granting a judicial writ to prevent Snohomish County from erroneously applying Snohomish County's criteria for designation of forest land to Stafne's proposal to remove all parcels in Twin Falls Estates rural settlement from any forest land designation?

ASSIGNMENT OF CPROR 3:

The Superior Court erred by failing to find SCC Chapter 30.74 is unconstitutional on its face and as applied to Stafne's citizen proposal.

ISSUE RELATING TO ASSIGNMENT OF CPROR 3:

Does SCC Chapter 30.74 unconstitutionally infringe upon judicial power, state supremacy, and the open administration of justice by giving the Planning Department unfettered discretion to secretly interpret and apply state, federal, and municipal laws to citizen public participation docketing proposals?

STATEMENT OF THE CASE

This appeal involves a series of final land use decisions made by Snohomish County with regard to parcels in the Twin Falls rural development since 1992 until the present. *See* Stafne declaration in

support of motion for summary judgment (Stafne declaration) and attached exhibits at CP pp. 427 – 779. In 1992 Snohomish County designated land owned by Twin Falls, Inc. as interim forest land under the Growth Management Act, RCW Chapter 36.70A (GMA). *Id.* at CP, pp. 428 - 429, paragraphs 4 – 7 and Exhibits 2 & 3 at CP pp. 449 – 779. Twin Falls, Inc. appealed Snohomish County’s designation of its land parcels to the Central Puget Sound Growth Management Hearings Board contending, among other things, that its 20 acre parcels did not meet the statutory definition of forest land set forth at RCW 36.70A.030 (8). *Id.* Stafne, the appellant/petitioner in this case, represented Twin Falls, Inc. *Id.*

The Hearings Board ultimately upheld Snohomish County’s forest land designation of Twin Falls 20 acre parcels. *See Twin Falls et al. v. Snohomish County*, CPSGPHB Case No. 93-3-0003 (1993). A copy of that decision is included at CP pp. 480 – 539.

The legislature subsequently amended the definition of forest land.

In 1994 Snohomish County removed Twin Falls land from forest land designation and classified all its parcels as low density rural residential land. Stafne Declaration at CP pp. 429 - 430, paragraphs 8 –

10 and Exhibit 5 “Amended Motion No. 94-210 Amending 92-283, Relating to Interim Forest Land Designations” at CP pp. 539 – 550.

The ordinance removed Twin Falls’ and other developers’ less than 40 acre parcels from forest land designation. CP, p. 543, paragraphs 7 – 10. The Council found it would be unfair to developers, including Twin Falls, Inc., to designate less than 40 acre parcels as forest land regardless of a developer’s ownership of contiguous parcels exceeding 40 acres in size. *Id.* The County Council also took “official notice” of the legislature’s repeal of the original definition of forest land. *Id.* Thus, Snohomish County found in 1994 when it removed all of the parcels in Twin Falls Estates from forest land designation that:

“g. Site 21. This 180 acre parcel shall be removed from any forestry designation based upon [paragraph] 10 [the finding that it would be unfair to include any less than 40 acre parcels as forest land] above, on testimony, and landowner’s petition. The site is characterized by streams, wetlands, lakes and very steep slopes, so much that one area landowner testified that a recent attempt to log in the site had to be aborted because of steep terrain. The site is also intended by the landowner to be developed into low density recreational/residential use and is currently used for recreational purposes.” *Id.*, CP 545 paragraph g.

Based on the above findings the Snohomish County Council removed all Twin Falls Estates parcels from forest land designation. *Id.* at 546 and 547 at paragraphs 2 k.

After 1994 Snohomish County processed BLAs proposed by owners of parcels in Twin Falls Estates rural settlement. CP pp 430 – 434 at paragraphs 11 – 25. This process occurred openly and pursuant to SCC Chapter 30.41E. *See* CP 209 – 211.

In 1998 Stafne and Twin Falls, Inc. completed a land trade with the Washington Department of Natural Resources (DNR). Twin Falls, Inc. traded productive forest land on top of a ridge for the steep cliffs separating that commercial forest land from Twin Falls rural settlement. CP 430 – 431 paragraph 11 and CP p. 646. Twin Falls and Stafne wanted the steep cliffs as a buffer to protect Twin Falls Estates rural community from DNR’s commercial logging activities above the ridge line. *Id.* There is evidence in the record before the Superior Court indicating the DNR did not contemplate the adjacent cliff land it was transferring to Twin Falls rural settlement could or would be used as “commercial forest land of long term significance”.

For example, the deed required that part of the steep cliffs be used as a Peregrine Falcon Reserve subject to DNR’s Habitat Conservation Agreement with the United States Secretary of the Interior. *See* Exhibit 6, Deed signed by Governor Locke conveying adjacent state lands to Twin Falls ...” at CP pp. 551 – 555. The Habitat Restriction is set forth at CP p. 553.

Lot 11 of the Twin Falls Estates community is owned by Stafne. In 2004 he built his residence on this parcel. Stafne Declaration at CP 431 paragraph 12. Stafne's parcel was boundary line adjusted in 2007 to include several acres of the land received from the State in 1998. Stafne Declaration at CP 431 at paragraph 12; CP 435 – 436 at paragraphs 23 – 26; and recorded BLA for Lot 11 at CP pp. 698 – 724. These several acres contained a waterfall and the steep cliffs surrounding it. *Id.* A picture of this waterfall and the land surrounding it is contained at CP p. 557.

In 2004 Jack Alhadiff built a house on an approximately 21 acre parcel the State DNR transferred to Twin Falls. Stafne Declaration, CP 434, paragraph 19. Alhadiff's parcel was designated as "commercial forest land" as opposed to "forest transition area". *Id.* Although Snohomish County required minimum densities of one home per eighty acres on commercial forest land, Snohomish County granted Mr. Alhadiff a building permit to build his home inside Twin Falls rural settlement. *Id.*

In 2005 the Planning Department proposed all land parcels in Snohomish County which had previously been designated as "forest transition" area be re-designated with a "commercial forest land" designation. Stafne Declaration at CP 433 paragraph 17. This would

have affected all of the DNR land transferred to Twin Falls, Inc., except for Alhadiff's parcel which had commercial forest land designation.

Stafne, on behalf of the Twin Falls community, opposed the proposed amendments because the Planning Department erroneously assumed the owners of all forest transition land area had not transitioned land out of commercial forestry uses. *Id.* Twin Falls Estates rural settlement presented evidence the parcels in its community had transitioned away from using land for commercial forestry purposes and were now using the previously owned DNR land for rural residential and recreational purposes. *See* Exhibit 9 to Stafne's declaration, Snohomish County Planning Commission Exhibit 64 to the ten year comprehensive plan at CP 580 – 581. Ultimately, the Department withdrew the proposal to eliminate the forest transition area by re-designating all land in that designation as commercial forest land. Stafne Declaration at CP 433 paragraph 17.

