

No. 45563-3-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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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.

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APPELLANTS' REPLY BRIEF

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COURT OF APPEALS  
DIVISION II  
TACOMA, WA

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**TABLE OF CONTENTS**

I. THE WHATCOM COUNTY COUNCIL DID NOT HAVE UNFETTERED DISCRETION TO DISREGARD ITS MRL CRITERIA AND DENY CNW’S QUALIFIED APPLICATION – ITS LEGISLATIVE DISCRETION IS BOUNDED BY THE GROWTH MANAGEMENT ACT. ....1

II. THE COUNCIL’S DECISION WAS NOT MADE IN CONSIDERATION OF PLAN GOALS AND POLICIES, BUT WAS IN CONTRAVENTION TO ITS WELL-ESTABLISHED BIFURCATED REVIEW PROCESS.....9

III. WHATCOM COUNTY’S IMPROPER ACTION IS NOT SAVED BY THE COUNTY’S AFTER-THE-FACT APPLICATION OF THE PUBLIC INTEREST CRITERION. ....18

IV. CONCLUSION.....23

## TABLE OF AUTHORITIES

### Cases

<i>Anderson v. Pierce County</i> , 86 Wn. App. 290, 936 P.2d 432 (1997).....	21
<i>Buecking v. Buecking</i> , 179 Wn.2d 438, 444, 316 P.3d 999 (2013) .....	6
<i>Diehl v. Mason County</i> , 94 Wn. App. 645, 972 P.2d 543 (1999).....	4
<i>Maranatha Mining, Inc. v. Pierce County</i> , 59 Wn. App 795, 801 P.2d 985 (1990).....	20
<i>Raynes v. Leavenworth</i> , 118 Wn.2d 237, 821 P.2d 1204 (1992).....	4, 5
<i>Stafne v. Snohomish County</i> , 174 Wn.2d 24, 271 P.3d 868 (2012).....	7, 8
<i>Sunderland Family Treatment Services v. Pasco</i> , 127 Wn.2d 782, 903 P.2d 986 (1995).....	21
<i>Swinomish Indian Community v. Western Washington Growth Management Hearings Board</i> , 161 Wn.2d 415, 166 P.3d 1998 (2007).....	5
<i>Washington State Department of Corrections v. Kennewick</i> , 86 Wn. App. 521, 937 P.2d 1119 (1997).....	21

### Growth Management Hearings Board Cases

<i>Franz v. Whatcom County Council</i> , WWGMHB Case No. 05-2-0011 (FDO, September 19, 2005), 2005 WL 2458412 .....	13
<i>Wells v. Whatcom County</i> , WWGMHB Case No. 97-2-0030c (FDO January 16, 1998) 1997 WL 312640 .....	10, 11
<i>Wells v. Whatcom County</i> , WWGMHB Case No. 97-2-0030c (Order Re: Motions To Reconsider February 17, 1998) 1998 WL 312640.....	13
<i>Whatcom County Sand &amp; Gravel Assoc. v. Whatcom County</i> , WWGMHB No. 93-2-0001 (Final Order and Dismissal, September 6, 1993) 1 993 WL 839718 .....	21

**Statutes**

RCW 37.70A..... 7  
RCW 37.70A.020(2)(8) ..... 22  
RCW 37.70A.040..... 5  
RCW 37.70A.060(1)..... 22  
RCW 37.70A.120..... 4,5,6,7,8,18,23

**Whatcom County Code Provisions**

WCC 2.160.080. .... 18  
WCC 2.160.080(3)(c). .... 18  
WCC 20.73 ..... 15,16  
WCC 20.73.130 ..... 16  
WCC 20.73.703 ..... 16  
WCC 20.84 ..... 16  
WCC 20.84.220 ..... 16,20

**Appendices**

- A. *Wells v. Whatcom County*, WWGMHB Case No. 97-2-0030c (FDO January 16, 1998) 1997 WL 312640
- B. *Franz v. Whatcom County Council*, WWGMHB Case No. 05-2-0011 (FDO, September 19, 2005), 2005 WL 2458412
- C. *Concrete Nor'West v. Whatcom County*, SEPA Administrative Appeal, File Nos. SEP2009-00132 and PLN2009-0013 (Findings of Fact, Conclusions of Law, and Decision, June 16, 2010)
- D. *Concrete Nor'West v. Whatcom County*, WWGMHB Case No. 07-2-0028 (Order on Dispositive Motion, February 28, 2008) 2008 WL 1766781

**I.**  
**THE WHATCOM COUNTY COUNCIL DID NOT HAVE  
UNFETTERED DISCRETION TO DISREGARD ITS MRL  
CRITERIA AND DENY CNW'S QUALIFIED APPLICATION – ITS  
LEGISLATIVE DISCRETION IS BOUNDED BY THE GROWTH  
MANAGEMENT ACT.**

In the famous 1939 MGM Wizard of Oz screenplay by Noel Langley, Florence Ryerson and Edgar Allan Woolf, the stage was set for Dorothy's quest to find her way home to Kansas. She began by requesting help from the appropriate authority – the great and powerful Wizard of Oz. The Wizard assured Dorothy her request would be granted, so long as she met the necessary conditions. The Wizard directed:

But first you must prove yourself worthy by performing a very small task. Bring me the broomstick of the Wicked Witch of the West.

...

Bring me the broomstick and I'll grant you your requests. Now go!

Go she did. Though no small feat, Dorothy obtained the broom.

Upon delivering the broom, Dorothy said to the Wizard:

Please, sir. We've done what you told us. We've brought you the broomstick of the Wicked Witch of the West. We melted her.

...

Yes, sir. So we'd like you to keep your promise to us, if you please sir.

To this the Wizard responded:

Not so fast! Not so fast! I'll have to give this matter a little more thought! Go away and come back tomorrow!

CNW's<sup>1</sup> experience with the Whatcom County Council is not unlike Dorothy's with the Wizard of Oz. CNW followed the Comprehensive Plan adopted by Whatcom County's Council and there is no debate that CNW met all stated MRL designation criteria. The County's planning staff meticulously evaluated the application against the Plan criteria, Plan goals and policies and the general amendment criteria and found the lands qualified for MRL designation. (AR 224-237.) The Planning Commission concurred that the criteria were met. (AR 276-79.) As noted by Councilmember Bill Knutzen at the February 14, 2012 Council Meeting: "The business owner has followed all the rules and gone through the entire process." (AR 289.)

But when CNW presented itself to the Council for action consistent with its Plan, it, like Dorothy, learned that the Plan and its stated criteria are irrelevant to the Council. CNW had followed the steps outlined by the Plan and met all of the MRL criteria. However, after completing the County's process, CNW is now advised that the Council could nonetheless disregard these same Plan provisions and criteria.

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<sup>1</sup> CNW collectively refers to petitioners Concrete Nor'West and 4M2K, LLC.

According to the County and the Board, the Plan imposes no responsibilities on the Council. The County thus asserts: “The petitioner’s remedy is to file another proposal at the next annual docketing cycle or mandatory review or it is through the political or election process.” (RP 56; *see also* AR 1000.) The County argues that CNW’s remedy is to “go away and come back tomorrow.” But the County also states that, if CNW comes back tomorrow, designation remains at the unfettered whim of the Council. According to the County: “Even if a site meets all of the designation criteria in the CP [Comprehensive Plan], neither the GMA nor the County CP place a duty upon the County to re-designate the land to MRL upon the request of the property owner.” (AR 1005.)

If the County’s position is sustained, the Plan’s MRL designation process – which was intended to preserve and enhance mineral resources as the GMA requires – is reduced to a mere façade and its purpose is thwarted. Fortunately, the Council does not have unfettered discretion to disregard its own Plan when denying an MRL designation criteria. The County and the Board grossly overstate the Council’s discretion and misinterpret and improperly fail to give purpose and meaning to the mineral resource chapter of its Plan.

The County relies heavily on *Raynes v. Leavenworth*, 118 Wn.2d 237, 821 P.2d 1204 (1992), to support its claim that its legislative act of denying CNW's qualified MRL application was a uniquely discretionary act, essentially immune from Board or Court intervention. (See County Brief at p. 3.) *Raynes*, however, did not address a legislative decision pursuant to the GMA,<sup>2</sup> and has no application in this case.

In *Raynes*, the Court was asked to determine whether a pre-GMA zoning decision was a quasi-judicial decision, subject to the appearance of fairness doctrine, or a legislative decision, and, instead, reviewable only under the arbitrary and capricious standard. *Id.* at 250. In that context, one where the challenger did not assert that the decision was arbitrary and capricious, the *Raynes* Court held that the legislative action was well within the City's discretion. *Id.*

However, when a legislative body makes planning decisions under the GMA, its discretion is not unbridled. It is bounded by the requirements of its own comprehensive plan and development regulations, and the requirements and goals of the GMA. *Diehl v. Mason County*, 94 Wn. App. 645, 651, 972 P.2d 543 (1999). See also RCW 36.70A.120. While the GMA affords deference to a municipality's decision-making,

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<sup>2</sup> In *Raynes*, the Court was asked to determine if a writ or review may be issued for a 1989 legislative decision to approve an amendment to the City's zoning ordinance. 118 Wn.2d at 241-42. The Growth Management Act was adopted a year later, in 1990.

legislative actions under the GMA are nonetheless subject to scrutiny. Such legislative decisions do not even receive the benefit of the more deferential arbitrary and capricious review standard afforded in the *Raynes* case and to most legislative acts. *Swinomish Indian Community v. Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 435, fn. 8, 166 P.3d 1198 (2007). Here:

the amount [of deference] is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the [municipality's] actions a "critical review" and is a "more intense standard of review" than the arbitrary and capricious standard. (Citations omitted.)

*Id.* Legislative decisions under the GMA are subject to more rigorous review under the clearly erroneous standard in light of the mandates and goals of the GMA. *Id.*

Judicial scrutiny in this case must be applied in light of the GMA mandate that "each county ... that is required or chooses to plan under RCW 36.70A.040 shall perform its activities ... in conformity with its comprehensive plan. RCW 36.70A.120 (emphasis added). There appears to be no disagreement that the planning activities contemplated in RCW 36.70A.120 include legislative decisions rejecting a comprehensive plan amendment. The County argues, however, that this provision is only

violated if the Plan includes a provision that literally and unequivocally mandates designation of lands that meet the published MRL criteria.

The plain language of RCW 36.70A.120 does not support the County's argument. It mandates that local planning activities conform to the local comprehensive plan, and such a plan is, by its very nature, comprised of goals and policies. If RCW 36.70A.120 was intended to only narrowly require adherence to unequivocally stated directives, the legislature would have so stated. It did not, but instead directed each municipality more generally to "perform its activities ... in conformity with its comprehensive plan." RCW 36.70A.120. The statute should be given its plain meaning based on the words employed. *Buecking v. Buecking*, 179 Wn.2d 438, 444, 316 P.3d 999 (2013).

Moreover, the County's argument, if accepted, effectively renders both RCW 36.70A.120 and the County's Plan a nullity. Whatcom County dedicated an entire chapter of its Comprehensive Plan, chapter 8, to preservation of resource lands, and twelve pages are exclusively dedicated to goals, policies and designation criteria designed to preserve and enhance the mineral resource industry. (See AR 144-156.) The Plan states that its resource lands policies and goals are "designed to identify and protect the important natural resource lands found in Whatcom

County as defined by RCW 36.70A.” (AR 143.) Specific to the mineral resource lands section, the Plan states

The purpose of this section is to guide Whatcom County in land use decisions involving lands where mineral resources are present.

(AR 144.)

The County not only failed to be guided by its MRL goals, policies and criteria (*see* Meeting Minutes at AR 289-91) it declared to the Growth Board that the MRL designation criteria are irrelevant to review of the Council’s decision (RP at 55). A legislative decision made without consideration of published criteria intended to guide all decisions regarding mineral resource lands cannot qualify as a planning activity “in conformity with its comprehensive plan” as required by RCW 36.70A.120.

To shield itself from its decision to ignore its own Plan and criteria, the County again relies exclusively on *Stafne v. Snohomish County*, 174 Wn.2d 24, 271 P.3d 868 (2012). However, the County fails to address the distinguishing factors presented in CNW’s opening brief.

*Stafne* did not address or define the circumstances in which a local comprehensive plan gives rise to a duty to apply stated plan criteria. In fact, there was no discussion whatsoever in that case of the merits of that particular rejected amendment, or whether any specific plan criteria were

even implicated. Rather, the *Stafne* Court contemplated that the existence or scope of a municipality's duty will be the product of review of the facts and issues specific to each case. 174 Wn.2d at 37. No bright line rules were announced. As important, *Stafne* did not construe or address RCW 36.70A.120. *Stafne* simply stands for the proposition that a challenge to an amendment rejection must be made to the Growth Management Hearings Board. The County and the Board misapplied and improperly extended *Stafne* and *Stafne* does not absolve the Council of its failure to apply its own published MRL designation criteria.

The County's Comprehensive Plan, including its MRL designation criteria, did not become a nullity simply because the County denied, rather than approved the qualified MRL designation application. The County was required under RCW 36.70A.120 to perform this planning activity in conformity with the MRL provisions of its Comprehensive Plan. It did not do so.

The Council's action denying the qualified MRL application without regard to its published designation criteria was outside its discretion and contrary to the GMA's mandate to act in conformity with its Comprehensive Plan.

**II.**  
**THE COUNCIL'S DECISION WAS NOT MADE IN  
CONSIDERATION OF PLAN GOALS AND POLICIES, BUT WAS  
IN CONTRAVENTION TO ITS WELL-ESTABLISHED  
BIFURCATED REVIEW PROCESS.**

When the Council considered CNW's MRL application, the council members opposing the application did not make a single reference to any Comprehensive Plan goal or policy, any MRL designation criteria or any of the general Plan amendment criteria to support their vote. (*See Meeting Minutes at AR 288-291.*) In the argument before the Growth Board, the County made no attempt to support the Council's decision as consistent with the Comprehensive Plan goals and policies, either in its brief (*see AR 999-1010*) or in oral argument (*see RP 54-59*). The County was consistent in its argument to the superior court and did not discuss the Comprehensive Plan goals and policies in its brief; much less argue that the goals and policies supported the Council's denial of CNW's application. (*See CP 139-154.*) Instead, the County limited its discussion of the Plan to the MRL designation criteria – the County did not claim the criteria were not met (*see County Brief at p. 20; RP at p. 88*), but asserted that the designation criteria are irrelevant to this appeal (*RP at p. 88*).

Remarkably, on this appeal, for the first time since its 2012 legislative action that its decision, the County attempts to argue, after-the-fact, that Council's action is supported by Plan's goals and policies.

(County Brief at pp. 17-18.) The County continues to refrain from any argument that the MRL designation criteria were not met. (*See* County Brief at p. 20. *See also*, RP at p. 88.) It acknowledges that its Plan does, indeed, set forth MRL designation criteria. (County Brief at p. 16.) However, despite this acknowledgement, the County asserts that the Plan itself “does not set out any kind of process” that the Council must follow in considering an MRL designation application. (County Brief at p. 16.)

The Council’s action was not consistent with the Plan goals and policies as interpreted by the Growth Board, by the County’s own Hearing Examiner and even the Council itself in the context of the earlier SEPA appeal for CNW’s MRL application. The Plan goals and policies, as interpreted by the Growth Board, establish a process that deliberately defers review and resolution of incompatibility issues to the permitting phase.

The County’s current position – that it has discretion to disregard this bifurcated review process – is remarkable since, until this appeal, the County has embraced and acknowledged that bifurcated process. In fact, the County has invoked its established bifurcated review process to successfully bar challenges to other MRL designation decisions.

The County’s two-step phased review process of selecting MRLs through application of the Plan-established criteria, while deferring

detailed review to site-specific permitting was first addressed and acknowledged by the Growth Board in 1998 in *Wells v. Whatcom County*, WWGMHB Case No. 97-2-0030c (FDO January 16, 1998) 1998 WL 43206.<sup>3</sup> There, the Board reviewed the County's MRL designation of 4,046 acres using the Plan's MRL designation criteria. The designation was challenged on the basis that the designation allegedly resulted in prohibited impacts to residential uses. *Id.* at p. 9 (CP 338).

The Board rejected the challenge. It noted that, under the County's Plan, merely designating lands MRL cannot automatically translate to increased or expanded mining. *Id.* Though a necessary first step toward expanded mining, the MRL designation is no more than a first step in an extensive and rigorous process. Mining could not occur without subsequent administrative approval based upon strict standards. The Board found this process of requiring detailed review at the permit phase effectively balances the interests of competing land uses. Thus, the Board held.

[T]here is no evidence in the record that the County's mineral lands designations create prohibited impacts on residential uses. ... CP Policy 8P-4 provides:<sup>4</sup>

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<sup>3</sup> The *Wells* decision is at CP 330-341 and is attached as Appendix A.

<sup>4</sup> Policy 8-P4 remains the same as it was stated in the Plan at the time of this decision. Compare AR 878 to AR 855.

Allow mining within designated MRLs through zoning and a discretionary and administrative permit process, requiring:

1. on-site environmental review, with county as lead agency, and
2. application of appropriate site specific conditions, and
3. notification to neighboring property owners within 1,000 feet to insure opportunity for written input and/or appeal, and
4. access to de novo review by the Hearing Examiner if administrative approval or denial is appealed.

The record does not support Petitioners' arguments that residential uses will be impermissibly impacted by mineral lands designation. Project-specific review will provide the opportunity for residents likely to be affected by a mining proposal to voice their concerns to the County. (Emphasis added.)

*Id.* at pp. 9-10 (CP 338-39). On reconsideration, the Board clarified the purpose of the Plan policies and confirmed that compatibility concerns are adequately addressed in the phased-review process:

Policy 8P-4 directs County staff to allow mining within designated MRLs through the permitting process. It does not require staff to permit in all circumstances.

We hold that the primary purpose of Policy 8P-4 is to conserve mineral lands rather than, as WRW concludes, that the primary purpose is to resolve land use compatibility conflict issues. Specific conflicts are appropriately addressed in a site-by-site permitting and review process.

\* \* \*

The County's MRL designation answers the "basic" compatibility issues. The permit stage review has not been eliminated. (Emphasis added.)

*Wells v. Whatcom County*, WWGMHB Case No. 97-2-0030c (Order Re: Mot. To Reconsider February 17, 1998) 1998 WL 312640.<sup>5</sup> (CP 344-45.)

The County's MRL designation criteria and their proper application were again addressed by the Board in 2005, this time in the context of a private landowner application, in *Franz v. Whatcom County Council*, WWGMHB Case No. 05-2-0011 (FDO, September 19, 2005) 2005 WL 2458412.<sup>6</sup> In this challenge, the petitioner raised a multitude of perceived environmental impacts, including impacts to water.

With regard to its bifurcated review process, the County cited *Wells* and urged the Board to again acknowledge and accept the County's bifurcated process as an appropriate process through which to conserve MRLs as required by the GMA and still balance competing interests through detailed subsequent review at the permitting stage. *Id.* at p. 16 (CP 312). The Board concluded:

“Whatcom County's explanation of its use of MRL designation criteria in the review of potential MRLs and in providing language that can be used to determine the wisdom of granting or denying an administrative permit and applying any conditions thereto is persuasive.” *Id.* at p. 17 (CP 313.)

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<sup>5</sup> The *Wells* reconsideration decision is at CP 343-45.

<sup>6</sup> The *Franz* Decision is at CP 297-322 and is attached as Appendix B..

The Board thus found:

The MRL designation 12 criteria listed under I. Non-metallic Mineral Deposits in Chapter 8 – Resource Lands section of the updated Comprehensive Plan operate together to provide appropriate evaluation tools for selection of MRLs and to set the stage for conditioning, approval, or denial of any permits for mining operations sought for sand, gravel and rock deposits in the County.

*Id.* at p. 19 (CP 315).

Significantly, the County also successfully used its now well-established bifurcated review process as a means to bar the petitioner's challenges based on site-specific mining impacts.

Respondent County noted at the hearing and in its briefing that a proper venue for making specific critique and objection, and request for tight conditions on any request for a mining operations permit, is at the County when the application is officially reviewed, not in an ordinance adopting an amendment to the Comprehensive Plan. Use of all comprehensive plan goals, policies and criteria comes into play, including that for critical areas, when considering the nature of an administrative permit and any conditions to be placed on it.

(*Id.* at p. 12, CP 308.) The Board accepted the County's position and rejected petitioner's MRL designation challenge as prematurely asserted:

The County's argument is persuasive. Likely impacts on water and critical areas of any specific mining operation are dealt with and used as constraints and condition at the time of evaluating request for an administrative permit for mining in Whatcom County; not in comprehensive plan amendments about natural resources, in a Critical

Areas Ordinance, nor in designation of MRLs such as Ordinances 2005-003 and 2004-024. The full tool kit of protections in Whatcom County's Comprehensive Plan, Policies, and development regulations and in Chapter 20.73 of the Whatcom County Code (WCC) are used to evaluate for approval or denial and condition any mining permit under consideration by the County.

*Id.* at p. 9 (CP 305). The County's successful application of its designation process to bar site-specific challenges contradicts its current position that the Plan, through the MRL goals, policies and designation criteria, "does not set out any kind of process." (County Brief at p. 16.)

Finally, that the County's Comprehensive Plan establishes a clear process of designating MRL's was confirmed by the County's Hearing Examiner and the County Council when they both considered a SEPA appeal in relation to CNW's application. After reviewing the MRL goals, policies and criteria set forth in the mineral resource land section of the Plan, as well as the Board decisions cited above, the Examiner concluded that the County adopted a clearly defined MRL designation process:

A careful reading of the Whatcom County Comprehensive Plan establishes that the legislative body envisioned a two-step process prior to granting of surface mine permits. Pursuant to the Growth Management Act, Whatcom County is required to identify mineral resource lands of value and to provide a regulatory framework which allows surface mining in appropriate situations.

The first phase of determining whether or not surface mining should take place in a given area is the

application of the Designation Criteria for Mineral Resource Lands set forth in Chapter 8 of the Whatcom County Comprehensive Plan, starting at page 8-29. These criteria direct the Planning Commission and the Whatcom County Council when considering proposed additions to the MRL Overlay. Concrete Nor'West would have to convince the decision-makers that the site which they wish to incorporate into the MRL Overlay meets these designation criteria. These criteria do not require a complete investigation of potential significant impacts of future mining, prior to designating a property as a Mineral Resource Land.

On the other hand, Goal 8-P of Chapter 8 of the Whatcom County Comprehensive Plan, Policy 8-4, specifically states that environmental review and the application of appropriate site specific conditions be determined through an administrative permit approval process, pursuant to the Zoning Ordinance, requiring notification to property owners within 1,000-feet of the boundary of the site, to ensure opportunity for written input and/or appeal and granting access to *de novo* review by the Hearing Examiner.

These Comprehensive Plan Policies are carried out by the development regulations of WCC 20.73 and application of the Conditional Use Criteria of WCC 20.84,<sup>7</sup> which included a finding that a site specific proposed mining operation be consistent with the Goals and Policies of the Whatcom County Comprehensive Plan.

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<sup>7</sup> These standards preclude permit approval absent a finding that the proposed mining operation, as appropriately conditioned, will be harmonious in accordance with the general and specific objectives Whatcom County's Comprehensive Plan and zoning regulations and will not be hazardous or disturbing to existing or future neighboring uses. (WCC 20.84.220.) There are also standards to protect critical aquifer recharge areas and designated well head protection areas and control and minimize noise and dust impacts to surrounding properties and ensure public safety. (See WCC 20.73.130 to WCC 20.73.703.)

(AR 271.) The Examiner noted the County's own interpretation and application of the Plan in reaching this conclusion:

Whatcom County has specifically argued before the Growth Management Hearings Board that this is the process chosen and the Hearings Board has upheld this bifurcated as being appropriate and legal.

Whatcom County could have chosen a different process, could have Designation Criteria which would include a full environmental review of mining impacts and could have allowed mining on mineral resource lands to be an outright permitted use once a property is designated as a Mineral Resource Land. Whatcom County has chosen to take a different path.

(AR 272 (emphasis added).) (For convenient reference, a copy of the Examiner's decision is attached as Appendix C.)

On further appeal, the Whatcom County Council reviewed all of the Examiner's findings and conclusions, including those conclusions quoted above. (AR 274-75.) The Council thereafter concluded that all the conclusions of law drawn by the Examiner regarding were proper and adopted the conclusions as their own. (AR 275.)

