

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

No. 38577-5-II

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COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

BY Rowley

BRITT DUDEK and BRUCE BAGULEY,

Appellants,

v.

THE EASTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD; DOUGLAS COUNTY; CITY OF EAST
WENATCHEE; PANGBORN MEMORIAL AIRPORT;
THE PORT OF CHELAN COUNTY; and
THE PORT OF DOUGLAS COUNTY,

Respondents.

APPEAL FROM EASTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD DECISION AFFIRMING
DOUGLAS COUNTY'S AMENDMENT OF ITS GMA
COMPREHENSIVE PLAN AND DEVELOPMENT REGULATIONS
AND APPEAL FROM THURSTON COUNTY SUPERIOR COURT
DECISION AFFIRMING THAT DECISION AND DISMISSING
DECLARATORY JUDGMENT CLAIM

(Thurston Co. Case No. 08-2-00074-2, EWGMHB Case No. 07-1-0009)
The Honorable Gary Tabor, Presiding

APPELLANTS' REPLY BRIEF

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I. INTRODUCTORY COMMENT

Respondent the City of East Wenatchee's ["the City" hereafter] "Responding Brief" completely violates — and Respondent Douglas County's ["the County"] "Responding Brief" substantially violates — the singular directive of the RAPs regarding the content of a Response Brief, i.e., "The brief of respondent should conform to section (a) *and answer the brief of appellant or petitioner.*" RAP 10.3(b) (emphasis added).

For example, Appellants' Opening Brief accurately states at page 29 that Douglas County Board of County Commissioners ["BOCC"] Resolution TLS 07-9B amended the Greater East Wenatchee Area Comprehensive Plan ["GEWA Plan"] a second time in the year 2007, and also its amended development regulations pertaining to Airport Overlay zones. Appellants attached a complete copy of that resolution at Appendix ("A") to their Opening Brief in order to eliminate any doubt about the comprehensive plan amendment.

Respondents the City and the County failed to properly answer. For example, at page 4 of the County's Response Brief, the County portrays TLS 07-9B as only amending development regulations, and then it uses that improper omission to improperly argue at page 34 of its brief that RCW 36.70A.130 is inapplicable. Although the County also attached TLS 07-09 to its response at Appendix ("C"), it ignored the contents of that resolution, just as it ignored Appellants' argument. In fact, the County obviously combed through the resolution for "favorable" portions which it summarized in detail at pages 7-8 of its Responding Brief. Given that

attention by the County to the content of TLS 07-9B, its failure to properly answer Appellants' RCW 36.70A.130 argument is inexcusable.

Additional examples of Respondents' violation of the RAPs and their failure to answer are set out below.

II. REPLY TO DOUGLAS COUNTY

A. Reply to Counter-Statement of Case — Statement of Facts (County's Brief at pp. 5-10)

It's interesting that the County's factual statement speaks of the Appellants as living within the "AP-O" but is silent about the fact that they live within a designated RCW 36.70A.060 Agricultural Resource Area of Long Term Commercial Significance ["Agricultural Resource Area" hereafter]. That Appellant Mr. Baguley does not currently farm his land is irrelevant, so long as his farm property is located within the Agricultural Resource Area. *King Co. v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 14 P.3d 133 (2000); *City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Board*, 136 Wn.2d 38, 959 P.2d 1091 (1998).

It appears that Douglas County and the Airport Commission invested considerable time in the review process, but that does not speak to the issues in this appeal. This appeal is about omissions, i.e., the failure of the County to produce a record to establish that it considered what the Growth Management Act ["GMA"] required it to consider.

The Appellants' Brief points out, and the County does not dispute:

- that the RCW 43.21C.030(2)(c) SEIS [attached at Appendix ("I") to Appellants' Opening Brief] did not even mention either Pangborn

Field or the Agricultural Resource Area;

- that the County's obligation to produce RCW 43.21C.030(2)(e) alternatives studies was wholly ignored;
- that the findings and conclusions of TLS 07-9B addressed airport interests but it entirely ignored agricultural interests;
- that the sole purpose for reliance upon RCW 36.70A.510 was to eliminate uses within the Agricultural Resource Area that might be "incompatible" with the adjoining airport use; and
- that "public participation" and process prior to submittal to the BOCC is irrelevant to this appeal. The process and participation objections raised in this appeal relate solely to BOCC failures during its final review, modification and approval.

