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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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SCOTT E. STAFNE,

Appellant/Petitioner

vs.

SONOHOMISH COUNTY AND
SNOHOMISH COUNTY PLANNING DEPARTMENT

Appellees/Respondents

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

APPELLANT/PETITIONER'S REPLY BRIEF

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The County's Response Brief (RB) never addresses the different consequences of a.) Municipal legislative decision-making under the Growth Management Act¹ (GMA), and b.) Municipal quasi-judicial/ministerial decision-making under the Land Use Petition Act² (LUPA).

REPLY TO COUNTY'S "INTRODUCTION":

The introduction to the County's RB mischaracterizes Stafne' arguments as being only:

"...whether Snohomish County has a statutory duty under the ... GMA docketing process to enact legislation removing a natural resource designation from land when a landowner claims that his land no longer meets the statutory definition of natural resource land." Rb, p. 1.

The County claims Stafne argued the Superior Court should have instructed the County Council to *legislatively designate* natural resource land *pursuant to GMA*. But Stafne

¹ RCW Chapter 36.70A

² RCW Chapter 36.70C

never argued that contention to the Superior Court³ or in his Opening Brief on Appeal (OB). After falsely stating that Stafne seeks “legislative relief” under the GMA, the County argues Stafne is not entitled to any such relief under the GMA. But the County is responding to a phantom GMA argument the County has manufactured.

Stafne urges this Court to ignore the County’s response arguments to legal contentions Stafne has never advanced.

REPLY TO “STATEMENT OF CASE”:

The County states at page 4 of RB that the land acquired by Stafne from the State was Commercial Forest. Stafne disputes this⁴. The land was acquired by Twin Falls, Inc. from Washington State. A few acres of this land later were configured into Stafne’s residential parcel. The land that was incorporated into Stafne’s parcel was designated as Forest

³ See e.g. Clerk’s Papers (CP) p. 281, line 15 – p. 285, line 2).

⁴ The County’s citations to CP 149 and 162 do not support the proposition that the land Stafne received was “commercial forest”.

Transition Area⁵ (hereafter referred to as FTA or transition land).

The County claims FTA is simply an “overlay” of Commercial Forest Land (CFL). *But the two types of land are very different.* Both FTA land and Stafne’s low density rural residential land have a minimum density requirement of one house per twenty acres⁶. CFL has a minimum density of one house per eighty acres⁷.

FTA land - as its name suggests - is land the County anticipated would or could transition to other uses⁸.

The different land designations (*i.e.* FTA land and CFL) are important because the County was required to take them into account prior to granting Stafne’s site-specific Boundary Line Adjustment (BLA) application. By granting Stafne the

⁵ CP 163, paragraph 9 F.

⁶ CP p. 166, paragraph 17; County’s 30 (b) (6) designee deposition (deposition) p. 340, deposition p. 40, lines 10 – 12.

⁷ CP 434, paragraph 19.

⁸ CP, p. 339, deposition page 35, line 17 through page 36, line 4.

BLA in 2007 the County decided that inclusion of transition land into his less than 40 acre rural residential parcel was *consistent* with Snohomish County's comprehensive plan and development regulations relating to FTA land. SCC 30.41E.100. *Woods v. Kittitas County*, 174 P.3d 25, 33, 162 Wash.2d 597 (2007). The County's decision in 2007 to create a new residential parcel that did not meet the criteria for forest land was supported by a.) The County's 1994 ordinance removing the Twin Falls rural settlement from any forest land designation⁹; b.) The 1995 comprehensive plan adopting the FTA designation¹⁰; and c.) The other site- specific decisions by the County from 1998 through 2007 configuring residential parcels inside Twin Falls Estates to include transition land¹¹.

The County incorrectly states at page 5 of RB that Stafne obtained multiple ministerial boundary line adjustments for the

⁹ CP, pp. 540 – 546; p. 429, paragraph 7 – 430, paragraph 10.

¹⁰ Stafne asks this Court take judicial notice of this fact.

¹¹ CP p. 430, paragraph 11 – p. 432, paragraph 16; p. 434, paragraph 19 – p. 439, paragraph 35.

newly acquired transition resource land. Stafne, Twin Falls, Inc., Twin Falls Estates rural settlement, and the owners of other parcels and/or homes in Twin Falls Estates rural settlement are not the same entities and Stafne objects to the statement that they are.

Stafne *does agree* that he obtained and recorded the unappealed final land use decision set forth at CP, pp. 698 – 724. Stafne’s motions for summary judgment involved only the consequences of this site-specific BLA decision under LUPA.