Contrary to the County's current position, its Comprehensive Plan establishes a clear MRL designation process founded upon application of the published MRL designation criteria and deferred in-depth review and resolution of compatibility issues at the permitting phase. The Council did not make its decision regarding CNW's application in conformity with its Plan, but wholly ignored its now well-acknowledged process. If the

Council wishes to choose another process that provides for earlier site-specific review, it can legislatively amend its Plan. But unless or until it legislatively amends its MRL designation process, the Council is without discretion to simply ignore its adopted Comprehensive Plan. Ignoring the established MRL designation process, as the Council did in this case, violates the GMA mandate that the Council conduct its planning activities in conformity with this adopted Plan. RCW 36.70A.120.

The Council's denial of CNW's qualified MRL designation application did not comply with the GMA and Board erred when it sustained the improper action.

**III.  
WHATCOM COUNTY'S IMPROPER ACTION IS NOT SAVED BY  
THE COUNTY'S AFTER-THE-FACT APPLICATION OF THE  
PUBLIC INTEREST CRITERION.**

Finally, though the Council made no mention of the public interest criterion at WCC 2.160.080, the County asks the Court to apply this provision to authorize the Council to otherwise ignore its MRL designation criteria. Of course, WCC 2.160.080, in the context of a public interest determination, mandates that the Council consider the impact its decision will have on mineral resources lands. WCC 2.160.080(3)(c) provides:

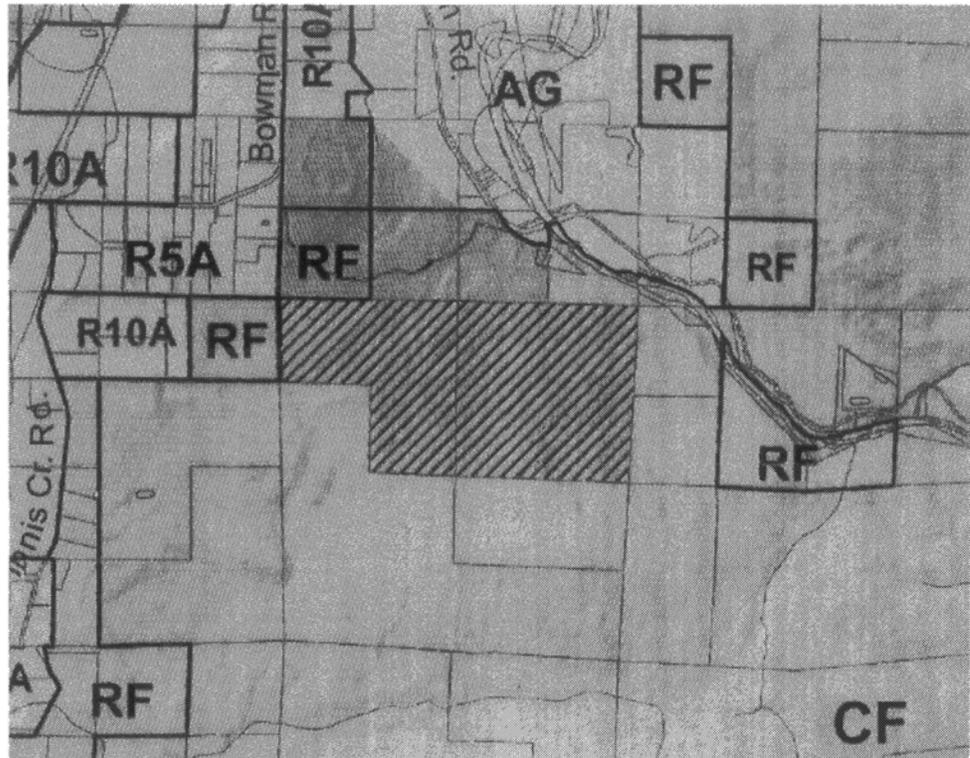
...In determining whether the public interest will be served, factors including but not limited to the following shall be considered:

\* \* \*

Anticipated impact upon designated agricultural, forest and mineral resource lands. (Emphasis added.)

To the extent the Council's decision may be deemed to be based upon the public interest element of the general amendment criteria, there is nothing in the record to evidence that the Council gave the requisite consideration of the impact of denial on mineral resources lands. Its focus was exclusively the neighbors' voiced concerns.

Notably, between the opposing neighbors and the proposed MRL designation, are lands already designated MRL. The shaded area of RF property on the below excerpt of the map at AR 203 depicts the existing MRL property. The area with cross-hatching depicts the proposed MRL property.



CNW encourages the Court to review each of the County's citations to the record as to public opposition. Their "concerns" are based upon speculation and fear rather than substantiated impacts. Moreover, even with MRL designation, these neighbors will be afforded an opportunity for full review and resolution of compatibility issues at the permitting phase. If compatibility cannot be addressed, a permit cannot issue. *See* AR 272-73 WCC 20.84.220.

In the context of permit decision, the courts will not allow a hearing examiner to base its decision on community displeasure. *Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App 795, 805, 801 P.3d

985 (1990). See also, *Department of Corrections v. Kennewick*, 86 Wn. App. 521, 533, 937 P.2d 1119 (1997); *Anderson v. Pierce County*, 86 Wn. App. 290, 306, 936 P.2d 432 (1997); *Sunderland Family Treatment Services v. Pasco*, 127 Wn.2d 782, 797, 903 P.2d 986 (1995). Given the established process of deferred site-specific review, this Court should likewise not allow the County to, after-the-fact, apply the public interest criterion as a mechanism to trump and effectively repeal the designation process adopted in its Plan.

When Whatcom County was in its early GMA planning and MRL designation process, this Board issued a rare advisory statement in *Whatcom County Sand & Gravel Assoc. v. Whatcom County*, WWGMHB No. 93-2-0001 (Final Order and Dismissal, September 6, 1993) 1993 WL 839718. In an Addendum to the Decision, this Board noted that

“the political heat generated from the inevitable conflict between surface mining and residential development, in conjunction with the frustration of local officials’ perception of DNR supremacy, caused both Whatcom County staff and elected officials to lose focus as to the GMA requirements.”

The Board also noted that, at that time, the Council rejected mineral resource designations “because of fear that such designation would give ‘rights’ to mining operators.” After making these observations, the Board

advised that decision-making on such bases is not consistent with the GMA. The Board explained:

Among the goals of the GMA are the reduction of conversion of undeveloped land into low-density residential development and the discouragement of incompatible uses while maintaining and *enhancing* natural resource industries. RCW 36.70.020(2)(8). RCW 36.70A.060(1) requires regulations that “assure that the use of lands adjacent to ... mineral resource lands shall not interfere with the continued use ... of these designated lands .. for extraction of minerals.

Whatcom County needs to focus on these goals and requirements for adopting of the July 1, 1994 comprehensive plan and development regulations.

The Whatcom County Council again lost focus of the GMA goals and requirements, as implemented through its own Comprehensive Plan, when it rejected CNW’s qualified application. The County did not further the public interest when it disregarded its established designation process and rejected an application that meets all of the adopted MRL designation criteria, especially since the subsequent permitting process ensures adequate protection of the neighboring land owners that opposed this designation.

Whatcom County’s decision was not in conformity with the established MRL designation process set forth in its Comprehensive Plan and obstructs the its own goals and policies and those of the GMA to

preserve and enhance the mineral resource industry. Its decision was contrary to and fails to comply with the GMA.

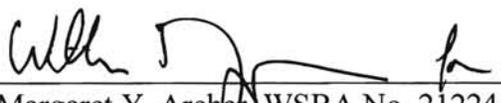
**IV.  
CONCLUSION**

Though afforded discretion, local jurisdictions cannot wholly ignore and disregard stated plan goals, policies and criteria and act in contravention of those goals, policies and criteria. Whatcom County's total disregard of Plan criteria, goals and policies and rejection of CNW's MRL qualified application violated RCW 36.70A.120. This Court should reverse the Board's Decision and remand the matter with direction to the County to take action consistent with its Plan and stated criteria.

Dated this 14<sup>th</sup> day of April, 2014.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By   
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Attorneys for Appellants

1998 WL 43206 (West.Wash.Growth.Mgmt.Hrgs.Bd.)

Western Washington Growth Management Hearings Board  
State of Washington

\*1 SHERILYN C. WELLS, ET AL., PETITIONER

v.

WHATCOM COUNTY, RESPONDENT, AND MICHAEL AND JEAN FREES TONE, ET AL., INTERVEN-  
ORS.

No.

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January 16, 1998

**FINAL DECISION AND ORDER**

**I. INTRODUCTION**

These proceedings include review of portions of Whatcom County's comprehensive plan (CP) and development regulations (DRs) that are under a determination of invalidity and of provisions of the CP and DRs that are not under invalidity. For those portions under invalidity, the County has the burden of demonstrating that the amended provisions will no longer substantially interfere with the fulfillment of the goals of the Growth Management Act (GMA, Act). RCW 36.70A.320(4) (1997). If the County meets this burden, the amendments are presumed valid and the burden becomes Petitioners' to show the County's action is not in compliance with the requirements of the Act. RCW 36.70A.320(1)-(2). The Board "shall find compliance unless it determines that the [County's] action is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." RCW 36.70A.320(3). For the Board to find the County's action clearly erroneous, Petitioners must "persuade us to a point where we form a definite and firm conviction that a mistake has been made." *Clark County Natural Resources Council v. Clark County*, WWGMHB #96-2-0017, Compliance Order (Dec. 2, 1997), at 5.

**SYNOPSIS OF THE ORDER**

Whatcom County has made substantial progress toward compliance with the GMA in its adoption of a CP. We found compliance and we rescinded invalidity in a number of areas. We expect that the County will exercise continued energy in addressing those portions of the plan that remain under invalidity or in which we found non-compliance.

Regarding urban growth areas, we did not rescind invalidity for the Geneva Area of the Bellingham Urban

330

Growth Area (UGA). Invalidation was also continued for the aquifer recharge area and the Drayton Harbor area of the Blaine UGA but the remainder, including the road right-of-way, was found to be compliant and not substantially interfering with the GMA. We found the Sumas UGA as well as those for Ferndale, Lynden, Nooksack, and Everson complied with the Act. We continued invalidity for the long-term planning area (LTPA) of the Birch Bay UGA but rescinded invalidity and found compliant the short-term planning area (STPA). We found the Custer UGA no longer substantially interferes with the Act and is in compliance. We found the Cherry Point UGA in compliance with the Act.

Regarding rural areas, with the exception of Point Roberts and Deming, which we found compliant and no longer substantially interfering with the goals of the Act, we did not rescind earlier findings of invalidity. We continued invalidity regarding DRs.

In regard to natural resources, we found the agricultural land section in compliance with the exception of the overlay provisions. Forest lands and mineral lands we found to be in compliance.

\*2 Public participation efforts of the County we found to be in compliance.

Petitioners failed to meet their burden of proof regarding all other issues.

#### **PROCEDURAL HISTORY**

On May 27, 1997, pursuant to 36.70A RCW and by its own declaration, partially in response to findings of invalidity entered in Cases #94-2-0009 and #96-2-0008, Whatcom County adopted a CP and associated DRs. The respective histories of those cases are found in the March 29, 1996, Third Compliance Order, Case #94-2-009 (rural areas), the September 12, 1996, Final Order in Case #96-2-0008 (TUGAs), and in the Order Re: Invalidation in both these cases entered July 25, 1997.

On October 29, 1997, a motions hearing was held in this case at the Department of Corrections, Olympia, Washington. On November 5, 1997, an order was entered regarding those motions to intervene, join cases, and dismiss certain parties. On December 10-11, 1997, a hearing on the merits was held at the Whatcom County Courthouse, Bellingham, Washington. Rulings were entered on motions to reconsider rulings on additions and supplements to the record and on motions to strike briefs. Petitioner Wells' motion regarding additions to the record concerning Birch Bay was granted and materials assigned Index #26-001. City of Blaine's motion regarding the Silverman background papers was granted and materials assigned Index #15-034. Whatcom Water District #10's motion regarding the final environmental impact statement was granted and the materials assigned Index #15-033. All other motions were denied or deferred.

Present for the Board were members Les Eldridge (presiding) and Nan Henriksen; and Andrew S. Lane, Hearings Examiner. Daniel Gibson, Chief Civil Deputy Prosecuting Attorney and Alexander Mackie represented Whatcom County. Also present were Kurt Denke representing petitioners Lee and Barbara Denke; Sherilyn Wells, *pro se*; David Bricklin representing Whatcom Resource Watch; Intervenors Michael and Jean Freestone; Samuel Plauch and Amy Kosterlitz representing Trillium Corporation and Semiahmoo Company; Melody McCutcheon representing the City of Blaine; Robert Carmichael representing Birch Bay Water and Sewer District; Lesa Starkenburg-Kroontje representing Whatcom Sand and Gravel Association; Robert Tull representing Suden Valley Community Association; Curtis Smelser representing Jim and Ruth Trull; and Dawn Sturwold representing the City of Bellingham.

On January 14, 1997, Petitioner Denke filed a Withdrawal of Issue and Request for Relief of Petitioners Lee and Barbara Denke. Consequently, we will not address the issue raised by this Petitioner.

#### IV. UGAs

##### Background

In Case #96-2-0008, the Board invalidated all of the County's interim urban growth areas (IUGAs) not contiguous to municipal boundaries; the IUGAs outside the municipal boundaries of Blaine and Sumas; and the IUGA for the Geneva area of the Bellingham IUGA. *C.U.S.T.E.R. Association v. Whatcom County*, WWGMHB #96-2-0008, Final Decision and Order (FDO) (September 12, 1996), at 21. The County subsequently adopted final UGAs and the Board removed its determination of invalidity for the Cherry Point non-contiguous UGA and the UGA outside the municipal boundaries of Sumas. *C.U.S.T.E.R. Association v. Whatcom County*, WWGMHB #96-2-0008, Order Re: Invalidity (July 25, 1997).

##### Bellingham (Geneva)

\*3 The Board determined the Geneva area of the Bellingham IUGA was invalid because "water resources and watershed impacts . . . had reached critical deficiencies" and no analysis had been conducted to support its designation for urban growth. Case #96-2-0008 FDO, at 19. The Board continued invalidity in July 1997, stating: "Nothing has changed since our prior order with regard to the critical deficiency for water resource and watershed impacts in that area." Order Re: Invalidity, at 10. There has not yet been analysis to support urban designation for this area of the Lake Whatcom watershed. The County argues that Bellingham "has now provided a detailed land needs analysis and findings." Whatcom County's Response Brief, at 115. However, nothing in Bellingham's findings reveals any analysis that justifies inclusion of this area of the watershed in the UGA as a means of addressing the "critical deficiency for water resource and watershed impacts."

Bellingham and the County concluded the City was better able to protect the watershed from existing and future development in Geneva. Bellingham stated: "Inclusion of the area within the UGA allows the City to influence, and potentially regulate development consistent with its policies and adopted land use controls, and to devote City resources to mitigate impacts of existing and future development." City of Bellingham's Response Brief, at 2. Until an interlocal agreement or annexation is in place that would ensure the regulation of development and expenditure of resources to mitigate the impacts of that development, no additional protection would be available if included in the UGA and unmitigated urban development could be allowed to continue. The record does not reveal why the County is unable to protect the watershed if it is not designated for urban growth.

It appears to us that nothing has changed since our prior orders regarding invalidity. The County has not demonstrated that the Geneva UGA no longer substantially interferes with the goals of the GMA. Therefore, invalidity continues for the Geneva UGA.

##### Blaine

The Blaine UGA is the same size as the Blaine IUGA previously determined invalid. One difference between the UGA and the IUGA is the short-term restrictions placed on development in certain parts of the UGA. The unincorporated portion of this UGA consists of STPAs and LTPAs. The STPAs are intended to accommodate ten years of growth; the LTPAs are intended to be developed at urban densities after the STPAs have been developed. In their briefs and at the hearing on the merits, Blaine and the County offered to remove the LTPAs from the Blaine UGA if the Board found these areas continue to substantially interfere with the goals of the Act.

The Board found the Blaine IUGA invalid because it was "incredibly oversized." Case #96-2-0008 FDO, at 17.

In its July 25, 1997 Order Re: Invalidity, the Board was specifically troubled by those portions of the IUGA now contained in the LTPAs - the aquifer recharge area and the area south of Drayton Harbor. The record supports the Board's continued concern over the inclusion of the LTPAs within the Blaine UGA. The justification for including the aquifer recharge area within the UGA is to provide greater protection for the watershed. However, "protection of critical areas is a function of RCW 36.70A.060 and .170, not [the UGA provisions of] .110." Order Re: Invalidity, at 10. The justification for including the Drayton Harbor area within the UGA was a concern about proper transportation planning, not anticipation of urban growth. However, "[i]f there is a necessity for a 'land bridge' between these two areas [of the City] it certainly must be much more tightly drawn than the one here." *Id.*

\*4 The County has not shown that the Blaine UGA, as a whole, no longer substantially interferes with the fulfillment of the goals of the Act. However, the record and argument of the County, City, and intervenors enable the Board to specifically identify those portions of the UGA that create substantial interference with the goals of the GMA. The aquifer recharge area and the Drayton Harbor area of the Blaine UGA, excluding the road right-of-way connecting the two portions of the city of Blaine, remain invalid; the remainder of the Blaine UGA, including the road right-of-way, is not invalid and complies with the GMA.

#### Sumas

The Board has previously rescinded invalidity for the Sumas UGA, finding it no longer substantially interferes with the goals of the GMA. Order Re: Invalidity, at 6. Thus, the question is whether the Sumas UGA complies with the Act.

Petitioners' sole argument is "[t]he slight downsizing of this UGA coupled with the minor (16 percent) increase in County population that results from extending the Plan from the year 2010 to 2015 . . . cannot come close to justifying the substantial area proposed." Opening Brief of Whatcom Resource Watch (WRW), at 22-23. The Board finds WRW's argument does not meet its burden of definitely and firmly convincing this Board that the County made a mistake when it adopted the Sumas UGA. Therefore, the Sumas UGA complies with the Act.

#### Ferndale, Lynden, Nooksack, and Everson

Only Petitioner Wells objected to the UGAs of Ferndale, Lynden, Nooksack, and Everson. Wells argued the UGAs were too large because Lynden used a 50 percent market factor; Ferndale's densities are below 4 dwelling units per acre; and the Nooksack/Everson UGA includes a floodplain. None of Wells' arguments are sufficient to definitely and firmly convince the Board that the County made a mistake in adopting these UGAs. Therefore, these UGAs comply with the Act.

#### Birch Bay

The Birch Bay IUGA was among the non-contiguous IUGAs invalidated because it was not adequately served with public facilities and services; urban growth did not exist within much of the area; and the record was void of any analysis of the cost of providing public facilities and services to this area. The present incarnation of the Birch Bay UGA consists of a STPA and a LTPA. Development in the LTPA can occur only when public services can be provided and will generally occur in the last half of the 20-year planning horizon.

The STPA consists of lands predominantly developed and provided with urban services. *See* Birch Bay Water and Sewer District Exs. 17-733 and 17-734. In contrast, the LTPA consists of neither existing development nor public facilities and services. Although the record shows the water and sewer district has planned for servicing all of its district (which includes the LTPA), urban services do not now exist in the LTPA.

Nothing has changed within the LTPA to warrant lifting invalidity. As to the LTPA portion of the Birch Bay UGA, the County has failed to show it no longer substantially interferes with the goals of the Act. The determination of invalidity continues for that portion of the Birch Bay UGA denominated as LTPA.

\*5 As to the STPA portion of this UGA, the Board is satisfied that there are adequate services in place so that there is no longer substantial interference; invalidity is lifted for that portion of the Birch Bay UGA denominated as STPA. The question is whether this portion of the UGA complies with the Act.

Petitioners' primary argument is lack of water. However, there is insufficient evidence in the record to support this argument. The Board is not persuaded that the County made a mistake when it designated as UGA that portion of the Birch Bay UGA denominated as STPA. Therefore, the STPA portion of the Birch Bay UGA complies with the Act.

#### Custer

The Board's Order Re: Invalidity noted the County made significant improvements in the Custer "provisional" UGA over the IUGA, including requiring a "master plan process" and limiting the UGA to intermodal and transportation services with accessory and supporting uses. However, "notably absent [was] an analysis of need, supply, and public facilities and service costs associated with this designation." Order Re: Invalidity, at 8. Petitioner WRW relies on this lack of analysis to support its argument for non-compliance and invalidity.

Existing infrastructure is substantial and the requirement for master plan approval ensures sufficient funding for necessary new infrastructure. The record shows that the Custer UGA is served by substantial existing infrastructure, including a freeway interchange, all weather roads, rail spurs, and rail switching facilities. Also, development of this UGA is conditioned on approval of a master plan which, among other things, identifies utilities needs and requirements. The Board is satisfied the Custer UGA no longer substantially interferes with the GMA, and Petitioners have not definitely and firmly convinced the Board that the County made a mistake when it adopted the Custer provisional UGA. Therefore, the Custer UGA complies with the Act.

#### Cherry Point

As with the Sumas UGA, the Board has previously rescinded invalidity for the Cherry Point UGA, finding it no longer substantially interferes with the goals of the GMA. Order Re: Invalidity, at 6. Thus, the question is whether the Cherry Point UGA complies with the Act.

In its Order Re: Invalidity, the Board stated:

"Additional analysis was done on the Cherry Point industrial area for its establishment as a noncontiguous UGA. A more persuasive and complete analysis of the heavy industrial needs and available supply for the planning period was shown in this record. Adopted DRs for Cherry Point limit the area to heavy industrial large users and necessary accessory or supporting uses. Costs of utilities and other infrastructure are to be borne by the development rather than by the public at large."

*Id.* at 5-6. In light of the additional analysis regarding the Cherry Point UGA and the industrial lands needs of the County, Petitioners have not shown the County was clearly erroneous when it adopted the Cherry Point UGA. Petitioner Wells raises environmental concerns, but fails to provide specific evidence to support her claims of violation of the GMA. Petitioner WRW questions the validity of the analysis of the Cherry Point industrial area, arguing that the resulting industrial UGA is too large. The Board is not persuaded by Petitioners. Neither Petitioner has definitely and firmly convinced this Board that the County made a mistake when it adopted the Cherry Point UGA. Therefore, the Cherry Point UGA complies with the Act.

## V. RURAL

\*6 The 1997 amendments to the GMA (ESB 6094) give us considerable guidance in reviewing the challenges to the rural elements of the CP. These elements include small towns, crossroads commercial, resort and recreational subdivisions, suburban enclaves, and transportation corridors, and “rural incentive zones” in zoning districts R2A, RR1, RR2, RR3, and urban-zoned districts (Ex. JE-21).

Regarding the rural element of comprehensive plans, the GMA states:

A county shall adopt measures to minimize and contain the existing areas or uses of more intensive rural development. Lands included in such existing areas or uses shall not extend beyond the logical outer boundary of the existing area or use, thereby allowing a new pattern of low-density sprawl. Existing areas are those that are clearly identifiable and contained and where there is a logical boundary delineated predominately by the built environment, but that may also include undeveloped lands if limited as provided in this subsection. RCW 36.70A.070(5)(d)(iv).

During the hearing, we posed the question to the County as to what measures, benchmarks, or thresholds were used to clearly identify existing areas and determine logical boundaries as called for in .070(5)(d)(iv). The County responded that those identifications and determinations were carried out on a case-by-case basis. In examining the R2A, RR1, RR2, and RR3 patterns of development for such zones and the accompanying maps in Ex. JE-21, it is difficult to determine where a logical boundary might fall or where the minimization and containment occur in these zones. For example, under R2A zoning, Academy Road has 455 acres or 90 percent of the zone still subject to division in an area bounded in part by rural forest and R5A zones. Approximately 10 percent of the lots now divided appear to occupy areas in the west and northwest areas of the zone. A line could be drawn which would allow infill in undivided areas of the zone in that western area but leave approximately 80 percent of those 455 acres in a less dense, more rural zone. The record does not provide reasons for failure to exclude undivided acreage from the more intense zone, nor is a logical boundary discernable. This instance is typical of the 30+ areas (“suburban enclaves,” “additional areas,” “small towns,” “resorts”) listed in this exhibit.

In the zoning classifications noted above, there are more than 6,000 acres which have yet to be divided. From a review of each area, we conclude that a majority of the acreage has yet to be subdivided. Logical boundaries are not readily apparent from this record. The County needs to show much more clearly that its work to minimize and contain existing areas of more intensive rural development has been carried out before we can be convinced that substantial interference has been removed in these rural areas.