If one is an airport booster, he or she is likely to be pleased with the record produced below. If one is an agricultural user however, he must be disheartened by the omissions. Where, as here, the omissions concern obligatory matters, the Appellant has overcome any presumption of validity. *Mahr v. Thurston County*, WWGMHB No. 94-2-0007 (1994) Given the fact that this argument was made in Appellants' Opening Brief [at page 18], the failure of the County to answer the argument must be taken as an admission of its soundness.

B. Reply to Standard of Review — APA and UDJA Standard
(County's Brief at pp.10-14)

At page 11-12, the County argues for "deference" owed to Douglas County "in recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this

chapter..." However, RCW 36.70A.060 limits that discretion regarding zoning for "adjoining" properties to an Agricultural Resource Area, prohibiting uses that would interfere with customary and reasonable farming practices. Such discretion is also severely limited when adopting development regulations affecting land uses within an Agricultural Resource Area pursuant to RCW 36.70A.177. The "deference" owed the County is no greater than the limited zoning authority granted in the GMA. *King Co. v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d., supra.

The County is owed deference only so long as it legislates consistently with the GMA.

The constitutional questions raised in the Declaratory Judgment request constituted facial challenges to DCC 18.65. No trial was held and no "findings of fact" were entered, and no deference to "findings of fact" is owed. The constitutional arguments were particularly appropriate for raising in this APA appeal since the vague and ambiguous provisions of that code relate to agricultural uses and make illusory an agricultural "exemption."

C. Reply to County re: GMA Protections Owed Pangborn Airport
(County's Brief at pp. 14-22)

Again, Douglas County's response does not answer the argument made by the Appellants in their Opening Brief. Appellants claim that "general aviation airport" — as intended and used by the legislature in RCW 36.70.547 and RCW 36.70A.510 — has the same meaning as that phrase is given in the National Plan of Integrated Airport Systems

["NPIAS"] which is supplied at Appendix ("S") to Appellants' Opening Brief. At pages 35-40 of their Opening Brief, Appellants made the following arguments:

- that legislative history demonstrates the truth of the foregoing claim; and
- that even if Pangborn was a "general aviation" airport, then:
 - (1) the County had already provided RCW 36.70A.510 protections in 2000 when it first adopted the AP-O district, and it was under no statutory compulsion to amend its Comprehensive Plan and development regulations as was done in TLS 07-9B; and
 - (2) where competing GMA requirements exist, the record must disclose that required alternatives were considered and it must disclose and support the reason for making the choice between the alternatives that the County made.

Douglas County's brief ignores the last two arguments described above. Its lack of response must be taken as an admission that Douglas County's amendments were not compelled by RCW 36.70A.510. It's also an admission that the record fails to establish that the County considered competing alternatives and properly chose between them.

Appellants' argument sought the intent of the legislature's use in RCW 36.70.547 and RCW 36.70A.510 of the descriptive phrase "general aviation airport." Appellants' argument was based upon legislative history, which was supplied at Appendices ("Q") and ("R") to its opening

brief. The fact that SB 6422 [Co.R 745-750] included two (2) of the NPIAS ["reliever and general aviation"] designations and that SSB 6422 [Co. R. 751-756] eliminated the requirement for "reliever" airports is compelling evidence that the legislature was borrowing terminology from the NPIAS. That classification system classifies airports by their highest and most sophisticated use, to the end that a commercial airport can provide services to general aviation, but a general aviation airport cannot provide services to commercial aviation. The NPIAS classification system does more than simply describe airport types; it designates Pangborn Field as a "primary and commercial Service Airport" as opposed to a "reliever and General Aviation Airport."

