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NO. 84894-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

COURT OF APPEALS NO. 62843-7-I

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SCOTT E. STAFNE,

Appellant,

vs.

SNOHOMISH COUNTY AND SNOHOMISH COUNTY PLANNING  
DEPARTMENT,

Respondents.

*AMICUS CURIAE* WASHINGTON ASSOCIATION OF  
PROSECUTING ATTORNEYS' MEMORANDUM IN SUPPORT OF  
SNOHOMISH COUNTY'S PETITION FOR REVIEW

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## TABLE OF CONTENTS

Table of Authorities .....	ii
I. INTRODUCTION .....	1
II. INTEREST OF <i>AMICUS CURIAE</i> .....	1
III. ISSUES PRESENTED FOR REVIEW .....	2
IV. ARGUMENT .....	2
A. The Court of Appeals' Decision is Contrary to Supreme Court Precedent .....	2
B. The Court of Appeals' Decision is in Conflict with Another Decision of the Court of Appeals.....	5
C. The Issues Involved with Snohomish County's Petition are of Substantial Public Interest.....	7
V. CONCLUSION.....	10

**TABLE OF AUTHORITIES**

**Washington State Cases**

Coffey v. City of Walla Walla,  
145 Wn.App. 435, 438, 187 P.3d 272 (2008).....6

Torrence v. King County  
136 Wn.2d 783, 785, 966 P.2d 891 (1998).....2, 3, 4

**Statutes and Court Rules**

RAP 13.4(b)(1).....2

RAP 13.4(b)(2) .....6

RAP 13.4(b)(4) .....7

RCW 36.27.020 .....1

RCW 36.70A.020(11).....9

RCW 36.70A.130.....7

RCW 36.70A.290(2).....9

RCW 36.70A.290(3).....9

RCW 36.70A.300(2).....9

RCW 36.70C.020(2)(a).....5

**Other Authorities**

King County Comprehensive Plan Docket Proposals  
[http://www.kingcounty.gov/property/permits/codes/growth/Complan/  
amend/YearlyReport/DocketArchive.aspx](http://www.kingcounty.gov/property/permits/codes/growth/Complan/amend/YearlyReport/DocketArchive.aspx) .....7

## I. INTRODUCTION

*Amicus curiae* Washington Association of Prosecuting Attorneys ("WAPA") respectfully urges this Court to accept review of Stafne v. Snohomish County and Snohomish County Planning Department, Court of Appeals No. 62843-7-I, which decision was ordered published on June 30, 2010, and is appended to Snohomish County's Petition for Review.

## II. INTEREST OF *AMICUS CURIAE*

WAPA is a statewide association of the 39 elected prosecuting attorneys. WAPA assists the prosecuting attorneys in carrying out the statutory duties found at RCW 36.27.020. WAPA accomplishes its purpose by appearing as *amicus curiae* or intervenor in pending lawsuits, proposing legislation, and testifying regarding legislation proposed by others. Prosecuting attorneys are responsible for providing legal counsel to the counties on a wide range of land use issues, including planning under the Growth Management Act ("GMA"). Prosecutors also represent the counties in litigation arising out of land use decisions, including suits arising out of enactments of comprehensive plan updates and amendments. The prosecuting attorneys, therefore, have a vital interest in this case which will determine how challenges to comprehensive plan amendments will be litigated, and in what forum. WAPA supports Snohomish County's petition for review.

### III. ISSUES PRESENTED FOR REVIEW

WAPA refers the Court to Snohomish County's Petition for Review, which identifies the issues presented for review.

### IV. ARGUMENT

The GMA was adopted by the state legislature in 1990. The GMA requires that certain counties and cities jointly plan for future development. As part of that planning process, participating jurisdictions are required to adopt comprehensive plans and accompanying development regulations to implement the plans. Planning jurisdictions must also provide an avenue by which the public may submit proposed comprehensive plan changes. At issue here is the significant question of how county decisions regarding those proposed changes may and should be appealed. For the following reasons, WAPA respectfully requests that this Court grant review.

#### **A. The Court of Appeals' Decision is Contrary to Supreme Court Precedent.**

The Court of Appeals' decision is in conflict with this Court's decision in Torrence v. King County, 136 Wn.2d 783, 966 P.2d 891 (1998), and therefore review is warranted. RAP 13.4(b)(1). In Torrence, pursuant to the GMA, King County had designated the Torrence property as agricultural land of long-term commercial significance. Torrence v.