Petitioner WRW argued the amount of proposed rural lands previously invalidated by the Board (24,000 acres) went well beyond any limited areas of more intensive rural development than could ever be justified under ESB 6094, codified as Section .070(5)(d)(iv). WRW further noted that “there is no analysis offered that shows how the County trimmed each area to more intensive rural development to areas necessary for ‘infill of existing patterns.’” From this record we found it difficult to determine how or whether the trimming to which WRW refers was accomplished. The County appears to have accommodated preexisting zoning, not actual uses. In limited, more intensely developed areas, the County may determine how to recognize those existing land uses. However, existing zoning cannot be a sole criterion for designating rural lands for more intense development. The Act requires the County to demonstrate that substantial interference has been eliminated before we can lift a determination of invalidity.

\*7 The County's presentation regarding crossroads commercial referenced identification, location, limitation to

the area of existing development, and small additional areas for growth and infilling. We could find nothing in the record to demonstrate how that limitation was accomplished in light of our finding in Case #96-2-0008 that "the areas in question go well beyond infill of existing patterns and localized services." Referral in the County brief to the CP and to Notebook 4 (the section on crossroads commercial, and small town mapping) yielded only maps showing a variety of wetlands, slopes, and zoning boundaries, together with some delineation of zoning but no information on the percentage of land still to be divided or potential areas of growth within the commercial crossroads area.

The same lack of clarity in measures taken within the gateway industrial and guide meridian elements of the new "transportation corridor" category precludes our determination of what actions have been taken to remove the substantial interference with the goals of the Act found in preceding cases.

The rural incentive zones' stated purpose is to "reduce potential densities in the 'not urban but not rural' zones." The rural incentive zones are applied to the categories of suburban enclaves, additional areas, small towns, and resorts, but not to all of the individual areas in those categories. Throughout those categories, however, we find it a remarkable coincidence that the County's efforts to meet the requirements of ESB 6094 and remove substantial interference with the goals of the Act have resulted, in virtually every discernable case, in maintaining the status quo.

We are able to identify two exceptions to these conclusions. The County's argument regarding Point Roberts as a resort area seem to us persuasive in that the area is clearly delineated with finite boundaries (Puget Sound on three sides, the international border on the fourth side) which are unlikely to change. In reviewing the map (Ex. JE-21) of the small town of Deming, it was obvious to us that the boundaries in Deming's case are logical and that substantial interference with the Act is not present.

With those two exceptions, absent a clearly presented analysis of steps taken to remove substantial interference and provide the logical boundaries and limitation of more intense use called for in the Act, we are unable to rescind the earlier findings of invalidity regarding rural areas.

## VI. ZONING

The Board previously found invalid: the PUD provisions (WCC 20.85); the clustering and bonus density provisions of the RR, RR-I, R, and RC districts; the allowance for more intense densities where public water and/or public sewer are available; the multifamily provisions in the GC district (WCC 20.62.065); the densities in the RC district (WCC 20.64.051, .052, and .060); and the GC (WCC 20.62), RC (WCC 20.64), GI (WCC 20.65), LII (WCC 20.66), GM (WCC 20.67), and HII (WCC 20.68) districts in their entirety, except as to the siting of essential public facilities. *Whatcom Environmental Council v. Whatcom County*, WWGMHB #94-2-0009, Third Compliance Order (March 29, 1996).

\*8 Of these invalid DRs, only the PUD and bonus density provisions were substantively amended. In July 1997, we rescinded the determination of invalidity as to the PUD provisions (except for the Blaine UGA outside of municipal boundaries and the Geneva portion of the Bellingham UGA) because the County has limited application of the PUDs to UGAs. Thus, the PUD provisions are presumed valid. Petitioners have presented no argument that the current PUD ordinance does not comply with the Act. The PUD provisions are not clearly erroneous and, therefore, comply with the Act.

The bonus density provisions have been eliminated. This is a step in the right direction. However, as we stated

in the Third Compliance Order, the clustering provisions combined with the County's zoning results in urban densities in rural areas. Elimination of the bonus density provisions helps, but does not save the DRs. The County did not substantively amend any of the other invalid DR provisions. The County has not shown that its DRs no longer substantially interfere with the fulfillment of the goals of the GMA. Therefore, the finding of invalidity on the DRs continues.

## VII. NATURAL RESOURCES

Maintenance and enhancement of natural resource industries are among the goals of the GMA. RCW 36.70A.020(8). To achieve this goal, the Act requires counties and cities to designate:

- (a) Agricultural lands that are not already characterized by urban growth and that have long-term significance for the commercial production of food or other agricultural products;
- (b) Forest lands that are not already characterized by urban growth and that have long-term significance for the commercial production of timber; [and]
- (c) Mineral resource lands that are not already characterized by urban growth and that have long-term significance for the extraction of minerals.

RCW 36.70A.170(1). In addition, counties and cities must adopt DRs to conserve agricultural, forest, and mineral resource lands designated under RCW 36.70A.170. RCW 36.70A.060(1).

### Agricultural Lands

The County designated approximately 100,000 acres as agricultural lands. This designation consists of 88,000 acres in the Agricultural Zone. The County assumes ten percent of this acreage will be lost to "environmental constraints" and "necessary urban encroachment," leaving approximately 80,000 acres available for long-term conservation. Another 28,000 acres available for long-term conservation is included in the Agricultural Protection Overlay Zone, which applies to certain rural zoned lands. Residential development is permitted in the overlay zone, but DRs emphasizing protection of open space for agricultural production restrict how development can occur.

Petitioner Wells argues there is between 118,136 and 139,680 acres of agricultural land in Whatcom County. Based on this range of acreage, Wells asserts the County is not conserving sufficient land for agriculture. However, Wells does not explain how the acreage she identifies correlates to agricultural lands of long-term significance within the meaning of the GMA.

\*9 Petitioner Wells argues that the overlay zone does not conserve agricultural lands in the "long-term," where CP Policy 8A-1 asserts a "long-term" planning horizon of 250 years. Altering the overlay zone will require amendment to the County's CP and DRs. Petitioner Wells also argues that the development densities allowed in the overlay zone far exceed the densities allowed in the Agricultural Zone. "Permitted densities should be significantly reduced if the overlay zone is to achieve a long-term conservation outcome similar to Agricultural zoning." Petitioner Well's Brief, at 10. The County asserted that it did not create the overlay zone to provide identical protection provided by the Agricultural Zone; the two zones act in concert to conserve the County's agricultural lands of long-term significance.

In order to comply with the provision of RCW 36.70A.020(8), the County must require those using the overlay development provisions to reserve the balance of land for long-term agricultural use rather than the current provisions which constitute a holding pattern for future sprawl. It must ensure that resultant development does not constitute inappropriate growth nor threaten the long-term commercial viability of remaining farmland, and only

removes a small percentage of the land from ongoing long-term agricultural usage. The overlay provisions are clearly erroneous and do not comply with the Act.

Aside from the overlay provisions, Petitioners have not definitely and firmly convinced the Board the County made a mistake in adopting the agricultural provisions of its CP or DRs. Except for the overlay provisions, the agricultural lands provisions comply with the Act.

Forest Lands

The County has designated 223,613 acres as forest lands. These lands are divided into two categories: Rural Forestry (generally, lots between 20 and 40 acres) and Commercial Forestry (lots larger than 40 acres). New residential development is not allowed in Commercial Forestry lands. New residential development is allowed in Rural Forestry lands at 1 unit per 20 acres, and clustering is permitted.

The sole complaint about the County's forest lands is Petitioner Wells' assertion that residential uses should be discouraged on forest lands. Petitioner Wells offers several conclusory statements, but does not explain how the very limited residential development allowed by the County fails to conserve forest lands of long-term significance. Petitioners have not definitely and firmly convinced the Board the County made a mistake in adopting the forest lands provisions of its CP or DRs. Therefore, the forest lands provisions comply with the Act.

Mineral Lands

The County designated 4,046 acres as mineral resource lands. To select these lands for designation, the County utilized general criteria applicable to all lands, and specific criteria for designated agricultural and forest lands. Of this more than 4,000 acres of mineral resource lands, 294 acres are within agricultural-zoned lands and 924 acres are within forest lands. In other words, out of approximately 88,000 acres of agricultural-zoned land, 294 acres are also designated as mineral resource lands; and out of over 223,000 acres of forest lands, 924 acres are also designated mineral resource lands.

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\*10 Petitioners' argument that the GMA gives priority to designation of agricultural lands and forest lands is without merit. In support of their argument, Petitioners rely on the natural resource goal, RCW 36.70A.020(8). This goal requires the County to "[m]aintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries." The mining industry is not excluded by the language of .020(8); mining is among the natural resource-based industries the County must maintain and enhance. Even if agriculture and forestry had a superior position relative to mining, there is no evidence in the record that the overlap of mineral resource lands onto less than one percent of agricultural lands and less than one percent of forest lands in any way violates the GMA.

Similarly, there is no evidence in the record that the County's mineral lands designations create prohibited impacts on residential uses. Although existing mining activity should be conserved by mineral lands designation, it will not necessarily be enhanced. As the County stated, mineral lands designation is not a right to mine. CP Policy 8P-4 provides:

Allow mining within designated MRLs through zoning and a discretionary and administrative permit process, requiring:

1. on-site environmental review, with county as lead agency, and
2. application of appropriate site specific conditions, and
3. notification to neighboring property owners within 1,000 feet to insure opportunity for written input and/or appeal, and

338

4. access to de novo review by the Hearing Examiner if administrative approval or denial is appealed.

The record does not support Petitioners' arguments that residential uses will be impermissibly impacted by mineral lands designation. Project-specific review will provide the opportunity for residents likely to be affected by a mining proposal to voice their concerns to the County.

Petitioners have failed to definitely and firmly convince the Board that the County made a mistake in adopting and applying the mineral lands designation criteria. Therefore, the mineral lands provisions comply with the Act.

### VIII. PUBLIC PARTICIPATION

The Board finds no flaw with the County's public participation efforts. Petitioner Wells argued that the County's process did not comply with the GMA because the County did not *listen* to all the citizens who participated. A more accurate characterization is that the County did not *agree* with positions urged by some of the citizens who participated. The County complied with the Act's public participation requirements.

### IX. WATER

With regard to water resource problems and watershed impacts, the Board shares the concerns of the Petitioners and Washington Department of Ecology. Ecology commented that the CP "understates the uncertainty regarding future water supplies for certain uses in certain locations" Ex. 51 (March 18, 1997 letter from Ecology to Whatcom County) attached to Petitioner Wells' Brief. The CP recognizes that availability of potable water "will almost certainly be a limiting factor to development in some areas of the county." Nevertheless, the CP was written with the "working assumption that there will be adequate water supply." CP 1-13. Although the CP's language with regard to water resources is not clearly erroneous, we agree with Ecology that a more detailed discussion and acknowledgement of how realistic the CP's assumptions may be would provide the County and its citizens a more forthright vision of the future.

### X. ALL OTHER ISSUES

\*11 Issues not included in the above discussion were considered by the Board. We found that Petitioners failed to meet their burden of proof regarding these issues.

### ORDER

The following sections of the CP are found to no longer substantially interfere with the fulfillment of the goals of the Act and their previous findings of invalidity are rescinded:

1. The Blaine UGA, excluding the aquifer recharge area and the Drayton Harbor area,
2. The STPA of the Birch Bay UGA,
3. The Custer UGA,
4. Point Roberts,
5. The Small Town of Deming.

The following sections of the CP and associated DRs are found to be noncompliant and are remanded to the County to be brought into compliance within 180 days of the date of this order (July 15, 1998):

1. The Agricultural Protection Overlay Zone (Category III CP Findings Ex. JE-2) and WCC 20.38.

The following sections previously found invalid are found to be in continued substantial interference with the goals of the Act and are remanded to the County to be brought into compliance within 180 days (July 15, 1998):

1. Geneva portion of the Bellingham UGA,
2. Aquifer recharge area and the Drayton Harbor area of the Blaine UGA,
3. LTPA portion of the Birch Bay UGA,
4. Previously invalidated rural areas (including provisions in the DRs and the rural element of the CP) with the exception of the Small Town of Deming and Point Roberts,
5. Sections of the Whatcom County Code as noted in Section VI of this order.

We specifically readopt the findings and conclusions regarding invalidity found in the March 29, 1996, and September 12, 1996, orders in these cases.

Findings of Fact pursuant to RCW 36.70A.270(6) and Conclusions of Law are adopted and appended as Appendix I.

This is a Final Order under RCW 36.70A.300(5) for purposes of appeal.

Pursuant to WAC 242-02-830(2), a motion for reconsideration may be filed within ten days of issuance of this final decision.

So ORDERED this 16th day of January, 1998.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Les Eldridge  
Board Member

Nan A. Henriksen  
Board Member

**APPENDIX I**

**Findings of Fact and Conclusions of Law HLE Findings of Fact**

1. We specifically readopt the findings and conclusions regarding invalidity found in the March 29, 1996, and September 12, 1996 orders in these cases to the extent they do not conflict with the findings and conclusions contained in this order.

2. May 27, 1997, Whatcom County adopted a comprehensive plan and associated development regulations. The deadline provided for by the GMA for adoption of the comprehensive plan was July 1, 1994. The deadline provided for by the GMA for adoption of development regulations was January 1, 1995.

3. By Order dated July 25, 1997, we lifted our determination of invalidity for the UGAs of Cherry Point and Sumas, the PUD ordinance (except as to its application to those areas of the Blaine UGA outside municipal boundaries and the Geneva portion of the Bellingham UGA). Remaining areas of invalidity were continued.

\*12 4. The bonus density provisions of Title 20 WCC have been repealed by the County.

340

5. The Agricultural Protection Overlay Zone does not conserve agricultural lands for long-term agricultural uses.
6. Zoning districts R2A, RR1, RR2, and RR3 include more than 6,000 acres which have not been divided. Logical boundaries of development are not readily apparent.
7. The rural element of the CP allows urban growth outside of UGA boundaries.

**Conclusions of Law**

1. The following sections of the CP no longer substantially interfere with the fulfillment of the goals of the GMA:

- The Blaine UGA, excluding the aquifer recharge area and the Drayton Harbor area;
- The STPA of the Birch Bay UGA;
- The Custer UGA;
- Point Roberts;
- The Small Town of Deming.

2. The Agricultural Protection Overlay Zone does not comply with the requirements of the GMA.

3. The following sections previously found invalid are found to be in continued substantial interference with the fulfillment of the goals of the GMA:

- The Geneva portion of the Bellingham UGA;
- The Aquifer recharge area and the Drayton Harbor area of the Blaine UGA;
- The LTPA portion of the Birch Bay UGA;
- Previously invalidated rural areas (including provision in the DRs and the rural element of the CP) with the exception of the Small Town of Deming and Point Roberts;
- Sections of the Whatcom County Code as noted in Section VI of this order.

1998 WL 43206 (West.Wash.Growth.Mgmt.Hrgs.Bd.)

END OF DOCUMENT

341

2005 WL 2458412 (West. Wash. Growth. Mgmt. Hrgs. Bd.)

Western Washington Growth Management Hearings Board  
State of Washington

\*1 LINDA FRANZ, PETITIONER

v.

WHATCOM COUNTY COUNCIL, WHATCOM COUNTY EXECUTIVE, RESPONDENTS

AND

JAMES F. CARR, INTERVENOR

Case No. 05-2-0011

September 19, 2005

**FINAL DECISION AND ORDER**

This matter comes before the Board through a Petition for Review filed on March 25, 2005, by Ferndale area resident Linda Franz. The petition challenges Whatcom County's adoption of Ordinance AB2004-082A amending Respondent County's Comprehensive Plan and zoning maps, creating a Mineral Resource Lands designation near Ferndale. Petitioner also challenges adoption of Ordinance AB2004-400, which amends the County's Comprehensive Plan, Chapter 8, Mineral Resource Lands. Both these measures were adopted on January 25, 2005, as part of Respondent County's comprehensive plan enactments under terms of the Growth Management Act. Additionally, the Petitioner alleges an absence of due process in the County's Determination of Non-significance under terms of the State Environmental Policy Act (SEPA).

Petitioner represented herself throughout the adjudication of this case. Karen Frakes, Civil Deputy Prosecutor, represented the Whatcom County Executive and Whatcom County Council. Lesa Starkenburg-Kroontje, attorney, represented Intervenor James Carr, owner of a sand and gravel pit that is a significant part of the subject designated land in this matter. Following the Hearing on the Merits the Board reviewed the oral and written record, deliberated, and came to a final decision. (See Procedural History).

**SYNOPSIS**

In the State of Washington balancing the obligation to conserve a diminishing non-renewable resource against the concerns of neighboring rural residents impacted by surface mining operations will be a difficult issue until the resource no longer exists. Whatcom and other counties faced this confounding situation in the 1990s. Appeals of county actions and determinations were carried to both the Western and Eastern Washington Growth Management Hearings Boards. The directives and values expressed in the Growth Management Act (GMA) regarding mineral resource lands and residential-classified rural lands rose again in 2004 and 2005 in this Whatcom County conflict over additional mineral resources lands designation activity. Two citations from a WWGMHB decision in Case 97-2-0030c, *Wells v. Whatcom County* are both instructive and applicable here:

The Board finds no flaw with the County's public participation efforts. Petitioner Wells argued that the County's process did not comply with the GMA because the County did not *listen* to all the citizens who

participated. A more accurate characterization is that the County did not *agree* with positions urged by some of the citizens who participated. The County complied with the Act's public participation requirements.

Final Decision and Order - January 16, 1998.

Policy 8P-4 directs County staff to allow mining within designated MRLs through the permitting process. It does not require staff to permit (mining) in all circumstances.

\*2 We hold that the primary purpose of Policy 8P-4 is to conserve mineral lands rather than, as WRW concludes, that the primary purpose is to resolve land use compatibility conflict issues. Specific conflicts are appropriately addressed in a site-by-site permitting and review process.

Order on Motion for Reconsideration - February 17, 1998.

Petitioner timely brought a challenge of two ordinances regarding mineral resource lands designation adopted by Whatcom County as amendments to its Comprehensive Plan and Zoning Map: Ordinance 2005-003, Mineral Resource Designation for the North Star Property and 2005-024, amendments to the comprehensive plan's resource policies. For authority in her challenge, Petitioner largely cited provisions of the GMA and the Washington Administrative Code (WAC). She additionally included citations to selected goals, policies, and designation criteria in Chapter 8 - Resource Lands of the County's Comprehensive Plan and addressed what appeared to her to be shortcomings in the use of the State Environmental Policy Act at the local level. While she offered views and opinions on the substance and the process of the County's consideration and adoption of these ordinances, the Board determines Petitioner did not complete the process of critique and/or advocacy for conditioning any actual mining operation contemplated by Intervenor Carr near her Ferndale-area rural residential home. To accomplish that effectively, she must participate in the review and comment during a county administrative permit process that will likely be requested by the Intervenor.

The County's mineral resource lands ( MRLs) designation effort, their review and modification of criteria from the 1997 Comprehensive Plan, and their use of the SEPA process to arrive at a Declaration of Nonsignificance at the designation stage, was exercised within the arena of both state mandates and local options under the GMA and was not clearly erroneous. Especially given the diversity of needs and views on community preservation, economic development, and stewardship of mineral resource lands the County faces, the two subject ordinances were properly adopted and are compliant with the GMA.

#### BURDEN OF PROOF

For purposes of board review of the comprehensive plans and development regulations adopted by local governments, the GMA establishes three major precepts: a presumption of validity; a "clearly erroneous" standard of review; and a requirement of deference to the decisions of local government.

Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations, and amendments to them are presumed valid upon adoption:

Except as provided in subsection (5) of this section, comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.

RCW 36.70A.320(1).

The statute further provides that the standard of review shall be whether the challenged enactments are clearly erroneous:

\*3 The board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of

this chapter.  
RCW 36.70A.320(3).

In order to find Whatcom County's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Department of Ecology v. PUDI*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

Within the framework of state goals and requirements, the boards must grant deference to local governments in how they plan for growth and development:

In recognition of the broad range of discretion that may be exercised by counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter, the legislature intends for the boards to grant deference to the counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

RCW 36.70A.320(1) (in part).

In sum, the burden is on the Petitioner to overcome the presumption of validity and demonstrate that any action taken by the County is clearly erroneous in light of the goals and requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2). Where not clearly erroneous, and thus within the framework of state goals and requirements, the planning choices of local governments must be granted deference.

#### PROCEDURAL HISTORY

On March 25, 2005, Linda Franz, a resident of a rural neighborhood near Ferndale, filed a Petition for Review of two Whatcom County ordinances adopted January 25, 2005, and a SEPA determination that resulted in a Declaration of Nonsignificance (DNS) in May of 2004. An ordinance updating the mineral resources section of the Comprehensive Plan, and adding designation criteria, is numbered 2005-024. The other challenged ordinance is the MRL designation of the North Star property and is numbered 2005-003. The numbers on county ordinances are incorrectly stated in the issues statement in earlier documents. They are corrected in succeeding briefs and in the final decision and order.

A prehearing conference was held on April 22, 2005. At that time Petitioner indicated she would restate some of her issues since the original issues statement contained some items over which the Growth Boards have no jurisdiction. Mr. James F. Carr, owner of property historically mined at North Star Road and the proponent of Ordinance 2005-003, was admitted by the Presiding Officer as Intervenor in this case. A second prehearing order was issued on May 18, 2005. Voluminous documents were filed at the Board's office and questions about the status of supplements to the record were fielded. A conference telephone call was held June 1, 2005, to sort out papers, supplements, a proposed motion from Petitioner on invalidity, and options for rulings by the Board. Following discussions, Petitioner agreed that contents of her motion were actually part of the ordinary advocacy, arguments, and presentation normally made to the Board in a hearing brief and in statements at a hearing on the merits. Petitioner withdrew her motion on June 2, 2005. An Order on Rulings - Addition and Supplements to the Index - was issued by the Presiding Officer on June 6, 2005.

\*4 In due course and on schedule, hearing briefs were filed and the Hearing on the Merits occurred in the What-

com County Courthouse on August 17, 2005. All parties and their counsel appeared. Ms. Franz represented herself. All three board members attended, one via telephone hook-up. A post-hearing letter and attachments were received from Whatcom County enclosing materials on the ordinance processes at Whatcom County and practices on public notice and public participation. These items were mailed to the Board in response to a Board member's questions and a request for further information.

### ISSUES PRESENTED

1) Does the rezone of the North Star/Carr **MRL**, as enacted in Ordinance #2005-003, fail to comply with the Growth Management Act's (GMA) goals and requirements for rural lands, rural elements, and rural development, at:

- RCW 36.70A.011
- RCW 36.70A.030 (14) a, b, c, d, & g & (15)
- RCW 36.70A.070 (1) and (5) b, c & c[ii][iv] and [v]
- WAC 365-195-210
- WAC 365-195-300 (1) a, rural element
- WAC 365-195-330 (1) & (2) c,[iv] & d, [i]
- WAC 365-195-500 (1)
- WAC 365-195-800 (1)

2) Does the subject rezone fail to comply with the GMA's goals and requirements for private property rights, at:

- RCW 36.70A.020 (6) & (10)
- RCW 36.70A.060 (1)
- RCW 36.70A.370 (1) & (2)
- WAC 365-195-310 (2) l & m
- WAC 365-195-725 (2)
- WAC 365-195-855
- WAC 365-190-040 (2) g

3) Does the subject rezone fail to comply with the GMA's goals and requirements for protection of water and critical areas, at:

- RCW 36.70A.030 (5)
- RCW 36.70A.080 (1) a
- WAC 365-195-070 (1) (3) & (7)
- WAC 365-195-200 (5) a, b, c, d
- WAC 365-195-305 (1) c & (2) l
- WAC 365-195-410 (1) a, b, c, d & (2) a and b

4) Does the subject rezone fail to comply with the GMA's goals and requirements for natural resource lands, at:

- RCW 36.70A.030 (10) (11) and Finding-Intent - 1994 c 307
- RCW 36.70A.131 (1) & (2)
- RCW 36.70A.170 (1) c & d
- WAC 365-195-400 (1) & (2) a
- WAC 365-195-825 (1) a, b, & c-f [ii] and [iii] and (2) a and b

5) By taking action to adopt the subject rezone has Whatcom County failed to comply with Minimum Guidelines

to Classify Agriculture, Forest, Mineral Lands and Critical Areas, as outlined in the Washington Administrative Code, at:

- WAC 365-190-020
- WAC 365-190-030 (2), (4) a, b, and c (11) (12) (14) and (15)
- WAC 365-190-040 (1) (2) b[i]
- WAC 365-190-070 (1) and (2) a, c, d & d [i] [iii] [iv] [v] [xi] and [xi] l
- WAC 365-190-080 (1) a, v (2) a & a[i] [ii] [iii] and at (2)c [i] [iv] and at (5) a [v] & (5)b at [i] [iv] & (5)c [vi]{F}

6) By taking actions to adopt the rezone has Whatcom County failed to comply with the goals and requirements for public notice and participation; denied citizens due process in the SEPA determination of Non-significance; failed to consider alternatives; and failed to protect citizens' health, welfare, and well-being? Did Whatcom County seek assistance from state agencies in recent policy and MRL determinations, especially with long-term planning? See:

- \*5 • RCW 36.70A.035 (1) a, c, and (2) a
- RCW 36.70A.140
- WAC 365-195-600 (2) a [iii] [iv] [vii] [xi] [xii] and (2) b
- WAC 365-195-610
- WAC 365-195-730 (2) a, b, c
- WAC 365-195-900 (2)

7) Has Whatcom County effectively violated its own Comprehensive Plan at Chapter 8, Resource Lands and its plan policy[s] in its Mineral Resource Lands ( MRL) designation criteria? Has Whatcom County essentially violated its own policies and goals in comprehensive planning: Goal 8J, particularly 8J(1), Goal 8K, particularly at 8K(1) and 3, Goal 8L, particularly at 8L(1), (2), and (4), and Goal 8P, particularly at 8P(1), (4), and (5)? (Does this constitute internal inconsistency and non-compliance with the GMA?)