In early September, 2007 Stafne was asked by Snohomish County to participate as a "stakeholder" with regard to the development of new Planning Department regulatory proposals for the Forest Transition Area. Stafne declaration at CP 433 - 435 at paragraph 18; CP, p. 586 -587, 592. Through this participation Stafne and other Twin Falls Estate parcel owners learned the County had maintained the forest land

designations on the land transferred by the DNR in 1998. Stafne declaration at CP 433 – 434 at paragraph 18. Stafne and other Twin Falls Estate homeowners requested the Department identify the GMA designation for all lands in the parcels comprising Twin Falls rural community. *Id.* See also Exhibit 10 to Stafne’s declaration at CP pages 593 – 594 (September 26, 2007 email correspondence by Stafne and Margolis to county planners); p. 608 (October 5, 2007 Nieman response to Stafne and Margolis); and p. 600 (October 24, 2007 Stafne email to Tom Nieman).

On October 29, 2007 Stafne filed a “GMA public participation” docketing proposal to remove parcels in the Twin Falls rural settlement community from any forest land designation and to reclassify any forest land in those parcels as low density rural residential land. Stafne Declaration at CP p. 433 – 434 at paragraph 18; Exhibit 11, Twin Falls Docket XIII Proposal at CP 632 – 695.

Stafne’s proposal advised the County he was seeking removal of any forest land classification within the parameters of Twin Falls Estates rural settlement. (*Id.*) The proposal also observed that many Twin Falls parcels had been boundary line adjusted to parcel configurations that were not reflected by current Assessor’s maps. Stafne Proposal, CP 156 (Legal Description relating to area sought to be rezoned and re-

designated). The proposal included a recorded amended survey purporting to show the reconfiguration of parcels within the parameters of Twin Falls Estates rural settlement after the BLAs. CP 157 – 158.

In the “Discussion of the Proposed Amendments” Stafne explained a purpose of the DNR land trade was to give the State prime forest land in return for DNR’s steep cliffs because these cliffs provided a buffer between the DNR’s commercial forestry operations and the Twin Falls rural settlement. Docket Application, CP at 647 – 648, paragraphs 1 – 7. The proposal also stated another reason for the trade was the establishment of a Peregrine Falcon Reserve in the steep cliffs of Parcel 16 of Twin Falls Estates. *Id.*, CP at page 648 at paragraph 8.

The Proposal described each of the 5 less than 40 acre parcels transferred by the State. *Id.* at CP p. 648 at paragraph 9. The proposal at paragraphs 10 – 14 (CP 648 – 649) indicated that BLAs configured land traded by DNR into already existing Twin Falls Estates parcels in a low density rural residential classification. Paragraph 15 at CP 649 stated “[f]rom 1992 until the present TFE [Twin Falls Estates] has maintained roads to serve all home sites, added underground power, water, and telephone utilities, and created recreational common area to accommodate homeowners of the TFE.”

The proposal stated it was not requesting a change in density requirements because both “low density rural residential” lands and “forest transition area” lands had a maximum density of one house per 20 acres. Paragraphs 18 and 19 at CP 650 summed up the crux of Stafne’s public participation docketing proposal:

18. These proposals to change the zoning and land use designation for TFE are prompted by the County’s continuing regulatory scrutiny of the FTA [Forest Transition Area] and recently proposed regulation requiring 1 house per 80 acres in the FTA. This has caused concern to the TFE community because TFE has transitioned over the years under existing FTA regulations into a rural community with a rural community infrastructure. TFE owners do not want to use their property as CFL or to be foresters. Rather they seek to preserve and enhance their rural life style, which promotes privacy, scenic beauty, abundant wildlife, and recreation. Moreover, in this regard it is the position of the TFE Community that TFE does not meet the definition of Commercial Forest Land under the Growth Management Act, which is the County’s basis for its CFL and FTA designations. To the extent the county may want a buffer between DNR’s commercial practices, DNR and TFE have mutually resolved those conflicts between themselves through the land trade previously discussed.

19. It is also the position of the TFE community that the present land use regulatory framework applicable to TFE is confusing, not consistent with actual use, and serves no valid purpose when one considers TFE’s current status as a low density rural community. Therefore, the TFE community respectfully requests Snohomish County adopt these proposals which reflect the actual status of TFE so that the community does not have to become embroiled in the details of forestry applicable to CFL every time planners seek to change FTA and CFL regulations.

The Proposal stated several times that it was based on BLAs of the previously owned DNR steep cliffs into some of Twin Falls pre-existing low density rural residential parcels and that these land use decisions were not yet shown in the Assessor's maps. For example, Stafne's Docket Proposal states at CP p. 647 at paragraph 7:

"Exhibit 5 is a current copy of Assessor's Maps for TFE [Twin Falls Estates] and adjacent areas. It does **not** reflect the numerous boundary lines adjustments inside TFE's boundaries [since] 1998. However, I have marked the outer parameters of TFE on the Assessor's maps and indicate the subject property as being inside this boundary. I asked the Assessor's Office to provide a legal description of TFE's outer boundary so that I could comply with the Docketing requirements. I was told the Assessor does not do this; but could only provide the legal descriptions which I believe are not current. The assessor who knows the most about the BLAs within TFE is Debbie Sundheim. Ms. Sundheim is on vacation. The TFE community urges reviewers to speak with Ms. Sundheim regarding any questions about TFE's outer boundary when she returns from her vacation on October 31, 2007. [Emphasis in original]"

The Planning Department produced an undated Initial Review and Evaluation of Stafne's Docket Proposal. This Review is set forth at CP 728 – 734. The review was done pursuant SCC 30.74.030 (a) and (d). These provisions state:

- (1) The department shall conduct an initial review and evaluation of proposed amendments, and assess the extent of review that would be required under the State Environmental Policy Act (SEPA) prior to county

council action. The initial review and evaluation shall include any review by other county departments deemed necessary by the department, and shall be made in writing. The department shall recommend to the county council that the amendment be further processed only if all of the following criteria are met, except as provided in SCC 30.74.040:

(a) The proposed amendment is consistent with the countywide planning policies, the GMA, and other state or federal law;

* * *

(d) Any proposed change in the designation of agricultural and forest land is consistent with the designation criteria of the GMA and the comprehensive plan;

The Planning Department, which did not consider any of the final BLA decisions incorporating DNR land into the Twin Falls Estates rural settlement, applied its legal analysis only to the five DNR parcels as they existed in 1998 and not to the Twin Falls Estates parcels as they existed at the time of the Docket Proposal. *See Review*, at CP 731 first paragraph of part d. In other words, the Planning Department's initial review did not evaluate Stafne's proposal to remove any forest land designations from parcels within Twin Falls Estates rural settlement. Rather the review evaluated whether the DNR lots as they existed in 1998 were consistent with the GMA, other applicable laws, and the County's designation criteria.

