

FILED
AUG 04 2010

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

84894-7

No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 62843-7-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

2010 JUL 29 PM 3:51
FILED
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

SCOTT E. STAFNE,

Appellant,

vs.

SNOHOMISH COUNTY AND
SNOHOMISH COUNTY PLANNING DEPARTMENT,

Respondents.

PETITION FOR REVIEW

MARK K. ROE
Snohomish County Prosecuting Attorney

Laura C. Kisielius, WSBA #28255
Bree Urban, WSBA #33194
Deputy Prosecuting Attorneys
Robert J. Drewel Bldg., 7th Floor, M/S 504
3000 Rockefeller Avenue
Everett, Washington 98201-4046
Phone: (425)388-6330 Fax: (425)388-6333

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii, iv, v
I. IDENTITY OF PETITIONERS	1
II. CITATION TO COURT OF APPEALS DECISION	1
III. ISSUES PRESENTED FOR REVIEW	1
IV. STATEMENT OF THE CASE	2
V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED	4
A. The Court of Appeals Erred By Holding a Local Jurisdiction’s Legislative Decision Not to Adopt a GMA Docket Proposal is a “Land Use Decision” Reviewable Under LUPA.	4
1. The County Council’s Legislative Decision Was Not a “Land Use Decision” Under LUPA.	5
2. The Court of Appeals’ Decision Conflicts with <u>Coffey v. City of Walla Walla</u>	7
B. The Court of Appeals Erred By Holding that a Challenge to a Local Jurisdiction’s Legislative Decision Not to Adopt a GMA Docket Proposal Need Not Be Raised with the Growth Board. ...	9
1. The Growth Board is the Agency with Specialized Expertise in the GMA.	9
2. The Court of Appeals’ Decision Conflicts with <u>Torrance v. King County</u>	10
3. <u>Torrance v King County</u> is Well Reasoned and Should be Followed.	13
C. The Court of Appeals Erred By Failing to Recognize a Local Jurisdiction Has the Legislative Prerogative Not to Adopt a GMA Docket Proposal.	16

1.	Local Jurisdictions Have Discretion to Reject Docket Proposals.....	16
2.	The Comprehensive Plan Designation of Property is Fundamentally Different From the Zoning of Property.....	18
VI.	CONCLUSION	20
VII.	APPENDICES.....	21
Appendix A	Court of Appeals Opinion (May 24, 2010)	A-1
Appendix B	Order Amending Opinion (June 2, 2010).....	B-1
Appendix C	Order Amending Opinion and Publishing (June 30, 2010).....	C-1
Appendix D	Order Denying Motion for Reconsideration (June 30, 2010).....	D-1

TABLE OF AUTHORITIES

<u>STATE CASES</u>	<u>PAGE</u>
<u>Anderson v. Seattle</u> 78 Wn.2d 201, 471 P.2d 87 (1970).....	7
<u>Chelan County v. Nykreim</u> 146 Wn.2d 904, 52 P.3d 1 (2002).....	5
<u>Citizens for Clean Air v. City of Spokane</u> 114 Wn.2d 20, 785 P.2d 447 (1990).....	14, 16
<u>Citizens for Mount Vernon v. City of Mount Vernon</u> 133 Wn.2d 861, 947 P.2d 1208 (1997).....	13
<u>City of Burien v. Central Puget Sound Growth Mgmt. Hr'gs Bd.</u> 113 Wn. App. 375, 53 P.3d 1028 (2002).....	17
<u>City of Redmond v. Central Puget Sound Growth Mgmt. Hr'gs Bd.</u> 136 Wn.2d 38, 959 P.2d 1091 (1998).....	15
<u>Coffey v. City of Walla Walla</u> 145 Wn. App. 435, 187 P.3d 272 (2008).....	6, 7, 8, 9
<u>Dioxin/Organochlorine Center v. Department of Ecology</u> 119 Wn.2d 761, 837 P.2d 1007 (1992).....	13
<u>Estate of Friedman v. Pierce County</u> 112 Wn.2d 68, 768 P.2d 462 (1989).....	14, 16
<u>King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.</u> 142 Wn.2d 543, 14 P.3d 133 (2000).....	10
<u>Lewis County v. W. Wash. Growth Mgmt. Hr'gs Bd.</u> 157 Wn.2d 488, 139 P.3d 1096 (2006).....	15
<u>Peste v. Mason County</u> 133 Wn. App. 456, 136 P.3d 140 (2006).....	10
<u>Philippides v. Bernard</u> 151 Wn.2d 376, 88 P.3d 939 (2004).....	7
<u>Post v. City of Tacoma</u> 167 Wn.2d 300, 217 P.3d 1179 (2009).....	5
<u>Quadrant Corp. v. State Growth Mgmt Hr'gs Bd.</u> 154 Wn.2d 224, 110 P.3d 1132 (2005).....	10

<u>Smith v. Bates Technical College</u> 139 Wn.2d 793, 991 P.2d 1135 (2000).....	13
<u>Swinomish Indian Tribal Community v. W. Wash. Growth Mgmt. Hr'gs Bd.</u> 161 Wn.2d 415, 166 P.3d 1198 (2007).....	10
<u>Thurston County v. W. Wash. Growth Mgmt. Hr'gs Bd.</u> 164 Wn.2d 329, 190 P.3d 38 (2008).....	10
<u>Torrance v. King County</u> 136 Wn.2d 783, 966 P.2d 891 (1998).....	10, 11, 12, 13, 14, 16, 20
<u>Viking Properties, Inc. v. Holm</u> 155 Wn.2d 112, 118 P.3d 322 (2005).....	17
<u>Wenatchee Sportsmen Ass'n v. Chelan County</u> 141 Wn.2d 169, 4 P.3d 123 (2000).....	6
<u>Westside Hilltop Survival Comm. v. King County</u> 96 Wn.2d 171, 634 P.2d 862 (1981).....	6
<u>Windust v. Dep't. of Labor & Indus.</u> 52 Wn.2d 33, 323 P.2d 241 (1958).....	7

GROWTH BOARD CASES

<u>Cole v. Pierce County</u> CPSGMHB Case No. 96-3-0009, Final Decision and Order (July 31, 1996), 1996 WL 678407.....	18
<u>SR 9 / US 2 LLC v. Snohomish County</u> CPSGMHB Case No. 08-3-0004, Order Granting Motion to Dismiss (April 9, 2009), 2009 WL 1134039.....	18
<u>Torrance v. King County</u> CPSGMHB Case No. 96-3-0038, Order Granting Dispositive Motion (Mar. 31, 1997), 1997 WL 461768.....	11, 18

STATUTES

Chapter 34.05 RCW.....	9
Chapter 36.70C RCW.....	3
RCW 36.70A.020.....	16

RCW 36.70A.030.....	2, 3
RCW 36.70A.070.....	2
RCW 36.70A.130.....	6
RCW 36.70A.140.....	6
RCW 36.70A.250.....	9
RCW 36.70A.280.....	9, 10, 12
RCW 36.70A.300.....	10, 12
RCW 36.70A.3201.....	17
RCW 36.70A.470.....	2, 17
RCW 36.70B.020.....	6
RCW 36.70C.020.....	5

RULES

CR 12(b)(6).....	20
RAP 13.4.....	4

REGULATIONS

WAC 365-190-040.....	19
----------------------	----

I. IDENTITY OF PETITIONERS

Petitioners are Snohomish County and the Snohomish County Planning Department (together, the "County"), the respondents in the Superior Court and the respondents in the Court of Appeals.

II. CITATION TO COURT OF APPEALS DECISION

Division I of the Court of Appeals issued an unpublished opinion terminating review of this case on May 24, 2010 (App. A, pages 1-20). The opinion was amended on June 2, 2010 (App. B). The opinion was published and further amended on June 30, 2010 (App. C). Also on June 30, 2010, the County's motion for reconsideration was denied (App. D).

III. ISSUES PRESENTED FOR REVIEW

This case involves Appellant/Petitioner Scott E. Stafne's ("Stafne") proposed legislative amendment to the County's Growth Management Act ("GMA") comprehensive plan. The Snohomish County Council ("County Council"), the County's legislative body, did not adopt Stafne's proposed amendment. The County respectfully requests that this Court review the following issues:

1. Is the decision of a local legislative body not to adopt a proposed legislative amendment to a GMA comprehensive plan a "land use decision" appealable under the Land Use Petition Act ("LUPA")?