8) Does a portion of the Whatcom County Comprehensive Plan now substantially interfere with fulfillment of the goals and policies of the GMA and should be declared invalid by the WWGMHB? To wit: the North Star/Carr MRL specific amendment to the Whatcom County Comprehensive Plan, expressed in adopted Ordinance 2005-003. And is adopted Ordinance 2005-024, amendments to the Comprehensive Plan, chapter eight (8)- Resource Lands, including Mineral Resource Lands - Designation Criteria, EXCEPT for Criteria 8 and 12, interfering with fulfillment of the goals and policies of the GMA?

#### DISCUSSION of the ISSUES and POSITIONS of the PARTIES

**1. Does the rezone of the North Star/Carr MRL, as enacted in Ordinance #2005-003, fail to comply with the Growth Management Act's (GMA) goals and requirements for rural lands, rural elements, and rural development?**

Petitioner brings into focus language of the Act and of the Procedural Criteria for Adopting Comprehensive Plans, and its recommendations for meeting requirements, that provide guidance and implementation terms for rural lands element[s] of a local comprehensive plan. While she states that mining is allowed in rural areas, it "is not characteristic of traditional rural lifestyles\_ is not compatible for the use of land by wildlife,...it does not preserve open space.\_ as experienced by residents near the North Star MRL, it does not enhance rural sense of community or quality of life." Petitioner's Hearing Brief, p.15. Petitioner asserts enjoyment of property is curtailed and that noise, air pollution, and water contamination effects of mining destroys the quiet rural element. *Ibid.*

Of further concern to Petitioner is her belief there are no rural lands in Whatcom County that cannot be designated as Mineral Resource Lands if specific project mitigation is created. This, she asserts, does not comply with RCW 36.70A.070 and local plan directives and guidelines found in WAC 365-195. Petitioner charges Whatcom County has effectively not precluded any rural lands from being designated for mineral resources, as required by WAC 365-195-300. Pointing to plan policies for the rural element, preservation of critical areas, and provisions for buffers to separate certain rural land uses, as recommended in WAC 365-195-330, Petitioner sees an absence of adequate protections in the County's comprehensive plan, stating that Goal 8J of that plan is not at work guiding implementation features of the plan and development regulations (policies, designations and criteria):

\*6 GOAL 8J: Sustain and enhance, when appropriate, Whatcom County's mineral resource industries, support the conservation of productive mineral lands, and discourage incompatible uses upon or adjacent to these lands. *Ibid.* p. 16-26.

Turning attention to a local government's achievement of objectives in WAC 365-195-210, particularly concurrency, consistency, and protection of domestic water systems, Petitioner claims in her brief at pages 20, 21, and 25:

"Concurrency" - The North Star MRL does not meet the criteria of concurrency because there are no alternatives for water for local residents should the mine impact water resources.

"Consistency" - The MRL is inconsistent with preservation of rural character; rural land where mining will not occur; restricting density to one unit per 20 acres with MRL designations. Petitioner further states the mineral resource plan of Whatcom County is rife with inconsistencies and this violates internal consistency provisions of the Act and the WAC.

"Domestic water system" - \_when a population exists such that many people would be irreparably harmed if the water was compromised\_ protection of water is paramount. Mining over, in, or adjacent to ground water sources threatens water supplies. Spills have contaminated water supplies, drained aquifers, and forever change the composition and quality of an aquifer. (also Exhibit 140)

Concerned the County handles designation of MRL lands erratically over time, Petitioner states that instead of protecting MRLs from incompatible adjacent uses, [this] places MRLs where incompatible uses of land already exist, as evidenced by the North Star site. *Ibid.* p. 26

On the other hand Whatcom County notes that while the GMA mandates conservation of natural resource lands (including mineral resource lands), there is no similar mandate for the conservation of rural lands. One of the important functions of rural lands is to provide necessary support of and buffering for natural resource lands. *Achen, et al., v. Clark County, et al.*, WWGMHB case No. 95-2-0067 (FDO September 20, 1995). Further, the MRL development regulations are not intended to protect development from the resource, but are to be designed to protect the resource from incompatible encroachments. *Id.* While Petitioner contends mining is inherently incompatible with rural character, prior WWGMHB decisions reach a contrary conclusion. The Board held in *Abenroth, et al., v. Skagit County*, WWGMHB no. 97-2-0060c (FDO January 23, 1998) that the GMA does not prohibit mining on non-designated rural lands and that there is nothing in the GMA that disallows mining that is not of long-term commercial significance in the rural zone. The County further argues that not all rural land qualifies under the County's MRL designation criteria: that not all areas are de-facto mineral lands. Goal 8P of the Comprehensive Plan requires that designated MRLs contain commercially significant deposits. Exhibit 109, p.15 of Exhibit A. Stating that Petitioner's argument on this matter is conclusory, MRL designation criteria #1 actually provides that designations contain at least 20 acres with one million cubic yards of proven and extractable sand, gravel, or rock material. Exhibit 109, p. 17 of Exhibit A. Prior to mining in Whatcom County an administrative permit must be obtained and in that process whatever buffers are necessary to mitigate adverse im-

pacts to neighboring properties will be imposed. Brief of Respondent, p.11-13.

\*7 **Determination and Conclusion:** The holdings of the Board in prior cases and the arguments of the County are persuasive. The designation of the North Star MRL on rural lands in Whatcom County, and application of its associated 1997 MRL criteria conforms with GMA requirements and WAC guidance for allowable uses and for protecting the character of rural lands. Petitioner has not met its burden of proof pursuant to RCW 36.70A.320(2).

**2. Does the subject rezone fail to comply with the GMA's goals and requirements for private property rights?**

Viewing impacts to adjacent rural land uses in the Ferndale area R-5 zone where Petitioner resides as a compromise and deterioration of private property rights, Petitioner states the North Star MRL adversely affects private property rights and constitutes an unjust taking, in violation of a GMA goal: RCW 36.70A.020[6] and of RCW 36.70A.370. Further, she asserts non-monetary losses are experienced by landowners residing adjacent to the North Star property; degradation of health, welfare, water, and quality of life. Past practices of North Star mining site operators raised concern for some adjacent property owners about health threats and quality of life enjoyment. And, citing real estate valuation and sale experiences of her neighbors, Petitioner asserts there is at least a 20 percent loss in property value of nearby homes, including the home and property owned by Linda Franz and her husband. Petitioner states in her brief:

It is discriminatory that neighboring property owners suffer loss of property value because the County created an MRL benefiting sole business owners at the expense of their neighbors, without compensation, and in violation of GMA mandates. Mining profits and neighboring property owners suffer loss-monetary and quality of life. \_\_Whatcom County, instead of planning for future use and need, designating MRLs and compensating individuals when appropriate, uses MRLs to locate mining anywhere. *Ibid.* p.27-28

Stating that Whatcom County R-5 rural area residents are denied equal opportunity to preserve neighborhood character when the designation of MRLs over a period of time comes *after* rural neighborhoods develop, Petitioner asserts this is not compliant with preserving the character and vitality of existing neighborhoods noted in the recommended Housing Element features of local comprehensive plans at WAC 365-195-310 (2)[l] and [m]. At hearing, Petitioner did note that the R-5 designation is the "odd child of rural lands." She opines in her hearing brief: "Residents are denied equal opportunity to preserve neighborhood character or vitality when the County declares ad hoc MRLs in areas already occupied by residential homes." She further claims the County may not be complying with WAC 365-195-725 (2) if it ignores losses that will be incurred by abutting adjacent property owners and provides no recourse for loss of value, loss of environment, or loss of water should mining affect wells in the area, especially shallow wells. She cites for authority Exhibits 6, 25, and 357. *Ibid* p.32. Petitioner declares the County sets up, rather than avoids, property rights issues. Ordinance 2005-003 has already taken property (devaluation). Petitioner references Exhibits 6 and 332 and WAC 365-195-855. *Ibid* p. 34. Offering the view that Whatcom County has public input but no public discussion, Petitioner worries that processes for defining categories, assigning designations for lands, and informing the public {WAC 365-190-040} in land use planning here puts personal property rights at risk throughout the county, *Ibid.* p. 36.

\*8 Respondent County argues that Growth Management Hearings Boards do not have jurisdiction to resolve violations of the United States and/or Washington State Constitution, such as those raised by Petitioner about a taking of private property and property damage. Boards have held this in their own decisions. Note for example, *Roth, et al., v. Lewis County*, WWGMHB No. 04-2-0041c (Order on Motions to Dismiss, June 2, 2004). In comprehensive planning a change in designation criteria does not result in any impacts on any particular piece of

property. RCW 36.70A.020(6) is thus not violated. Since no mining activity can occur on a designated MRL until an administrative permit is lawfully obtained and any conditions applied, any takings contention, if legitimate, is certainly premature at this stage.

In a post-hearing memo sent in response to a Board question about public participation, counsel for Whatcom County also included text of the County's Comprehensive Plan Goal and three policy statements on respecting and accounting for Property Rights. Additionally Chapter 8- Resource Lands Goal 8K of the Comprehensive Plan imposes a duty upon county decision makers to ensure that extraction industries do not adversely affect the quality of life in Whatcom County and that the rights of property owners are recognized.

**Determination and Conclusion:** The Board's holdings in prior cases cited above are persuasive. The County's argument is persuasive. The Board cannot here conclude the GMA goal to respect property rights [RCW 36.70A.020(6)] was thwarted or violated by Whatcom County. Petitioner did not carry her burden of proof pursuant to RCW 36.70A.320 (2).

### **3. Does the subject rezone fail to comply with the GMA's goals and requirements for protection of water and critical areas?**

Petitioner Franz writes in her brief and argues at hearing that GMA goals and requirements for protection of water and critical areas are not met with the County's designation of an MRL at North Star (*Ordinance 2005-003*). She cites RCW 36.70A.030; 080 (1)[a]; and WAC 365-195-200 at 5 a, b, c, and d; WAC 365-195-305; and WAC 365-195-410 for authority on definitions and to note the valuing of conservation and protection the GMA requires.

The Petitioner states at p. 39 of her hearing brief that, "Included in or near North Star are wetlands; one critical recharge aquifer and two having the same characteristics; the Lake Terrell state wildlife recreation area; watershed for Lake Terrell Creek; wetlands; and areas of Aldergrove Road immediately south of the MRL which flood in winter under certain conditions. Petitioner observes none of this appears to have been taken into consideration in the SEPA Determination of Nonsignificance." Cited for authority and reference are Exhibits 22, 67, 96 127, 140, 342, 343, and 359.

Urging use of provisions in the GMA to achieve conservation and evaluate reasonable alternatives to proposed designations and actions, Franz states mining at the North Star site will threaten potable water availability since the source for such water in that Ferndale R-5 area is groundwater. Franz further states that "mines create air pollution and there are no facilities to mitigate dust, noise, and air pollution." Petitioner adds that high winds are common in that area and that dust, sand, and rocks are common on North Star Road. Cited are Exhibits 128 and 347. Summarizing an argument, Petitioner writes in her brief, "Mining is not consistent with the area, which is rural residential; not consistent with preservation of the rural environment; not consistent with protection of groundwater resources supplying the only source of potable water; and mining in this area is not consistent with the mandate of the GMA to prevent incompatible uses from locating near MRLs. An after-the-fact MRL cannot meet this mandate." *Ibid at pp. 42-43.*

\*9 Whatcom County, on the other hand, notes that in 1997, as mandated by the GMA, the County adopted its critical areas ordinance (CAO) to protect critical aquifer recharge areas, wetlands, geologically hazardous areas, alluvial fan hazard areas, frequently flooded areas, and fish and wildlife habitat conservation areas. The proposed updated CAO is undergoing its review and was introduced to the full Council on July 12, 2005. The Petitioner has only challenged Ordinance 2005-003 and 2005-024; thus, arguments directed at critical areas impacts,

or areas Petitioner believes should be regarded as critical areas, are not proper here. Such issues are addressed in the current CAO. Any permitted mining activity in the MRL would be required to be mindful of, and comply with, the County's CAO. Chapter 16.16 Whatcom County Code. Brief of Respondent, p. 14.

Woven into Petitioner's argument about impacts on nearby water and critical areas is a connection she draws to preservation of rural character in rural neighborhoods near mining sites. Whatcom County states it does take rural settlements and population proximity into consideration. Chapter 8 of the Comprehensive Plan features much language addressing this matter. Exhibit 109, pp.5-8, 12-15 of Exhibit A. Criteria 7, 8, 9, and 10 specifically address mining and its potential for incompatibility with residential uses. Exhibit 109, pp. 17-18 of Exhibit A. And, pursuant to plan policy 8P-4, Whatcom County adopted the development regulations contained in Chapter 20.73 WCC, which chapter requires that prior to legally mining in an MRL one must first obtain an administrative permit. To obtain such a permit an applicant must comply with specific performance standards and ensure all potential impacts are mitigated. *Ibid.* p. 14

**Determination and Conclusion:** The County's argument is persuasive. Likely impacts on water and critical areas of any specific mining operation are dealt with and used as constraints and conditions at the time of evaluating a request for an administrative permit for mining in Whatcom County; not in comprehensive plan amendments about natural resources, in a Critical Areas Ordinances, nor in designations of MRLs such as Ordinances 2005-003 and 2005-024. The full tool kit of protections in Whatcom County's Comprehensive Plan, Policies, and development regulations and in Chapter 20.73 of the Whatcom County Code (WCC) are used to evaluate for approval or denial and condition any mining permit under consideration by the County. Petitioner has not met the burden of proof, pursuant to RCW 36.70A.320.

**4. Does the subject rezone fail to comply with the GMA's goals and requirements for natural resource lands?**

The impact on managing natural resources of long-term commercial significance is applied by Petitioner to designation of optimally-sized mineral resource lands. Her discussions with Department of Natural Resources [DNR] geologists reveal that 160 acres is a good minimum size for an MRL: not the 20-acre county minimum standard (county criterion) that under girded the North Star NRL designation. Disputing the County's findings, Franz states that the North Star site only adds.30 percent to the MRL land base in Whatcom County, not the 1.3 percent county studies determine, and that very small percentage cannot be construed to meet standards of long-term commercial significance for Whatcom County. This circumstance at North Star MRL, Petitioner argues, does not meet the terms of RCW 36.70A.030(10) and the Finding- Intent - 1994 c307 language of the GMA nor of RCW 36.70A.131(1).

\*10 Size creates an area of "substantial opportunity" which, Petitioner posits, can be equated to "long-term commercial significance." Petitioner expresses concern that North Star's 37 acres of combined lots will be difficult to manage and reclaim. Petitioner Franz claims "the purpose of MRLs is to identify and protect new resource areas, not expand current mines or MRLs in inappropriate (places). The MRL in question is spot-zoning. A plethora of small mines is not a plan - it's a dartboard." *Ibid.* pp. 47-48.

Registering concern about the County's meeting the actual terms of RCW 36.70A.131 at (1) and (2), Petitioner additionally argued, based on her conversation with a county employee, Jim Karcher, that the quality of pit-run gravel and other rock at North Star has not been in significant demand by the state's Department of Transportation for road bed material. Franz asserts North Star's production of common borrow fill is not unique and not in strong commercial demand, that it is used for pipe bedding and storm sewer (bedding support), which is a low

volume need.

The County's primary reliance on GeoEngineers, Inc. September 30, 2003, "Report: Engineering Geology Evaluation, Aggregate Resource Inventory Study, Whatcom County, Washington" (Exhibit 97), and its apparent lesser reliance on DNR studies and data, puzzled Petitioner. Ms. Franz wonders about the County's use of recommendations of a private firm in the minerals industry. Also referenced in her brief is her view that the report is limited in scope and ignores the need to search for mineral deposits in undeveloped areas of the County.

Expressing views in her briefing and at hearing that the County has been uneven in its planning for mineral resource lands during the past 14 years, she offers her view this has led to competing values and land uses that have several negative impacts. Petitioner cites the County's first failure to meet a mineral resources and critical areas designations deadline in 1991, set forth in RCW 36.70A.170(1)[c] and [d] and the terms of WAC 365-195-400 (1) and (2)a. *Ibid.* pp. 50-52. Later designations of MRLs in the 1990s still did not complete the County's inventorying and planning efforts for mineral resource lands. Yet natural resources-oriented comprehensive plan amendments and development regulations for Whatcom County were adopted periodically over the last 14 years. Petitioner Franz cites several sub-sections of WAC 365-195-825 to observe that uneven natural resources lands planning and MRL designations appears not to follow the dictates of several features of WAC 365-195 (Growth Management Act - Procedural Criteria for Adopting Comprehensive Plans and Development Regulations).

Whatcom County argues that County's policy is to conserve agricultural land and respect all resource lands, including those that may be, or are, designated as mineral resource lands in keeping with GMA requirements to conserve and manage all resource lands. Rural lands are a clear candidate for MRL designations where the criteria for demonstrating one million cubic yards of proven and extractable sand, gravel, and valuable metallic substances is met and a 20-acre minimum standard can be met. Exhibit 109. The GMA does not preclude classification or designation of additional mineral resources. WAC 365-190-070(2). In deciding upon a minimum size standard and what constitutes commercially viable mineral deposits, the County tailored its criteria to local circumstances that include the reality of a rapidly diminishing and limited non-renewable resource. Brief of Respondent at pp. 15-16. Intervenor notes that securing a 50-year minerals supply was actively discussed and debated during the adoption process of the 1997 Comprehensive Plan. As a result the County included an action item within the mineral resources chapter of the plan stating:

**\*11** Budget, initiate and complete a Comprehensive Construction Aggregate Study (CCAS) to document the short and long range availability and location of quality mineral resources, to be completed within five years of the adoption of this Comprehensive Plan Update the CCAS as needed based on the outcome of the study. (Plan, Ch. 8).

The 1997 Plan also contained a directive to maintain "an ongoing advisory committee consisting of representative of diverse interests" to further study issues pertaining to the conservation of MRLs. In 2000 the County Council established the Surface Mining Advisory Committee (SMAC). The SMAC commenced work on an action item in Chapter 2 of the Whatcom County Comprehensive Plan that provides:

The Mineral Resource Land Map designations and/or designation criteria should be reviewed at least once every seven years to determine if changes are necessary to meet mineral resource goals and policies. Such review should include consideration of the removal of land from Mineral Resource Designation after mining activity is completed and the addition of new designations in order to maintain a 50-year supply of mineral resources. Review may occur through sub-area plan updates provided a complete review will occur within the seven year time frame.

*Ibid.* p. 6

In January 2001, the Department of Natural Resources issued a study entitled Reconnaissance Investigation of Sand, Gravel, and Quarried Bedrock Resources in Bellingham 1:100,000 Quadrangle, Washington. Exhibit 89. The report states the working life of most significant pits in that area is 10 to 20 years. Following this, and in fulfillment of the 1997 comprehensive plan mandate action item, the GeoEngineers study (Exhibit 97) was accomplished and issued on September 30, 2003. Study authors concluded that MRL designations that existed in 2003 contained about 17 years worth of mineral material supply. GeoEngineers did examine the North Star area, determining it was a localized deposit of mineral resources that may extend beyond the historic 16-acre site that was operating under a state DNR permit in the subject area. *Intervenor's Response Brief* at pp.6-7.

Much of the known mineral resource is located under agricultural lands of long-term commercial significance outside of western Whatcom County. The County made a deliberate choice to rank high the conservation of such lands devoted to agricultural use. Exhibit 109, p.19 of Exhibit A, Exhibits 97 and 148. Most of the other known deposits are in pockets around rural areas. The resource is limited in the western part of the County. In *Intervenor's Response Brief* at p. 5, Intervenor notes that mineral resources within the North Star MRL were designated in an attempt to provide sufficient sand, gravel, and hard rock to provide for the 50-year planning horizon that is recommended under the classification system published by the Department of Natural Resources. Exhibit 332, p. 27. Further, none of the cities in Whatcom County have designated mineral resources and it is assumed that mineral resources for these areas will be provided by Whatcom County unincorporated areas. The Department of Natural Resources notes there are practical limitations on large deposits identified (160 acres and larger) in western Whatcom County because they are thin, dominantly sand, and the current land use is well-established farms and residential developments. Exhibit 89, p. 11. In fact there are many 20-acre or smaller active pits that have been commercially viable operations in Whatcom County for decades. Exhibit 89, Appendix 2. Brief of Respondent, pp. 15-16.

\*12 In February of 2004 the SMAC convened for the first of 16 open public meetings in an eight-month period. Exhibit 148, p.4. The SMAC reviewed the DNR Bellingham Quadrangle report and the GeoEngineers Report (Exhibits 97 and 89) and reviewed GIS-generated data and maps of potential resources areas depicting various pertinent data. As well, they considered the expertise of individual SMAC members. The SMAC deemed Plan Policy 8P-1 was not being met by existing MRLs and the deficit could not be met by designating all additional potential resource areas outside of the agricultural zoning district. Exhibit 149, Findings and Conclusions Nos. 4 and 5. In the ensuing designation effort, Whatcom County designated 24 MRL areas covering 4,204 acres. Most of these are east of Interstate Highway 5 and north of Bellingham in rural areas of the county. *Ibid.* p.7.

Whatcom County strenuously objects to Petitioner's characterization of the County's process of designation as spot zoning. The designation process is in keeping with the comprehensive plan and done in furtherance of the public interest. *Save a Neighborhood Environment v. Seattle*, 101 Wn.2<sup>nd</sup> 280,286,676 P.2d 1006 (1984). And, the County urges that the Growth Boards have no jurisdiction to rule on spot zoning challenges. *PRRVA v. Whatcom County*, WWGMHB case No. 00-2-0052 (Final Decision and Order, April 6, 2001). Brief of Respondent, pp.15-17.

**Determination and Conclusion:** Whatcom County's arguments are persuasive. The County balanced interests and used a lawful method of investigating, assessing, and designating mineral resources lands over time, even if not an ideal one. Closely protecting agricultural and forest lands from most mineral resources designations was a reasonable choice. It is a local option to tailor a balance in conservation of agricultural, forest, and mineral re-

source lands. The County referenced its 1997 Comprehensive Plan and adequately consulted technical and expert advisors to evaluate the request for a North Star MRL that is the subject of Ordinance 2005-003. Petitioner has failed in her burden to show that the designation process for natural resource lands, specifically the North Star MRL, does not comply with the GMA (RCW 36.70A.030 and .171) and with the Whatcom County Comprehensive Plan. The cases cited on spot zoning are persuasive.