Stafne complained to the Planning Department that it was his proposal, not the Planning Department's revision of it, which should be reviewed. *See* Stafne Declaration, Exhibit 16 at CP p. 736 (Stafne May 2, 2008 email to Hal Holbrook); p. 742 (Stafne May 29, 2008 email to Jacqueline Reid); p. 743 (email to Jacqueline Reed re BLAs); p. 761 (Stafne June 2, 2009 email to Holbrook); p. 763 (Stafne June 3, 2008 email to Holbrook); p. 763 (Stafne June 3, 2008 email to Holbrook);

Stafne and others also provided evidence contradicting all of the factual findings and legal conclusions set forth in the initial review. *See* Id. at CP p. 756 - 757 (Stafne's May 29 email to Reid 1.) Contradicting Review's finding there are Bull Trout in Twin Falls streams; 2.) Contradicting Review's finding Twin Falls Estates parcels do not have access to public services; 3.) Contradicting Review's finding that any of the parcels in forest designations are over 40 acres in size or have contiguous ownership; 4.) Contradicting remaining forest cover at Twin Falls is viable for commercial logging; and 5.) Contradicting there are no pending development permits. *See also* CP p. 736 (Stafne's June 2, 2008 email to Holbrook contradicting finding that any lots in forest land were greater than 40 acres in size or that there was contiguous ownership of any of the lots.); CP, p. 770 (Carole Palmer testimony regarding lack of any 40 acre lots or contiguous ownership.)

Stafne and others also provided comments to the Planning Department at a meeting between Twin Falls residents and Planners to discuss the inaccurate findings and conclusions contained in the Department's initial review. This meeting and the discussions it involved are evidenced by the by the following documents in Exhibit 16 to Stafne's Declaration. CP. at pp. 637; 740; 742 – 743, 746; 750; and 756.

On June 6, 2008 Stafne emailed Sheila McAllister an email for review by County Council members. Stafne Declaration Exhibit 11 at CP. Pp. 767 – 769. In that email Stafne complained 1.) The Planning Department failed to recognize Twin Falls was an established rural community; 2.) The Planning Department used the wrong data and therefore misapplied the County's Forestry Criteria to Stafne's proposal; and 3.) The Planning Department failed to consider that all Twin Falls parcels have access to public utilities.

On June 9, 2008 Stafne provided public testimony under oath to the Snohomish County Council. This testimony is set forth at CP 771 – 772. It succinctly told the Council of Twin Falls history. It also specifically identified the legislature's change in the definition of forest land from land primarily "useful" for growing trees commercially to land primarily "devoted to" growing trees commercially. Id.

At this same meeting the Department provided the Council with a Memorandum purporting to respond to Stafne's June 6, 2008 email to county council members. A copy of Stafne's June 6, 2009 email is set forth at CP pp. 767 – 769. A copy of the Planning Department's Memorandum response is set forth at CP pp. 208 – 209. This Memorandum was not made available to Stafne or the public. *See* Verified Amended Complaint, CP pp 21 – 32. After the hearing Stafne asked the author of the Memorandum for a copy. The author told Stafne he would fax him a copy of the Memorandum that day, but never did. *Id.*, CP p. 22, paragraphs 35 – 36. Stafne called the Planning Department employee on several occasions asking him to provide the Memorandum. Later the author's supervisor told Stafne a FOIA request would have to be filed to obtain the Memorandum. *Id.* This prevented Stafne from obtaining the Memorandum in time to make any meaningful comments to the Council about the Memorandum's legal conclusions. *Id.* The County's refusal to provide the Memorandum as part of the public participation docketing process is significant given the short limitation periods and exhaustion of remedy requirements imposed upon judicial review by Washington's land use statutes.

Although the Memorandum will be discussed more in the argument section, *infra*, it is worth noting here that the "secret"

Memorandum providing legal advice to the Council was based on 1.) The legislatively repealed statutory definition of “forest land”; and 2.) The Board’s holdings in *Twin Falls v Snohomish County*, supra.

After Stafne obtained the Memorandum through a FOIA request he moved to file an amended complaint. That motion was stipulated to by Snohomish County and its Planning Department. CP at pp. 1 – 2. A copy of the Amended Complaint is set forth at CP, pp. 3 – 59. Among other things the complaint alleged Snohomish County’s final land use decisions granting BLAs incorporating what had previously been parts of DNR owned forest land parcels into parcels in Twin Falls Estates rural settlement resulted in those lands being classified as Low Density Rural Residential. CP 5, paragraphs 7 – 8. Stafne also outlined the Snohomish County Docket process and alleged that it was inadequate, fundamentally unfair, and did not provide that process which was due under the circumstances. CP pp. 5 – 33, paragraphs 7 – 42. Stafne’s complaint also alleged the County and its Planning Department were negligent and committed legal malpractice with regard to the processing of his GMA public participation docket proposal.

In addition to his negligence and legal malpractice claims Stafne complaint also sought judicial writs and declaratory judgments.

On October 20, 2008 Snohomish County and the Snohomish County Planning Department filed a motion to dismiss, which is set forth at CP, p. 60 – 111. On November 7, 2008 Stafne filed motions for partial summary judgment and a declaratory judgment that a consequence of the unappealed 2007 final land use decision approving the BLA which reconfigured several acres of previously owned DNR land into Stafne’s parcel was that Stafne’s reconfigured parcel was now classified as low density rural residential land and contained no designated forest land. CP 112 – 122.

On November 26, 2008 Stafne took the deposition of CR 30 (b) (6) designee Troy Holbrook. Holbrook was produced as the person best able to testify concerning:

“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”).

At his deposition Holbrook testified his formal education took place in California Colleges and involved California Planning Law. CP p. 332 at deposition page 7 line 17 (7:17) – 8:9. At the time of his deposition Holbrook had been working at Snohomish County for

approximately two and one half years. *Id.*, CP, p. 332, 8:10 – 23. Snohomish County trained Holbrook with regard to its Comprehensive Plan and policies, but not with regard to the GMA. *Id.*, CP p 335 at 19:2 – 20:8. Holbrook testified that he was aware of BLAs, but did not process them. *Id.*, CP 335 – 337 at 21:10 – 25, line 6.

Holbrook was not aware that State law preempts Snohomish County Code or policies and admitted the Planning Staff primarily used its own policies in evaluating citizen proposals. CP p 338 at 30:2 – 31:2. Although Holbrook claimed to be familiar with the GMA’s definition of forest land (CP 338 at 31:19 – 21), it is immediately obvious from the Memorandum that Holbrook utilized the legislatively repealed definition of forest land to evaluate Stafne’s proposal. *See* Amended Complaint at CP 21 – 32 at paragraphs 30 – 39. *See also* CP 209 – 211 (Memorandum); and *infra*. Holbrook testified he obtained this erroneous statutory definition of forest land from the “statute books” and not online¹. CP 353 at 93:3 – 10. When Holbrook was provided a copy of the existing GMA definition of forest land he testified this statutory language would not change the Planning Department’s legal conclusions. CP 354 – 355 at 96:12 – 100:14.