2. Must a challenge to a local jurisdiction's denial of a proposed legislative amendment to its GMA comprehensive plan be filed with the Growth Management Hearings Board ("Growth Board")?

3. Must a local jurisdiction adopt proposed legislative amendments to its GMA comprehensive plan absent a statutory obligation to do so?

IV. STATEMENT OF THE CASE

Each jurisdiction planning under the GMA (chapter 36.70A RCW) maintains a comprehensive plan, a "generalized coordinated land use policy statement" of the jurisdiction. RCW 36.70A.030(4). A comprehensive plan is adopted and amended by legislative action. It contains a future land use map. The future land use map depicts how property is "designated" throughout the jurisdiction. RCW 36.70A.070. These property designations, established as a matter of legislative policy, control how property may thereafter be zoned by the jurisdiction.

The GMA requires each jurisdiction to establish procedures by which citizens can propose legislative amendments to the jurisdiction's comprehensive plan. RCW 36.70A.470(2). This public participation process is known as "docketing," and each suggested legislative amendment that is submitted during the docketing process is known as a "docket proposal."

Stafne owns property that is designated "forest land," a natural resource land designation, under the County's comprehensive plan. CP 149, 162; RCW 36.70A.030(8). As part of the County's annual docketing process, Stafne submitted a docket proposal requesting a legislative amendment to the County's comprehensive plan. Stafne's docket proposal sought to change the designation of his property on the future land use map from "forest land" to "rural residential." CP 149, 199. Stafne's docket proposal did not involve a rezone. The County Council did not adopt Stafne's docket proposal. CP 230-32.

Stafne did not appeal the County Council's decision to the Growth Board. Instead, he filed a lawsuit in superior court alleging multiple causes of action, including an appeal under LUPA (chapter 36.70C RCW). CP 3-59. The County moved to dismiss Stafne's lawsuit. CP 60-105. Stafne abandoned his LUPA cause of action. CP 261, 270. The superior court dismissed Stafne's lawsuit. CP 235-36.

On appeal, neither party made arguments related to the LUPA cause of action. Nonetheless, the Court of Appeals upheld the superior court's dismissal of Stafne's lawsuit on the basis that (1) the County Council's decision not to adopt Stafne's proposed legislative amendment to the County's comprehensive plan was a "land use decision" under

LUPA, and (2) Stafne failed to file his lawsuit within 21 days of the County Council's decision, the statute of limitations under LUPA.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The County prevailed in the Court of Appeals. However, because the Court of Appeals' decision has far-reaching consequences for the County and all other jurisdictions planning under the GMA, the County urges the Court to review this case. The Court of Appeals' decision is contrary to Supreme Court precedent (RAP 13.4(b)(1)), contrary to a decision from another Division of the Court of Appeals (RAP 13.4(b)(2)), and involves issues of substantial public interest (RAP 13.4(b)(4)).

A. The Court of Appeals Erred By Holding a Local Jurisdiction's Legislative Decision Not to Adopt a GMA Docket Proposal is a "Land Use Decision" Reviewable Under LUPA.

The Court of Appeals' decision holds that the County Council's legislative decision not to adopt Stafne's GMA docket proposal is a "land use decision" reviewable under LUPA. That holding is in direct conflict with the unambiguous statutory definition of the term "land use decision," as well as case law from Division III of the Court of Appeals. The Court of Appeals' holding on this issue impermissibly expands subject matter jurisdiction under LUPA by judicial fiat.

1. The County Council’s Legislative Decision Was Not a “Land Use Decision” Under LUPA.

LUPA is a statutory cause of action that did not exist at common law. A court’s subject matter jurisdiction under LUPA is limited to a review of those governmental actions meeting the definition of a “land use decision” under the statute. RCW 36.70C.020(2); Post v. City of Tacoma, 167 Wn.2d 300, 309-10, 217 P.3d 1179 (2009); Chelan County v. Nykreim, 146 Wn.2d 904, 926-31, 52 P.3d 1 (2002). That definition is clear and unambiguous. LUPA defines the term “land use decision,” in relevant part, as follows:

[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 re-zones and annexations...

RCW 36.70C.020(2) (emphasis added). Two portions of this statutory definition are pertinent to this case.

First, the statute states a “land use decision” is a final decision made by a local jurisdiction regarding an application for a “project

permit.” The term “project permit” is defined by RCW 36.70B.020(4).¹ The definition of “project permit” expressly excludes “the adoption or amendment of a comprehensive plan.” Because Stafne’s docket proposal requested an amendment to the County’s comprehensive plan, it was not an application for a “project permit.” Thus, the County Council’s decision regarding the proposal was not a “land use decision” pursuant to LUPA.

Second, LUPA’s definition of the term “land use decision” expressly excludes decisions regarding “applications for legislative approvals.” The GMA dictates that a jurisdiction’s comprehensive plan must be amended by “legislative action.” RCW 36.70A.130(1); see also RCW 36.70A.140. In light of that statutory mandate, Washington courts have long recognized that comprehensive plan amendments are legislative in nature. Coffey v. City of Walla Walla, 145 Wn. App. 435, 441, 187 P.3d 272 (2008) (citations omitted); see Westside Hilltop Survival Comm. v. King County, 96 Wn.2d 171, 175-79, 634 P.2d 862 (1981). Accordingly, Stafne’s docket proposal was an “application for legislative approval.” Because Stafne’s docket proposal was an “application for legislative approval,” the County Council’s decision regarding Stafne’s docket proposal was not a “land use decision” under LUPA.

¹ This Court recognizes that the definition of “project permit” in RCW 36.70B.020(4) applies within the LUPA context. See Woods v. Kittitas County, 162 Wn.2d 597, 610 & 613, 174 P.3d 25 (2007); Wenatchee Sportsmen Ass’n v. Chelan County, 141 Wn.2d 169, 179, 4 P.3d 123 (2000).

By holding LUPA applies to legislative decisions regarding GMA comprehensive plans, the Court of Appeals' decision impermissibly expands LUPA's scope by judicial fiat. See Philippides v. Bernard, 151 Wn.2d 376, 390, 88 P.3d 939 (2004) (refusing to expand the class of potential plaintiffs under wrongful death statutes because "[t]he legislature has created a comprehensive set of statutes governing who may recover for wrongful death and survival, and... 'it is neither the function nor the prerogative of courts to modify legislative enactments'"), quoting Anderson v. Seattle, 78 Wn.2d 201, 202, 471 P.2d 87 (1970), and citing Windust v. Dep't. of Labor & Indus., 52 Wn.2d 33, 36, 323 P.2d 241 (1958). This Court should rectify that error.

2. The Court of Appeals' Decision Conflicts with Coffey v. City of Walla Walla.

The Court of Appeals' decision in this case is in direct conflict with a recent decision from Division III of the Court of Appeals, Coffey v. City of Walla Walla, 145 Wn. App. 435. In Coffey, landowners dissatisfied with a city council's decision to amend the city's comprehensive plan filed a land use petition under LUPA challenging the decision. The trial court dismissed the lawsuit, finding that the city council's decision was legislative in nature, and the city council properly exercised its legislative discretion. Id. at 438.

On appeal, Division III of the Court of Appeals upheld the trial court's dismissal of the petition on the grounds that LUPA was not the appropriate method of challenging a comprehensive plan amendment. Id. at 440-41. The court noted that LUPA excludes "applications for legislative approval" from the definition of "land use decision." Id. at 440-41. It found that while applications for comprehensive plan amendments are not specifically listed as "applications for legislative approval" in the exclusions set forth in RCW 36.70C.020, "that list [of exclusions] is illustrative rather than exclusive," and interpreting case law "has long recognized that comprehensive plan amendments are legislative in nature." Id. Accordingly, the Coffey court reasoned that superior courts are not statutorily authorized to hear challenges to comprehensive plan amendments under LUPA. Id. at 441. This issue was correctly decided by the Coffey court.