Stafne does not agree with the statement at RB pp 6 - 7:

“[t]he County code does not specify any substantive standards for the County’s Council’s decision regarding which docket proposals to approve for further processing.”

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

Snohomish County's forest land designation criteria. These are substantive standards the ordinance requires be met before a proposal can be passed on for legislative consideration under SCC Chapter 30.73.

On page 8 of RB the County falsely states Stafne submitted a GMA citizen proposal seeking a change in the designation of **his** property. Stafne's ***GMA proposal*** sought to remove forest land designation from all lots in the Twin Falls Estates rural settlement. CP 156. The proposal was submitted on behalf of all parcel owners in Twin Falls Estates. CP 149.

REPLY TO ARGUMENT:

The County does not discuss Stafne's first assignment of error relating to the Superior Court's denial of his motions for partial summary judgment until pages 41 – 46 of RB. Because analysis of the legal issues raised by Stafne are better facilitated by considering the relevant LUPA and GMA final land use decisions in chronological order, Stafne will reply to the County's response arguments in the same order as they

were addressed in Stafne's OB. The following chart shows when relevant land use decisions were made and whether they were timely appealed pursuant to the GMA or LUPA.

<u>DATE</u>	<u>LAND USE ACTION</u>	<u>APPEAL</u>
1992	GMA Designation of TFE as Interim FL	yes
1994	GMA Classification of TFE as rural settlement	no
1995	Creation of GMA FTA designation in Comp Plan	no
1998-2009	LUPA Site-Specific BLAs reconfiguring TFE	no
2007	LUPA BLA of Stafne's residential parcel	no
2009	Denial of Stafne's GMA citizen proposal	not allowed

REPLY RE: STAFNE'S ASSIGNMENT OF ERROR #1

Stafne's first assignment of error is:

“[t]he Superior Court erred by not granting Stafne's motions for summary and declaratory judgments that after the final land use decision granting the [2007] BLA no part of Stafne's reconfigured parcel constituted forest land.” OB, p. 3.

Snohomish County asserts: 1.) Stafne was not entitled to a judicial de-designation of his land under the GMA as a matter of law; and 2.) Genuine issues of fact precluded the Superior

Court from determining whether Stafne's newly configured parcel met the definition of Forest Land. RB 41 – 45.

The County argues Stafne should have appealed to the Growth Management Hearings Board (GMHB) to determine the consequences of the County's final site-specific land use decision configuring Stafne's parcel. But the County cites no cases or other authority as support for this proposition. RB, pp. 12 -13. The County then concludes:

“[b]ecause the Growth Board and not the trial court had subject matter jurisdiction over Stafne's lawsuit, the trial court properly granted the County's motion to dismiss Stafne's complaint under Civil Rule 12(b)(1) for lack of subject matter jurisdiction.” RB, p. 13

The Supreme Court has held: “A challenge to a site-specific land use decision should be brought in a LUPA petition at superior court.” *Woods v. Kittitas County*, 174 P.3d 25, 31, 162 Wash.2d 597 (2007). A challenge to a site-specific land use decision cannot be brought before a GMHB. Id.

Stafne's motions for partial summary judgment¹² asked the Superior Court to issue a judgment declaring the consequences of the County's 2007 final land use action under LUPA. *The County asks this Court to assume this unappealed final land use decision under LUPA configuring Stafne's residential parcel had no legal consequences.* RB, pp. 25 – 29.

Stafne's motions for partial summary judgment were based on *Chelan County v Nykreim*, 146 Wn.2d 904, 52 P.3rd 1 (2002). In that case the Washington Supreme Court held a Superior Court had judicial power to declare the legal consequences of a ministerial approved site-specific BLA under LUPA.

“Under RCW 7.24.020, ‘[a] person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.’” *Id.*, 146 Wn2d at 114

¹² CP 112 – 122

In *Nykreim* Chelan County and adjacent land owners contended a BLA should be withdrawn because it illegally created three lots. But the owner of the land asserted a consequence of the County's failure to timely appeal its own final land use decision illegally creating three lots was that those lots became valid. The Supreme Court agreed with the land owner. The reason the Supreme Court concluded the County's final BLA trumped substantive law was Washington's policy promoting the finality of land use decisions. *Id.* at 146 Wn.2d at 917 – 938. *Nykreim's* reasoning is directly on point and should be followed here.