¹ Holbrook’s claim to have researched the “statute books” is likely not true unless the Planning Department is still using books containing pre-1994 statutes.

For example when asked “[w]ould you still continue to tell the Council that RCW 36.70.030 (8) defines land primarily *useful* for growing trees?”, Snohomish County’s designee said “yes”. CP 354 at 97:14 – 18. The County’s designee also stated that he would still tell the County Council that the factors set forth in RCW 36.70A.030 (8) (a) – (d) are discretionary and do not have to be followed by Snohomish County. CP 355 at p 98:8 – 100:10.

Oral argument was held regarding the parties cross motions on December 8, 2008. CP, p. 234. On December 10, 2008 the Superior Court dismissed Stafne’s complaint and denied his motion for summary judgment. CP, pp. 235 – 236.

ARGUMENT

I. ARGUMENTS RELATED TO ASSIGNMENT OF CPROR 1.

The standard of appellate review for the denial of a summary judgment is de novo. *Thompson v Wilson*, 175 P.3d 1149, 1152, 142 Wn.App. 803 (2008).

A. Snohomish County’s recorded BLA of Stafne’s residential lot was a final land use decision.

Exhibit 13 to Stafne’s declaration is a copy of the recorded BLA of Stafne’s residential lot. *See* Excerpts of Record (CP), p. 435,

paragraph 23 and CP pages 699 – 724. The BLA was recorded May 31, 2007 at 3:56 pm. CP, p. 699.

SCC 30.41E.100 sets forth “Decision Criteria” for granting BLAs. Subsection (1) states:

In reviewing a proposed boundary line adjustment, the department or hearing examiner shall use the following criteria for approval:

- (1) The proposed BLA is consistent with applicable development restrictions and requirements of this title, including but not limited to the general development standards of subtitle 30.2 SCC and any conditions deriving from prior subdivision or short subdivision areas.

SCC 30.41E.400 provides a BLA becomes effective upon recording of the BLA application, certified legal descriptions, and the BLA map². Once the time for filing an appeal lapsed under LUPA, Snohomish County’s approval of Stafne’s reconfigured Lot 11 became a

² SCC 30.41E.400 provides:

To finalize an approved BLA, the applicant must record with the county auditor the BLA application, certified legal descriptions, and the BLA map within one year of approval or the application and approval shall lapse. The department may grant up to one one-year extension for good cause. If the BLA affects more than one property owner, a conveyance document(s) shall be recorded at the same time as the BLA documents. The conveyance document(s) shall establish ownership consistent with the approved, adjusted boundaries. When a BLA is recorded subsequent to a record of survey for the same property, the recording number of the record of survey shall be noted on the BLA map. Recording fees and applicable state fees shall be paid by the applicant. Immediately after recording, copies of the recorded BLA documents shall be provided to the department by the applicant. The BLA shall not take effect until recorded.

final land use decision under controlling Washington precedent. *Chelan County v Nykreim*, 146 Wn. 2d 904, 52 P. 3d 1 (2002).

In *Nykreim* the BLA which was granted violated applicable substantive law because it resulted in the creation of three new lots. Nonetheless, the Supreme Court ruled that under the policies of Washington land use law the BLA constituted a final decision which could not be appealed by the County after LUPA's 21 day limitations period expired.

This court has also recognized a strong public policy supporting administrative finality in land use decisions. In fact, this court has stated that "[i]f there were not finality [in land use decisions], no owner of land would ever be safe in proceeding with development of his property. . . . To make an exception . . . would completely defeat the purpose and policy of the law in making a definite time limit." 146 Wn. 2d at 931 and 932.

Following this policy of finality of land use decisions, this court in *Wenatchee Association [v. Chelan County]*, 141 Wash.2d 169, 4 P.3d 123 (2000) held that an untimely petition under LUPA precluded collateral attack of the land use decision and rendered the improper approval valid.

In *James v. County of Kitsap*, 115 P.3d 286, 154 Wash.2d 574 (2005) the Supreme Court held because impact fees were a consequence of the issuance of a building permit (which is a "land use decision" subject to LUPA's procedural requirements) the impact fees needed to be challenged within 21 days of the issuance of the building permit. Citing

Nykreim as support for this holding the Court observed: “[t]he purpose and policy of the law in establishing definite time limits is to allow property owners to proceed with assurance in developing their property”.

Nykreim, Wenatchee Sportsmen, James, LUPA, and Washington land use policies favoring “finality” required Snohomish County to have appealed any obvious consequences of Stafne’s 2007 BLA of a few acres of DNR land into his residential parcel in the Twin Falls rural settlement. This is because 1.) The land which was incorporated into Stafne’s parcel through the BLA process lost all of its forest land characteristics under the GMA and Snohomish County’s forest land designation criteria (see *infra.*); and 2.) Any different result would offend the principles of “finality”, which include the proposition that prolonged uncertainty is manifestly unfair to land owners who seek a final determination of their property's status.

In this case it is undisputed Snohomish County approved Stafne’s BLA as a part of numerous BLA’s designed to reconfigure parcels in Twin Falls Estates rural residential community. (CP 209 – 210) It is unfair to Stafne at this late date for Snohomish County to tell him that a few acres comprising a waterfall and steep cliffs on his property (CP 421, paragraph 12) must now be managed as commercial forest land.

B. After Snohomish County's BLA the DNR land which was reconfigured into Stafne's residential parcel and Stafne's reconfigured parcel no longer met the GMA's definition of forest land.

The GMA at RCW 36.70A.030 (8) defines forest land. It states:

(8) "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.

Stafne's reconfigured parcel is part of Twin Falls Estates rural settlement. Stafne declaration, paragraphs 8 – 33, CP, pp. 429 – 438. Prior to being incorporated into Stafne's residential parcel these several acres were part of a greater than 40 acre parcel owned by DNR. *Id.* DNR's larger parcel, but not the several acres of predominantly steep cliffs Snohomish County reconfigured onto Stafne's residential lot, was

primarily devoted to growing trees for long term commercial production.
Id.

When these few acres were incorporated into Stafne's less than 40 acre residential parcel the character of these acres was changed to the low density rural residential character of Stafne's parcel and the other parcels in the Twin Falls Estates community. In other words, when Snohomish County approved the BLA it changed both the factual and legal analysis applicable to whether these several acres were primarily devoted to growing trees for long term commercial production on land that can be economically and practically managed for such production.

It is undisputed the parcel in question is Stafne's home. (CP 431, paragraph 12) This fact indicates Stafne's relatively small (less than 40 acre) parcel of land is "primarily devoted" to being a residence and **not** to growing trees for long term commercial production.