**5) By taking action to adopt the subject rezone has Whatcom County failed to comply with Minimum Guidelines to Classify Agriculture, Forest, Mineral Lands and Critical Areas, as outlined in the Washington Administrative Code?**

Directing attention to the Minimum Guidelines to Classify Agriculture, Forest, Mineral Lands and Critical Areas (WAC 365-190), in arguments and recitations, Petitioner disputes the accuracy of the County's computation that the North Star MRL would increase the mineral resources land base by 1.3 percent. Franz calculates it as .30 percent. Petitioner states the subject 37-acre site includes critical areas that must be buffered and otherwise protected asserting that the GeoEngineers Report included those areas in mineral material available. Exhibits 335, 336, and 337. She observes Respondent County should not have allowed the inclusion of some 'grandfathered pit' acreage in its North Star MRL designation since it is "almost depleted." *Ibid. pp. 55-59.*

\*13 Petitioner also reaches to include an assertion in her statements about Issue 6 that the County simply failed to examine alternative sites in its SEPA analysis for the North Star MRL designation proposal and disputes the County's use of a Declaration of Non-significance which she thinks should have been part of the fulfillment of recommendations and guidance to local governments in WAC 365-190, particularly in MRL designation and critical areas review.

Because Petitioner is concerned about irreparable harm to the groundwater in the area under and around the North Star MRL, because of past problems with contamination from industrial uses, she finds mining at North Star is too risky. Because of shallow well nitrate contamination problems and risk to deeper wells, she asserts water systems currently in place cannot handle more users. *Ibid. p. 60.* Ms. Franz notes in WAC 365-190-080 (1)[a]{v}, a directive to counties to adequately address wetlands, via a rating system, in comprehensive plans and development regulations. The ability to compensate for destruction or degradation of wetlands should be reckoned with. She wonders how wetlands preservation is feasible, given the history of operation of small mining enterprises in Washington. *Ibid. p. 64.* Petitioner asks how the County has planned for susceptibility to water and wetlands contamination as a filtration layer of sand is removed in North Star operations. She discerns from studies and reports that Lake Terrell Creek and its watershed and the Lake Terrell state wildlife recreation area are vulnerable.

Respondent County noted at hearing and in its briefing that a proper venue for making specific critique and objection, and request for tight conditions on any request for a mining operations permit, is at the County when the application is officially reviewed, not in an ordinance adopting an amendment to the Comprehensive Plan. Use of all comprehensive plan goals, policies, and criteria comes into play, including that for critical areas, when considering the nature of an administrative permit and any conditions to be placed on it. In outlining its process for designations of mineral resource lands by amendment to its Comprehensive Plan, the County noted at hearing and in its brief that it followed the guidance in WAC 365-190. It also exercised its local options to tailor criteria--- all of which come into play in reviewing specific requests for a mining permit--- in accordance with local conditions as known to them in reports it consulted and commissioned in enacting Ordinance 2005-003. Argument at Hearing and Brief of Respondent at p.15.

The County and Intervenor detail the submission of an application for MRL designation for the subject property on December 30, 2003. Exhibit 95. As well, they provide accounts of the SEPA process and adherence to WAC 197-11 guidelines which Petitioner questioned. The applicant obtained consent from the County Council to docket the potential Comprehensive Plan amendment, pursuant to Chapter 20.10 WCC. The Council agreed to place the request on the docket and notified the public of the application via the *Bellingham Herald* on February 22, 2004. Exhibit 86. Intervenor Carr submitted an environmental checklist, as required by WAC 197-11-315. Exhibit 96. He also submitted a Wetlands Delineation Report on May 3, 2004, and a geotechnical report on June 1, 2004. Exhibits 22 and 21. Comments on the project were received from County staff on wetlands and road issues. Exhibits 43 and 83. On March 29, 2004, Petitioner Franz submitted a detailed response to the checklist. Those comments were accepted and made a part of the file. Exhibit 67. In accordance with terms of WAC 197-11-330 the County SEPA official, John Guenther, reviewed the proposed action, information on the checklist, additional information in the file and issued a Declaration of Nonsignificance (DNS) on May 10, 2004. Exhibit 92. The SEPA official considered the variety of local, state, and federal regulations that would be available to require the applicant to mitigate impacts on adjacent uses in complying with terms of any administrative permit that might be issued. In accordance with WAC 197-11-340, Mr. Guenther sent the DNS and checklist to all agencies listed in that regulation and published notice of DNS issuance, as required by WAC 197-11-510 and WCC 16.08.130. Exhibit 84 and 85. The DNS became final on May 25, 2004, and was not appealed within the required 10 days thereafter, as required by WCC 16.08.170(1)(a). *Ibid.* pp.17-18. In this North Star matter, the Petitioner's concern about the impact of mining on groundwater, for example, would be raised at the administrative permit stage and the County geologist would typically require a groundwater assessment by a hydrogeologist and require mitigation measures based on that report. Exhibit 223, pp. 3, 4, and 8. If the permit stage is reached, another threshold SEPA determination will be made and, if probable, significant impacts exist, an environmental impact statement or a mitigated DNS would be required. *Ibid.* p.22.

**\*14 Determination and Conclusion:** Petitioner did not carry the burden of proving the County erred in its application of pertinent WAC guidelines (or of the applicable Whatcom County Comprehensive Plan and Whatcom County Code) in the designation of additional mineral resource lands through adoption of Ordinance 2005-003, an MRL designation amendment to the 1997 Whatcom County Comprehensive Plan. The SEPA process is staged in Whatcom County, applied both programmatically and specifically, and is not complete for a mineral resource lands matter until a final determination is made on an administrative approval permit for mining operations. Petitioner participated in the SEPA process to date and, in her case briefing, did not demonstrate the County failed to properly utilize that process in issuing a DNS on the subject MRL designation. The County's arguments are persuasive.

**6. By taking actions to adopt the rezone has Whatcom County failed to comply with the goals and requirements for public notice and participation; denied citizens due process in the SEPA determination of Nonsignificance; failed to consider alternatives; and failed to protect citizens' health, welfare, and well-being? Did Whatcom County seek assistance from state agencies in recent policy and MRL determinations, especially with long-term planning?**

Actual public notice and public participation deficits may have denied citizens due process in the SEPA determination and the MRL designation formal adoption on this matter Ms. Franz offers. She also states she is unable to see where or how the County considered alternatives to designating the North Star site an MRL. Citing RCW 36.70A.035 and .140 and WAC 365-195-600 and - 610 Petitioner Franz challenges the completeness of notice, the actual provision for early and continuous public participation in the development and amendment of plans and regulations, the actual dissemination of the MRL proposal and alternatives, and provision for open discus-

sion with the public. *Ibid.* p. 69-71.

Petitioner states in her brief she sees few signs the County timely consulted and coordinated with key state and federal agencies prior to adopting the North Star MRL and amending provisions of its comprehensive plan and zoning code. To support her claims that inadequate consultation occurred, or was absent altogether, Petitioner cites WAC 365-195-715 (1), (2), and (3), WAC 365-195-730 (2)[b] and [c], and WAC 365-195-900 (2) as applicable to the County's process of planning and consultation with relevant governmental authorities. Franz posits that effective features of the WAC would have resulted in notation of relevant laws and potential or actual law conflicts, invoking of Clean Water Act requirements, and documented use of Best Available Science in developing policies and regulations for proper designation of mineral resource lands. Petitioner states opportunities for public comment were, in her view, not equitable, that early notification of the proposed MRL did not occur, and that notices to the public comment deadlines and appeal to the Hearing Examiner deadlines were squeezed to unacceptable levels. Exhibits 67 and 96. The effectively one-day comment period on the proposed Declaration of Nonsignificance of called out by Petitioner as especially grievous. Exhibits 85, 92, and 333. Petitioner states solid information on participating in comment on comprehensive plan amendment and the mining permit process and information on the North Star proposed mining endeavor was not available or forthcoming. Franz found the County's published DNS notification incomplete and confusing. Petitioner gives a failing grade to the County on reaching out to private affected parties, such as adjacent area homeowners. *Ibid.* pp. 73-77.

\*15 Incorporating several features of her argument, Petitioner notes and finds instructive a Western Growth Board case (03-2-0006) Final Decision and Order, involving Jefferson County that requires proper evaluation of the environmental impacts of alternatives in a SEPA analysis and cites the County for failure to accomplish that evaluation under terms of RCW 43.21C.

In addition to notice requirements, the GMA public participation requirements include an adequate opportunity to be heard. RCW 36.70A.140. Whatcom County states that in GMA processes and the associated SEPA process, Petitioner's argument that the County provide the public with more than opportunity to comment is misplaced. Petitioner suggests some sort of discussion or dialogue with the public is required. Whatcom County notes than in WWGMHB Case No. 03-2-0007, Amended Final Decision and Order of November 3, 2003. *Better Brinnon Coalition v. Jefferson County*, the Western Board stated:

Local decision makers must allow citizens to make their feelings known but the county commissioners do not have to follow them, let alone must they engage in a particular form of interactive discussion such as Petitioner suggests should have been done here.

The GMA public participation requirements do not require the county commissioners to use public opinion to adopt a particular course of action; they just require the public be given an opportunity to comment throughout the decision-making process.

Brief of Respondent, p.20

Whatcom County outlines its compliance with notice requirements of state and local law in its briefing and post-hearing brief sent in response to a Board question at hearing. Petitioner and many others took advantage of many opportunities to address County staff and decision makers both orally and in writing since March 2004, including the Surface Mining Advisory Committee, the Planning Commission, the County Council Natural Resources Committee, and the County Council as a whole during the MRL process that lasted several months. Exhibits 5, 6, 7, 11, 12, 13, 15, 16, 47, 48, 49, 52, 53, 54, 55, 56, 57, 60, 61, and 88. Exhibit 222, pp. 12-18; Exhibit 223, pp. 5-8; Exhibit 224, pp. 2-5 and Exhibit 225, pp. 3-4. Petitioner's extensive involvement in the process is well documented in the record. In addition to participating in the public hearing process, Petitioner frequently con-

versed through e-mail with County staff. Exhibits 8, 99, 20, 30, 58, 59, 62, 63, 64, 65, and 66.

**Determination and Conclusion:** The Board's holdings in the WWGMHB Case No. 03-2-0007 are persuasive in its application to this case, as are the arguments of the Respondent County. The process followed by Whatcom County in the adoption of Ordinance 2005-003 is well-documented and complied with the requirements of the Whatcom County Code and the GMA. Petitioner participated orally and in writing at a number of points in the ordinance process and continues to do so. Petitioner has not carried the burden of proving that the County's public participation and notice activities and their review and consultation actions during the pendency of the ordinance were clearly erroneous.

**7. Has Whatcom County effectively violated its own Comprehensive Plan at Chapter 8, Resource Lands and its plan policy[s] in its Mineral Resource Lands ( MRL) designation criteria? Has Whatcom County essentially violated its own policies and goals in comprehensive planning: Goal 8J, particularly 8J(1), Goal 8K, particularly at 8K(1) and 3, Goal 8L, particularly at 8L(1), (2), and (4), and Goal 8P, particularly at 8P(1), (4), and (5)?(Does this constitute internal inconsistency and non-compliance with the GMA?)**

\*16 Questioning the compliance with the GMA of the Whatcom County Comprehensive Plan Chapter 8, Resource Lands, specific MRL designation criteria and the manner of public notice and participation for Whatcom County are overarching matters for Petitioner. Certainly, Petitioner directly opposes the North Star MRL designation near the City of Ferndale and any eventual permitting of mining at that site. The outcomes to date are unacceptable to her. Argument at hearing.

The Comprehensive Plan Goals and Policies challenged are:

Goal 8 J: It is referenced and stated earlier in this decision.

Policy 8J-1: Conserve for mineral extraction designated mineral resource lands of long-term significance. The use of adjacent lands should not interfere with the continued use of designated mining sites that are being operated in accordance with applicable best management practices and other laws and regulations.

Goal 8K: Ensure that mineral extraction industries do not adversely affect the quality of life in Whatcom County, by establishing appropriate and beneficial designation and resource conservation policies, while recognizing the rights of all property owners.

Policy 8K-1: Avoid significant mineral extraction impacts on adjacent or nearby land uses, public health and safety, or natural resources.

Goal 8L: Achieve a balance between the conservation of productive mineral lands and the quality of life expected by residents within and near the rural and urban zones of Whatcom County.

Policies 8L - 1: Discourage new residential uses from locating near designated mineral deposit sites until mineral extraction is completed unless adequate buffering is provided by the residential developer.

8L-2: Protect areas where existing residential uses predominate against intrusion by mineral extraction and processing operations.

8L-4: Buffer mineral resource areas adjacent to existing residential areas. Buffers preferably should consist of berms and vegetation to minimize impacts to adjacent property owners. Buffers should be reduced for a limited period of time during reclamation is quality minerals are contained therein.

21

Goal 8P Designate Mineral Resource Lands ( **MRLs**) containing commercially significant deposits throughout the county in proximity to markets in order to avoid construction aggregate shortages, higher transport costs, future land use conflicts and environmental degradation. Balance **MRL** designations with other competing land uses and resources.

8P-1: Seek to designate a 50-year supply of commercially significant construction aggregate supply, to the extent compatible with protection of water resources, agricultural lands, and forest lands.

8P-4: Allow mining within designated **MRLs** through an administrative approval use permit process, requiring:

- (1) on-site environmental review, with county as lead agency, and
- (2) application of appropriate site-specific conditions, and
- \*17 (3) notification to neighboring property owners within 1000 feet to insure opportunity for written input and/or appeal, and
- (4) access to de novo review by the Hearing Examiner if administrative approval or denial is appealed.

8P-5: Consider potential resource areas identified in the *Report Engineering Geology Evaluation Aggregate Resource Inventory Study Whatcom County, Washington* ( GeoEngineers, Inc. Sept. 30, 2003) during county review of land development projects in order to avoid development incompatible with mineral resource extraction.

The **MRL** designation criteria discussed in various briefs and at hearing by Petitioner appear to be the twelve criteria listed under I. Non-metallic Mineral Deposits in Chapter 8 - Resource Lands section of the updated Comprehensive Plan. A review of the record in this case does not show solid and direct objection to Criteria 4, 5, 6, 9, or 11. The Board determines they were not pursued. Petitioner stated in her issues presented that she does not object to Criteria 8 and 12.

Elsewhere in this discussion of issues and presentation of the position of the parties, Petitioner's arguments challenging criteria 1, 2, 3, 7, and 10 and citations to relevant state statutes and code is summarized and discussed.

Respondent County states that after the recent Comprehensive Plan update, the majority of the substance of the mineral resource lands element of the Comprehensive Plan remained unchanged from the version challenged in *Wells, et al., v. Whatcom County, et al.*, WWGMHB Case 97-2-0030c (FDO January 16, 1998). The County urges that the Board's words at page 12 in that decision in that case are still applicable in the present case:

Similarly, there is no evidence in the record that the County's mineral lands designations create prohibited impacts on residential uses. Although existing mining activity should be conserved by mineral lands designation, it will not necessarily be enhanced. As the County stated, mineral lands designation is not a right to mine. (emphasis added). CP Policy 8P-4 provides:

Allow mining within designated **MRLs** through zoning and a discretionary and administrative permit process, requiring:

1. On-site environmental review, with county as lead agency, and
2. application of appropriate site-specific conditions, and
3. notification to neighboring property owners within 1000 feet to insure opportunity for written input and/or appeal, and
4. access to de novo review by the Hearing Examiner if administrative approval or denial is appealed.

Whatcom County states that all criteria apply in any county review of a proposed **MRL** for non-metallic mineral resources. No criterion trumps another. Beyond the "general criteria" classification for non-metallic mineral lands they are grouped according to land use elements: Additional Criteria for Urban and Rural Land, Forest

Lands and Agricultural Lands Brief of Respondent, p. 10. [FN1]

**\*18 Determination and Conclusion:** Whatcom County's explanation of its use of MRL designation criteria in the review of potential MRLs and in providing language that can be used to determine the wisdom of granting or denying an administrative permit and applying any conditions thereto is persuasive. The criteria set for in Ordinance 2005-024 are consistent with policies in the comprehensive plan. The amendments to the 2004 Whatcom County Comprehensive Plan are not internally inconsistent with the rest of Whatcom County's 2004 Comprehensive plan and therefore comply with RCW 36.70A.070.

The record made by the County here during consideration of these subject ordinances does not support Petitioners' arguments that the criteria operate to err in designating commercially viable lands with proven mineral resources or to impermissibly impact residential uses near and adjacent to a mineral lands designation in violation of plan policies. The right to mine does not become legal unless a project-specific review occurs and an applicant is granted an administrative approval use permit by the county. In light of these factors, Petitioner's arguments and presentation fails to prove the two challenged 2005 ordinances, and the goals, policies, designations and criteria linked together and incorporated into the updated Whatcom County Comprehensive Plan, results in internal inconsistency or violation of the GMA.

**8. Does a portion of the Whatcom County Comprehensive Plan now substantially interfere with fulfillment of the goals and policies of the GMA and should be declared invalid by the WWGMHB? To wit: the North Star/Carr MRL specific amendment to the Whatcom County Comprehensive Plan, expressed in adopted Ordinance 2005-003. And is adopted Ordinance 2005-024, amendments to the Comprehensive Plan, chapter eight (8) - Resource Lands, including Mineral Resource Lands - Designation Criteria, EXCEPT for Criteria 8 and 12, interfering with fulfillment of the goals and policies of the GMA?**

Asserting the several circumstances surrounding the North Star MRL planning and siting process is riddled with error and the formal adoption of amendments to the County's plan risky, Petitioner asks the subject ordinances be invalidated. Petitioner sees endangering of public health, the environment, quality of life and use of one's property, and to nearby property values. Petitioner requests that the North Star/Carr MRL specific amendment to the Whatcom County Comprehensive Plan (Ordinance 2005-003) and amendments to the Comprehensive Plan, Chapter Eight (8) - Resource Lands, Mineral Resource Lands Designation Criteria, with the exception of those referenced above, in Ordinance 2005-024 be invalidated. *Ibid. p. 113-115.*

Respondent County in briefing, through exhibits, and at hearing delineated its processes of GMA and SEPA compliance and described its use of public participation, technical studies, consultation with experts, staff analysis and recommendations, and utilization of a Surface Mining Advisory Committee, the Planning Commission, and the County Council Natural Resources Committee to arrive at proposed mineral resources ordinances and then adopted them. In making these difficult choices in planning and designation for mineral resource lands, the County was reasonable and compliant with the terms of the Growth Management Act in its approach to or adoption of the ordinances.

**\*19** At hearing the County's representative noted that active planning, monitoring, and review processes are utilized to determine how implementation of Comprehensive Plan elements is faring. Further, the practice of attaching conditions to permitted industrial, including mining, projects is customary. The County urges that invoking invalidity on the MRL element of the Comprehensive Plan and the designation criteria is not appropriate or necessary.

**Determination and Conclusion:** The Board determines that the designation of the North Star Property is compliant. There is no reason to conclude Whatcom County will not utilize all the tools in the comprehensive plan, development regulations, zoning code, and its Critical Areas Ordinance to permit and monitor any mining operations connected with this designation. The Board also determines the new MRL criteria to be compliant. Therefore, the Board determines the implementation of these challenged Whatcom County Comprehensive Plan ordinances, Nos. 2005-024 and 2005-003, will not substantially interfere with the fulfillment of the goals and policies of the GMA.

#### FINDINGS OF FACT

1. Mineral deposits are located in eastern Whatcom County and in a variety of small and large acreages and landscapes in the western part of the County. The North Star mineral resources designation site is approximately four miles from the City of Ferndale on North Star Road and located in a rural zone of Whatcom County north of Bellingham.
2. Rural lands in the R-5 zone are eligible for designation as mineral resources lands at the local option of Whatcom County when lawful and appropriate criteria are utilized. Not all rural lands are eligible for mineral resource lands designation.
3. Rural residents can advocate for, and expect, basic protection of public health and the welfare of persons and property in Whatcom County when they select the appropriate avenues to seek protection and relief.
4. Rural lands in Whatcom County may be used to support and provide buffering from natural resources designated land uses so any rural development and the natural resources uses both achieve some graduated protections.
5. In local comprehensive planning a change in designation and designation criteria does not itself result in any impacts on any particular piece of property.
6. Whatcom County follows state guidelines on protection of property rights and has incorporated goals and policies in its Comprehensive Plan that directly reference respect and protection for property rights.
7. In or near the North Star MRL designation are wetlands, at least one critical recharge aquifer; the Lake Terrell state wildlife recreation area; the watershed for Lake Terrell Creek; and areas south of Aldergrove Road that flood in winter under certain conditions; the County's compliant critical areas ordinance will be applied at the time of permitting to protect these critical areas.
- \*20 8. There were historic problems with wastewater and noise management, groundwater contamination, and pollution on the North Star site under other ownership and management of mining operations. There are state agency enforcement citations in the public record that document such events.
9. Geologic studies of the North Star mining industrial area, a site of approximately 37 acres, indicate sand and gravel in commercially significant amounts is still deposited there, even though part of the site has been mined in years past. This adequately qualifies the site for MRL designation.
10. In Whatcom County a specific mineral resources site designation request is received by the County Council and must be considered through the County's annual amendment process; this process includes SEPA review and determination. Additional SEPA review is required as result of application review for an administrative approval

permit to mine.

11. The Department of Natural Resources' "*Reconnaissance Investigation of Sand, Gravel, and Quarried Bedrock Resources in Bellingham 1:100,000 Quadrangle, Washington*" and the GeoEngineers, Inc. September 30, 2003 "*Report: Engineering Geology Evaluation, Aggregate Resource Inventory Study, Whatcom County, Washington*"--- along with the expertise and expressed opinions of local residents, county staff, state resource agency personnel, and Surface Mining Advisory Committee members--- were relied upon in formulating new MRL designation criteria.

12. In ranking resource protection and enhancement, Whatcom County elected not to designate most agricultural and forest lands as mineral resource lands.

13. A lengthy public participation and lands analysis process occurred during the development and consideration of MRL ordinances 2005-024 and 2005-003, particularly in 2004 and 2005. Formation of a Surface Mining Advisory Committee, legal notices of actions contemplated, the availability of technical studies and publications, staff analysis, a SEPA determination process, review by the Planning Commission, and opportunities to communicate with County staff and appointed and elected officials, at hearings and informally, provided for an adequate public review and assessment of proposed MRL designations and criteria.

14. The MRL designation 12 criteria listed under I. Non-metallic Mineral Deposits in Chapter 8 - Resource Lands section of the updated Comprehensive Plan operate together to provide appropriate evaluation tools for selection of MRLs and to set the stage for conditioning, approval, or denial of any permits for mining operations sought for sand, gravel, and rock deposits in the County.

15. Whatcom County followed its GMA-compliant 1997 criteria appropriately to designate the North Star Property.

16. Whatcom County's new MRL designations are consistent with the MRL policies in its comprehensive plan.

17. An MRL designation is not a right to mine in designated lands.

\*21 18. Whatcom County has a demonstrated variety of planning, research, monitoring, review, and enforcement tools available to ensure proper implementation of the MRL designation process, with applicable criteria to guide permit evaluations and management of these lands, including mining operations that may be permitted to operate on them.

19. Because the County's adoption of Ordinances 2005-003 and 2005-024 complies with terms of the Growth Management Act and the Whatcom County Comprehensive Plan, the Board need not rule on the request for invalidity.

20. Any Finding of Fact hereafter deemed to be a Conclusion of Law is hereby adopted as such.

#### CONCLUSIONS of LAW

A. Whatcom County is located west of the crest of the Cascade Mountains and is required to plan, and does plan, for management of growth under terms of Chapter 36.70A RCW.

B. This Board has jurisdiction over the parties and subject-matter of this case. RCW 36.70A.

C. Petitioner Franz timely filed her petition for review.

D. Linda Franz, a resident of Whatcom County, has standing to raise her claims and bring this petition for review. RCW 36.70A.

E. The ordinance development and review process for No. 2005-024 is compliant with directives in Chapter 36.70A.050,.060,.070(1) and (5)[a][c] and WAC 365-190-170. The process incorporates local measures and criteria, exercising local options in resource lands designation and management appropriately, according to the County's compliant 1997 comprehensive plan criteria.

F. The ordinance development and review process for No. 2005-024 was consultative, drawing significantly on guidance and directives in Part Seven of WAC 365-195, and is compliant with the Chapter 36.70A RCW.

G. The designated local official's Declaration of Nonsignificance, under terms of the State Environmental Policy Act, and its integrated use with comprehensive plan development and update, development regulations and zoning designations was in accordance with the Whatcom County Code (WCC 20.10), WAC 365-195-760, Chapter 36.70A RCW and Chapter 43.21c RCW.