The County's final approval of the BLA under LUPA configuring transition land into Stafne's rural residential parcel caused the transition land to lose its forest land characteristics. This result was generally consistent with the County's 1995 comprehensive plan, which indicated an intention that FTA land could and would be transitioned to other land uses. *See*

e.g. Woods v. Kittitas County, 174 P.3d 25, 30 - 35, 162 Wash.2d 597 (2007)

Allowing a municipality to revisit and overturn previous site-specific final land use decisions pursuant to a claim of general “legislative power” under the GMA would eviscerate Washington State’s policy regarding the finality of unappealed land use decisions¹³. The principle of finality applies to land use decisions, like the 2007 BLA at issue here, *see e.g. Chelan County v Nykreim*, 145 Wn.2d 904, 52 P.3rd 1 (2002), as well as to unappealed decisions under the GMA. *See Woods v. Kittitas County*, 174 P.3d 25, 30 - 35, 162 Wash.2d 597 (2007);

¹³ The County’s premise that de-designation of natural resource land can only be accomplished through legislative means, *see e.g. RB*, 12 – 24, misses the point. Once the County has exercised legislative powers and enacted a comprehensive plan that plan must be followed in later “specific-site” land use decisions made by the County. Stafne’s complaint is not that the County failed to follow the 1995 comprehensive plan with regard to his 2007 BLA. Stafne’s complaint is the County is attempting to avoid the effects of his specific-site land use final 2007 BLA applying the provisions of the 1995 comprehensive plan to his newly configured parcel by simply claiming that the County Council might legislatively repeal the 1995 FTA comprehensive plan designation at some future time. *See CP*, p 650

Wenatchee Sportsmen Association v. Chelan County, 141 Wash.2d 169, 4 P.3d 123 (2000).

Finality of site-specific land use decisions is of overriding importance because once final decisions are made by the County and not appealed, people rely on those decisions. The record in this appeal is clear that Stafne and other Twin Falls Estate owners have relied on numerous County land use decisions which indicated the County's intention to transition Twin Falls Estates and adjacent property previously owned by the State into a rural settlement.¹⁴ Stafne's reliance on the principle of finality in moving for summary judgment was clearly appropriate under Washington law. *See e.g. Thurston County v W. Wash. GMRB*, 190 P.2d 38, 45 (2008) quoting *Deschenes v. King County*, 83 Wash.2d 714, 717, 521 P.2d1181 (1974), *overruled in part by Clark County Pub. Util.*

¹⁴ The record before this Court evidences the reliance Stafne and others placed on the Council's 1994 removal of Twin Falls development from any forest land designation and subsequent BLAs incorporating adjacent transition land into Twin Falls Estates rural settlement. CP, p 432, paragraph 14 – p 433 paragraph 17.

Dist. No. 1 v. Wilkinson, 139 Wash.2d 840, 991 P.2d 161 (2000) ("If there were not finality, no owner of land would ever be safe in proceeding with development of his property.")

The future legislative power the County now seeks to impose on Stafne's already configured parcel was not pertinent to Stafne's motions for summary judgment because this power had not been exercised. Only the law that existed in 2007 could be applied to Stafne's site-specific BLA.

Under the separation of powers doctrine it is the Court's duty (not the County's duty) to declare the legal consequences of the unappealed 2007 BLA configuration of Stafne's residential parcel. RCW 7.24.020; *Hale v Wellpinit School Dist. No 49*, 165 Wash.2d 494, 198 P.3d 1021, 1026 (2009); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803). The Superior Court's duty to declare the legal consequences of the unappealed 2007 final land use decision was grounded in the Washington Constitution and RCW 7.24.020. *Id.* The

County's challenge to the judiciary's performance of its Constitutional duty to declare the legal consequences of a site-specific final land use decision under LUPA because the County has a right under the GMA to enact prospective legislation has no legal merit.

It is significant the County does not dispute the finality of the 2007 land use decision configuring Stafne's residential parcel or the other BLA decisions configuring adjacent transition land previously owned by the State into Twin Falls Estates rural settlement. CP, 25. The County contends only that the adjustment of transition land into Stafne's parcel could not have resulted in a de facto de-designation of any transition land. CP 25 – 26. But the County advances no authority in support of this position.

Why can't land which has been reserved by the comprehensive plan for transition to non-forestry purposes be presumed to have been transitioned out of forest land

designation as a result of a County final land use decision granting a BLA? The answer is such land *can be transitioned* because the County did so when it granted - and failed to timely appeal - the site-specific configuration of a few acres of transition land into Stafne's rural residential parcel. After this land use decision Stafne's newly configured parcel clearly did not meet the statutory definition or country criteria for designation of forest land. *See* OB, pp. 26 – 30. The County's RB does not take issue with the fact that after the 2007 BLA Stafne's parcel no longer met the criteria for forest land. Instead the County argued:

“even if Stafne's property no longer meets the definition of forest land, as a matter of law the County is not required to de-designate his property *as part of the docketing process*”. [Emphasis Supplied] RB, p 16.

