No. 91378-1

SUPREME COURT
OF THE STATE OF WASHINGTON

CONCRETE NOR'WEST, a division of MILES SAND & GRAVEL COMPANY and 4M2K, LLC,

Appellants,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD; WHATCOM COUNTY; and FRIENDS OF NOOKSACK SAMISH WATERSHED,

Respondents.

BRIEF OF AMICUS CURIAE ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON

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[4835-8533-9427]

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Amicus Curiae Associated General Contractors of Washington ("AGC") respectfully submits this brief in support of the Petition for Review presented by Concrete Nor'West, a division of Miles Sand & Gravel Company and 4M2K, LLC (collectively referred to as "CNW").

I. IDENTITY AND INTERESTS OF AMICUS CURAIE

AGC is the state's largest trade association, representing and serving the commercial, industrial and highway construction industry. This professional association of commercial contractors is comprised of more than 600 members who have joined together to enhance the performance of its industry and build a better climate for construction.

The construction industry's contribution to the state's economy is significant. A 2012 University of Washington annual study revealed that, in 2011, more than 192,800 workers were employed by contractors, construction services and material suppliers in the state, and the workers in the construction industry comprised 8.3% of the state's private sector workforce. When the construction industry grows, the state's economy exponentially grows with it. For each dollar invested in new construction, an additional $1.97 in economic activity is generated throughout the state.

The construction industry, however, is an aggregate dependent industry. Sand, gravel and crushed bedrock produce the raw materials (aggregates) necessary to manufacture concrete, cement, asphalt and other

similar products vital to construction projects. These products are the building blocks upon which our state's homes, buildings, roads, bridges, and businesses are constructed. AR 640. The availability of high quality, economical and local construction aggregates in every county is thus a fundamental resource to support not only the private construction industry, but also Washington State, its local and regional economies, and its public works projects.

> Aggregates are literally the foundation of our economic and community infrastructure. Aggregates are used in almost every construction project whether it is new construction, rehabilitation of an existing structure or infrastructure. As 51.8% of construction aggregates are consumed in transportation and related projects, they become the foundation of state's economy to move and transport goods, people, and other services. . . .

AR 767 (Report to the Legislature Regarding Construction Aggregates). If aggregate is not available locally, it must be transported, usually by truck or barge. *Id.* Since the cost of transportation has steadily increased (AR 771), the cost to the construction industry (and ultimately the consumers) is greatly increased if construction aggregate is not available locally.[1]

Despite these availability concerns, the Board and Court of Appeals erroneously upheld Whatcom County's decision to deny CNW's

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[1] Increased importation and exportation of aggregate is also accompanied by more heavy trucks on the road and an increase in wear and tear on highway surfaces. AR 771.

valid and fully compliant application to designate lands with known mineral (aggregate) deposits. If it remains sustained, the challenged Board decision provides local governments with unfettered discretion to disregard objective designation criteria set forth in their GMA-compliant plans and refuse to designate qualified mineral resource lands, thus negatively impacting the availability of economical aggregates. The impact on the private and public construction industry will be profound.

The collective experience of AGC enables it to provide a unique perspective regarding the ramifications of the Board's erroneous decision.

II. ISSUES ADDRESSED BY AMICUS CURAIE

This brief addresses the issue as stated in CNW's Petition for Review, particularly whether the issue presented is of substantial public interest that should be determined by the Supreme Court. [2]

III. STATEMENT OF THE CASE

AGC adopts CNW's Statement of the Case.

IV. ARGUMENT

It is well-established in this case that CNW's application to

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[2] The issue presented is set forth at page 1 of the Petition:

> Did Division II err by concluding neither the Growth Management Act ("GMA") nor the Whatcom County Comprehensive Plan (the "Plan") impose a duty to designate lands as Mineral Resource Lands under an owner-initiated amendment application where (a) the lands satisfy all the Plan's designation criteria and further Plan goals, and (b) the annual amendment process established that the lands have known mineral resources of long-term commercial significance?

designate property Mineral Resource Lands ("MRL") satisfied all of the MRL designation criteria published in the Whatcom County Comprehensive Plan ("Plan"). When presented with the application, both the Planning Staff and Planning Commission advised the Council that the application met both the MRL designation criteria and the general Plan amendment criteria. Petition, Appendix A-2; Appendix B-9, B-12; AR 224-52, 276-79. CNW's application served to inform the Council of previously unidentified mineral rich lands.