The GMA's statutory factors for determining whether land meets the definition of forest land also preclude the several DNR acres in Stafne's reconfigured parcel from being considered forest land. This is because Stafne's parcel is a part of the Twin Falls Estates rural settlement. (CP 427, paragraph 2 and CP. 647 – 648) A rural settlement is not forest land of long term commercial significance under RCW 36.70A.030 (8) (a) because this provision requires forest land to be

determined by its proximity to rural settlements. If forest land is **proximate** to “rural settlements” it is not likely to be a part of a rural settlement.

RCW 36.70A.030 (8) (b) requires consideration of “surrounding parcel size and the compatibility and intensity of adjacent and nearby land uses”. Stafne’s lot is a part of Twin Falls Estates. (CP 427, paragraph 2) Twin Falls Estates is a rural settlement made up of less than 40 acre parcels pursuant to a 1994 ordinance allowing this use. (CP 429 – 430, paragraphs 8 – 10) As Stafne’s parcel is a part of a rural residential community its land uses are only compatible with those of the rural community of which it is a part.

RCW 36.70A.030 (8) (c) requires consideration of “long-term local economic conditions that affect the ability to manage for timber production.” It is difficult to imagine how “long term economic conditions” will affect Stafne’s ability to manage the few acres of steep cliff land he acquired from the DNR as forest land inside an established rural settlement.

Finally RCW 36.70A.030 (8) (d) requires consideration of “the availability of public facilities and services conducive to conversion of forest land to other uses”. Stafne’s parcel has already been converted to residential/recreational use consistent with the County Council’s

approval of such uses in the 1994 ordinance withdrawing Twin Falls from forest land designation. (CP 429 – 433, paragraphs 8 – 15)

Because Stafne’s residential parcel is devoted to residential and recreational uses (*Id.*) and is not “devoted to” the long term production of commercial forest land of long term significance the Superior Court should have granted Stafne’s motion for partial summary judgment declaring no part of his lot after May 31, 2007 constituted forest land pursuant to the GMA’s statutory definition.

C.) After Snohomish County’s BLA neither the DNR land which was incorporated into Stafne’s residential parcel or Stafne’s reconfigured parcel met Snohomish County’s criteria for designation as forest land.

It is undisputed that Stafne’s residential parcel is less than 40 acres in size. (CP 202) Snohomish County Policies 8.A.2 (a), (c), (e), (f), and (i) state:

Commercial Forest and Local Forest lands ... are designated pursuant to the Growth Management Act (RCW 36.70A.040) because they meet the following applicable criteria:

(a) Parcel Size (Commercial and Local Forest):
(a) A minimum of 40 acres or 1/16th of section...
* * *

(c) Island Size (Commercial Forest only): Islands shall be a minimum of 2,000 acres;
* * *

(e) Primary Use (Commercial and Local Forest): Land shall be primarily devoted to growing trees for long term commercial production; ...

(f) History of Development Permits (Commercial Forest and Local Forest): The land shall not be subject to any vested development applications containing residential lots or densities higher than one unit per 40 acres for Commercial Forest Land and one unit per 20 acres for Local Forest Lands

* * *

(i) Exceptions: The only exceptions to these criteria are isolated and uncommon inholdings (parcels surrounded by commercial forest land on all sides.)

These Snohomish County criteria are set forth at CP. p. 140.

After the BLA process Stafne's less than 40 acre residential parcel in Twin Falls Estates rural settlement did not meet any of the above Snohomish County criteria for designation as Commercial or Local Forest Land. When Snohomish County attached the several acres of previously owned DNR land onto Stafne's residential parcel through a final land use decision the County should have known based on its own criteria the reconfigured parcel would not meet the criteria for Commercial Forest Land or Local Forest Land.

Because Stafne's boundary line adjusted parcel did not constitute forest land under Snohomish County criteria this Court should reverse the Superior Court's failure to grant Stafne a partial summary judgment declaring no part of his residential parcel constituted forest land.

II. ARGUMENTS RELATED TO ASSIGNMENT OF CPROR 2.

A. Standards applicable to the issuance of a Constitutional writ of certiorari and statutory writs of mandamus and prohibition.

There was no dispute between the parties regarding the applicable standards the Superior Court should apply with regard to issuance of judicial writs. Stafne agreed the standards set forth in the County's motion to dismiss should be applied. CP p. 267, lines 1 – 7 (Constitutional Writ of Certiorari); CP 270; CP p. 270, lines 2 – 3 (Writ of Mandamus); and CP 272 lines 8 – 9 (Writ of Prohibition).

The standard of review for the Superior Court's grant or denial of a Constitutional writ of certiorari is de novo. *Saldin Sec. v. Snohomish County*, 80 Wn. App. 522, 527, 910 P.2d 513 (1996). The standard of review for the grant or denial of a writ of mandamus is also de novo. *Mower v King County*, 130 Wn. App. 707 at 719, 125 P.3d 148 (2005) citing *Saldin Sec. v. Snohomish County*, supra. The standard of review for the grant or denial of a statutory writ of prohibition is "abuse of discretion" considering "all the facts and circumstances shown by the record". *State ex rel. O'Brien v. Police Court*, 14 Wash. 2d 340, 348, 128 P.2d 332, 141 A.L.R. 1257 (1942).

The three factors agreed by the parties as necessary for the issuance of a Constitutional writ of certiorari are: 1.) No other avenue of relief is available to petitioner; 2.) The petition alleges facts that, if

verified, would establish the lower tribunal's decision was illegal or arbitrary and capricious; and 3.) The court exercises discretion to grant the writ.

The three factors agreed by the parties as necessary for the issuance of a writ of mandamus are: 1.) The individual at issue must be under a clear legal duty to act; 2.) the act at issue must be specific rather than general, and 3.) performance of the act must not be useless.

The four factors agreed by the parties as necessary for the issuance of a writ of prohibition are: 1.) The individual must be under a clear legal duty to act; 2.) The act at issue must be must be precise and specific rather than general; 3.) The act must be ministerial in nature; and 4.) Performance of the act must not be useless.

In this appeal one of Stafne's contentions is the Superior Court erred by failing to issue a writ requiring the Planning Department and County to follow the GMA's present statutory definition of forest land with regard to any determinations made pursuant to SCC 30.74.030 (a) and (d). Alternatively, Stafne urges in this appeal the Superior Court erred in failing to prohibit the Planning Department and the County from applying an incorrect statutory definition of forest land pursuant to SCC 30.74.030 (a) and (d). While the actual application of law to citizen proposals may be discretionary, use of the applicable statutory definition

would seem to be a ministerial duty. All that is necessary is obtaining the correct statutory language.