While this may or may not be true *with regard to the docketing process*, Stafne was still entitled to go before the Superior Court pursuant to RCW 7.24.020 and ask the Court to apply existing law to determine the legal consequences of the

County's unappealed site specific-land use decision under LUPA. See *Chelan County v Nykreim*, 145 Wn.2d 904, 52 P.3rd 1 (2002)

The County's "factual issue" arguments (RB, pp. 42 – 45) are disingenuous. The County's first factual issue is stated to be "the effect of Stafne's boundary line adjustment is unclear". RB, p. 43. While the legal effect of the County's 2007 site specific land use decision may be unclear to the County, this point is irrelevant. Stafne's has asked the judiciary to exercise its judicial power to declare what the legal effects of the BLA are.

Next the County argues a factual issue exists because the Assessor's maps have not been updated. RB, 43 – 44. But this is not pertinent to Stafne's motions for summary judgment. It is the *recorded* BLA, not the County Assessor's belated review of it, that constitutes the County's final land use decision under SCC 30.41E.400. (BLA decisions are final when they are

recorded.) It is only the final land use decision that was material to the Superior's Court's rendering of a decision relating to Stafne's motions for partial summary judgments pursuant to LUPA.

The County claims on pages 44 – 45 of RB that the “reasonableness” of the County's 2009 docketing procedures and legal analysis is a “question of fact”. But this is not so. Stafne's motions for summary judgment asked the Superior Court to declare the consequences of the County's 2007 BLA and had nothing to do with the County's docketing process.

The Superior Court should have granted summary judgment as a matter of law because no reasonable juror faced with the evidence set forth on pages 26 – 30 of Stafne's OB could conclude that his residential parcel constituted commercial forest land. *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005). (“Questions

of fact may be determined as a matter of law ‘when reasonable minds could reach but one conclusion.’”)

REPLY RE: STAFNE’S ASSIGNMENT OF ERROR #2.

Stafne’s second assignment of error claimed:

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

The County has not responded to Stafne’s contention that it was arbitrary and capricious for the County to have applied a legislatively repealed definition of forest land to his citizen proposal. The County also has not challenged Stafne’s contention of bad faith legislative decision making in violation of the Separation of Powers doctrine and Stafne’s right to the open administration of justice. As the County has not addressed any of the arguments set forth at OB, pp. 30 – 47, there is nothing to reply to with regard to these arguments.

The County's response to Stafne's assignment of error #2 is this Court should not reach the merits of granting an extraordinary writ. In this regard, the County argues the Superior Court 1.) could not force the County to legislatively de-designate forest land pursuant to the GMA; 2.) did not have subject matter jurisdiction over Stafne's GMA citizen proposal; and 3.) appropriately deferred to the County legislature on a matter of policy involving political considerations. These arguments have no merit.

The County's GMA docketing process occurs in two phases. In the first phase the Planning Department is required to perform fact finding and quasi-adjudicative decision-making to determine whether a citizen proposal complies with applicable law. SCC 30.74.030 (a) and (d). Only if a proposal is determined to be consistent with applicable law during phase one is the proposal allowed to be passed on for legislative consideration by the County Council.

What happens during the phase one process is the Planning Department frequently utilizes arbitrary and capricious fact finding and quasi-judicial determinations as a basis for not passing on citizen proposals for legislative consideration. *See* declaration of Gene Miller, paragraphs 12 – 21¹⁵. The Planning Department's use of the repealed GMA statutory definition of forest land as a basis for not passing on Stafne's citizen proposal for legislative consideration is an example of this legislative abuse.

¹⁵ Gene Miller is a member of the Snohomish County Planning Commission and was a Snohomish County senior planner for many years. Miller declaration, paragraphs 2 – 4. Stafne designated Miller's declaration as part of the record on appeal on June 16, 2009. Miller's declaration was included as a part of the record before the Superior Court as evidence to show County policy was to use arbitrary fact finding and adjudication in phase one of the docketing process to prevent citizen proposals from being passed on for legislative consideration in phase two. Miller's declaration shows, among other things, that PDS initially recommended a citizen proposal be passed onto the phase two because, among other things, PDS found the citizen's property was served by utilities. But after political objections were lodged against the citizen's proposals and it was moved to another docket, PDS found the same specific site had no access to utilities even though the record was clear the site had access to utilities. Through this example and others Miller's declaration avers that PDS duties pursuant to SCC 30.74.030 (a) and (d) are performed not to reach a correct factual and legal analysis but are used to provide an arbitrary and unreviewable basis for PDS and/or the County Council avoid hearing citizen proposals based on political considerations disguised as impartial fact finding and adjudication.