Douglas County faults this legislative history — at p. 15 of its Response Brief — but does not answer it. Appellants cited — at page 37 of its Opening Brief — 2A Sutherland, Statutory Construction, §48.18 (7th ed.) and *State v. Schwab*, 103 Wn.2d 542, 693 P.2d 108 (1985) as authority for the proposition that what a legislature includes or excludes through the process of amendment during enactment provides compelling evidence of legislative intent. Douglas County did not respond with contrary authority. Instead, at footnote 8 at page 15 of its Response Brief, the County opines — without argument or citation to authority — that the legislative history provided by the Appellants is "an erroneous approach to prove legislative history." Passing treatment of an issue or lack of reasoned argument is insufficient to allow for meaningful review by the appellate court and should be disregarded. *State v. Stubbs*, 144 Wash.App.

644, 184 P.3d 660 (2008)

Douglas County then suggests what it considers to be more appropriate evidence of legislative intent, i.e., "bill digests and reports, committee reports, testimony, floor debates, and other legislative materials." The County does not even demonstrate that any worthwhile legislative history is actually to be found in any of the sources suggested by the County to be superior. Incredibly, the County failed to provide any legislative history of the type it faulted the Appellants for not providing.

At page 14 of its Response Brief, the County rephrases the issue to "Pangborn is an Airport Serving General Aviation." Arguing contra to the NPIAS classification scheme, Douglas County reverses the NPIAS classification system to the end that any airport "serving general aviation" is classified as a "general aviation airport." By that logic, every airport in the State of Washington is classified by its lowest level use — serving general aviation — rather than by its highest use as NPIAS requires.

Douglas County does admit that there are no reported cases interpreting or applying RCW 36.70A.510 and RCW 36.70.547. The legislature's intent in its use of the phrase "general aviation airport" presents an issue of first impression.

Douglas County cites to a number of Growth Management Hearings Board decisions which are not helpful. While they discuss airport protections generally under the GMA, they do not address the specific issue of legislative intent. There are many growth board decisions that assume, without deciding, that the term "general aviation

airport" applies to all airports. Had the legislative history actually been examined, Douglas County would have been able to cite to that decision, but it did not.

Moreover, none of the cases cited by Douglas County present the sort of competition between adjacent uses — each required by the GMA to be protected — as we have in this case.

Similarly, Douglas County relies upon a letter from an aviation planner from the Washington State Department of Transportation offering his opinion concerning the intent of the legislature's choice of the phrase "general aviation airport." However, that letter is an opinion that does not consider the actual legislative history. The inclusion in SB 6422 of the dual reference to "reliever" and "general aviation" compels the conclusion that the legislature was relying upon the NPIAS classification systems. Moreover, the inclusion of the word "reliever" compels the conclusion that the legislature first intended that the RCW 36.70.547 requirement apply relatively broadly to two classifications of airports, and that elimination of "reliever" from the final version adopted as SSB 6422 evidenced an intent to narrow the bill's applicability. The arguments of Douglas County and the opinion of the WSDOT planner are diametrically opposed to the actual legislative history, which is the primary source for ascertaining legislative intent. Questions of statutory interpretation are questions of law, upon which the courts are the final arbiter. *King County v. CPSGMHB*, 142 Wn.2d 133, *supra*.

While it is true that Pangborn Airport is considered an essential

public facility under the GMA, the County action below did not purport to act under its "essential public facilities" development regulations. DCC 18.80.240 treats essential public facilities as a conditional use. DCC 18.80.240(G) prohibits locating [expanding] an essential public facility within an Agricultural Resource Area unless the County shows that the essential public facility is not incompatible with the Agricultural Resource Area. The record in this case provides no evidence to demonstrate that the airport is compatible with adjoining Agricultural Resource Areas. By contrast, RCW 36.70A.510 provides a planning tool to require adjoining Agricultural Resource Area to become compatible with the airport. Since Douglas County could not achieve its goal of forcing Agricultural Resource Areas to conform by administratively modifying permits issued under DCC 18.80.240, it chose to achieve its goal by amending its Comprehensive Plan and the text of its development regulations, ostensibly under compulsion of RCW 36.70A.510. As shown above, the statute does not apply to Pangborn Airport, no compulsion to modify previously adopted AP-O protections existed, and no effort was made to balance the competing demands of agriculture and airport, both of which the GMA requires the County to protect.