Stafne is uncertain which writ should be applied in this case. Is application of the correct statutory definition pursuant to duties imposed by SCC 30.74.030 (a) and (d) a ministerial function that should be mandated by simply applying the correct definition? Or is using a legislatively repealed statutory definition, instead of the applicable statutory definition, under SCC 30.74.030 (a) and (d) a ministerial duty which should be prohibited? Or should the Superior Court simply have granted a Constitutional writ of certiorari because Snohomish County's erroneous interpretation of state law and its own forest land criteria was arbitrary and capricious and in violation of 1.) The GMA and municipal law; 2.) The Separation of Powers doctrine, 3.) The Supremacy Clause; and 4.) Stafne's right under Article 1, Section 10 to the open administration of justice?

B. It is the province and duty of the judiciary to declare what the law is.

The County has tailored its ordinances so as to prevent judicial review of any Snohomish County Planning Department determinations under SCC Chapter 30.74 not to pass a citizen public participation proposal on to the County's final docket where legislative decisions are

made. *See* SCC 30.74.050. (CP pp. 313 – 329) If the County's attempt to shield citizen proposals from any judicial oversight is not rejected the Planning Department and County will be able, as happened in this case, to apply whatever legal standards the County wants in any way the County wants without any check or balance.

The fundamental function of the judicial branch is judicial review. *Hale v Wellpinit School Dist. No 49*, 165 Wash.2d 494,198 P3d. 1021, 1026 (2009). The power and duty of the judiciary to prevent other branches of government from encroaching on the judiciary's core power of judicial review of declaring the meaning of state, federal, and municipal law is not open to debate. *Id*³.

Unfortunately, the supremacy clause of the Washington Constitution, (Article XI, Section 11) is not self enforcing. Where, as here, a municipality intentionally or without due regard erroneously applies state law to a citizen proposal pursuant to a duty imposed by ordinance only the judicial branch can perform judicial review to determine whether the municipality's determination of the law is correct.

³ In *Hale*, *supra*, the Supreme Court noted Washington had long applied the holding of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803) that " it is emphatically the province and duty of the judicial department to say what the law is."

Hale v Wellpinit School Dist. No 49, supra, 1021, 1025 - 10277 (2009).

It is also a judicial task to determine whether the Planning Department properly determined whether Stafne's proposal was consistent with the County's own forest land designation criteria pursuant SCC 30.74.030 (d). *Id. Cf. City of Gig Harbor v North Pacific Designs*, 2009-WA-0304.537 (2009) (Judicial review of land use ordinances applied to a developer by a municipality.)

In considering whether the Superior Court should have granted a judicial writ this Court should be mindful that it is the "province and duty" of the judicial branch of government to say what the law is, *i.e.* perform judicial review.

In this case the evidence in the record indicates Snohomish County intended to and has usurped judicial power by delegating to its planning department the unfettered judicial power to determine whether citizen proposals are consistent with state, federal, and municipal law. This aggrandizement of power violates Article IV, Section 1, Article XI, Section 11, and Article 1, Section 10 of the Washington Constitution. *See infra*.

C. Existing land use statutes do not provide for judicial review of the County's failure to pass Stafne's proposal onto the final docket.

Stafne could not appeal to the Growth Management Board the Council's refusal to pass his citizen proposal onto the final docket under RCW 36.70A.280 (1) (a). *See Agricultural for Tomorrow v Snohomish County*, CPSGMHB Case No. 99-3-0004 (June 18, 1999), *Torrance v King County*, CPSGMHB Case No. 96-3-0038, (Mar. 31, 1997) and *Cole v. Pierce County*, CPSGMHB Case No. 96-3-0009 (July 31, 1996). In the above cases the Board held that if there has been no amendment of a plan or development regulation within 60 days the Growth Management Hearings Board has nothing to review. By design, a refusal to process a citizen proposal on to the final docket pursuant to SCC Chapter 30.74 does not constitute an approval of a plan, development regulation, or amendment which can be appealed pursuant to RCW 36.70A.280 (1) (a).

Also by design Snohomish County's refusal to process Stafne's application to the final docket did not constitute a final "land use decision" under LUPA that is subject to judicial review. *See* RCW 36.70C.020 (1). *See also* CP p. 103 at lines 10 – 16; and CP at p. 323, line 11 – p. 325, line 20.

Stafne's lack of any remedy was a factor the Superior Court should have considered prior to denying Stafne's petition for a writ.

D. The procedure Snohomish County utilized for evaluating Stafne's proposal to remove Twin Falls Estates rural settlement parcels from any forest land designation was arbitrary and capricious and contrary to law.

SCC Chapter 30.74 "Growth Management Public Participation Program Docketing" sets forth the process for including or rejecting "citizen proposals" to amend Snohomish County's comprehensive plan and/or development regulations on to the final docket. The ordinance requires citizen "public participation" proposals to undergo an initial review by the Planning Department to determine, among other things, whether the proposals comply with state, federal, and municipal law, as well as state and municipal forest land designation criteria.

In this case the Department utilized the legislatively repealed definition of forest land, as well as the holdings by the Growth Management Review Board in *Twin Falls, Inc. v Snohomish County*, *supra*, as a primary basis for rejecting Stafne's proposal. See CP 209 – 211. In its Memorandum to the Council at CP, p. 210, the Planning Department contends lands in Twin Falls Estates rural settlement should not be removed from forest land designation because the *Twin Falls* case ruled the land was "primarily useful" for growing trees. In this regard, the Department's Memorandum states:

The applicant states that certain parts of the proposal site are not economically viable forest land and that due to

boundary line adjustments, several of the lots are now in both LDRR [low density rural residential] and Commercial Forest land designations. In the Central Puget Sound Growth Management Hearings Board Case No. 93-3-003 *Twin Falls, Inc. v Snohomish County*, the Board rejected the contention by Twin Falls that because a parcel of land is not being managed for commercial forestry purposes, it cannot be designated as forestry land. **RCW 36.70.A.030 (8) defines forest land as land primarily useful for growing trees.** [Emphasis Supplied]

The legislature changed the GMA's definition of forest land after the *Twin Falls* decision. The definition was changed from land which is primarily "useful" for growing trees to land which is primarily "devoted" to growing trees. *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wash.2d 38, at 50 – 51, 959 P.2d 1091 (1998). In *City of Redmond, supra.*, the Supreme Court held the terminology "devoted to" with regard to agricultural lands means land which is "actually used or capable of being used" for agricultural production." *Id.*, at page 53.

The Memorandum's dismissal of Stafne's point that the steep cliffs Twin Falls received from the state DNR could not economically be managed as commercial forest land is contrary to the criteria that land "must be actually used or capable of being used" as commercial forest land. (CP 210 – 211) Moreover, the plain language of the new definition requires Snohomish County to consider whether any land in

Twin Falls Estates rural settlement was “primarily devoted to growing trees for long-term commercial timber production **on land that can be economically and practically managed for such production...**”. [Emphasis Supplied].