The County is wrong when it claims Stafne was required to make this complaint about the phase one adjudication process to the GMHB. The GHMB only has jurisdiction to consider timely appeals of an amendment of a plan or development regulation. OB, pp. 35 - 36. Stafne is not seeking to appeal any recently enacted comprehensive plan or development regulation under the GMA.

The Superior Court should not have deferred to the application of a repealed definition of forest land by the Planning Department or the County to Stafne's proposal for the reasons stated in Stafne's OB, in this section of Stafne's reply brief set forth above, and in the final section of this reply brief.

STAFNE'S REPLY RE: ASSIGNMENT OF ERROR #3.

Stafne's assignment of error #3 states:

“SCC Chapter 30.74 is unconstitutional on its face and as applied because it authorizes and mandates the Snohomish County Planning Department to interpret and apply state, federal, and municipal

law to citizen proposals and does not provide for the open administration of justice.”

Contrary to the County’s assertions on pages 33 – 34 of RB Stafne argued to the Superior Court that SCC Chapter 30.74 was both facially unconstitutional (CP, p. 262, line 1 – 262, line 22) and unconstitutional as applied. CP, p. 281, line 15 – 285, line 2.

Stafne’s facial challenge does not turn on whether the Planning Department’s activities are characterized as the “practice of law” or “judicial review”. Stafne’s facial attack is based on SCC Chapter 30.74 delegating fact finding and adjudicatory powers regarding real property to non-lawyers via an ordinance that is specifically intended to prevent any later judicial review of those preliminary quasi-judicial administrative decisions which are a predicate for later municipal legislative consideration.

The County’s argument that Stafne “ignores the special role administrative agencies play in implementing law in

modern day American society” is absurd. Virtually all administrative decision making in America is subject to review by the Courts. Only in Snohomish County is there an administrative process in place that makes unskilled laymen the *final arbiters* of whether citizen proposals regarding their real property are consistent with state, federal, and municipal law. Of course, this unchecked judicial power comes in handy for planners as they can use it during phase one of the docketing process to quickly get rid of pesky citizen proposals¹⁶.

Washington Courts have inherent power to strike down legislative enactments when necessary to preserve and protect the judicial power granted the judiciary by the Washington Constitution. *See* cites at OB, pp. 49. The Superior Court should have exercised this power to declare Snohomish County’s docketing process an unconstitutional infringement upon judicial power.

¹⁶ Miller Declaration, paragraphs 12 – 21.

Stafne's arguments that the application of SCC 30.74.030 (a) and (d) are unconstitutional include, but are not limited to: The Planning Department's inadequate fact finding with regard to Stafne's proposal (OB pp. 15 – 17); The Planning Department's failure to consider the effect of site-specific boundary line adjustments on Stafne's proposal (OB pp. 15); The Planning Department's application of the repealed definition of forest land to Stafne's proposal via a non-public (secret) memorandum (OB pp. 17 – 19); and The Planning Department's application of *Twin Falls et al. v. Snohomish County*, CPSGPHB Case No. 93-3-0003 (1993) to Stafne's proposal (OB p. 18.).

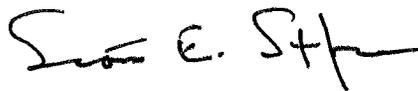
Since the County is not inclined to admit its mistakes or that it has infringed upon judicial power at the expense of the judicial branch of government and the rights of citizens to the open administration of justice, it is up to the Courts to tell us all how our system works under the GMA and LUPA.

CONCLUSION

The Superior Court's denial of Stafne's summary judgment motions should be reversed and this Court should grant the motions. The Superior Court's order dismissing Stafne's complaint should also be reversed.

This Court should mandate the Superior Court to issue an extraordinary writ ordering Snohomish County to apply the correct definition of forest land to the parcels that make up Twin Falls Estates rural settlement. This Court also should declare SCC 30.74.030 subsections (a) and (d) are both unconstitutional facially and unconstitutional as applied to Stafne's proposal.

Respectfully Submitted,



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