King County, 136 Wn.2d at 785. Several years later, as part of the County's comprehensive plan update, Torrence requested the agricultural designation be removed and the property be reclassified as industrial. Id. at 786. The proposed amendment was considered by King County but not adopted. Id. Torrence petitioned the Central Puget Sound Growth Management Hearings Board ("Board") to review the County's decision not to reclassify the property. Id. The Board ultimately found King County in compliance with the GMA because the County's decision not to adopt Torrence's proposal was not illegal under the Act. Id.

However, prior to the Board's decision, which would have been appealable to superior court, Torrence filed a separate lawsuit in superior court. Id. Torrence's suit was premised on the same facts as the matter before the Board, but was styled as a Land Use Petition Act ("LUPA") appeal. Id. at 786-87. Torrence later amended the complaint to add a request for a constitutional writ of certiorari. Id. at 787. Torrence's LUPA claims "were dismissed by court order . . . because the superior court found King County took no action subject to challenge under LUPA." Id., fn 2. However, the superior court did determine that the constitutional writ of certiorari should issue. Id. at 787.

On direct appeal, this Court reversed finding that Torrence's "decision to forgo an available appeal [an appeal of the Board's decision]

and to instead seek a remedy by means of a constitutional writ of certiorari [wa]s fatal to Torrence's case." Id. at 792. This Court stated that the GMA establishes an administrative review process designed to resolve allegations that a local government failed to comply with the GMA and that any challenger must file a petition with the Board. Id. at 788. This Court further found that pursuant to the GMA and the Administrative Procedure Act, a party wishing to challenge a Board decision may bring an appeal in superior court and that this appeal process "provides an aggrieved party the opportunity for adequate and complete relief from a GMHB decision." Id. at 790, 793.

Contrary to Torrence, the Court of Appeals here found that Stafne was not required to appeal Snohomish County's comprehensive plan decision to the Board, but rather, could appeal directly to superior court. The Court of Appeals' decision is contrary to Torrence and its reasoning is unavailing. The Court of Appeals determined that Stafne could file a LUPA appeal directly with the superior court since the exhaustion requirement of filing with the Board was rendered futile in light of the Board's view that it does not have jurisdiction to consider a county's decision to reject a comprehensive plan docketing proposal.

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**B. The Court of Appeals' Decision is in Conflict with Another Decision of the Court of Appeals.**

The Court of Appeals erred in concluding that Stafne could appeal Snohomish County's decision regarding Stafne's docket proposal, a legislative act, via LUPA. By its terms, LUPA provides only for the appeal of land use decisions. A "land use decision" is defined, in relevant part, by the statute as:

a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

(a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses . . .

RCW 36.70C.020(2)(a) (emphasis added). The statute expressly excludes from the definition "applications for legislative approvals." Nothing in the statute or the body of LUPA case law supports the Court of Appeals' decision that Stafne could appeal Snohomish County's decision through LUPA. In fact, the Court of Appeals' decision is in direct conflict with another Court of Appeals decision on this point.

In Coffey v. City of Walla Walla, 145 Wn.App. 435, 438, 187 P.3d 272 (2008), the city council adopted a comprehensive plan amendment related to a particular property and a group of neighbors opposed to the change filed a LUPA petition in superior court alleging that the amendment violated aspects of the GMA. The Court of Appeals held that appellants' "attempt to use the LUPA process to challenge the amendment was not statutorily authorized. The superior court lacked subject matter jurisdiction to consider the claim since the GMHB had exclusive authority to do so." Id. at 441. The Court of Appeals found that the GMA sets up a basic dichotomy: review of political and legislative decisions regarding local area planning is to the Board; review of land use actions relating to project permits is to superior court in the form of a LUPA action. Id. 440. The Court went on to point out that the case law "has long recognized that comprehensive plan amendments are legislative in nature." Id. at 441 (citations omitted).

The Court of Appeals' conclusion that Snohomish County's decision not to adopt Stafne's docket proposal as part of its comprehensive plan update was a land use decision reviewable by the superior court under LUPA was in error and is in direct conflict with another Court of Appeals decision, Coffey. These factors support this Court accepting review of the decision below. RAP 13.4(b)(2).

**C. The Issues Involved with Snohomish County's Petition are of Substantial Public Interest.**

The implications of the Court of Appeals' decision are significant and of substantial public interest; the decision therefore warrants review. RAP 13.4(b)(4). Currently there are 29 counties planning under the GMA. These counties make up 95 percent of the state's population. Pursuant to the mandates of the GMA, these counties adopt comprehensive plan amendments on an annual cycle for more limited matters, and periodically, every four years for King County, comprehensive plan amendments that are much broader in scope. RCW 36.70A.130. King County last conducted one such four-year update in 2008. King County has set up a docket process, somewhat similar although not identical to Snohomish County's, whereby citizens can submit proposed comprehensive plan amendments for the County's consideration. In the lead up to the 2008 update, King County received 86 such docket proposals. <http://www.kingcounty.gov/property/permits/codes/growth/CompPlan/amend/YearlyReport/DocketArchive.aspx> (docket proposals submitted in 2006 and 2007 were considered for the 2008 comprehensive plan update).