Snohomish County’s conclusion that it could ignore the issue of the economic and practical viability of devoting land in Twin Falls Estates rural settlement to use as “commercial forest land of long term significance” because the GMA defined forest land as being “primarily useful” for growing trees was arbitrary and capricious because it was flat out wrong.

The new definition of forest land also includes a second element, which required the consideration of statutory “factors” in determining whether land inside Twin Falls Estates rural settlement constituted “forest land of long term commercial significance”. *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, supra, 136 Wash.2d at 54⁴. The Planning Department’s Memorandum erroneously concludes Snohomish County does not have to consider the statutory

⁴ Although *City of Redmond*, supra, dealt with the definition of agricultural land, both the statutory definitions of “agricultural land” and “forest land” include factors which the legislature required be considered when designating either of these natural resource lands.

factors set forth by the legislature in this second and separate element of the definition of forest land. CP, p. 211.

The clearest example of the Department concluding the County could ignore these legislative factors is set forth in rebuttal to Stafne's argument "[t]he Planning Department failed to consider that all Twin Falls lots have access to public utilities". CP, p. 211. There the Planning Department tells the County Council the original WAC standards, which were incorporated by the legislature into the present statutory definition of forest land, are discretionary and **do not** have to be followed by the County.

RCW 36.70A.170 (2) requires that counties and cities consider the guidelines established pursuant to 36.70A.050 when designating natural resource lands. **One of these guidelines is consideration of the availability of public services and facilities conducive to the conversion of land. The state guidelines are advisory and not mandatory.** ... [Bold Emphasis Supplied] CP, p. 211

Other portions of the Department's Memorandum also reflect total ignorance of the second element of the GMA's definition of forest land. For example, in response to Stafne's argument Twin Falls Estates was an established rural community the Planning Department concluded "[c]onsideration of an 'established rural community' is not included in the criteria [of forest land]". CP, p. 210. Snohomish County is wrong.

Snohomish County cannot ignore RCW 36.70A.030 (8) (a), which instructs forest land is land that is proximate to, not within a rural settlement. By statute Snohomish County must consider the proximity of potential forest land to rural settlements. *Id.*

A legislative act is arbitrary and capricious if it is a willful and unreasonable action, without consideration and regard for facts or circumstances. *Teter v. Clark County*, 104 Wash. 2d 227, 234 - 37, 704 P. 2d 1171 (1985); *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wash.2d 740, 769, 49 P.3d 867 (2002); *Palermo at Lakeland, LLC v. City of Bonney Lake*, 193 P.3d 168, 174, 147 Wn. App. 64 (2008)

In this case Snohomish County's process denying Stafne's proposal to remove forest land designations from all portions of Twin Falls rural settlement was willful and unreasonable because it was based on a statutory definition that had been legislatively repealed in 1993. (CP 210) It was willful and unreasonable for Snohomish County not to apply the applicable statutory definition of forest land to Stafne's proposal. Snohomish County's failure to pass Stafne's proposal on to the final docket was also arbitrary and capricious because it was made without consideration of those statutory factors set forth in RCW 36.70A.030 (8) (a) – (d). See Memorandum at CP 209 – 211 and the deposition of

Snohomish County Planning Department's CR 30 (b) (6) designee at CP 331 – 355.

Stafne asserts the Superior Court should have taken into account Snohomish County's arbitrary and capricious and illegal conduct when considering whether to issue a judicial writ.

E. The evidence in the record suggests Snohomish County will continue to apply the repealed definition of forest land to future Stafne and other citizen proposals to remove parcels from forest land designation pursuant to SCC Chapter 30.74.

Snohomish County's designee with regard to the application of parts "a" and "d" of SCC 30.74.030, which requires the Planning Department to determine whether a Docket application complies with state, federal, and municipal laws testified 1.) He was not familiar with the principal of state supremacy (CP p 338 at 30:2 – 31:2.); and 2.) Notwithstanding his knowledge that Snohomish County had followed the repealed statutory definition of forest land the Planning Department would "stand by" this erroneous legal conclusion. (CP pp. 354 – 355 at 96:15 – 100:10) In short, Snohomish County's designee refused to testify the Department would apply the correct statutory definition of forest land when determining whether citizen proposals are consistent with state law. (*Id.*)

Deponent's status as a CR 30 (b) (6) witness is significant. Snohomish County was required to "prepare" its designee so that he could provide "complete, knowledgeable, and binding answers." *Flower v T.R.A. Industries, Inc.*, 127 Wn. App. 13, 39, 111 P.3d 1192 (2005).

Snohomish County never conceded in the record below that it applied the repealed definition of forest land to Stafne's docket application. But the admissions of its designee during deposition (*id.*) and in the Memorandum at CP pp. 209 - 211 do not leave Snohomish County's use of the repealed definition as a basis for denying Stafne's proposal open to challenge.

The legal consequences of applying an erroneous statutory definition are clear under Wash. Const. art. XI, § 11. Snohomish County's actions are illegal. *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wash.2d at 752 - 766; *Palermo at Lakeland, LLC v. v City of Bonney Lake*, 193 P.3d 168, 174, 147 Wn. App. 64 (2008), 193 P.3d 168, 174 (2008). Because the record suggests Snohomish County will continue applying its own policies, rather than applicable state law (*see* CP pp. 354 – 355 at 96:15 – 100:10), there is a strong need for judicial intervention to prevent Snohomish County from continuing to apply its erroneous interpretation of state law to citizen proposals in the future.

The Superior Court should have considered the likelihood the County would continue applying the repealed definition of forest land to Stafne's proposal and future citizen proposals when determining whether to grant a writ.

F. Evidence in the record suggests Snohomish County's procedures and application of procedures pursuant to SCC 34.74 were inconsistent with the good faith exercise of legislative power.

A brief prepared by the County in response to a denial of another citizen "public review" proposal explains how the ordinance is designed to prevent 1.) Administrative review and then judicial review under the GMA; and 2.) Judicial review under LUPA. CP pp. 313:14 – 325:3.