H. The ordinance development and review process for No. 2005-003, the North Star MRL designation, is compliant with the County's 1997 comprehensive plan criteria, the implementation of SEPA, and does not interfere with fulfillment of GMA goal 8. RCW 36.70A.020(8).

I. The ordinance development and review process for No. 2005-024 and No. 2005-003 in its public participation elements is compliant with RCW 36.70A.035 and RCW 36.70A.140 and the Whatcom County Code at 20.10.

J. The two ordinance amendments to the Whatcom County Comprehensive Plan (adopted Mineral Resource Lands Designation and Criteria and the North Star MRL designation) are internally consistent with these comprehensive plan policies and goals: Goal 8J, particularly Policy 8J(1); Goal 8K, particularly Policies 8K(1) and 3; Goal 8L, particularly Policies 8L(1), (2), and (4); and Goal 8P, particularly Policies 8P(1), (4), and (5), and, therefore, with RCW 36.70A.070.

\*22 K. The amendments to the Comprehensive Plan of Whatcom County, as adopted in Ordinances No. 2005-024 and No. 2005-003, are compliant with Chapter 36.70A RCW. No declaration of invalidity is required.

L. Any Conclusion of Law hereafter deemed to be a Finding of Fact is hereby adopted as such.

#### ORDER

These challenges to the Whatcom County Comprehensive Plan, its policies and goals, and its mineral resource lands designations and criteria do not prevail. This Board, having determined that Ordinances 2005-024 and 2005-003 amending the Whatcom County Comprehensive Plan are in compliance with the Growth Management Act (Ch. 36.70A RCW) as to all the challenges raised in the petition, this case is hereby DISMISSED.

Pursuant to RCW 36.70A.300 this is a final order of the Board.

**Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing, or oth-

erwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy to all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

Done this 19<sup>th</sup> Day of September 2005.

Gayle Rothrock  
Board Member

Hite, concurring in result:

Before beginning an analysis of the arguments presented on the issues before the Board, it is important to be clear about the scope of the Board's review here. A basic requirement of the GMA constrains the scope of board review in this case. This is the requirement that a challenge to an enactment must be brought within 60 days of the date of publication of its adoption. RCW 36.70A.290(2). This requirement applies to, among others, comprehensive plan provisions that establish the criteria under which future comprehensive plan amendments will be considered. As to the North Star designation, these are the 1997 designation criteria under which the North Star MRL designation was adopted. Despite Petitioner's exhaustive presentation on many issues related to the compliance of the North Star MRL with the GMA, this principle limits the challenges that she can bring to that MRL.

## I. CHALLENGES TO THE MRL DESIGNATION

### A. Compliance of the 1997 Designation Criteria with the GMA

\*23 Issues 1-5 challenge the compliance of the North Star MRL with substantive provisions of the GMA. Petitioner timely appealed the ordinance adopting the North Star MRL designation but she did not (nor could she in 2005) appeal the 1997 comprehensive plan designation criteria that allowed the MRL designation. Petition for Review, March 25, 2005, at 1; see also Revised Issues Statement, April 28, 2005, I.1.a and c. However, the MRL designation was processed pursuant to the County's *existing* (1997) comprehensive plan designation criteria. Ordinance 2005-003, Findings of Fact. [FN2] That is, the designation criteria that were applied to determine whether to grant the MRL were not those adopted in the 2004 update but those that had been adopted as part of the 1997 comprehensive plan. Ex. 27. [FN3] Because the 1997 designation criteria are not now subject to chal-

lenge, Petitioner is barred from arguing that those criteria fail to comply with substantive provisions of the GMA. Intervenor notes that the 1997 designation criteria are in compliance with the GMA and reminds the Board that the North Star MRL was approved pursuant to those criteria, rather than the newly adopted 2004 MRL designation criteria:

While we recognize that the Petitioner is challenging the modifications to the criteria, it must be recognized that the 2005 criteria were not applied to the North Star MRL. Therefore, the Petitioner's attempts to analyze the North Star MRL under the new criteria should be ignored.

Brief of Intervenor at 15:

The 1997 designation criteria must be deemed to be compliant with the GMA and with the related administrative regulations in Ch. 365-190 WAC and Ch. 365-195 WAC because any challenge to them now would not be timely. [FN4] RCW 36.70A.290(2). The substantive requirements of the GMA with which the 1997 designation criteria for MRLs are deemed compliant include the requirements for rural lands (Issue No. 1); the goal to protect private property rights (RCW 36.70A.020(6)) (Issue No. 2); protection of water and critical areas (Issue No. 3) [FN5]; goals and requirements for natural resource areas (Issue No. 4); and compliance with the Minimum Guidelines to Classify Agriculture, Forest, Mineral Lands and Critical Areas (Ch. 365-190 WAC) (Issue No. 5). While there may be a basis for challenging the MRL designation's compliance with the GMA provisions listed in Issues 1-5, such a basis would be extremely limited. The 1997 designation criteria must be read in light of the GMA provisions that governed their adoption in the first place, and, where the comprehensive plan and development regulations do not expressly allow an action, the GMA provisions apply. With those caveats, though, an MRL that was adopted consistent with the County's 1997 designation criteria is compliant with the GMA.

Since the North Star MRL was adopted pursuant to existing comprehensive plan policies and development regulations, the chief basis for board review of the MRL is the consistency of the MRL with those county policies and regulations. Petitioner fails to demonstrate that some aspect of the North Star MRL falls outside the scope of the County's application of the 1997 designation criteria, and therefore I would find that she has failed to meet her burden of proof with respect to Issues 1-5.

#### **B. Consistency of the North Star MRL with the 1997 Mineral Resource Lands Designation Criteria**

\*24 Intervenor argues that “[I]t cannot be disputed that the North Star designation complies with the necessary criteria.” Intervenor's Response at 30. Petitioner's arguments are primarily challenges to the compliance of the designation criteria with the GMA. See Petitioner's Opening Brief and Reply Brief of Petitioner. It is difficult to discern Petitioner's arguments concerning the consistency of the North Star MRL with the designation criteria because those arguments are interspersed with her arguments on other points in extremely lengthy briefs. Petitioner's Opening Brief is 116 pages without exhibits; Petitioner's reply brief is 51 pages without exhibits. However, it appears that she challenges the consistency of the North Star MRL with at least one 1997 designation criterion: Criterion 2 requires a minimum MRL designation size of twenty acres. General Criteria 2, Mineral Resource - Designation Criteria, Chapter 8, p. 17, Ordinance 2005-024 (with changes made in 2005 marked). Petitioner argues: “Whatcom limits density in MRLs to one unit per twenty acres, yet the North Star MRL has one unit per 12.01 acres.” Petitioner's Opening Brief at 25.

As Intervenor points out, the designation criterion does not apply to lot size. It requires that the land designated with an MRL be at least twenty acres in size. Intervenor's Response Brief at 18. The North Star MRL designation site is 37 acres. Finding of Fact 9, Ordinance 2005-003. It is therefore consistent with General Criterion 2. I would find that the North Star MRL designation is consistent with the 1997 designation criteria.

### C. Procedural Challenges to the North Star MRL

While the 1997 designation criteria must be deemed compliant with the GMA, the adoption of a plan amendment pursuant to those designation criteria must still meet the procedural requirements of the GMA. The allegations in Issue No. 6 primarily address procedural questions. These include a variety of claims: failure to comply with the public notice and participation requirements of the GMA; denial of due process to citizens in the SEPA determination; failure to consider alternatives; failure to protect citizens' health, welfare and well being; and failure to seek assistance from government agencies. Petitioner's Opening Brief at 68.

The Board does not have jurisdiction to decide constitutional claims such as the claim of denial of due process in the SEPA determination. *Roth, et al. v. Lewis County*, WWGMHB Case No. 04-2-0014c (Order on Motions to Dismiss, September 10, 2004). Similarly, the Board does not have general jurisdiction over claims outside the GMA, SEPA (State Environmental Policy Act) or the Shoreline Management Act (SMA). *Ibid.* Thus, the claims that the Board can consider here are those grounded in particular provisions of the GMA, SEPA, or the SMA.

The statutory provisions cited by Petitioner are RCW 36.70A.035(1)(a) and (c), (2)(a), and 36.70A.140. These statutory provisions apply only to the public participation and notice claims. The cited administrative regulations, WAC 365-195-600(2)(a)(iii), (iv), (vii), (xi), (xii), and (2)(b), 365-195-610, 365-105-730(2)(a), (b), and (c), WAC 365-195-900(2), are part of the Procedural Criteria for Adopting Comprehensive Plans and Development Regulations (Ch. 365-195 WAC), which are guidance rather than mandatory requirements:

\*25 This chapter makes recommendations for meeting the requirements of the act. The recommendations set forth are intended as a listing of possible choices, but compliance with the requirements of the act can be achieved without using all of the suggestions made here or by adopting other approaches.

WAC 365-195-030(1).

Compliance with the Procedural Criteria cannot be the sole basis for a claim of noncompliance; they may be considered but in the light of a statutory requirement. Therefore, the only issues to be considered by the Board in Issue 6 are those challenging public participation and notice.

The County's public participation procedures with respect to the determination of non-significance (DNS) for the North Star MRL are fully set out in the main decision in the discussion of Issue 5. The County's public participation procedures for the approval of the North Star MRL pursuant to the 1997 designation criteria are referenced in the discussion of Issue 6 in the main decision. I concur that these show that the County complied with RCW 36.70A.035 and 36.70A.140 in processing the North Star MRL.

## II. CHALLENGES TO THE 2004 MINERAL RESOURCE ELEMENT UPDATE (ORDINANCE 2005-024)

The Issue 8 claims are addressed to Ordinance 2005-024, the County's update of its mineral resource lands element. (Issue 7 seeks a determination of invalidity, both as to the 2004 updated mineral resource land designation criteria and as to the North Star MRL. However, invalidity may not even be considered unless there first is a finding of noncompliance. RCW 36.70A.302(1)(a). Unlike the challenges to the MRL adopted pursuant to the 1997 designation criteria, the challenges to the designation criteria adopted in the 2004 update are timely. Ordinance 2005-024 was adopted pursuant to RCW 36.70A.131, which requires the County to review its mineral resource lands designations as part of its RCW 36.70A.130(1) update:

As part of the review required by RCW 36.70A.130(1), a county or city shall review its mineral resource lands designations adopted pursuant to RCW 36.70A.170 and mineral resource lands development regula-

tions adopted pursuant to RCW 36.70A.040 and 36.70A.060. In its review, the county or city shall take into consideration:

1. New information made available since the adoption or last review of its designations or development regulations, including data available from the department of natural resources relating to mineral resource deposits; and
2. New or modified model development regulations for mineral resource lands prepared by the department of natural resources, the department of community, trade, and economic development, or the Washington state association of counties.

RCW 36.70A.131.

These challenges may properly reach all matters related to the updated mineral lands element that were raised by the Petitioner in her participation before the County's decision-makers. RCW 36.70A.280(4).

Issue 8 alleges that the Mineral Resource Lands Designation Criteria violate comprehensive plan goals: Goal 8J, particularly 8J(1), Goal 8K, particularly at 8K(1) and (3), Goal 8L, particularly at 8L(1), (2) and (4), and Goal 8P, particularly at 8P(1), (4), and (5)

\*26 In her opening brief, Petitioner also argues that the mineral resource lands designation criteria fail to comply with the same GMA requirements that she argued applied to the North Star MRL in Issues 1-5. Petitioner's Opening Brief at 82. The failures to comply with the GMA are alleged as: failing to protect property rights; using ad-hoc spot zoning; establishing mineral resource lands of long-term significance; [failing to] protect the public; [failing to] protect water resources of the public, maintain the GMA rural element requirements; designating mineral resource lands after rural development has taken place; developing a mineral resource plan that results in unconstitutional takings of private property; developing a plan with internal inconsistency; allowing mine expansion in inappropriate areas for unproven resources. Ibid.

The County's mineral resource plan is based in clearly articulated local circumstances. The first circumstance is that there is a deficit between what existing MRLs can generate in terms of commercially significant construction aggregate and the needs for a 50-year supply. Brief of Respondent at 6; Exhibit 148. The second, a key determination by the Surface Mining Advisory Committee, is that the deficit could not be met by designating all of the additional potential resource areas outside of the Agricultural zoning district. Ibid.

In adopting MRL designation criterion 12, the County made an express policy decision to protect prime agricultural soils from use for mining purposes:

Prohibit MRL designations in areas designated Agriculture by the Whatcom County Comprehensive Plan that contain "Prime Farmland Soils" as listed in Table 5, Soil Survey of Whatcom County Area, Washington, U.S. Department of Agriculture Soil Conservation Service. Al Goldin (1983).

Additional Criteria for Designated Agricultural Areas, 12, Chapter Eight - Resource Lands, Whatcom County Comprehensive Plan, Ordinance 2005-0023.

This has meant that the County had to turn to lands now designated as rural as the source of the mineral resources required to be conserved under the GMA. Importantly, Petitioner does not challenge the policy to exempt agricultural resource lands from MRL designation. Given the unchallenged choice to protect agricultural lands from a change in designation to mineral resource lands, the County has few alternatives but to rely upon rural lands for MRL designation changes. The updated designation criteria and the mining permit application procedures represent the balance that the County has struck between conserving mineral resources, protecting

agricultural resource lands, and mitigating the effects of mineral resource extraction upon nearby residents.

Petitioner alleges that the updated designation criteria are inconsistent with certain plan provisions. Inconsistency under the Act means that it is impossible to carry out one provision of a plan and also carry out the other. *Camp Nooksack Association v. City of Nooksack*, WWGMHB Case No. 03-2-0002 (Final Decision and Order, July 11, 2003). I would not find that the cited comprehensive plan policies are inconsistent with the new designation criteria but that they have been balanced with the weight in favor of conservation of agricultural lands. Petitioner's own situation demonstrates that this balance is not perfect. However, I would find that it is within the range of discretion afforded to the County.

**III. CONCLUSION**

\*27 For these reasons, I concur in the result reached in the main decision.

Dated this 19th day of September 2005.

Margery Hite  
Board Member

I concur in the conclusion in the main decision that the Petitioner has not carried her burden of proof pursuant to RCW 36.70A.320 (2) for the issues raised in the petition, that the County is in compliance with the GMA on these issues, and that the case should be dismissed. I concur in Board Member Hite's analysis of the issues.

Dated this 19th day of September 2005.

Holly Gadbow  
Board Member

FN1. Project-specific review (see Policy 8P-4) will provide the opportunity for residents likely to be affected by a mining proposal to voice their concerns and file comments and recommendations with county officials. If they disagree with the issuance of any particular administrative permit Petitioner and others have a right to appeal to the County Hearing Examiner.

FN2. The North Star MRL application was submitted well in advance of the adoption of updates to the MRL designation criteria in Ordinance 2005-024. See the Staff Report dated June 2, 2004. Exhibit 27.

FN3. The Petition for Review in this case challenges Ordinance 2005-003 creating the North Star Mineral Resource Land ( MRL) designation, and Ordinance 2005-024, updating the mineral resources element of the Whatcom County Comprehensive Plan pursuant to RCW 36.70A.131.

FN4. As Intervenor points out, the mineral element of the plan was upheld by this Board in *Wells v. Whatcom County*, WWGMHB Case No. 97-2-0030c (Final Decision and Order, January 16, 1998). Brief of Intervenor at 13.

FN5. Petitioner did not actually allege noncompliance with any statutory requirement for the protection of critical areas since none of the cited statutory provisions requires protection of critical areas.

2005 WL 2458412 (West.Wash.Growth.Mgmt.Hrgs.Bd.)

326

END OF DOCUMENT

322

Q-016

WHATCOM COUNTY HEARING EXAMINER

RE: SEPA Application	)	File No. SEP2009-00132
by	)	
Concrete Nor'West for	)	File No. PLN2009-0013
<i>Comprehensive Plan Amendment</i>	)	
<hr/>		
SEPA Administrative Appeals filed by	)	
<i>Concrete Nor'West</i>	)	APL2010-0004
<i>Friends of the Nooksack Samish Watershed</i>	)	APL2010-0005
	)	
	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
	)	AND DECISION

SUMMARY OF APPEALS AND DECISION

Appeals: Both Concrete Nor'West and Friends of the Nooksack Samish Watershed have appealed a Mitigated Threshold Determination of Nonsignificance under SEPA for the Concrete Nor'West proposed Amendment to the Comprehensive Plan Map to add to the Mineral Resource Lands Overlay 280-acres located near the South Fork of the Nooksack River, north of Wickersham in south-central Whatcom County.

Concrete Nor'West, the Proponent of the Amendment to the Comprehensive Plan Map to extend the Mineral Resource Lands Overlay to the subject property, has appealed the inclusion of a condition attached to the MDNS [Exhibit No. 6 in the Hearing Examiner file] which stated that the Amendment requested, if granted by the Whatcom County Council after review, "... shall not be effective until such time as additional environmental review is completed to address site specific issues; and a Development Agreement, pursuant to RCW 36.70B.170 and WCC 20.92.850, is entered between Whatcom County and Concrete Nor'West."

Friends of the Nooksack Samish Watershed appealed the issuance of a Determination of Nonsignificance and requested that an Environmental Impact Statement be completed prior to the Planning Commission and Whatcom County Council considering the request to extend the Mineral Resource Lands Overlay to the subject 280-acre parcel.

Decision: The Hearing Examiner has determined that the "mitigation conditions" attached to the DNS were unnecessary and/or inappropriate for a SEPA Determination and amounted to a non-legislative revision of the procedure for reviewing a site specific mining operation set forth in the Whatcom County Code.

The Appeal of Concrete Nor'West of the "mitigation conditions," attached to the DNS by the Responsible Official, is UPHELD.

The Appeal of Friends of the Nooksack Samish Watershed, requesting that the Hearing Examiner overturn the Determination of Nonsignificance issued by the Responsible Official, is DENIED.

**FINDINGS OF FACT**

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**I.**

**Background Information**

Appellant: Appellant (s): Friends of the Nooksack Samish Watershed  
Concrete Nor'West

Applicant: Concrete Nor'West

WC File # Being Appealed: SEP2009-00132

Property Location/Address: Within the NW ¼ and NE ¼ of Section 28, Township 37 North, Range 5 East, W.M.

Assessor's Parcel Numbers (APN): 370528 180450 and 370528 461325

Zoning: Commercial Forestry (CF)

Comprehensive Plan: Commercial Forestry

Authorizing Ordinances: WCC 20.92 Hearing Examiner  
WCC 16.08.170 SEPA Appeals

Applicable State Law: RCW 43.21C State Environmental Policy Act  
WAC 197-11 SEPA Rules  
RCW 36.70B.170 Development Agreements

Applicable Local Ordinances: WCC 16.08.160 SEPA Substantive Authority  
WCC 20.43 Commercial Forestry Zone  
WCC 20.73 Mineral Resource Lands Special District  
Comprehensive Plan, Chapter 8, Resource Lands  
Comprehensive Plan, Chapter 11, Environment

Exhibits:

- 1 Administrative Appeal Application, APL2010-0004, with attachments
  - 1-1 Statement for Appeal
  - 1-2 Customer Receipt
  - 1-3 Letter dated January 11, 2010, from Lesa Starkenburg-Kroontje to Tyler Schroeder re: SEPA MDNS, File No. SEP2009-00132/Concrete Nor' West

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  - 1-4 Western Washington Growth Management Hearings Board, Final Decision and Order, No. 97-2-0030c
  - 1-5 WAC 197-11-444: Elements of the environment
  - 1-6 Whatcom County Comprehensive Plan, Chapter 8-Resource Lands \*\*Action Plan, June 2008
  - 1-7 Whatcom County Hearing Examiner Decision, City of Nooksack, APL06-0024/SEP06-0062, CMP06-0013
- 2 Administrative Appeal Application, APL2010-0005, with attachments
  - 2-1 Letter in support of Appeal, dated January 21, 2010, from David Mann and Brendan Donckers
  - 2-2 Customer Receipt
  - 2-3 Notice of Appearance dated April 28, 2010, from Lesa Starkenburg-Kroontje
- 3 Notice of Withdrawal of SEPA DNS and Issuance of MDNS, dated December 29, 2009
- 4 Letter, dated January 11, 2010, from Lesa Starkenburg-Kroontje to Tyler Schroeder re: SEP2009-00132/Concrete Nor' West, with attachments:
  - 4-1 WAC 197-11-444: Elements of the environment
  - 4-2 Whatcom County Comp Plan, Chapt 8-Resource Lands\*\*Action Plan, June 2008
  - 4-3 Hearing Examiner Dec, City of Nooksack, APL06-0024/SEP06-0062
  - 4-4 Western Washington Growth Management Hearings Board, No. 97-2-0030c
  - 4-5 Western Washington Growth Management Hearings Board, No. 05-2-0011
  - 4-6 Address Label, date stamped received PDS, January 12, 2010
- 5 Letter, dated December 28, 2009, to Interested/Concerned Parties, from David Stalheim re: Withdrawal of SEPA DNS, and issuance of MDNS
- 6 MDNS, SEP2009-00132, Mitigation Conditions
- 7 Re-issued MDNS Distribution List, SEP2009-00132

- 8 Revised DNS Distribution List
- 9 Revised DNS for public notice purposes, dated December 1, 2009
- 10 DNS, dated November 10, 2009
- 11 Aerial Map showing Existing and Proposed MRL
- 12 DNS Distribution List

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- 13 Legal Notice, November 10, 2009
- 14 SEPA Checklist
- 15 Letter dated January 5, 2001 from Anna Martin
- 16 RCW 78.44.091: Reclamation Plans – Approval Process
- 17 Email correspondence opposing DNS, received November 19 thru December 23, 2009, addressed to Tyler Schroeder
- 18 Letter, dated December 28, 2009 from Lesa Starkenburg-Kroontje to Tyler Schroeder
- 19 Email correspondence re: DNS, addressed to Schroeder
- 20 Letter dated December 23, 2009, from Nooksack Indian Tribe to Schroeder
- 21 Email from David Mann to Schroeder, dated Dec 28, 2009, withdrawing appeal of DNS
- 22 Letter dated January 11, 2010 from Larry Kimmett to Schroeder re: opposition to MDNS
- 23 Letter dated January 15, 2010 from Lummi Indian Business Council opposing rezone
- 24 Ordinance No. 2005-024/AB2004-400
- 25 Email correspondence opposing County's Decision not to require EIS, received Dec 13 – 19, 2009
- 26 Concrete Nor'West address and phone info
- 27 Dept of Archaeology & Historic Preservation, letter dated December 15, 2009 re: Request for Archaeology Survey
- 28 Letter dated December 15, 2009 to Tyler Schroeder from Residents of Whatcom County re:

Saxon Gravel Pit Expansion, Concrete Norwest

- 29 Email Comments to Tyler Schroeder, received December 12-14, 2009, requesting EIS
  - 30 Email Comments received 12/16/2009 to County Planners / Tyler Schroeder requesting EIS
  - 31 Letter, stamped received December 4, 2009 to Loisann and Suzanne Shull, opposing DNS
  - 32 Email Comments received in January opposing MDNS and requesting EIS to Tyler Schroeder
- 
- 33 Certificate of Posting, date April 28, 2010
  - 34 Legal Affidavit of Publication, dated April 29, 2010
  - 35 Email communication regarding scheduling of open record hearing
  - 36 Staff Report, dated May 7, 2010
  - 37 Memorandum Submitted on Behalf of Concrete Nor'West by Lesa Starckenburg, dated May 11, 2010 [notebook with attachments]
    - 37-1 DNS, dated November 10, 2009
    - 37-2 Revised DNS, dated December 1, 2009
    - 37-3 Letter dated Dec 28, 2009, from David Stalheim to Interested/Concerned Parties
    - 37-4 WAC 197-11-444: Elements of the environment.
    - 37-5 WC Comp Plan, Chapter Eight-Resource Lands \*\*Action Plans, June 2008
    - 37-6 Comp Plan Amendments, Chapter 2.160
    - 37-7 WCC, Chapter 20.73 Mineral Resource Lands Special District (MRL)
    - 37-8 WCC, Chapt 20.84 Variances, Conditional Uses, Admin Approval Uses, Appeals
    - 37-9 Whatcom County Hearing Examiner Decision, dated October 3, 2006, APL2006-0024/SBP2006-0062/CMP2006-0013, City of Nooksack Appellant
    - 37-10 Final Decision and Order, No. 97-2-0030c Western Washington Growth Management Hearings Board, Wells vs. Whatcom County and Freestone
    - 37-11 Final Decision and Order, Case No. 05-2-0011, Western Washington Growth Management Hearings Board, Linda Franz v. Whatcom County Council and Whatcom County Executive and James Carr
  - 38 Letter dated May 10, 2010, from Concrete Nor'West to Whatcom County Hearing Examiner, re: administrative Appeals, APL2010-0004 and APL2010-0005
  - 39 Friends of Nooksack Samish Watershed Hearing Brief, prepared by David Mann, dated May 12, 2010, with attachments
    - 39-1 Letter, dated May 11, 2010, from Peter Willing of Water Resources Consulting
    - 39-2 Peter Willing Vita
    - 39-3 Washington State Appeals Court, Magnolia Neighborhood v. City of Seattle
    - 39-4 WA State Supreme Court, King County v. WA State Boundary Review Board

- 40 Letter dated May 13, 2010, from Larry Kimmett
- 41 Letter dated May 18, 2010, from Paul Brass
- 42 Letter, not dated, from Suzanne and Loisann Shull
- 43 Letter, dated May 21, 2010, from Ken Carrasco
- 44 Letter, dated May 2010, from Bonnie Rice
- 45 Reply Memorandum Submitted on Behalf of Concrete Nor'West, by Lesa Starkenburg-Kroontje, dated May 21, 2010

**Parties of Record:**

Friends of the Nooksack Samish Watershed  
c/o David Mann  
Gendler & Mann  
1424 -4<sup>th</sup> Avenue, Suite 1015  
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Suzanne and Loisann Shull  
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Acme, WA 98220

Bonnie Rice  
1210 Bowman Road  
Acme, WA 98220

David Stalheim, Tyler Schroeder, Doug Goldthorp  
Planning and Development Services

## II.

Concrete Nor'West has docketed a request with the Whatcom County Council to have the subject 280-acre parcel, owned by Concrete Nor'West and adjacent to their existing surface mine near the Nooksack River in south-central Whatcom County, added to the Mineral Resource Lands Overlay, Chapter WCC 20.73 of the Whatcom County Zoning Ordinance.