D. Reply to Priorities and Lack of Conflict
(County's Brief pp. 22-29)

Douglas County misstates Appellants' position when — at page 22 of its brief — it claims that "Petitioners urge that absolute 'untouchable' status be conferred the agricultural lands adjacent to Pangborn." To the contrary, Appellants' briefs — both in this Court and below — acknowl-

edge that interferences from adjoining lands are allowed so long as they do not interfere with the continued use, "in the accustomed manner and in accordance with best management practices." RCW 36.70A.060(1). Appellants also acknowledge that non-agricultural uses can be placed within an Agricultural Resource Area provided the development regulations comply with the limited discretion, conservation and enhancement obligations contained in RCW 36.70A.177. *King Co. v. CPSGMHB*, 142 Wn.2d 543, *supra*.

While complaining incorrectly that Appellants' argue for "untouchable status," Douglas County completely ignored the argument contained in Appellants' Opening Brief at pages 19-20 and 36. There, Appellants specifically cite to *Swinomish Indian Tribal Community et al., vs. WWGMHB et al.*, 161 Wn.2d 415, 166 P.3d 1198 (2007). That case specifically dealt with the question of competing but potentially conflicting GMA requirements — critical areas vs. Agricultural Resource Areas — as they relate to the regulation of land within the Resource Area.

"Riparian farm land in Skagit County qualifies as both "agricultural land" and "critical areas" under the GMA . . . In an effort to "protect" both, consistent with what the GMA requires . . . the county's 2003 ordinance established a "no harm" standard that ongoing agricultural operators must meet . . . In effect, the county's no harm standard sets the "existing" condition of local critical areas as the baseline for measuring harm." *Swinomish*, 161 Wn.2d, *supra* at page 427

So long as tension exists between competing GMA requirements, the GMA provides counties some discretion to balance the two in order to resolve the tension and to meet both requirements. But the record must

clearly show that the conflict was recognized and addressed and it must demonstrate how the county resolved the conflict. It cannot simply ignore the Agricultural Resource Area side of the conflict as Douglas County did in this case. The County argues — at page 26 — that it "converts no Agricultural Resource Lands." While this point is not determinative, it should be pointed out that "land" consists of far more than the soil.

". . . ownership of property entails more than the right to exclusive possession, and includes the right to use the land. (citations omitted) Hence, inverse condemnation actions seeking recovery for interference with the use and enjoyment of property, whether characterized by physical invasion or not, are governed by the ten-year prescriptive period (real property, not tort, statute of limitations). *Highline School District No. 401 et al., v. Port of Seattle*, 87 Wn.2d 6, 548 P.2d 1085 (1976)

"Property" includes the air space over head. *Martin v. Port of Seattle*, 64 Wn.2d 309, 313, 391 P.2d 540, 543 (1964) There is no authority to support Douglas County's argument that "converting" the right to use airspace is less a conversion than would be conversion of the use of the surface of the ground.

There is an interesting portion of the County's Response Brief that argues that the existence of the AP-O does not conflict with — but actually enhances — the Agricultural Resource Area. As argued above, expanding the AP-O would have required a showing that the airport was compatible with the Agricultural Area. Reliance on RCW 36.70A.510 turns the tables, requiring uses in the Agricultural Area to become compatible with the airport.

It is clear from reading Appellants' Opening Brief and the Respondents' Briefs that the parties do not see eye to eye on this question, but even that disagreement begs the question. The question, of course, is the absence of any evidence in the record to show that the legislative body even considered the Agricultural Resource Area. Without a record, argument of legal counsel that under the GMA the Agricultural Resource Area was actually "enhanced" by Resolution TLS 07-9B is idle speculation. Appellants have complained before three tribunals about the absence of any evidence in the record addressing Agricultural Resource Area interests. Douglas County has had ample opportunity to demonstrate that the record included such discussions, if they existed. Respondents are unable to locate any such support in the record. We are left instead with Resolution TLS 07-9B, which makes no findings whatsoever regarding the Agricultural Resource Area.