Conversely, the Court of Appeals here clearly confused the concept of (1) a legislative amendment changing the comprehensive plan designation of property, and (2) a quasi-judicial decision changing the zoning of property. The Court of Appeals' opinion repeatedly refers to Stafne's docket proposal as a request to change the zoning of his property. App. A at 1, 5, 8, 9, 11, 13-18 and 20. But this case does not involve a rezone of Stafne's property. As explained below in pages 18-19 of this

petition, there is a fundamental difference between the comprehensive plan designation of property and the zoning of property. The distinction between comprehensive planning and zoning is critical to effective implementation of the GMA. If the conflict between Coffey and this case is not corrected, significant confusion in this area of law will abound at both the judicial and local legislative levels.

B. The Court of Appeals Erred By Holding that a Challenge to a Local Jurisdiction's Legislative Decision Not to Adopt a GMA Docket Proposal Need Not Be Raised with the Growth Board.

The Court of Appeals held that Stafne did not have to bring his GMA-related complaint to the Growth Board. That holding directly conflicts with the statutory requirements of the GMA and the Administrative Procedure Act ("APA") (chapter 34.05 RCW), as well as with case law from this Court.

1. The Growth Board is the Agency with Specialized Expertise in the GMA.

When the legislature enacted the GMA, it created the Growth Board to hear and determine matters relating to a local jurisdiction's compliance with the GMA. RCW 36.70A.250; RCW 36.70A.280. This Court has described the duties of the Growth Board, in part, as follows:

The Board is charged with determining compliance with the GMA and, when necessary, invalidating noncomplying comprehensive plans and development regulations.

Swinomish Indian Tribal Community v. W. Wash. Growth Mgmt. Hr'gs Bd., 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007), citing King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd., 142 Wn.2d 543, 552, 14 P.3d 133 (2000).

In recognition of the special jurisdiction granted to the Growth Board under RCW 36.70A.280, both this Court and the Court of Appeals have held that parties aggrieved by a jurisdiction's action respecting its comprehensive plan must submit their complaints first to the Growth Board. Thurston County v. W. Wash. Growth Mgmt. Hr'gs Bd., 164 Wn.2d 329, 340-41, 190 P.3d 38 (2008); Peste v. Mason County, 133 Wn. App. 456, 467, 136 P.3d 140 (2006). After the Growth Board issues a final decision regarding a GMA-related dispute, an aggrieved party may appeal that decision to superior court under the APA, RCW 36.70A.300(5); Quadrant Corp. v. State Growth Mgmt Hr'gs Bd., 154 Wn.2d 224, 233, 110 P.3d 1132 (2005). The Court of Appeals' holding in this case contravenes this established process.

2. The Court of Appeals' Decision Conflicts with Torrance v. King County.

The Court of Appeals' decision is in direct conflict with this Court's opinion in Torrance v. King County, 136 Wn.2d 783, 966 P.2d 891 (1998). While the County expressly argued to the Court of Appeals

that Torrance should control the outcome of this case, the Court of Appeals' decision fails to even mention Torrance. See County's Response Brief at 30-32; County's Answer to Motion to Publish at 11-16.

The facts in Torrance are analogous to the facts in this case. In Torrance, the plaintiff owned real property in King County that was designated "agricultural land," another GMA natural resource land designation, under King County's comprehensive plan. During King County's annual docketing process, the property owner submitted a docket proposal to the King County Council requesting that the GMA comprehensive plan designation of his property be changed. Id. at 786. The council decided not to change the property's designation. Id. The property owner petitioned the Growth Board to review the council's decision. The Growth Board found that the council's decision not to change the designation of the property was a legal exercise of legislative discretion. Torrance v. King County, CPSGMHB Case No. 96-3-0038, Order Granting Dispositive Motion (Mar. 31, 1997), 1997 WL 461768.

Although the property owner could have appealed the Growth Board's final decision to superior court pursuant to the APA, he did not. Torrance v. King County, 136 Wn.2d at 786. Instead, he filed a new lawsuit against King County in superior court seeking a constitutional writ

of certiorari. Id. at 786-87. The trial court granted the requested writ. Id. at 787.

On direct appeal, this Court reversed the trial court, holding the trial court should not have granted the writ because the property owner failed to pursue the appropriate avenue of review. Torrance holds the GMA establishes a mandatory administrative review process designed to resolve allegations that a local jurisdiction failed to comply with the GMA. Id. at 788. A person making an allegation of non-compliance must file a petition with the Growth Board. Id. at 788; RCW 36.70A.280. After the Growth Board issues a final decision regarding the dispute, an aggrieved party can appeal that decision to superior court under the APA. Id. at 790; RCW 36.70A.300(5). In Torrance, this Court held the property owner's failure to exhaust his administrative remedies was fatal to his claim. Id. at 792.

Although the facts of this case are substantially similar to the facts in Torrance, the Court of Appeals' decision reaches the opposite result. The Court of Appeals determined that Stafne need not appeal the County Council's decision regarding Stafne's docket proposal to the Growth Board, but could instead apply directly to superior court for relief.

3. **Torrance v King County is Well Reasoned and Should be Followed.**

Torrance is consistent with statutory and common law and should be followed here. The APA generally requires a petitioner to exhaust all administrative remedies before filing a claim in superior court. RCW 34.05.534; Dioxin/Organochlorine Center v. Department of Ecology, 119 Wn.2d 761, 776-77, 837 P.2d 1007 (1992) (holding appeal to the Pollution Control Hearings Board was a necessary prerequisite to seeking judicial review). This statutory requirement reflects the common law doctrine of exhaustion of administrative remedies, which is “founded upon the belief that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional expertise of judges.” Citizens for Mount Vernon v. City of Mount Vernon, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997) (citations omitted). This Court has explained the doctrine of exhaustion of remedies as follows:

In general, a party must exhaust all available administrative remedies prior to seeking relief in superior court. The court will not intervene and administrative remedies must be exhausted when: (1) a claim is cognizable in the first instance by an agency alone; (2) the agency has clearly established mechanisms for the resolution of complaints by aggrieved parties; and (3) the administrative remedies can provide the relief sought.

Smith v. Bates Technical College, 139 Wn.2d 793, 808, 991 P.2d 1135 (2000) (citations omitted). All three of those conditions are met in this

case. The GMA vests original jurisdiction over GMA-related complaints in the Growth Board, the Growth Board has clearly established mechanisms for resolving complaints, and the Growth Board has the power to require a local jurisdiction to amend its comprehensive plan, which is the relief Stafne seeks in this lawsuit.

This Court has listed five separate policy underpinnings for the exhaustion of remedies doctrine, two of which are particularly pertinent to GMA-related cases such as this one: (1) to “allow the exercise of agency expertise;” and (2) to “insure that individuals are not encouraged to ignore administrative procedures by resort to the courts.” Estate of Friedman v. Pierce County, 112 Wn.2d 68, 78, 768 P.2d 462 (1989) (citations omitted); see also Citizens for Clean Air v. City of Spokane, 114 Wn.2d 20, 30, 785 P.2d 447 (1990). These public policies support the holding of Torrance and are thwarted by the Court of Appeals’ decision in this case.

Specialized agency expertise is essential to the proper resolution of GMA-related disputes. Land use is a complex, highly regulated and often confusing area of the law that is outside the conventional expertise of most judges. The Growth Board has specialized expertise in the GMA and associated land use policies, statutes and regulations. Accordingly, GMA-related disputes are precisely the types of cases that should be heard by a specialized adjudicative body before coming to superior court for review.

While superior courts have authority to overturn the Growth Board's interpretations of the GMA, it is crucial that superior courts have the reasoning of the Growth Board before them when making such decisions.

As the agency with specialized expertise in the GMA, the Growth Board's interpretation of that statute is entitled to substantial weight. Lewis County v. W. Wash. Growth Mgmt. Hr'gs Bd., 157 Wn.2d 488, 498, 139 P.3d 1096 (2006) (citation omitted); City of Redmond v. Central Puget Sound Growth Mgmt. Hr'gs Bd., 136 Wn.2d 38, 46, 959 P.2d 1091 (1998) (citation omitted). As discussed below on page 18 of this petition, the Growth Board interprets the GMA as authorizing local jurisdictions to reject docket proposals such as Stafne's. If the Growth Board's interpretation of the GMA on this substantive point of law is to be overruled by Washington courts, it should be overruled pursuant to the proper procedures – namely, on appeal of a Growth Board decision under the APA, not on direct review of a County Council legislative decision under LUPA.