Pursuant to the Court of Appeals' reasoning in Stafne, those 86 proposals, whether accepted or rejected by the County, could give rise to a LUPA cause of action in superior court. Assuming the Court of Appeals'

futility reasoning factored into which matters are appealable under LUPA, some matters would presumably still go to the Board; however, even if that were the case, it would nonetheless play havoc with the entire system of GMA appeals.

As an initial matter, beyond the facts of Stafne, it is not clear what other appeals to the Board could be considered futile; an argument could, and likely would, be made that the definition extends beyond just the facts of that case. This uncertainty as to the appropriate venue would cause confusion for appellants, counties, the Board, and the courts. One implication of this confusion could be that appellants, in order to protect their interests, will feel compelled to file simultaneous appeals with both the Board and the superior court, leading to the expenditure of unnecessary costs, time, and resources for all involved. In addition, given the short, and varying, appeal periods under LUPA and the GMA, appellants filing in only one venue, could find out too late that it is in fact the incorrect venue.

In addition to varying statutes of limitation, LUPA and GMA appeals also differ in many other respects. The appeals processes are, for example, different with respect to the standard of review and deference, development of the record, discovery, and the rules of evidence. It is illogical to subject one set of GMA appeals to one set of rules and

procedures, and subject another set of GMA appeals to an entirely different venue and set of rules.

In addition, removing GMA appeals from the Board's purview undermines the goals and objectives of the Act. The Board and its rules are designed to be citizen friendly, furthering one of the goals of the GMA which is to "[e]ncourage the involvement of citizens in the planning process. . . ." RCW 36.70A.020(11). Board appeals are also subject to strict statutory timelines, promoting the rapid resolution of GMA-related matters. RCW 36.70A.290(2), (3); RCW 36.70A.300(2). The courts are simply not set up to provide the same level of ease and speed of decision-making to the public; hearing GMA matters under LUPA would undermine these important considerations. These considerations are of further concern to WAPA given the additional resources of county staff and prosecuting attorneys that would be necessary to litigate this increase in LUPA cases, which by their nature involve more time and resources than appeals before the Board. Finally, as previously discussed, the Board's long history of expertise with GMA issues would be sacrificed.

Given the potentially far-reaching implications of the Court of Appeals' decision in Stafne and the substantial public interest involved, WAPA urges this Court to accept review.

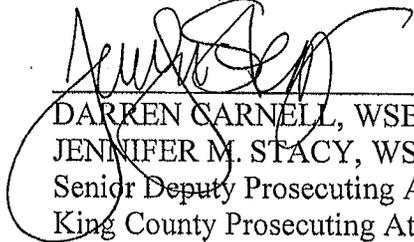
**V. CONCLUSION**

For all of the foregoing reasons, WAPA respectfully urges this Court to accept review.

DATED this 24<sup>th</sup> day of September, 2010.

DANIEL T. SATTERBERG  
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Respectfully submitted



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**To:** Cherberg, Diana  
**Subject:** RE: Stafne v. Snohomish County (Case No. 84894-7): Documents to be Filed

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**From:** Cherberg, Diana [mailto:Diana.Cherberg@kingcounty.gov]  
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**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** Stacy, Jennifer; Carnell, Darren  
**Subject:** Stafne v. Snohomish County (Case No. 84894-7): Documents to be Filed

Dear Supreme Court:

Attached are the following three documents for filing in the matter of *Scott E. Stafne vs. Snohomish County and Snohomish County Planning Department*, Supreme Court No. 84894-7:

1. Motion for Leave to File Amicus Curiae Washington Association of Prosecuting Attorneys' Memorandum In Support of Snohomish County's Petition for Review
2. Amicus Curiae Washington Association of Prosecuting Attorneys' Memorandum In Support of Snohomish County's Petition for Review
3. Certificate of Service

These documents are being filed by Jennifer Stacy, King County Senior Deputy Prosecuting Attorney, WSBA #30754, (206) 296-9047, [jennifer.stacy@kingcounty.gov](mailto:jennifer.stacy@kingcounty.gov)

Thank you,

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