If the request was granted, the property would remain in the Commercial Forestry Zoning Designation, but could be available for surface mining pursuant to the requirements of the Mineral Resource Lands Overlay set forth in Chapter 20.73.

Whatcom County Planning and Development Services is the lead agency reviewing the Concrete Nor'West proposal, pursuant to the State Environmental Policy Act. Concrete Nor'West filed with Whatcom County an Environmental Checklist [Exhibit No. 14] describing the proposal as a Comprehensive Plan Amendment request and analyzing the environmental consequences of approval for the proposal as nonexistent because this was not a project specific proposal and did not have any impacts, and full environmental review would take place at the time an actual permit application for mining activity on the site was submitted to Whatcom County.

The Whatcom County Planning Director, as the Responsible Official under SEPA, originally issued a Determination of Nonsignificance without "mitigation conditions" on November 10, 2009. On December 1, 2009, the Director reissued the Determination as a Revised Determination of Nonsignificance, again without "mitigation conditions." The revised DNS was issued because the original DNS had not been sent to approximately 34 concerned citizens who had requested notification. This second DNS extended the original comment period.

During the second comment period, extensive and numerous public comments were submitted. On December 28, 2009, the Director issued a Notice of Withdrawal of the SEPA

Determination of Nonsignificance and issued a Mitigated Determination of Nonsignificance, dated December 29, 2009, with "mitigation conditions," which read as follows:

Mitigation Conditions

The threshold determination for the Comprehensive Plan amendment (PLN2009-00013) is a phased SEPA decision pursuant to WAC 197-11-060(5). Phased review is appropriate when the sequence is from a non-project document to a document of a narrower scope such as a site specific analysis. As such, this determination is based on a non-project action which seeks to amend the Comprehensive Plan to include a mineral resource overlay (MRL) designation on Commercial Forest lands.

This Threshold Determination shall be supplemented with site specific environmental review at the time of a development application and a new threshold determination shall be issued prior to issuance of any underlying permits. The site specific environmental review will address probable adverse environmental impacts from the proposal, including but not limited to issues related to dust, noise, traffic, groundwater, water quality and archaeological resources.

**The amendment of the Comprehensive Plan to include the subject property in a MRL designation shall not be effective until such time as additional environmental review is completed to address site specific issues, and a Development Agreement pursuant to RCW 36.70B.170 and WCC 20.92.850 is entered between Whatcom County and Concrete Nor'West. [Emphasis added].**

The Director also sent a letter, [Exhibit No. 5], dated December 28, 2009, addressed to "Dear Interested/Concerned Parties," explaining the newly issued Mitigated DNS. This letter acknowledges that the proposal is a non-project action seeking to amend the Comprehensive Plan and would authorize or allow Concrete Nor'West to apply for subsequent permits to mine. It was pointed out that the subsequent applications would be subject to additional environmental review under SEPA, that phased review of the application was appropriate, and that the revised SEPA decision adding the above "mitigation conditions," "... makes clear that this Threshold Determination cannot be used for subsequent permit development applications, and must be supplemented with new information and a new Threshold Determination." The Appellant, Concrete Nor'West, acknowledges the accuracy of this statement.

The Director goes on in the letter, dated December 28, 2009, to address the portion of the "mitigation conditions," addressing future process by stating as follows:

We also recognize that the decision to designate the land for potential gravel extraction is a significant public policy question.

The Whatcom County Comprehensive Plan recognizes and encourages that adequate mineral resources be designated in Whatcom County. Yet, the designation of this land could occur without the decision-makers having site specific environmental review documents available for their consideration.

The revised SEPA decision requires that additional public review would be necessary before a Comprehensive Plan amendment would become effective. A Development Agreement, authorized pursuant to RCW 36.70B.170 and WCC 20.92.850 would require additional public hearings and a decision of the Whatcom County Council before staff would be authorized to approve any site specific development applications for the extraction of mineral resources on the property.

Concrete Nor'West objects to the portion of the "mitigation conditions," which reads as follows:

The amendment of the Comprehensive Plan to include the subject property in a MRL designation shall not be effective until such time as additional environmental review is completed to address site specific issues, and a Development Agreement pursuant to RCW 36.70B.170 and WCC 20.92.850 is entered between Whatcom County and Concrete Nor'West.

It is the position of Concrete Nor'West that under current law a Mineral Resource Lands Designation becomes effective when approved by the Whatcom County Council; that site specific environmental and other impact issues are to be dealt with, pursuant to the process set forth within Chapter 20.73 of the Whatcom County Code; and that the requirement for a Development Agreement approved by the Whatcom County Council amounts to a revision of the currently existing legal procedures for reviewing a surface mine proposal set forth in the Whatcom County Code.

### III.

Appellants, Friends of the Nooksack Samish Watershed, appealed the SEPA MDNS, arguing that the Responsible Official's MDNS, which deferred all consideration of environmental effects of mining on this site until a specific project application for actual mining was received, that this decision was in error, and that an EIS considering at least some of the potential, significant adverse impacts of future mining at this location should be prepared and be available to the decision-makers (the Whatcom County Planning Commission and the Whatcom County Council) before the Planning Commission makes its Recommendation and the Whatcom County Council makes its Decision on the proposed Comprehensive Plan Amendment which would put the subject property within the Mineral Resource Lands Overlay.

The Hearing Examiner file includes a large number of written comments from citizens concerned about impacts of a mining operation on that site. In general, these concerns relate to

protection of the aquifer and possible impacts on private wells in the area; impacts on the quality of life including noise, dust, and traffic impacts; impacts on property values; impacts on local tourist-related businesses in the immediate vicinity of the proposed expanded MRL; possible impacts on farming in the area; and adverse impacts on the Nooksack River and the current attempts to restore endangered fish species using the river.

Comments from both the Lummi Nation and Nooksack Indian Tribe raised concerns about the impact of mining in this area on salmonid populations and water quality in the Nooksack River. These comments, along with numerous other comments, point out that a great number of salmon restoration projects have been completed in this general area, and that there are a number of threatened salmonid species and trout that could be affected should the mining change conditions, including water temperature and water quality, within the Nooksack River.

In addition, comments were received from the Washington State Department of Archeology and Historic Preservation, stating that the area has a high potential for archeological resources and burials and requesting a professional archeological survey. The comments from the Lummi Nation and Nooksack Indian Tribe Officials also raised concern about impacts on cultural resources.

#### IV.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following

#### CONCLUSIONS OF LAW

##### I.

The proposed 280-acre expansion of the Mineral Resource Lands Overlay to include the subject parcel, pursuant to the request of Concrete Nor' West, requires a Comprehensive Plan Amendment. SEPA review process of the proposed Comprehensive Plan Amendment is the first step in review of the proposed Comprehensive Plan Amendment. After SEPA issues have been resolved, the Planning Department will review the proposed Amendment. It will be set for public hearing in front of the Whatcom County Planning Commission, and Whatcom County Planning and Development Services Staff will prepare and present a Staff Report to the Planning Commission. Public testimony will be taken. At the end of the Planning Commission proceedings, the Planning Commission will make a Recommendation, and the matter, along with the record before the Planning Commission, will be placed in front of the Whatcom County Council. The Council can either approve or deny the requested Mineral Resource Lands expansion. The Whatcom County Council, should it choose, can hold a public hearing prior to any vote on the proposed Comprehensive Plan Amendment.

If the Council approves the Amendment, that approval can be appealed to the Growth Management Hearings Board, pursuant to the Growth Management Act. Growth Management Hearings Board Decisions can be appealed to the Courts.

If the property is ultimately included in the Mineral Resource Lands Overlay, the underlying zoning will remain Commercial Forestry and the property owner can seek a discretionary Administrative Approval Use Permit to mine some, or all, of the site, pursuant to Chapter WCC 20.73. WCC 20.73 sets forth the process or procedure for obtaining a permit to mine and the criteria that Planning and Development Services Staff are to use in determining whether or not to grant administrative approval for the mining and, if granted, what Conditions of Approval are required in order to meet the requirements of Chapter WCC 20.73. Prior to making a decision, Whatcom County Planning, as the lead agency, will require SEPA review and issue a Threshold Determination of either Environmental Significance, which would require an Environmental Impact Statement or a Determination of Nonsignificance, which could include specific conditions to mitigate potential adverse environmental impacts not otherwise covered by current regulations.

In determining if, and under what conditions, an administrative approval for surfacing mining should be granted, the administrative decision-maker [Historically, the Whatcom County Geologist has reviewed and ruled on surface mining permit applications.] is to require at a minimum that the activity adhere to the Development and Performance Standards of WCC 20.73.700.

The notification requirements for administrative approval of a proposed surface mine have been expanded to cover all property owners within 1,000-feet of the external boundaries of the subject property. Other than the expanded notice provisions, the Administrative Approval Uses Permit section is processed using procedures and criteria set forth in WCC 20.84.235. This section gives the Planning Department the authority and responsibility to approve or deny Administrative Approval Uses Applications. The administrative decision is to be based upon compliance with the Development Standards established for the proposed use, in this case, WCC 20.73, as well as the Conditional Use Criteria set forth in WCC 20.84.220.

The Conditional Use Criteria of WCC 20.84.220 requires that the use be harmonious and in accordance with the objectives of the Whatcom County Comprehensive Plan and the applicable zoning regulations. Additionally, it sets forth a number of requirements which can be used to either condition the permit, or, in an appropriate situation, deny it. These additional criteria are aimed at appropriately mitigating the impacts of the proposed use on the surrounding community. If these impacts cannot be reasonably mitigated, denial of the permit application would be appropriate.

Pursuant to WCC 20.73 and 20.84, decisions of the Planning Department on Administrative Approval Use Permits are appealable to the Whatcom County Hearing Examiner. In the case of surface mining permit appeals, WCC 20.73 provides that the appeal to the Hearing Examiner is subject to *de novo* review. *De novo* review allows the Parties to create a new and complete record before the Hearing Examiner and allows the Hearing Examiner to make a decision without referring to or granting deference to the administrative decision made by Planning.

The decision by the Hearing Examiner on the appeal of the administrative decision, and on any appeals of the SEPA Threshold Determination made on the mining application, may be appealed to the Whatcom County Council and, ultimately, to the Courts.

## II.

The "mitigation conditions" placed on the DNS issued by the Responsible Official for this proposed Comprehensive Plan Amendment delayed the effective date of the approval of the Comprehensive Plan Amendment until such time as a site specific application for mining on this site was approved by the Whatcom County Council. It further modified the procedural requirements for obtaining a mining permit, as set forth in WCC 20.73 and WCC 20.84, to require the Applicant to enter into a Development Agreement, pursuant to State law and subject to approval by the Whatcom County Council.

If allowed to stand, the "mitigation conditions," placed on the DNS by the Responsible Official, would modify legislatively adopted procedural requirements for the Amendment of a Comprehensive Plan contained in the Revised Code of Washington. It would also rewrite the procedural requirements in the Whatcom County Code, adopted by the Whatcom County Council, and set forth in WCC 20.73 and WCC 20.84, for obtaining a permit for surface mining.

There is no authority allowing the Responsible Official to use his SEPA authority to set aside the statutory process requirements for obtaining a permit to mine, as set forth in the Whatcom County Code, by requiring a different process determined by the Responsible Official to be more appropriate. Neither the Responsible Official nor the Hearing Examiner has any authority to revise the Whatcom County Code. As pointed out by the Applicant, Concrete Nor'West, "Process is not an element of the environment subject to review under SEPA."

It was inappropriate for the Responsible Official to use the substantive power under SEPA to attach conditions to a Determination of Nonsignificance which both changed the process for the adoption of Comprehensive Plan Amendments under State law, and the process for obtaining a permit for site specific surface mining, pursuant to the Whatcom County Code.

The Appeal of Concrete Nor'West of the "mitigation conditions" should be upheld. The portion of the "mitigation conditions," which did not involve the process for obtaining a Comprehensive Plan Amendment approval and/or future approval of a permit to mine, just restated existing law, and did not mitigate environmental impacts.

## III.

A more difficult issue to resolve is the issue raised by Friends of the Nooksack Samish Watershed. Friends argues that at least some of the potential impacts of actual mining on this site should be the subject of an Environmental Impact Statement in order to provide the Planning Commission and Whatcom County Council with sufficient environmental information to decide whether the proposed expansion of the Mineral Resource Lands Overlay proposed by Concrete Nor'West should be approved.

Concrete Nor'West argues that the proposal is a non-project action, that prior to any mining taking place on this site, Concrete Nor'West would be required to address significant adverse

environmental impacts, if any, as part of the process for obtaining an actual site specific permit for any mining on the property.

The Responsible Official acknowledged the appropriateness of a phased review under SEPA which would not require an assessment of the environmental impacts of actual mining on this site until an application for a permit to mine was received and processed.

This Hearing Examiner reached the same conclusion in a prior case involving a proposed Comprehensive Plan Amendment to expand the Mineral Resource Lands Overlay to add an approximately 25-acre parcel to the MRL Overlay [Whatcom County Hearing Examiner file, APL2006-0024]. The Hearing Examiner's Decision was summarized on the first page of the decision as follows:

**Decision**

The Whatcom County Hearing Examiner concludes that future review of a mining project on the property will be subject to requirements for environmental analysis and mitigation, both under SEPA and pursuant to Whatcom County regulation of Mineral Resource Lands, including meeting the requirements for a permit to conduct surface mining. This will provide adequate analysis of and specific mitigation for any adverse environmental impacts of actual surface mining on this site.

Concrete Nor'West has submitted and cited two decisions of the Western Washington Growth Management Hearings Board dealing with the Whatcom County Comprehensive Plan and Zoning Ordinance in reference to designating Mineral Resource Lands and to obtaining site specific permits in Whatcom County for actual mining.

In the matter of Sherilyn C. Wells, et al., v. Whatcom County, Western Washington Growth Management Hearings Board, Case No. 97-2-0030c, 1998. [Exhibit 4-4 in the Hearing Examiner file], in reference to issues raised by Friends in this appeal, the Growth Management Hearings Board stated as follows:

"Similarly, there is no evidence in the record that the County's mineral lands designations create prohibited impacts on residential uses. Although existing mining activity should be conserved by mineral lands designation, it will not necessarily be enhanced. As the County stated, mineral lands designation is not a right to mine. CP Policy 8P-4 provides:

Allow mining within designated MRLs through zoning and a discretionary and administrative permit process, requiring:

1. on-site environmental review, with county as lead agency, and
2. application of appropriate site specific conditions, and

3. notification to neighboring property owners within 1,000 feet to insure opportunity for written input and/or appeal, and
4. access to de novo review by the Hearing Examiner if administrative approval or denial is appealed.

The record does not support Petitioners' arguments that residential uses will be impermissibly impacted by mineral lands designation. Project-specific review will provide the opportunity for residents likely to be affected by a mining proposal to voice their concerns to the County." [At page 10].

As can be seen from the above quote, Whatcom County had taken the position, before the Hearings Board, that a Mineral Resource Lands designation is not a right-to-mine. The Board accepted the County's argument that later project specific review provides the necessary opportunity to raise concerns about actual impacts of a mining proposal.

In a second decision by the Western Washington Growth Management Hearings Board, Case No. 05-2-0011, [Exhibit 4-5 of the Hearing Examiner's file] the Hearings Board addresses a Determination of Nonsignificance for the proposed addition of Mineral Resource Lands to the MRL Overlay, stating as follows:

"The SEPA process is staged in Whatcom County, applied both programmatically and specifically, and is not complete for a mineral resource lands matter until a final determination is made on an administrative approval permit for mining operations. Petitioner participated in this SEPA process to date and, in her case briefing, did not demonstrate that the County failed to properly utilize that process in issuing a DNS on the subject MRL designation. The County's arguments are persuasive." [at page 23]

The Responsible Official acknowledged this policy of Whatcom County to review and address, under SEPA, impacts of a proposed mining operation at the time there is an Administrative Approval Use Permit Application for a mining operation. Whatcom County has routinely not required a SEPA review of environmental issues related to actual mining operations during the process of determining whether or not to designate specific properties as Mineral Resource Lands, but instead considering the Comprehensive Plan Amendment to be a non-project action not subject to an impact analysis until an actual permit application has been filed. The Responsible Official acknowledged this policy in his letter of December 28, 2009, Exhibit No. 5, and through his three Threshold Determinations of Nonsignificance. None of the Threshold Determinations contained "mitigation conditions," designed to deal with potential adverse impacts from actual mining on this site.

Friends argues that this ongoing policy is in error and that at least some analysis of the actual potential adverse impacts from mining needs to be done under SEPA at the point where a specific project property may be placed within a Mineral Resource Lands Overlay.

In support of this position, Friends mainly relies on King County v. Washington State Boundary Review Board for King County, et al, 122 Wash.2d 648, 860 P.2d 1024 (1994), hereinafter referred to as Black Diamond. In Black Diamond, the Supreme Court was dealing with an Annexation by the City of Black Diamond of lands in unincorporated King County approved by the King County Boundary Review Board. The Washington State Supreme Court in a 5-3 decision held that an Environmental Impact Statement should have been prepared for the proposed annexations, reversed the Determination of Nonsignificance issued by the City of Black Diamond and remanded the matter with the requirement that an Environmental Impact Statement be prepared and that the Board re-open its hearings to consider the Environmental Impact Statement, and then issue a new decision.

The three Justices who dissented argued that an Environmental Impact Statement was not required at this point because future allowed and potential uses were speculative.

In Black Diamond, the Supreme Court concluded as follows:

We therefore hold that a proposed land-use related action is not insulated from full environmental review simply because there are no existing specific proposals to develop the land in question or because there are no immediate land-use changes which will flow from proposed action. Instead, an EIS should be prepared where the responsible agency determines that significant adverse environmental impacts are probable following the government action. [at page 12].

The Court also points out in a footnote that agencies can limit the scope of the EIS to "the level of detail appropriate to the scope of the non-project proposal," citing WAC 197-11-442 (2). In support of the Court's decision, the Court pointed out that a likelihood of development of the annexed property was unquestionable and that, if annexed, "they will by force of law become part of the Black Diamond Urban Growth Area."

The Hearing Examiner reads this decision to indicate that there is no clear or absolute line of demarcation between project specific applications requiring full environmental review and non-project applications, which are often exempted from environmental review because the impacts of future development may be speculative.

In Black Diamond, the Court concluded that the annexation action itself would unquestionably result in future development which could have significant adverse environmental impacts. In this case, future mining on this site, if added to the MRL Overlay, is not a foregone conclusion.

In this appeal, the Hearing Examiner does not believe that expanding the Mineral Resource Lands Overlay, the subject site will unquestionably lead to new or different development than that which is currently allowed. It will allow applications for surfacing mining on the site where they are prohibited at this time. But the surface mining activity will only be allowed after a full environmental

review and findings by decision-makers that both the specific development standards, both for surface mines and the more-general Conditional Use Criteria, can be met.

#### IV.

A careful reading of the Whatcom County Comprehensive Plan establishes that the legislative body envisioned a two-step approval process prior to the granting of surface mine permits. Pursuant to the Growth Management Act, Whatcom County is required to identify mineral resource lands of value and to provide a regulatory framework which allows surface mining in appropriate situations.

The first phase of determining whether or not surface mining should take place in a given area is the application of the Designation Criteria for Mineral Resource Lands set forth in Chapter 8 of the Whatcom County Comprehensive Plan, starting on page 8-29. These criteria direct the Planning Commission and the Whatcom County Council when considering proposed additions to the MLR Overlay. Concrete Nor'West would have to convince the decision-makers that the site which they wish to incorporate into the MRL Overlay meets these Designation Criteria. These criteria do not require a complete investigation of potential significant environmental impacts of future mining, prior to designating a property as a Mineral Resource Land.

On the other hand, Goal 8-P of Chapter 8 of the Whatcom County Comprehensive Plan, Policy 8-4; specifically states that environmental review and the application of appropriate site specific conditions be determined through an administrative permit approval process, pursuant to the Zoning Ordinance, requiring notification to property owners within 1,000-feet of the boundary of the site, to ensure opportunity for written input and/or appeal and granting access to *de novo* review by the Hearing Examiner.

These Comprehensive Plan Policies are carried out by the development regulations of WCC 20.73 and application of the Conditional Use Criteria of WCC 20.84, which included a finding that a site specific proposed mining operation be consistent with the Goals and Policies of the Whatcom County Comprehensive Plan.

In regard to Resource Lands, Comprehensive Plan Goal 8-Q, dealing with fish and wildlife, reads as follows:

Goal 8-Q: Ensure that mining avoids adverse impacts to the habitat of threatened and endangered fish and wildlife species.

In order to approve a specific mining operation, the decision-maker would have to conclude that this Goal has been met. In the case of this subject parcel, there is a reasonable amount of evidence already in the record which suggests that there is a potential for adverse impacts to the habitat of threatened and endangered fish species. The Applicant would be required to establish that mining could take place at this location while avoiding these potential adverse impacts, or the application to mine could be denied based on lack of consistency with the Comprehensive Plan.

Additionally, if an Environmental Impact Statement is required for proposed mining on this site, the decision-maker has substantive authority under SEPA to attach conditions to an administrative permit approval for a mining operation necessary to mitigate specific, identified adverse environmental impacts, or to deny a permit or approval, using substantive authority of SEPA, based on a finding that the mining proposal would result in probable significant adverse environmental impacts identified in the Final Environmental Impact Statement. WCC 16.08.160.

## V.

The Hearing Examiner's reading of the Comprehensive Plan in relation to mineral resource lands and surface mining, along with the adopted regulations applying to the Mineral Resource Lands, anticipated a bifurcated review process in which the Whatcom County Council would determine what properties to place within the MRL based on specific Designation Criteria referring mainly to the value and location of non-metallic mineral deposits while leaving the determination of the impacts and approval or denial of specific mining operations to an administrative permit approval process, with *de novo* appeal to the Hearing Examiner.

Whatcom County has specifically argued before the Growth Management Hearings Board that this is the process chosen and the Hearings Board has upheld this bifurcated process as being appropriate and legal.

Whatcom County could have chosen a different process, could have Designation Criteria which would include a full environmental review of mining impacts and could have allowed mining on mineral resource lands to be an outright permitted use once a property is designated as a Mineral Resource Land. Whatcom County has chosen to take a different path. This path is consistent with the general division between project actions and non-project actions allowed under SEPA.

## VI.

The Threshold Determination of the Responsible Official under SEPA is entitled to substantial weight. Friends has failed to show sufficient evidence of a substantial likelihood of a significant environmental impact should the Whatcom County Council approve the request to include the subject property within the Mineral Resource Lands Overlay.