In its decision, the Court of Appeals invoked the futility exception to the exhaustion of remedies doctrine, stating it would be futile for Stafne to raise his claim with the Growth Board because the Growth Board was unlikely to rule in his favor. The futility exception to the exhaustion of remedies doctrine should be invoked only in rare circumstances. Citizens

for Clean Air v. City of Spokane, 114 Wn.2d 20 at 31-32; Estate of Friedman v. Pierce County, 112 Wn.2d at 80-81. As recognized by this Court in Torrance, the existence of Growth Board precedent holding that Stafne's claim is unfounded does not justify circumvention of the Growth Board on futility grounds. Instead, such a situation makes it particularly important for Stafne to obtain a decision from the Growth Board before going to superior court, so that the trial judge will be fully apprised of the Growth Board's substantive interpretation regarding the merits of Stafne's claim under the GMA. Any other rule authorizes blatant forum shopping.

C. **The Court of Appeals Erred By Failing to Recognize a Local Jurisdiction Has the Legislative Prerogative Not to Adopt a GMA Docket Proposal.**

By treating Stafne's legislative proposal for a GMA comprehensive plan amendment as an application for a site-specific rezone, the Court of Appeals' decision usurps local legislative discretion, undermines the policies of the GMA and provides false expectations to citizens that they are entitled to comprehensive plan amendments. These are issues of substantial public interest warranting the Court's review.

1. **Local Jurisdictions Have Discretion to Reject Docket Proposals.**

The GMA is a policy-driven land use planning statute designed to reduce the conversion of undeveloped land across the state into sprawling, low-density development. See RCW 36.70A.020(2). This Court has

stated “[t]he comprehensive plan is the central nervous system of the GMA. It receives and processes all relevant information and sends policy signals to shape public and private behavior.” Woods v. Kittitas County, 162 Wn.2d at 608 (citation omitted). Legislative bodies have broad discretion in setting the public policy embodied in a jurisdiction’s GMA comprehensive plan. See RCW 36.70A.3201; Viking Properties, Inc. v. Holm, 155 Wn.2d 112, 125-26, 118 P.3d 322 (2005).

In this case, Stafne’s primary legal argument is that the County Council lacked legislative discretion, and instead had an obligation to adopt his docket proposal. There simply is no authority supporting this contention. While the GMA requires local jurisdictions to establish procedures allowing citizens “to suggest” comprehensive plan amendments (RCW 36.70A.470(2)), “it does not require that a [local jurisdiction] necessarily *act upon* the desires expressed by the public during that participation.” City of Burien v. Central Puget Sound Growth Mgmt. Hr’gs Bd., 113 Wn. App. 375, 388, 53 P.3d 1028 (2002) (emphasis in original). Instead, the GMA requires that elected officials, accountable at the ballot box, ultimately decide on the content of “policy documents” such as the comprehensive plan. Id.

For this reason, the Growth Board recognizes a jurisdiction’s decision not to adopt a docket proposal is purely a matter of legislative

discretion. See, e.g., SR 9 / US 2 LLC v. Snohomish County, CPSGMHB Case No. 08-3-0004, Order Granting Motion to Dismiss (April 9, 2009), 2009 WL 1134039 (“Absent a duty to amend its Plan or development regulation, such [docketing] decisions are within the jurisdiction’s discretion.”); Torrance v. King County, CPSGMHB Case No. 96-3-0038, Order Granting Dispositive Motion (March 31, 1997), 1997 WL 461768 (King County did not violate the GMA by failing to adopt comprehensive plan amendment to change property’s agricultural designation); Cole v. Pierce County, CPSGMHB Case No. 96-3-0009, Final Decision and Order (July 31, 1996), 1996 WL 678407 (Pierce County did not violate the GMA by failing to adopt comprehensive plan amendment to change property’s designation). It is because the Growth Board interprets the GMA as allowing local jurisdictions the discretion to reject docket proposals that the Growth Board routinely determines that complaints like Stafne’s do not violate the GMA.

2. The Comprehensive Plan Designation of Property is Fundamentally Different From the Zoning of Property.

The Court of Appeals’ decision treats Stafne’s docket proposal as though it were an application for a quasi-judicial, site-specific rezone. The published opinion makes numerous references to “zoning” when the zoning of Stafne’s property was never at issue. See App. A at 1, 5, 8, 9,

11, 13-18 and 20. Taken in conjunction with the Court of Appeals' holding that Stafne should have filed a petition under LUPA, those repeated references to "zoning" indicate the Court of Appeals did not understand what a docket proposal is, how "designation" under the GMA differs from "zoning," or why a citizen's request to amend a comprehensive plan is (and should be) treated differently from a citizen's request for a site-specific rezone.

Comprehensive planning occurs on a regional scale to establish a jurisdiction's public policy for resource management. Zoning is enacted after a comprehensive plan is adopted, as an implementation of that plan. While the zoning of property may be changed on a parcel-by-parcel basis pursuant to a quasi-judicial, site-specific rezone, under the GMA counties are cautioned not to review the comprehensive plan designation of natural resource lands on a parcel-by-parcel basis. WAC 365-190-040(10)(b). Thus, changing the natural resource land designation of a specific parcel of property in a jurisdiction's comprehensive plan is not analogous to rezoning that parcel.

The GMA contains no criteria that would entitle a property owner to a change in the comprehensive plan designation of a particular parcel. Because the GMA gives the County Council legislative discretion not to

adopt docket proposals such as Stafne's, the Court of Appeals should have upheld the trial court's dismissal of Stafne's lawsuit under CR 12(b)(6).

VI. CONCLUSION

The Court of Appeals' decision evidences significant confusion regarding the difference between legislative GMA comprehensive plan amendments and site-specific rezones. This confusion caused the Court of Appeals to create a new statutory cause of action under LUPA, undermine local legislative discretion and thwart the policies of the GMA. In addition, the Court of Appeals failed to explain why its decision disregards this Court's opinion in Torrance v. King County. Although the County prevailed in the Court of Appeals, it is urges this Court to review this decision due to its sweeping consequences for all jurisdictions planning under the GMA.

Respectfully submitted this 29th day of July, 2010.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
Laura C. Kisielius, WSBA #28255
Bree Urban, WSBA #33194
Deputy Prosecuting Attorneys
Attorneys for Snohomish County

VII. APPENDICES

Appendix A Court of Appeals Opinion (May 24, 2010) A-1

Appendix B Order Amending Opinion (June 2, 2010).....B-1

Appendix C Order Amending Opinion and Publishing
(June 30, 2010)C-1

Appendix D Order Denying Motion for Reconsideration
(June 30, 2010) D-1

Appendix A

Court of Appeals Opinion
(May 24, 2010)

FACTS

The Twin Falls Property

In 1992, Twin Falls, Inc. acquired approximately 180 acres of land in Snohomish County from Three Rivers Timber Company. The property was logged under forest practice permits issued by the Department of Natural Resources (DNR) and was classified in a timber tax category. The property contains waterfalls, two lakes, steep cliffs, and pockets of noncommercial forest land. Twin Falls intended to develop the property for low density residential and recreational use. Twin Falls segregated the property into 11 parcels.

In compliance with the Growth Management Act (GMA), chapter 36.70A RCW, in December 1992, the Snohomish County Council (Council) enacted an ordinance that adopted an interim forest land conservation plan and designated interim forest land pending adoption of a comprehensive plan. The ordinance designated the majority of the Twin Falls property as "Interim Commercial Forest or Interim Forest Reserve." Approximately 120 acres of the property was designated as Interim Commercial Forest, and approximately 20 acres at the southern end was designated as Interim Forest Reserve.

Twin Falls filed an appeal with the Central Puget Sound Growth Management Hearings Board (CPSGMHB), challenging the Council's decision to designate its property as Interim Commercial Forest and Interim Forest Reserve.¹ In a lengthy decision issued on September 7, 1993, the CPSGMHB concluded that the Council's decision to designate the Twin Falls property as Interim Commercial Forest and

¹ Twin Falls v. Snohomish County, No. 93-3-0003, 1993 WL 839715 (Cent. Puget Sound Growth Mgmt. Hr'g Bd. Sept. 7, 1993).