The County has never argued that the MRL designation criteria were not satisfied. Instead, it now argues that its own criteria are "irrelevant" to deciding an MRL application. RP at 55, 88; AR 1005. After-the-fact, the County argues that the Council rejected CNW's application because (1) the Plan imposed no duty to designate lands satisfying the MRL criteria, and (2) the Council determined the "public interests" were served by withholding designation of these qualified lands. The Council articulated none of these later proffered explanations in its initial determination. *See* AR 288-92.

Notably, two of the three council members who voted against CNW's application acknowledged CNW as a "good and reputable corporate citizen" that is "one of the best" gravel companies. AR 289, 291. Nonetheless, one announced she was unwilling to approve the application

without a water study, even though Planning Staff assured her that such study was a prerequisite to any mining permit and would be provided and analyzed at the permit phase. AR 290. Another seemed to disavow the Plan goal to maintain and enhance the mineral resource industry, questioning the "culture that wants more and more" and challenging the notion that "people have to grow and use more and more energy, homes, roads, pavement and gravel to survive." AR 291. But there was no discussion of the MRL designation criteria or the GMA mandate to designate and conserve mineral resources lands. Likewise, there was no discussion of the economic and public works impacts that would certainly accompany an aggregate shortfall—consequences of great public concern.

AGC concurs with CNW's argument that the GMA, including the GMA goal to "maintain and enhance resource based industries,"[3] imposes a mandate to designate and conserve MRLs. *See King County v. Central Puget Sound Growth Mgmt Hrgs Bd,* 142 Wn.2d 543, 13 P.3d 133 (2000). A county is not relieved of that mandate once it has completed its initial designations and its plan is approved, yet the Council's decision to reject CNW's qualified application identifying mineral rich lands was contrary to this mandate. It also contravened the stated purpose of the Resource Land section of the County's Plan, which is to "ensure the provision of

[3] RCW 36.70A.020(8).

land suitable for long-term farming, forestry and mineral extraction so the production of food, fiber, wood products and minerals can be maintained as an important part of our economic base through the planning period." AR 831. This purpose cannot be advanced if, in the amendment process, the Council is free to disregard its supporting MLR designation criteria as "irrelevant." Such action undermines an otherwise GMA-compliant plan and is contrary to the GMA mandate to each planning county "to perform its activities ... in conformity with the comprehensive plan." RCW 36.70A.120.[4]

The Court of Appeals and the Board also myopically and inappropriately defined consideration of the "public interest" as consideration only of public opposition. Concerns of the neighboring public should and will be considered at the permitting phase and appropriate mitigation will accompany any permit approval. But consideration of the "public interest," especially at the designation phase, requires more than consideration of the view of those who oppose mining.

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[4] The Court of Appeals misapprehended the amici arguments below as a collateral attack of the Plan. (*See* Petition, Appendix A-8, n.2.) Neither CNW nor the amici argue that the County's Plan does not comply with the GMA. Rather, CNW and AGC argue that the Board, and now the Court of Appeals, improperly construed and applied the GMA-compliant Plan. The Council's disregard of the published MRL criteria, and the Board's decision to condone this disregard, was contrary not only to the GMA mandate, but the Plan provisions intended to incorporate that mandate. There is no value in a GMA compliant plan if the local government refuses to acknowledge and apply that plan when presented with proposed annual amendments.

It necessarily requires consideration of the availability of finite resources and the economic health of the larger community.

AGC is especially qualified to address this imperative. Access to mineral deposits of long term commercial significance is critical to the economic well-being of its industry and the state as a whole. If local governments may disregard the objective criteria in the GMA-compliant plans in favor of isolated public outcry, the effect will be to foreclose even potential access to known mineral deposits.

Significantly, even the County's general plan amendment criteria explicitly acknowledge the imperative to consider resource lands' availability in all planning decisions. The County's code provides that, for any Plan amendment, consideration of the "public interest" must include consideration of the "anticipated impact upon designated ... mineral resource lands." WCC 2.160.080(A)(3)(c). The Board and Court of Appeals' decisions are inconsistent with this local mandate.