The County's belief that the Department's determinations were not subject to judicial review appears to have led to the Department's cavalier treatment of the facts and law with regard to Stafne's proposal. For example, Stafne's proposal was submitted October 29, 2008. The proposal stated existing assessor maps did not reflect the reconfiguration of parcels made as a result of a series of recorded BLAs. The Planning Department's first response was to ignore the BLAs and treat Stafne's proposal as one to remove DNR's 1998 parcels from forest land designation. After complaints this analysis was faulty because it did not consider Stafne's proposal to remove forest land designation from all parcels within Twin Falls rural settlement, the Department belatedly

checked with the Assessor's Office as Stafne's March 29, 2008 proposal suggested. (CP 209 – 210) But this was not done until a few days before the June 6, 2008 hearing on Stafne's application. (CP 350 at 79:17 – 80:7) After finally checking with the Assessor's Office the Department's Memorandum concedes there have been many BLAs at Twin Falls Estates. (CP 209 – 210) The Department then explains Stafne's proposal cannot be reviewed because the Assessor's Office is behind in completing its maps. (*Id.*) The Department informs the Council it will continue to check with the Assessor's Office to determine when the Assessor's maps for Twin Falls rural settlement are complete. (*Id.*)

The Department's rationale for not being able to obtain the recorded BLAs is disingenuous. It is the Planning Department that approves BLAs. (CP p. 338 at 32:18 – 21) It is the Auditor's and Recorder's office that records BLAs. (CP p. 350, at 80:8 – 81:10) The assessor's mapping had nothing to do with the County's final land use decisions approving the BLAs. SCC 30.41E020 (2) (BLA decisions are to be made within 45 days after submission); SCC 30.41E.400 (BLA decisions are final when they are recorded.)

Given the Planning Department was notified of the Assessor map issue on March 29, 2008, it is reasonable to ask: Why didn't the

Planning Department check its own final BLA decisions or recorded documents in the Auditor's office prior to issuing its initial determination?

The following facts run counter to any assertion that consideration of Stafne's citizen proposal involved good faith legislative decision making consistent with the Separation of Powers doctrine, the Supremacy Clause, and the rights of citizens to the open administration of justice: 1.) Stafne was required to submit a proposal containing "[a]n explanation of how the proposed amendment is consistent with the GMA, the countywide planning policies, and the goals and objectives of the comprehensive plan. SCC 30.74.020 (5); 2.) The only reason in the record for refusing to pass Stafne's proposal on to the final docket was the Department's determination that his proposal was not consistent with the GMA and municipal law under SCC 30.74.030 (a) and applicable forest designation criteria under. SCC 30.74.030 (d). (CP 209 – 211); 3.) The ordinance appears designed to prevent judicial review of the County's determinations of the application of fact to law, (CP pp. 313:14 – 325:3.); 4.) The County applied the repealed definition of forest land to Stafne's application (CP 210); 5.) The County refused to timely provide Stafne with the Memorandum setting forth the basis for the Planning Department's determinations (CP p. 21, paragraph 30 – p. 32,

paragraph 39); and 6.) The County's failure to appreciate the supremacy of state law over county policies (CP p 338 at 30:2 – 31:4)

In summary, SCC Chapter 30.74 sets up as prelude to the County Council's legislative process a kangaroo court, *i.e.*, the Planning Department. It is this kangaroo court's surreal application of law to facts done in secret and outside public view which is the only basis for failing to pass Stafne's proposal onto the final docket for legislative consideration.

This is not good faith legislating because the process infringes upon the judicial power of the courts pursuant to Wash. Const. art IV§ 1, the supremacy of state law pursuant to Wash. Const. art. XI § 11, and Stafne's rights to the open administration of justice pursuant to Wash. Const. art. 1 § 10.

ALLEGATION OF CPROR 3

SCC Chapter 30.74 is unconstitutional on its face and as applied because it authorizes and mandates the Snohomish Planning Department to interpret and apply state, federal, and municipal law to citizen proposals and does not provide for the open administration of justice.

SCC 30.74.030 (a) requires the Planning Department to determine whether a citizen proposal is consistent with state, federal and municipal law. SCC 30.74.030 (d) requires the Department to determine whether citizen proposals are consistent with the GMA's definition of

forest land and Snohomish County's forest land designation criteria. In essence these provisions impose a duty upon the Planning Department to apply all applicable state, federal, and county law to each citizen "public participation" proposal. Performance of this duty requires consideration of both applicable statutory language and controlling judicial interpretation relating thereto. See e.g. *Hale v Wellpinit School District No 149*, supra, at 1026: "We have also said that '[i]t is a fundamental rule of statutory construction that once a statute has been construed by the highest court of the State, that construction operates as if it were originally written into it."

Snohomish County was not free under the Separation of Powers doctrine and Washington's Supremacy Clause to give the Planning Department the unfettered right to engage in what amounts to judicial review of citizen proposals. This is especially so where results of the Department's pseudo judicial review of citizen proposals is by design of the ordinance the primary factor for not passing citizen proposals on to the final docket where actual legislative decision making occurs.

Article 1, Section 10 of the Washington Constitution states: "Justice in all cases shall be administered openly, and without unnecessary delay." In *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 780 – 781, 819 P.2d 370 (1991) the Court ruled this provision

required giving a litigant access to the name of a blood bank donor pursuant to discovery. Here the Planning Department performed fact finding and rendered legal conclusions and tried to hide them. This is not an open administration of justice.

Washington courts have in a variety of circumstances protected their inherent judicial power under Article IV, Section 1 to preserve the integrity of the administration of justice. For example, in **Saldin Sec. v. Snohomish County**, 80 Wn.App. 522, 527, 910 P.2d 513 (1996) the Court of Appeals declared courts have inherent power to perform judicial review. In *Hagan & Van Camp v Kassler Escrow, Inc.*, 96 Wash.2d 443, 635 P.2d 730 (1981) the Supreme Court determined the proper administration of judicial power required the judiciary to protect citizens from the harm associated with the unauthorized practice of law. In *Jones v Allstate Insurance Co.*, 146 Wn.2d 291, 45 P.2d 1068 (2002) the Supreme Court held the need to protect the public mandated that non-lawyers who give legal advice meet the standard of care expected of attorneys. Under the rationale of these case laymen who engage in judicial review should be held to standards expected of a reasonable judge and/or attorney.

Here, Stafne requests this Court apply these holdings and rule a municipality cannot premise legislative decision-making with regard to

citizen's real property on the exercise of pseudo judicial power by persons in the executive branch who have no legal training where the municipality contemplates those decisions will not be subject to judicial review.

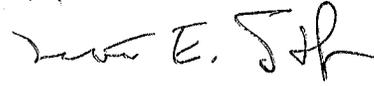
CONCLUSION

Stafne respectfully requests this Court reverse the Superior Court's denial of Stafne's motion for summary judgment. Stafne urges this Court grant Stafne's motion declaring his residential parcel is classified as low-density rural residential land as a consequence of Snohomish County's final land use decision adjusting his lot.

Stafne also requests this Court reverse the Superior Court's order granting Snohomish County's motion to dismiss. Stafne requests this Court issue the appropriate judicial writ to prevent the Planning Department from engaging in further pseudo judicial review of Stafne's present or future proposals to remove all forest land designations from Twin Falls Estates rural settlement.

Stafne requests this Court declare SCC 30.74.030 (a) and (d) are facially unconstitutional and that the process applied to Stafne's proposal pursuant to those ordinance provisions was unconstitutional.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Scott E. Stafne". The signature is written in a cursive style with a large, stylized initial "S".

Scott E. Stafne, Pro Se
WSBA #6964