Interim Forest Reserve complied with the GMA and the State Environmental Policy Act, chapter 43.21C RCW.

In April 1994, the legislature changed the GMA definition of "forest land" from "primarily useful for growing trees" to "primarily devoted to growing trees." Laws of 1994, ch. 307, §1.²

In August 1994, the Council considered a number of requests from land owners, including Twin Falls, to change the interim forest land designation. The Snohomish County Planning Department (SCPD) reviewed each request under the adopted interim forest land conservation plan and prepared an evaluation and recommendation for each property.

In Amended Motion 94-210, the Council removed the interim forest land designation from the Twin Falls property and a number of other properties. In deciding to change the interim forest land designation, the Council expressly noted the recent legislative amendment to the definition of "forest land" under the GMA.

8. The County Council takes official notice of the changes in the state law passed by the legislature in the 1994 session in ESSB

² As amended, RCW 36.70A.030(8) defines "forest land" as follows:

'Forest land' means land primarily devoted to growing trees for long-term commercial timber production on land that can be economically and practically managed for such production, including Christmas trees subject to the excise tax imposed under RCW 84.33.100 through 84.33.140, and that has long-term commercial significance. In determining whether forest land is primarily devoted to growing trees for long-term commercial timber production on land that can be economically and practically managed for such production, the following factors shall be considered: (a) The proximity of the land to urban, suburban, and rural settlements; (b) surrounding parcel size and the compatibility and intensity of adjacent and nearby land uses; (c) long-term local economic conditions that affect the ability to manage for timber production; and (d) the availability of public facilities and services conducive to conversion of forest land to other uses.

6228 related to the definition of forestry resources which are to be designated and protected under the Growth Management Act (GMA). These changes became effective after Planning staff and the Planning Commission had completed their recommendations on the instant petitions.

9. Although the interim forestry designation criteria will not be formally amended until Council considers the final forestry plan as part of GMA plan adoption, Council concludes that the FAC recommendation is consistent with and should be used as initial implementation of ESSB 6228 which defines forestry resources as those which are primarily devoted to production of long term commercial significance. The phrase 'primarily devoted to' also includes consideration of landowner's intent, as found by the Puget Sound Growth Planning Hearings Board in the case of Twin Falls, et al, vs. Snohomish County (No. 93-3-0003 September 1993).

Consistent with the change in the statutory definition of forest land, the Council also concluded that the Interim Commercial Forest and Interim Forest Reserve designations should not apply to property "for which complete subdivision applications were received prior to their initial interim forestry designation, or for existing tracts of land less than 40 acres in size, regardless of ownership."

In specifically addressing the decision to remove the interim forestry designation on the Twin Falls property, Amended Motion 94-210 states:

This 180 acre parcel should be removed from any forestry designation based upon Council conclusion 10 above, on testimony and on the landowner's petition. The site is characterized by streams, wetlands, lakes and very steep slopes, so much so that one area landowner testified that a recent attempt to log in the area had to be aborted due to the steep terrain. The site is also intended by the landowner to be developed into low density recreational/residential use and is currently used for recreational purposes.

In 1995, the Council adopted a comprehensive plan under the GMA and designated the Twin Falls property as Low Density Rural Residential (LDRR).

In 1998, Twin Falls and DNR agreed to a land trade. The land Twin Falls received from DNR was designated in the comprehensive plan as Commercial Forest Land (CFL) and Forest Transition Area (FTA). A CFL designation means the forest land is appropriate for long term conservation in accord with the GMA. FTA designation means forest land is located adjacent to land that is not designated as forest land.

Stafne Property

Scott Stafne owns Lot 11 in Twin Falls Estates (TFE)³. Lot 11 consists of more than 20 acres and is zoned LDRR. The northeast boundary of Lot 11 runs along the base of a cliff. The adjacent commercial forest land above the cliff was owned by DNR. In 2004, Stafne built a house on Lot 11.

In 2006, Stafne acquired three or four acres of land previously owned by DNR. The property was zoned CFL and FTA.

In May 2007, the County approved Stafne's request for a boundary line adjustment (BLA) to reconfigure Lot 11 to incorporate the land previously owned by DNR. Stafne recorded the BLA on May 31:

Annual Review

Under the GMA, comprehensive land plans and development regulations are subject to ongoing review and evaluation. RCW 36.70A.130(1)(a). A county must review and if necessary revise the comprehensive plan and development regulations every seven years. RCW 36.70A.130(4)(a).⁴

³ Stafne also owns another lot, Lot 16, in Twin Falls Estates. Lot 16 is not the subject of this lawsuit.

⁴ Snohomish County last reviewed and revised the comprehensive plan in 2004.

The GMA also requires counties to “establish and broadly disseminate to the public a public participation program” to consider amendments to the comprehensive plan on an annual basis. RCW 36.70A.130(2)(a). RCW 36.70A.470 requires counties to adopt procedures for interested parties, and applicants “to suggest plan or development regulation amendments. The suggested amendments shall be docketed and considered on at least an annual basis, consistent with the provisions of RCW 36.70A.130.” RCW 36.70A.130(2)(b) states that “all proposals shall be considered by the governing body concurrently so the cumulative effect of the various proposals can be ascertained. . . .”

In compliance with the requirements of the GMA, the Council established annual docket review procedures and criteria in chapter 30.74 of the Snohomish County Code (SCC), “Growth Management Act Public Participation Program Docketing.”

SCC 30.74.020 sets forth the requirements for a proposed amendment to the comprehensive plan or to the development regulations.⁵ SCPD conducts an initial

⁵ SCC 30.74.020 provides:

Any person proposing amendments to the comprehensive plan or development regulations under this chapter must submit the following to the department:

- (1) A description of the proposed amendment including proposed map or text changes;
- (2) The location of the property that is the subject of amendment on an assessor map dated and signed by the applicant, if the proposal is for a future land use map amendment;
- (3) A legal description and a notarized signature of one or more owners, if a rezone is requested by owners concurrent with a requested future land use map amendment;
- (4) An explanation of why the amendment is being proposed;
- (5) An explanation of how the proposed amendment is consistent with the GMA, the countywide planning policies, and the goals and objectives of the comprehensive plan;
- (6) If applicable, an explanation of why existing comprehensive plan language should be added, modified, or deleted; and
- (7) A SEPA checklist.

review and evaluation of proposed amendments according to the criteria set forth in SCC 30.74.030 and .040. The Council then holds a public hearing to determine "which of the proposed amendments should be further processed." SCC 30.74.050.

SCC 30.74.030 establishes the criteria for evaluating proposed amendments to the comprehensive plan or the development regulations. SCC 30.70.030 provides, in pertinent part:

(1) The department shall conduct an initial review and evaluation of proposed amendments, and assess the extent of review that would be required under the State Environmental Policy Act (SEPA) prior to county council action. The initial review and evaluation shall include any review by other county departments deemed necessary by the department, and shall be made in writing. The department shall recommend to the county council that the amendment be further processed only if all of the following criteria are met, excerpt as provided in SCC 30.74.040:

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

(b) The time required to analyze probable adverse environmental impacts of the proposed amendment is available within the time frame for the annual docketing process;

(c) The time required for additional analysis to determine the need for additional capital improvements and revenues to maintain level of service, when applicable to the proposal, is available within the time frame for the annual docketing process;

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

(e) The proposed amendment does not make a change in an area that is included in a proposed subarea plan scheduled for completion and final action by the council prior to the next docket submittal deadline;

...

(g) The time required for processing any required additional amendments not anticipated by the proponents is available within the time frame of the annual docketing process; and

(h) If the proposed amendment has been reviewed by the planning commission or county council as part of a previous proposal, circumstances related to the current proposal have

significantly changed and support a plan or regulation change at this time.