The SEPA Determination relates to a non-project action which requires an application for Administrative Approval Use Permit for a surface mining permit in the future. The application for an Administrative Approval Use Permit is for actual mining and will be subject to full environmental review at the time an actual mining proposal is submitted. At the time the application is submitted and reviewed, Whatcom County has full authority to require an Environmental Impact Statement, if deemed appropriate by the Responsible Official; to attach substantive mitigation conditions to any Determination of Nonsignificance; to deny, based on the substantive authority under SEPA, any permit application, which has been subjected to the requirement for an Environmental Impact Statement; and to deny or condition any permit application based on the criteria set forth in WCC 20.73 and WCC 20.84.235, including, by reference, the Conditional Use Criteria of WCC 20.84.220,

which allow a permit application to be denied based on its failure to establish that it is harmonious and in accordance with the general and specific objectives of the Whatcom County Comprehensive Plan.

VII.

The decision of the Responsible Official to issue a DNS for the proposed addition of the 280-acres to the Mineral Resource Lands Overlay should be upheld. The request of Friends of the Nooksack Samish Watershed that the Hearing Examiner overturn the DNS issued and require an EIS should be denied.

VIII.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following

DECISION

*The Appeal of Concrete Nor West of the Mitigation Conditions attached to the DNS by the Responsible Official is UPHELD.*

*The Appeal of Friends of the Nooksack Samish Watershed requesting that the Hearing Examiner overturn the Determination of Nonsignificance, issued by the Responsible Official, is DENIED.*

NOTICE OF APPEAL PROCEDURES FROM FINAL DECISIONS OF  
THE WHATCOM COUNTY HEARING EXAMINER

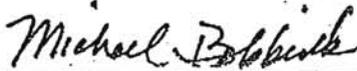
This action of the Hearing Examiner is final. The following review procedure is available from this decision and may be taken by the applicant, any party of record, or any County department.

Appeal to County Council. Within ten business days of the date of the decision a written notice of appeal may be filed with, and all required filing fees paid to, the Whatcom County Council, Courthouse - 1st Floor, 311 Grand Avenue, Bellingham, WA 98225. The appeal notice must state either:

- 1) The specific error of law which is alleged, or
- 2) How the decision is clearly erroneous on the entire record.

More detailed information about appeal procedures is contained in the Official Zoning Ordinance at Section 20.92:600-.830. A copy of this document is available for review at the County Council Office. After an appeal has been filed and the Council office has received the hearing record and transcript of the public hearing, the parties will be notified of the time and date to file written arguments.

DATED this 16<sup>th</sup> day of June 2010.

  
Michael Bobbink, Hearing Examiner

Comprehensive Plan which states as follows:

**Policy 8P-1** Designate a 50 year supply of commercially significant construction aggregate supply.

On January 22, 2008 the County filed a motion to dismiss the Petition for Review. Concrete Nor'West responded to the motion on February 5, 2008.

A telephonic hearing on the motion was heard on February 13, 2008. Petitioner Concrete Nor'west appeared through its attorney Lesa R. Starkenburg-Kroontje. Whatcom County appeared through its attorney Karen Frakes. All three Board members attended, James McNamara presiding.

### III. ISSUES ON APPEAL

\*3 On the motion, the issues for the Board are:

1. Does the Board have jurisdiction over the Petition for Review where the challenged action is the decision of the County to deny an application to change the comprehensive plan and zoning designation to adopt a mineral resource lands comprehensive plan and zoning designation for approximately 24.9 acres of Petitioner's land?
2. Assuming that the first question is answered in the affirmative, does the petition for review state a claim upon which the Board may act where Petitioner has not alleged that its property met the County's requirements for designation of a mineral resource land pursuant to its adopted designation criteria?

### IV. DISCUSSION

#### Positions of the Parties

##### **County's Position**

The County begins by pointing out that it adopted its Comprehensive Plan in 1997. Its plan included specific provisions regarding mineral resource lands and designation of mineral lands of long-term commercial significance. [FN5] Following a challenge to those provisions, the Board found the mineral resource provisions complied with the GMA in *Wells v. Whatcom County, WWGMHB No. 97-2-0030c (FDO, January 16, 1998)*.

Pursuant to RCW 36.70A.130, the County completed a review and update of its Comprehensive Plan seven years later, including changes to the mineral resource provisions. The County notes that the Board found that update compliant with the GMA in *Franz v. Whatcom County, et al., WWGMHB No. 05-2-0011*. Having conducted the review of its 1997 plan, the County argues that it is currently under no obligation under the GMA to review its plan until the next seven year review in 2011. [FN6]

The County relates that, on December 30, 2005, Concrete Nor'west filed an application with the County for an amendment to the County comprehensive plan and zoning map to create a mineral resource land and zoning overlay designation for approximately 24.9 acres. [FN7] The matter was considered and denied by the County Council at a public hearing held on January 30, 2007. [FN8] The County argues that the Board does not have jurisdiction over decisions to deny an application to amend a comprehensive plan or development regulation. Instead, the County argues, unless a petition alleges that a comprehensive plan, a development regulation or amendments to either violate the GMA, the Board does not have subject matter jurisdiction to hear the petition. [FN9] Further, the County argues, a review based on a "failure to act" is authorized only where the jurisdiction fails to take an "action by a deadline specified in the act", citing to WAC 242-02-220(5). [FN10] Because the County did not adopt any changes to its GMA compliant comprehensive plan or development regulations, and

287

did not fail to meet any deadline established by the GMA, the Board lacks subject matter jurisdiction, the County argues.

#### **Petitioner's Position**

\*4 Petitioner argues that both approvals and denials of comprehensive plan amendments are subject to hearings board appeal. [FN11] It asserts that the annual review provisions of the Growth Management Act is a requirement that the County must engage in and over which the Board has jurisdiction. The County's review and evaluation of proposed amendments constitute an "action" reviewable by the Board, it claims.

Petitioner further claims that the annual review process is also intended to provide the opportunity to consider newly acquired information and thereby meet its requirement under RCW36.70A.171 to review its mineral resource land designations.

Just as the County is required to address non-compliant provisions of its plan during an update under RCW36.70A. 130(1) and (4), so too should it be required to address noncompliance issues in its mineral designations when it elected to consider its proposal, Petitioner suggests. [FN12]

Petitioner also claims that when the County engages in the update process set forth in RCW 36.70A. 130(2) and publicizes its annual comprehensive plan review, it opens itself up to challenge if that review results in actions that are in violation of GMA mandates. In this case, Petitioner asserts, those violations include the County's failure to designate its property as mineral resource lands.

#### **Board Discussion**

***1. Does the Board have jurisdiction over the Petition for Review where the challenged action is the decision of the County to deny an application to change the comprehensive plan and zoning designation to adopt a mineral resource lands comprehensive plan and zoning designation for approximately 24.9 acres of Petitioner's land?***

At the outset, we reject the County's broad proposition that the Growth Management Hearings Boards lack jurisdiction over any denial of an application for an amendment to a local jurisdiction's comprehensive plan.

Significantly, neither party cited in their briefs any Washington appellate court decisions or prior decisions of the Western Board that addressed the issue of the Board's jurisdiction to hear an appeal of a denial of a comprehensive plan amendment. Therefore, we look to the language of the statute.

The jurisdiction of the boards is established in RCW 36.70A.280 and 36.70A.290. RCW 36.70A.280(1)(a) provides:

- (1) A growth management hearings board shall hear and determine only those petitions alleging either:
  - (a) That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21 C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW;

The County stated at oral argument that it accepts and considers applications for mineral resource land designation as part of the annual review of its comprehensive plan. It also admitted that, in the event that it grants an application to designate a property with the mineral resource land designation, that determination is subject to appeal to the Board. However, it maintains that a denial of the same type of application is not subject to Board appeal. It cites to the provisions of RCW 36.70A.280(1)(a) that give the Board jurisdiction over compliance with

the GMA “as it relates to plan, development regulations or amendments” [FN13] and RCW 36.70A.290(2) language regarding petitions “relating to whether or not an adopted plan, development regulation, or permanent amendment thereto is in compliance with the goals and requirements of this chapter”. [FN14] The distinction, the County argues, is that applying the mineral resource land designation requires a plan amendment and in this case, no such amendment was made. Thus, the County argues, because the Board does not have subject matter jurisdiction in the absence of a plan amendment, this appeal must be dismissed.

\*5 We do not read RCW 36.70A.280(1) and 36.70A.290(2) so narrowly. The Washington Supreme Court has held that the Board's jurisdiction is limited to comprehensive plans, development regulations and amendments thereto. [FN15] The subject of Petitioner's appeal is a comprehensive plan amendment and therefore within the scope of the grant of jurisdiction to the boards. Further, the courts hold that the question of compliance with the GMA is uniquely a board question. [FN16] If the boards do not have jurisdiction over a denial of a comprehensive plan amendment, there is no remedy for the petitioner whose application for a comprehensive plan amendment has been denied since there is no other avenue for appeal.

But a local jurisdiction can find itself “not in compliance with the requirements of this chapter” even when it denies an application submitted during annual review. By way of example, RCW36.70A.140 imposes the following duty:

Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments .... (emphasis supplied)

Were a local jurisdiction to fail to comply with this duty of public participation in the consideration of proposed amendments, it could hardly be asserted as a defense that, because the proposals were ultimately not adopted, the Board had no jurisdiction to consider a challenge to a lack of public participation. Instead, even in the face of a denial, the Board would have jurisdiction to determine if the city or county was “in compliance with the requirements of this chapter” with regard to GMA public participation requirements in reaching that determination.

In our example, the critical question is not, therefore, whether the local jurisdiction denied a request for a comprehensive plan amendment but whether the denial violated a requirement imposed under the GMA. [FN17] RCW36.70A.140 imposes a requirement to adopt and follow a public participation plan. In the absence of a remedy for failing to follow the public participation plan, the adoption of one would be a meaningless act. Thus, the County's position that, in the absence of an amendment, the Board is without jurisdiction to review a denial of a proposed amendment is incorrect.

While the application of the County's mineral resource land designation criteria is a different type of issue from the just cited public participation example, there is an important similarity. Just as a jurisdiction could not take shelter in a failure to engage in public participation merely because the application under consideration was denied, neither can the County shield itself from a review of how it applies its mineral resource designation criteria based on its decision to deny a request to make a designation change. In the case of public participation requirements, the process by which the local jurisdiction reaches its ultimate conclusion is subject to review; in the present case, the process of considering the application of the designation criteria would be an appropriate area

205

of Board review. Were it otherwise, it would not be possible for the Board to review those cases where the County's mineral resource land designation criteria were misapplied or misinterpreted so as to deny designation in cases where the lands under consideration met the applicable criteria. Furthermore, an aggrieved party seeking to challenge the County's decision to deny a proposed redesignation would have no recourse to the courts as the adoption and amendment of comprehensive plans is a matter over which the Growth Management Hearings Boards have jurisdiction. [FN18]

\*6 The County characterizes the Petitioner's challenge as based on a "failure to act" [FN19] and points out that it adopted its mineral resource lands provisions, including the required designation of mineral lands of long-term commercial significance in 1997. [FN20] It further notes that, seven years later, it performed the review of its comprehensive plan and mineral resource provisions, as required by RCW36.70A.130. [FN21] Consequently, it argues, it had no obligation to revisit this portion of the comprehensive plan in 2006, when this application was submitted, and that its mineral resource provisions are immune from challenge until 2011, [FN22]

However, merely because the County is currently under no obligation to review its mineral resource lands provisions at the present time does not mean that the failure to follow its adopted process and criteria for a designation change is subject to challenge only every seven years.

As part of its effort to conserve mineral resource lands, the County adopted a process within its comprehensive plan for designation of mineral resource lands upon application of the property owner or operator. The County's Mineral Resources section of its comprehensive plan describes the difficulty of designating a sufficient supply of mineral resources and calls for an expansion of mineral resource designations that meet certain criteria:

The fifty year demand for minerals in Whatcom County is difficult to project and requires many assumptions. Based upon Whatcom County's per capita rate of consumption of 12.2 cubic yards of sand & gravel and 1.3 cubic yards of bedrock that is being utilized for official planning purposes, approximately 174.4 million cubic yards would be required over the fifty year planning period from 2005-2054. The Washington State Department of Natural Resources, however, has recommended a per capita rate that would result in a fifty year demand of approximately 129 million cubic yards in Whatcom County. This estimate assumes that conservation, recycling, increased cost, high density development (which requires less rock per person), and political decisions will result in reduced demand despite continued population growth. Conversely, some factors may increase demand for aggregate such as the construction of mass transportation systems, the possible substitution of masonry materials for wood products, and increased exports to Canada or other United States counties.

Meeting the demand for construction aggregate in Whatcom County requires expansion of the mineral resource land designations and the consideration of the importation of aggregates. The policies and criteria below are meant to guide meeting the demand for construction aggregate. [FN23]

The comprehensive plan then goes on to specify 17 designation criteria. [FN24] Using those designation criteria, the plan establishes a process for making additional designations. One of those methods is upon the application of the owner or operator of a mineral resource operation:

#### **MINERAL RESOURCES - SITE SELECTION METHOD**

- \*7 1. Sites meeting Mineral Resources Designation Criteria 1-5 (and areas enclosed by these sites greater than 50%).
2. Sites requested by owner or operator meeting designation criteria.
3. Sites that are regionally significant meeting designation criteria.

4. Sites adjacent to both roads and other proposed MRL sites meeting designation criteria [FN25]

Having chosen to adopt a process for considering applications for the designation of additional mineral resource lands as part of its GMA requirement to conserve natural resource lands, the County cannot then avoid review of the decisions it makes upon those applications during annual review.

While we do not accept the County's position that the boards lack jurisdiction over denials of proposed plan amendments, neither do we accept Petitioner's argument that a local jurisdiction necessarily opens unamended portions of its plan to appeal when it conducts its annual review. Petitioner misreads the statutory scheme of plan updates set forth in RCW 36.70A.130. Contrary to its assertion that "The annual procedure to either legislatively amend, or chose not to amend, a comprehensive plan is a requirement for Whatcom County under the GMA" [FN26] the GMA instead provides that local jurisdictions may consider updates, proposed amendments or revisions may be considered "no more frequently than once every year".[FN27] Pursuant to RCW 36.70A.130(4)(a) the County shall review, and if necessary revise, its comprehensive plan every seven years. It is this seven year update cycle to which RCW 36.70A.131 refers when it mandates that the County shall review its mineral resource lands designations and development regulations as part of the review required by RCW 36.70A. 130(1).

**Conclusion:** The subject of Petitioner's appeal is a comprehensive plan amendment and therefore within the scope of the grant of jurisdiction to the boards. The County's process for considering applications for the designation of additional mineral resource lands as part of its GMA requirement to conserve natural resource lands is subject to Board review even when that review concludes in denial of an application.

***2. Assuming that the first question is answered in the affirmative, does the petition for review state a claim upon which the Board may act where Petitioner has not alleged that its property met the County's requirements for designation of a mineral resource land pursuant to its adopted designation criteria?***

Having concluded that the mere fact of the denial of the Petitioner's application does not divest the Board of jurisdiction, this does not necessarily lead to the conclusion that the Board can hear this appeal. Instead, we must examine the issues presented in the Petition for Review to determine if they present claims that the Board can address in this appeal.

In this case, Petitioner has not alleged a violation of a GMA requirement with regard to the very aspect of the County's process that we have concluded is subject to review - the application of the mineral resource designation criteria.

\*8 Once the plan has been found compliant or is presumed compliant after the period for appeal has expired, the goals and procedures adopted in the plan are presumed to comply with the GMA. When a local jurisdiction acts in conformity with its compliant comprehensive plan, there is no basis for a challenge to those actions as failing to comply with GMA goals and requirements. Once a comprehensive plan is adopted and is either found or deemed compliant with the GMA, challenges may not be brought to compliance with GMA goals but must be brought under the policies and objectives adopted by the comprehensive plan to meet GMA requirements. Therefore, Petitioner's challenges in Issue 1, i.e. failure to comply with goals 5, 6 and 8 of the GMA, [FN28] are not timely.

As we have already addressed above, the challenges in Issue 2 (to the sufficiency of the annual review) are not well-founded. The compliance of the County's plan policies and development regulations are not opened for re-

291

view annually unless the County adopts a change to them. The seven-year update pursuant to RCW 36.70A.130 is the opportunity for the County and its citizens to raise amendments to bring the plan and development regulations into compliance where necessary.

Although it is possible to raise a claim for violation of the County's own plan requirements, the petition for review did not do that. The violation of the County's comprehensive plan goals asserted in Issues 3 and 4 do not raise claims under express requirements of the plan with respect to the property at issue here. Goals 8H, 8K, 8P and 8P-1 state general objectives of the County's mineral resource lands strategy; they do not require any particular action with respect to the Petitioner's application. While the plan does contain requirements for the consideration of additional mineral resource lands designations upon application of the property owner, those plan requirements are not challenged in the petition for review.

A Growth Management Hearings Board may decide only issues "presented to the board in the statement of issues, as modified by any prehearing order".[FN29] The issues in this case, as stated in the Prehearing Order allege that that County's decision to not make a designation change to Petitioner's property violated GMA goals five, six and eight (issue 1); that the County violated its obligations under RCW36.70A. 130(1)(a), .131 and .170(c) (issue 2); that the County violated its own comprehensive plan goals (issue 3); and that the County violated a comprehensive plan policy (issue 4). Conspicuously absent is an allegation that the County misapplied its mineral resource land designation criteria, and that Petitioner's property qualified for designation under those criteria. In the absence of such an allegation, under RCW 36.70A.290(1), the Board lacks a basis upon which to consider whether the County applied those criteria correctly. Since the petition for review fails to state a claim of a failure to follow a plan requirement in the County's determination with regard to the mineral resource lands designation criteria, this appeal must be dismissed.

**\*9 Conclusion:** Petitioner has not alleged a violation of a GMA requirement with regard to the very aspect of the County's process that we have concluded is subject to review - the application of the mineral resource designation criteria. In addition, Petitioner's challenges in Issue 1 are not timely. Once a comprehensive plan is adopted and is either found or deemed compliant with the GMA, challenges may not be brought to compliance with GMA goals but must be brought under the policies and objectives adopted by the comprehensive plan to meet GMA requirements. The challenges in Issue 2 are not well-founded. The compliance of the County's plan policies and development regulations are not opened for review annually unless the County adopts a change to them, which is not the case here. The violation of the County's comprehensive plan goals asserted in Issues 3 and 4 do not raise claims under express requirements of the plan with respect to the property at issue here.

#### V. FINDINGS OF FACT

1. Whatcom County is a county located west of the crest of the Cascade Mountains that is required to plan pursuant to RCW 36.76A.040.
2. On December 20, 2006 Petitioner submitted an application for an amendment to the Whatcom County Comprehensive Plan and zoning map to create a mineral resource land and zoning overlay designation for approximately 24.9 acres. The application was considered by County staff and the Planning Council.
3. On September 25, 2007, the Whatcom County Council adopted its 2007 comprehensive plan amendments. These amendments did not include the amendment requested by Petitioner.
4. On November 16, 2007 Petitioner filed a timely Petition for Review.
5. The Petition for Review in this case did not allege that the County improperly applied its mineral resource lands designation criteria, nor that Petitioner's property met those criteria.

6. Any Finding of Fact later determined to be a Conclusion of Law is adopted as such.

#### VI. CONCLUSIONS OF LAW

- A. The Board has jurisdiction over the parties to this action.
- B. Petitioner Concrete Nor'West has standing to raise the issues in this case.
- C. The jurisdiction of the Board includes the authority under RCW 36.70A.280(1) to determine whether a state agency, county, or city planning under RCW 36.70A is not in compliance with the requirements of this chapter.
- D. The subject of Petitioner's appeal is a comprehensive plan amendment and therefore within the scope of the grant of jurisdiction to the boards.
- E. The County's process for considering applications for the designation of additional mineral resource lands as part of its GMA requirement to conserve natural resource lands is subject to board review pursuant to RCW 36.70A. 280(1).
- F. The Board can find a county or city "not in compliance with the requirements of this chapter" within the meaning of RCW 36.70A.280(1) even where county or city denies an application submitted during annual review.
- \*10 G. A Growth Management Hearings Board may decide only issues presented to the board in the statement of issues, as modified by any prehearing order pursuant to RCW 36.70A. 290(1).
- H. Absent an allegation in the Petition for Review that the County misapplied its mineral resource land designation criteria, and that Petitioner's property qualified for designation under those criteria the Petitioner has failed to allege violations sufficient to allow the Board to consider whether the County applied those criteria correctly pursuant to RCW 36.70A.290(1).
- I. Once a comprehensive plan is adopted and is either found or deemed compliant with the GMA, challenges may not be brought to compliance with GMA goals but must be brought under the policies and objectives adopted by the comprehensive plan to meet GMA requirements.
- J. The challenges in Issue 2 are not well-founded. The compliance of the County's plan policies and development regulations are not opened for review annually unless the County adopts a change to them, which is not the case here pursuant to RCW 36.70A.130(1)and(4).
- K. The violation of the County's comprehensive plan goals asserted in Issues 3 and 4 do not raise claims under express requirements of the plan with respect to the property at issue here, and therefore will not be considered by the Board pursuant to RCW36.70A.290(1).
- L. Any Conclusion of Law later determined to be a Finding of Fact is adopted as such.

#### VII. ORDER

Based upon a review of the Petition for Review, the briefs and exhibits submitted by the parties, and having considered oral argument, and deliberated, the County's motion to dismiss the Petition for Review is GRANTED.

So Ordered this 28th day of February, 2008.

James McNamara  
Board Member

Holly Gadbow  
Board Member

293

Margery Hite  
Board Member

FN1. Respondent's Dispositive Motion, filed January 22, 2008.

FN2. Petitioner's Memorandum in Opposition to Dispositive Motion, at 2.

FN3. Id.

FN4. Id.

FN5. Respondent's Memorandum in Support of Dispositive Motion, at 1.

FN6. Id. at 2.

FN7. Id. at 3.

FN8. Id.

FN9. Id. at 4.

FN10. Id.

FN11. Id. at 4.

FN12. Id. at 9.

FN13. Respondent's Memorandum in Support of Dispositive Motion, at 4.

FN14. Id.

FN15. *Wenatchee Sportsmen v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (1999).

FN16. *Woods v. Kittitas County*, Slip Opinion 78331-4 (Dec. 20, 2007) at 19; *Somers v. Snohomish County*, 105 Wn.App. 937, 21 P.3d 1165 (2001, Div. I).

FN17. In this interpretation, this Board accords with *City of Tacoma v. Pierce County*, CPSGMHB Case No. 99-3- 0023 (Order on Reconsideration, March 27, 2000).

FN18. RCW 36.70A.280.

FN19. See, WAC 242-02-220(5).

FN20. Petitioner's Memorandum in Opposition to Dispositive Motion, at 1.

FN21. Id. at 2

FN22. Id.

FN23. Whatcom County Comprehensive Plan at 8-26 - 8-27.

204

FN24. *Ibid* at 8-29 -8-30.

FN25. Whatcom County Comprehensive Plan, at 8-30.

FN26. Respondent's Memorandum in Support of Dispositive Motion, at 6.

FN27. RCW 36.70A.130(2)(a).

FN28. RCW36.70A.020(5), (6) and (8).

FN29. RCW 36.70A.290(1).

**\*11 Pursuant to RCW 36.70A.300 this is a final order of the Board.**

**Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this Order to file a petition for reconsideration. Petitions for reconsideration shall follow the format set out in WAC 242-02-832. The original and three copies of the petition for reconsideration, together with any argument in support thereof, should be filed by mailing, faxing or delivering the document directly to the Board, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

**Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person, by fax or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order.

**Service.** This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(1)

2008 WL 1766781 (West.Wash.Growth.Mgmt.Hrgs.Bd.)

END OF DOCUMENT

295

COURT OF APPEALS, DIVISION II

OF STATE OF WASHINGTON

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

Appellants,

vs.

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

Respondents.

NO. 45563-3-II

CERTIFICATE OF SERVICE

14 APR 14 PM 3:20  
J. OSTRUSKE

THIS IS TO CERTIFY that on this 14<sup>th</sup> day of April, 2014, I served  
via the U.S. Postal Service, a true and correct copy of Appellants' Reply  
Brief by addressing for delivery to the following:

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