The Washington Legislature has also expressly found that "extraction of minerals by surface mining is an essential activity making an important contribution to the economic well-being of the state and nation." RCW 78.44.010. Consistent with that finding, it announced a legislative intent to "to clarify that surface mining is an appropriate land use." RCW 78.44.011. In conjunction with the 1994 GMA amendments,

the Legislature confirmed its commitment to resource land conservation:

> The legislature finds that it is in the public interest to identify and provide long-term conservation of those productive natural resource lands that are critical to and can be managed economically and practically for long-term commercial production of food, fiber and minerals. Successful achievement of the natural resource industries' goal set forth in RCW 36.70A.020 requires conservation of a land base sufficient in size and quality to maintain and enhance those industries and the development and use of land use techniques that discourage uses incompatible to the management of designated lands. . . .

Washington Laws, 1994, Chapter 307, Section 1.

Recognizing that identification, designation, and preservation of lands with construction aggregates is critical, a committee, comprised of representatives of the Governor's office, the aggregate industry, local governments and state agencies that either regulate the aggregate industry or consume significant amounts of aggregate resources to address issues presented to the industry, issued a 2003 Report to the Legislature that, consistent with AGC's experience and concern, is instructive on the public interest question presented. AR 760-792.

The committee found, among other things, that "designation of mineral resources of long-term commercial significance by local governments under the Growth Management Act is not being adequately implemented." AR 762. Counties have "only minimally implemented

meaningful mineral resource designations under the GMA." AR 764. The committee further found that inadequate mineral resource land designations, as well as poorly coordinated and cumbersome permitting practices, has resulted in "inadequate mineral resources to serve the state's needs for construction aggregate in the future." AR 763. This significant problem will be prolonged and exacerbated by the Board, and now the Court of Appeals' decision that effectively licenses a local government to disregard MRL designation criteria (designed to identify and conserve mineral resource lands) once its plan is deemed GMA compliant.

Unfortunately, by its nature, the designation of lands for surface mining is controversial. Though surface mining is highly regulated to minimize environmental impacts and ensure that mined properties are appropriately reclaimed, community opposition to proposed designations is almost a certainty. But community opposition cannot be considered in isolation. The aggregates acquired through surface mining are critical to the construction and maintenance of our public road systems, construction of our homes, and businesses and the maintenance and creation of jobs.

The Court of Appeals decision flashes a green light to local legislative bodies to succumb to political pressure rather than make prudent decisions—at the designation level—necessary to protect diminishing mineral resources. Supreme Court intervention is necessary to

ensure the County and other local governments comply with the GMA directive to identify, designate and conserve mineral resources lands.

The 2003 Report the Legislature appropriately noted: "The state of Washington needs to make sure aggregate resources are available and sustainable so the state has the ability to remain competitive and viable as a place to do business." AR 762.

> In a sense, construction aggregates take on essential public facility significance and are critical for long-term economic development and public infrastructure investment. They should be designated and conserved appropriately. AR 770.

The Board's decision to uphold and condone the Council's disregard of its own criteria to reject a qualified MRL designation application was contrary to GMA mandates and the stated purpose of the County's MRL Plan provisions. Beyond that, the Board's decision places in further jeopardy construction aggregates already in short supply and of critical importance to the economic health of both the private construction industry as well as state and local communities' public works projects.

V. CONCLUSION

This Court should accept review of the Board and Court of Appeals' decisions sustaining rejection of CNW's qualified MRL application.

Dated this 4 day of May, 2015.

Respectfully submitted,

AHLERS & CRESSMAN, PLLC

By _____

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 4th day of May, 2015, I served via first class postage and electronic mail, a true and correct copy of a Motion for Leave to File Brief of Amicus Curiae on Behalf of Associated General Contractors of Washington and Brief of Amicus Curiae Associated General Contractors of Washington by addressing for delivery to the following:

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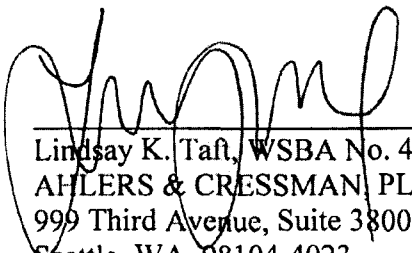

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All,

For filing in the above-referenced case, please find the following documents attached:

1. Motion For Leave to File Brief of Amicus Curiae on Behalf of Associated General Contractors of Washington; and
2. Brief of Amicus Curiae on Behalf of Associated General Contractors of Washington.

Case Name: Concrete Nor'West v. Western Washington Growth Management Hearings Board, et al.
Case No.: 91378-1
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If you have any trouble opening the attachment documents, please let me know.

Thank you.

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