Under SCC 30.74.040, a request to rezone property as part of the annual review also requires compliance with the criteria in SCC 30.74.030. SCC 30.74.040 provides, in pertinent part:

- (1) The rezone request is for an implementing zone consistent with a concurrent proposed amendment to the future land use map that meets the criteria of SCC 30.74.030;
- (2) Public facilities and services necessary for development of the site, as defined in applicable capital facilities plans, are available or programmed to be provided consistent with the comprehensive plan and development regulations as determined by applicable service providers; and
- (3) Site plan approval would not be required concurrent with the rezone under chapters 30.31A, 30.31B, or 30.31F SCC.

Annual Review Request

On October 29, 2007, Stafne submitted a docket proposal request and an environmental checklist to rezone and change the land use designation from CFL and FTA to LDRR for all of the previously owned DNR property acquired by TFE, including the portion of his property zoned CFL. The docketing proposal describes the land trade with DNR and the reasons for the request.

TFE has transitioned over the years under existing FTA regulations into a rural community with a rural community infrastructure. TFE owners do not want to use their property as CFL or to be foresters. Rather, they seek to preserve and enhance their rural lifestyle, which promotes privacy, scenic beauty, abundant wildlife, and recreation. Moreover, in this regard it is the position of the TFE Community that TFE does not meet the definition of Commercial Forest Land under the Growth Management Act, which is the County's basis for its CFL and FTA designations.

On March 31, 2008, SCPD issued an initial review and evaluation of Stafne's docketing proposal. The evaluation states, in part, that the docketing proposal does

not meet the criteria of SCC 30.74.030(a) because it is inconsistent with the resource land designation, "and it will not conserve designated forest land such as the proposal site." In analyzing the criteria under SCC 30.74.030(d), the evaluation states that the property designated as CFL continues "to meet the classification for designation as forest land of long-term commercial significance" under the County's comprehensive plan policies. The evaluation also notes that other than fire service, no other public services or facilities are available in TFE.

On June 6, Stafne sent an e-mail to the Council criticizing SCPD's review and evaluation. Stafne points out the statutory change in the definition of forest land and asserts that SCPD failed to recognize TFE is an established rural community that is zoned LDRR. Stafne also states that SCPD relied on outdated boundary maps and SCPD inaccurately states that TFE does not have access to public utilities.

The purpose of this email is to state in succinct terms why the County Counsel [sic] should reject the Planning Staff's evaluation that Twin Falls Docket proposal should not be placed on the Final Docket. Rather than point out every mistake in the Planning Department's Report and Map, I will for purposes of outlining the position of Twin Fall Estates to the County Council point out three reasons why the County Council should not accept the Planning Department's initial evaluation.

- I. The Planning Department failed to recognize Twin Falls Estates was an established rural community.

As my initial Docket proposal made clear Twin Falls Estates was asking that all the parcels within its rural community be classified as Low Density Rural Residential. The reason this was necessary was (1) because Twin Falls had acquired from the Department of Natural Resources some lots across the Twin Falls Estate which DNR had determined did not constitute economically viable commercial forest land; (2) this land (which was primarily classified as being in the Forest transition Zone) was boundary line adjusted by community lot owners so as to be incorporated as part of several existing parcels which had a low density rural residential classification; (3) this left

portions of 5 lots and two lots in different and conflicting land classifications than existed for the rest of Twin Falls Estates.

Therefore, the Twin Falls Estates' proposal sought to clarify this County Councils' previous decision after the legislature changed the definition of Commercial Forest Land that Twin Falls' Estates was and continued to be a low density rural residential community.

II. The Planning Department used wrong data and therefore misapplied the County's Forestry Criteria to the proposed Twin Falls Estates.

... The Staff's failure to consider the actual lots that existed at the time of the Proposal led it to wrongly conclude that there was contiguous ownership of lots totaling 40 acres or more. Id. Both the Offices of the County Assessor and the County Recorder have advised the Planning Staff that the lots upon which its initial analysis was based no longer exist and that there is no contiguous ownership of lots totaling 40 acres or more.

...
III. The Planning Department failed to consider that all Twin Falls lots have access to public utilities.
...

SCPD responded to Stafne's criticisms in a memorandum to the Council. The memorandum acknowledges that the evaluation does not reflect the recently recorded boundary line adjustments. While the memorandum states that the property continues to meet the criteria for designating the property as CFL and FTA, SCPD inaccurately relies on the previous statutory definition of forest land.⁶ Stafne claims he did not receive a copy of the SCPD memorandum to the Council until after the June 9 public hearing.

At the June 9 public hearing, the Council considered approximately 50 docketing proposals, including the request to rezone and change the comprehensive

⁶ The SCPD memorandum also states that a zoning change is unnecessary because the existing "Forestry" zoning "is the implementing zone for both LDRR and Forest land use designation."

No. 62843-7-I/11

plan designation for the previously owned DNR property acquired by Stafne and others in TFE. Stafne addressed the Council and submitted an oral statement in support of the docket proposal to change the zoning and land use map designation from CFL and FTA to LDRR. Stafne reiterated that the legislature had changed the definition of forest land “from land primarily ‘useful’ to growing trees to land primarily ‘devoted’ to growing trees.” Stafne argued that the land DNR traded to TFE was not appropriate for commercial logging, and that because SCPD did not “consider the actual parcel configuration within Twin Falls Estates boundaries,” the property did not meet the definition of CFL or FTA.

On June 16, the Council adopted Amended Motion No. 08-238 approving the final list of proposals it decided to consider. As reflected in Amended Motion No. 08-238, the Council decided to not place Stafne’s docket proposal on the final docket, noting “Do Not Process Further.”

On July 18, Stafne filed a complaint and petition against the County under the Land Use Petition Act (LUPA), chapter 36.70C RCW. Stafne challenged the Council’s decision to reject his docketing proposal to rezone and change the comprehensive land use map for that the portion of his property zoned CFL to LDRR.⁷ The crux of Stafne’s lawsuit is that the County erroneously evaluated his docketing proposal under the criteria as adopted in SCC 30.74.030(a) and (d).

On October 20, Stafne filed an amended complaint and petition seeking relief under LUPA and issuance of a statutory writ of certiorari, writ of mandamus, writ of prohibition, or constitutional writ of certiorari. Stafne also sought a declaratory judgment that as a matter of law, the portion of his property acquired from DNR that

⁷ Stafne’s lawsuit only challenges the Council’s decision as to his property.

No. 62843-7-1/12

was added to Lot 11 through a BLA does not meet the definition of "forest land" under the GMA.

The County filed a motion to dismiss under CR 12(b)(1) and CR 12(b)(6). The County argued the court lacked subject matter jurisdiction because the Council acted in a legislative capacity and Stafne failed to exhaust his administrative remedies by filing an appeal with the CPSGMHB. In the alternative, the County argued the court should dismiss Stafne's LUPA action as untimely.

Stafne filed a cross motion for partial summary judgment on his declaratory judgment action. In response to the County's motion to dismiss, Stafne argued that filing an appeal to the CPSGMHB was futile and asked the court to grant his request for a writ of mandamus, writ of prohibition, or constitutional writ of certiorari. The court granted the County's motion to dismiss and denied Stafne's cross motion for summary judgment.

ANALYSIS

Stafne argues the trial court erred in dismissing his lawsuit and denying his cross motion for summary judgment. Stafne contends he is entitled to issuance of a writ because SCPD erroneously relied on the previous statutory definition of forest land in recommending the Council reject his docketing proposal under SCC 30.74. Stafne also contends that as a matter of law, approval of the BLA to incorporate the CFL designated property into Lot 11 changed the zoning designation from CFL to LDRR.

Dismissal of Complaint and Land Use Petition.

We first address the County's argument that the CPSGMHB has exclusive jurisdiction over the Council's decision to reject a docketing proposal to change the zoning designation. The County asserts the court properly dismissed Stafne's complaint and LUPA petition because Stafne failed to exhaust his administrative remedies by filing an appeal to the CPSGMHB.⁸ Whether a tribunal has subject matter jurisdiction and Stafne failed to exhaust administrative remedies is a question of law.

Woods v. Kittitas County, 162 Wn.2d 597, 607-08, 174 P.3d 25 (2007).

Growth management hearings boards have exclusive jurisdiction to determine compliance with the GMA. Woods, 162 Wn.2d at 614-15. RCW 36.70A.280 sets forth the matters subject to review by growth management hearings boards. RCW 36.70A.280 provides, in pertinent part:

(1) A growth management hearings board shall hear and determine only those petitions alleging either:

(a) That, except as provided otherwise by this subsection, 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 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW. Nothing in this subsection authorizes a board to hear petitions alleging noncompliance with RCW 36.70A.5801; . . .

Here, the CPSGMHB has routinely decided that it does not have jurisdiction over a decision to reject a proposed change in the zoning designation during the

⁸ Snohomish County is within the jurisdictional boundaries of the CPSGMHB. RCW 36.70A.250(1)(b).

No. 62843-7-1/14

annual GMA docketing review.⁹ See, e.g., SR 9 / US 2 LLC v. Snohomish County, No. 08-3-0004, 2009 WL 1134039 (Cent. Puget Sound Growth Mgmt. Hrg's Bd. Apr. 9, 2009); Agriculture for Tomorrow v. Snohomish County, No. 99-3-0044, 1999 WL 508321 (Cent. Puget Sound Growth Mgmt. Hr'gs Bd. June 18, 1999); Cole v. Pierce County, No. 96-3-0009c, 1996 WL 678407 (Cent. Puget Sound Growth Mgmt. Hr'gs Bd. July 31, 1996); Agriculture for Tomorrow v. Snohomish County, No. 93-3-0009, 1999 WL 508321 (Cent. Puget Sound Growth Mgmt. Hr'gs Bd. June 18, 1999); Bidwell v. City of Bellevue, No. 00-3-0009, 2000 WL 1207507 (Cent. Puget Sound Growth Mgmt. Hr'gs Bd. July 14, 2000); Harvey v. Snohomish County, No. 00-3-0008, 2000 WL 1207506 (Cent. Puget Sound Growth Mgmt. Hr'gs Bd. July 13, 2000).

Although RCW 36.70A.280(1) expressly grants the CPSGMHB authority to review an "adopted comprehensive plan, development regulations, or permanent amendments", the CPSGMHB has ruled that it has "no jurisdiction to review a decision by a county not to adopt" a proposed docketing amendment to change the zoning designation. SR 9 / US 2 LLC, 2009 WL 1134039, at *3-4.

Specifically, the CPSGMHB has held that because the annual docketing procedure under RCW 36.70A.130 does not require a county to adopt proposed docketing amendments, it does not have jurisdiction to decide an appeal challenging a refusal to consider a proposed amendment. For example, in Harvey, the CPSGMHB ruled as follows:

Petitioners proposed comprehensive plan amendments to the County and the County declined to docket or adopt their proposed amendments. The County argued that the Board lacks jurisdiction

⁹ At oral argument the County conceded that it would have filed a motion to dismiss if Stafne had filed a petition with the CPSGMHB challenging the Council's decision to reject his docketing proposal.

over challenges to the County's failure to docket proposed comprehensive plan amendments. The GMA authorizes a local government to amend comprehensive plans annually; however, it does not require amendments. RCW 36.70A.130. Identical facts were before the Board in Agriculture for Tomorrow v. Snohomish County, where the County's Department of Planning and Development Services recommended that AFT's proposal not be processed. The Board granted the County's motion to dismiss in that case, relying on previous Board decisions. CPSGMHB Case No. 99-3-0004, Order on Dispositive Motion (Jun. 18, 1999).

In Cole v. Pierce County, a property owner appealed a county's refusal to adopt his proposed amendments that he alleged would 'correct' the county's original land use designation of his property. CPSGMHB Case No. 96-3-0009c, Final Decision and Order (Jul. 31, 1996). The Board rejected Cole's argument, holding that "the County's failure to act cannot be construed to be an 'action' under RCW 36.70A.130" and further holding that the actions challenged in Cole's petition were not taken in response to a GMA duty to act by a certain deadline, or in response to any other duty imposed by the Act, and that WAC 242-02-220(5) does not apply to this case." Cole, at 10-11. Consequently, the Board concluded that it did not have jurisdiction to resolve Cole's complaint. Id. at 11.

Harvey, 2000 WL 1207506, at *1.

Based on the decision of the CPSGMHB that it does not have jurisdiction to consider the decision to reject a docketing proposal to change a zoning designation, we conclude Stafne did not have to exhaust administrative remedies by filing an appeal with the CPSGMHB. Orion Corp. v. State, 103 Wn.2d 441, 457, 693 P.2d 1369 (1985) (resort to administrative procedures not required if futile). Consequently, Stafne had to file his challenge to the Council's decision in superior court under LUPA. Woods, 162 Wn.2d at 612 (citing Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 178, 4 P.3d 123 (2000)).

Where a land use decision is not subject to review by the growth management hearings board, a LUPA petition is the exclusive means to obtain judicial review of a

local jurisdiction's final decision. Woods, 162 Wn.2d at 610. The express purpose of the LUPA statute is to "reform the process for judicial review of land use decisions made by local jurisdictions" by replacing "the writ of certiorari for appeal of land use decisions." RCW 36.70C.010, .030.

Former RCW 36.70C.020(2) defines "land use decision" as follows:

(2) 'Land use decision' means 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;

(b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and

(c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

The Council's decision to reject Stafne's docketing proposal to change the zoning and land use designation on a portion of his property from CFL to LDRR is a final land use decision under RCW 36.70C.020(2). In Amended Motion No. 08-238, the Council made a final determination to reject Stafne's proposed docketing amendment to rezone and change the CFL and FTA zoning designation on the previously owned DNA property.

Stafne asserts the Council erroneously applied the adopted criteria under SCC 30.74.030(a) and (d) by relying on the former GMA definition of forest land and

ignoring the effect of the BLA. Under LUPA, relief may be granted where “[t]he land use decision is a clearly erroneous application of the law to the facts.” RCW 36.70C.130(1)(d).¹⁰

LUPA establishes a mandatory twenty-one day deadline for appealing the final land use decision of a local authority. RCW 36.70C.040(3). RCW 36.70C.040(3) provides in pertinent part that a LUPA “petition is timely if it is filed and served . . . within twenty-one days of the issuance of the land use decision.”

Here, there is no dispute that on June 16, 2008, the Council adopted Amended Motion 08-238 and rejected Stafne’s docketing proposal to rezone a portion of his property and change the land use map designation. There is also no dispute that Stafne filed his complaint and land use petition more than twenty-one days after adoption of Amended Motion 08-238. RCW 36.70C.040(2) provides, in pertinent part that: “A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served”

¹⁰ The standards for review under LUPA are set forth in RCW 36.70C.130(1). In pertinent part, RCW 36.70C.130(1) provides:

(1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

No. 62843-7-1/18

Because Stafne did not timely file his LUPA action, the court did not err in dismissing his lawsuit against Snohomish County.¹¹

Writ of Mandamus or Prohibition

LUPA does not preclude judicial review of a request for writ of mandamus or prohibition. RCW 36.70C.030(1)(b) states in pertinent part: “(1) . . . This chapter does not apply to: . . . (b) Judicial Review of applications for a writ of mandamus or prohibition. . . .”

A writ of mandamus requires a state official “to comply with law when the claim is clear and there is a duty to act.” RCW 7.16.160; Paxton v. City of Bellingham, 129 Wn. App. 439, 444, 119 P.3d 373 (2005) (quoting In re Personal Restraint of Dyer, 143 Wn.2d 384, 398, 20 P.3d 907 (2001)). Mandamus is an extraordinary remedy that is not available when there is a “plain, speedy and adequate remedy in the ordinary course of law.” RCW 7.16.170; Paxton, 129 Wn. App at 444-45.

A writ of prohibition is the counterpart to the writ of mandamus. A writ of prohibition is an extraordinary remedy that “may be invoked to prohibit judicial, legislative, executive, or administrative acts if the official or body to whom it is directed is acting in excess of its power.” RCW 7.16.290; Brower v. Charles, 82 Wn. App. 53, 57, 914 P.2d 1202 (1996). As with a writ of mandamus, a writ of prohibition cannot be issued if there is a plain, speedy and adequate legal remedy. RCW 7.16.300; Leskovar v. Nickels, 140 Wn. App. 770, 774, 166 P.3d 1251 (2007).

¹¹ The court also did not abuse its discretion in dismissing Stafne’s lawsuit requesting a constitutional writ of certiorari because Stafne had an adequate remedy at law. Snohomish County v. State Shorelines Hearings Bd., 108 Wn. App. 781, 785, 32 P.3d 1034 (2001).

We review the superior court's determination as to the availability of an adequate remedy at law for abuse of discretion. River Park Square, L.L.C. v. Miggins, 143 Wn.2d 68, 76, 17 P.3d 1178 (2001). We do not disturb the court's decision "unless the superior court's discretion was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." River Park Square, 143 Wn.2d at 76.

Stafne's allegation that the County erroneously applied the adopted criteria of SCC 30.74 by relying on an incorrect definition of forest land in denying his land use docketing proposal falls squarely within LUPA. The trial court did not abuse its discretion in deciding that Stafne had a plain, speedy and adequate legal remedy, and in denying his request for a writ of mandamus or prohibition.

Declaratory Judgment

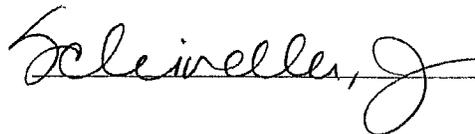
Stafne argues the court erred in denying his cross motion for summary judgment. Stafne contends that because the County approved the BLA to incorporate the CFL property into Lot 11, as a matter of law, the newly-configured lot does not meet the statutory definition of forest land under the GMA. We review summary judgment de novo. City of Oak Harbor v. St. Paul Mercury Ins. Co., 139 Wn. App. 68, 71, 159 P.3d 422 (2007). A party is not entitled to a declaratory judgment if there is an adequate alternative remedy available. Grandmaster Sheng-Yen Lu v. King County, 110 Wn. App. 92, 98-99, 38 P.3d 1040 (2002). Because LUPA is the exclusive means of judicial review of the Council's decision, we conclude Stafne had an adequate alternative remedy.

Stafne's reliance on Chelan County v. Nykreim, 146 Wn.2d 904, 52 P.3d 1 (2002), is misplaced. In Nykreim, the County mistakenly granted a BLA that conflicted

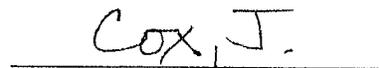
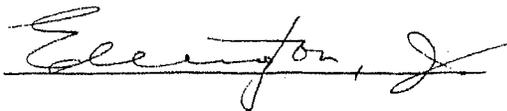
with the County's adopted development regulations. Nykreim, 146 Wn.2d at 911-12. The supreme court held that because the County's decision to grant the BLA was a final decision under LUPA, and the County did not timely appeal the decision under LUPA, the County could not challenge the validity of the BLA. Nykreim, 146 Wn.2d at 940.

Here, unlike in Nykreim, the County does not challenge the BLA or dispute that the decision to grant Stafne's request for a BLA is a final decision. Because Nykreim does not support Stafne's argument that granting the BLA changed the zoning or land use designation, the court did not err in denying his cross motion for summary judgment.¹²

We affirm the trial court's decision to dismiss Stafne's amended complaint and petition, and to deny his cross motion for summary judgment.¹³



WE CONCUR:



¹² We also note that as part of his request for a BLA, Stafne agreed that approval of the BLA "does not guarantee or imply the subject property may be developed or subdivided and boundary line adjustment approval may not be grounds for approval of subsequent modification or variance requests."

¹³ We also reject Stafne's argument that the criteria for annual review of docketing proposals as adopted in SCC 30.74.030 and .040 is unconstitutional, on its face and as applied to the decision to reject his proposal. A legislative enactment is presumed to be constitutional and a party challenging the enactment has the burden of proving unconstitutionality beyond a reasonable doubt. Island County v. State, 135 Wn.2d 141, 146, 955 P.2d 377 (1998). Stafne's premise that the procedures under SCC 30.74 prevent judicial review of the County's decisions is unfounded. As discussed, a docketing decision to reject a proposal is subject to judicial review under LUPA. Woods, 162 Wn.2d at 612.

Appendix B

Order Amending Opinion
(June 2, 2010)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

SCOTT E. STAFNE,

Appellant,

v.

SNOHOMISH COUNTY AND
SNOHOMISH COUNTY PLANNING
DEPARTMENT,

Respondents.

No. 62843-7-1

ORDER AMENDING OPINION

The unpublished opinion filed on May 24, 2010 in the above matter is amended to correct citations to the Snohomish County Code (SCC) as follows:

On page 7, 5th line from top, change SCC 30.70.030 to SCC 30.74.030;

On page 9, 1st line from top, change SCC 30.74.030(a) to SCC 30.74.030(1)(a) [3rd line from top in PDF version on court web site];

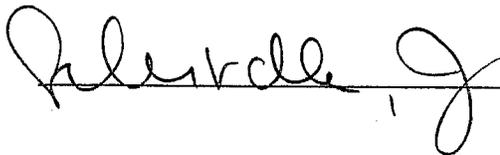
On page 9, 3rd line from top, change SCC 30.74.030(d) to SCC 30.74.030(1)(d) [5th line from top in PDF version on court web site];

On page 11, 5th line from bottom, change SCC 30.74.030(a) and (d) to SCC 30.74.030(1)(a) and (d) [page 12, 2nd line from top in PDF version on court web site];

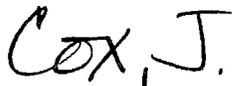
On page 16, 1st two lines from bottom, change "SCC 30.74.030(a) and (d) to SCC 30.74.030(1)(a) and (d) [page 17, 6th line from top in PDF version on court web site],

SO ORDERED.

Dated this 2nd day of June 2010.







2010 JUN -2 PM 3:15
COURT OF APPEALS
DIVISION ONE

Appendix C

Order Amending Opinion and Publishing
(June 30, 2010)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

SCOTT E. STAFNE,)
) No. 62843-7-1
)
) Appellant,)
)
) v.) ORDER AMENDING OPINION
) AND PUBLISHING
)
) SNOHOMISH COUNTY AND)
) SNOHOMISH COUNTY PLANNING)
) DEPARTMENT,)
)
) Respondents.)

Appellant Scott Stafne filed a motion to publish this Court's opinion filed on May 24, 2010. Snohomish County and the Snohomish County Planning Department filed a response to the motion to publish and appellant filed a reply. A panel of this court has determined that the opinion in the above matter should be published;

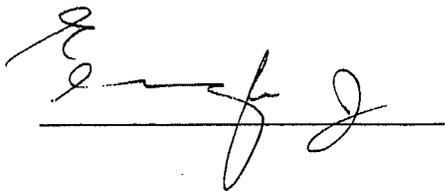
Now therefore, it is hereby ordered that the appellant's motion to publish the opinion is granted.

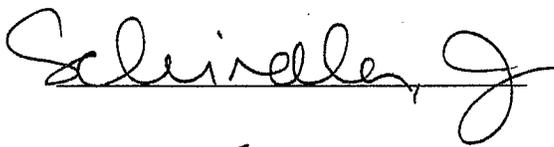
IT IS FURTHER ORDERED that the opinion be amended as follows:

At page 5, paragraph 2, line 2, "and is zoned LDRR" should be changed to "and is designated LDRR."

SO ORDERED.

Dated this 30th day of June 2010.





COX, J.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 JUN 30 PM 12:39

Appendix D

Order Denying Motion for Reconsideration
(June 30, 2010)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

SCOTT E. STAFNE,

Appellant,

v.

SNOHOMISH COUNTY AND
SNOHOMISH COUNTY PLANNING
DEPARTMENT,

Respondents.

No. 62843-7-1

ORDER DENYING MOTION
FOR RECONSIDERATION

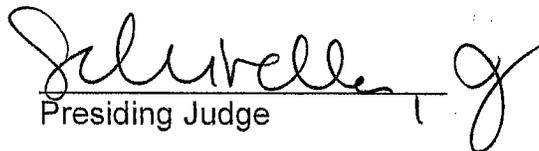
Snohomish County and the Snohomish County Planning Department filed a motion to reconsider the opinion filed in the above matter on May 24, 2010. A majority of the panel has determined this motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 30th day of June 2010.

FOR THE COURT:


Presiding Judge

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 JUN 30 PM 12:39