E. Reply to AP-O was Adopted Using Proper Public Participation
(County's Brief at pp. 29-35)

The first point that must be made is that the County's actions below did not involve the adoption of an Airport Overlay. The action below amended the GEWA Comprehensive Plan and the County's development regulations.

The second point is that the extent of process offered prior to the actions of the BOCC is irrelevant. Appellants complain of the procedural acts and omissions of the BOCC. Appellants do not complain of some abstract notion of procedural requirements; they rely upon specific violations of process required by both the GMA and the County's own Code.

It is especially frustrating to find the County argue — at page 31 of its Response Brief — that BOCC Resolution TLS 07-9B did not amend the GEWA Comprehensive Plan or development regulations. That is simply a false statement that conflicts with the language of Resolution 07-9B itself [see argument in Part I above].

There was more than one amendment to the GEWA Comprehensive Plan in 2007. Content to rely upon its attempted "dodge" of RCW 36.70A.130 "once annual" comprehensive plan amendment requirement, the County has failed to respond to the arguments on the merits contained in Appellants' Opening Brief at pages 29-31. Again, by failure to oppose, the County concedes the argument on the merits.

The County replicates the same argument [no comprehensive plan amendment] to avoid its own Code's procedural requirements [see the County's Brief at p. 31]. Given the explicit provisions in Resolution TLS 07-9B amending the GEWA Comprehensive Plan, this County argument suffers the same fate as when made to avoid RCW 36.70A.130. Again, by failure to oppose, the County concedes the argument on the merits.

The problem with Douglas County's RCW 36.70A.106 compliance arguments is that, had the BOCC complied with its own procedures, it was required either to remand to the Planning Commission or to hold a new hearing prior to approving changes. DCC 14.10.050

The County is grossly wrong when it says that Appellants' argument is based solely on a May 17, 2007 letter. Appellants' argument is based on RCW 36.70A.106 and on Title 14 of the Douglas County Code,

as argued at pages 31-35 of Appellants' Opening Brief. The problem — which the County ignores — is that the County had two (2) proposed changes requiring RCW 36.70A.106 notice to the Department, and only one (1) approved change. The May 17, 2007 "Department letter" constituted confirmation that CTED received the "notice of approved modification." While CTED received notice of the Planning Commission's proposed changes to the Comprehensive Plan, it never received notice of the BOCC proposed changes, which differed from the Planning Commission proposal, and which all were ignorant of until a decision was announced on May 9, 2007. Douglas County does not respond to this argument, but rather seeks to avoid it. Its failure to answer the argument concedes Appellants' point on the merits.

F. Reply to SEPA Argument
(County's Brief at pp. 35-40)

There are two problems with Douglas County's SEPA argument:

First, the 2004 RCW 43.21C.030(2)(c) SEIS is inaccurately described as discussing a "preferred action" and a "no action" alternative for the 2007 amendments to the Comprehensive Plan and development regulations amended. The SEIS does neither. In fact, the SEIS does not even mention Pangborn Airport or the Agricultural Resource Area [see SEIS at Appendix ("I") to Appellants' Opening Brief]. Specifically, page 10 of the SEIS — CR-1562, attached at Appendix ("I") to Appellants' Opening Brief — describes the preferred alternatives discussed in the SEIS:

"1) Preferred Plan - The preferred alternative is the amendment to the 1995 Greater East Wenatchee Area Comprehensive Plan and implementation regulations pursuant to the GMA, as amended, and to comply with goals and policies set forth in the Douglas County Regional Policy Plan. Amendments include the following:

- a. Revisions, additions and deletions to the *mineral resource* designations located within the Greater East Wenatchee Area;
- b. Revisions, additions and deletions to the agricultural resource policies *for clustering, clustering of existing lots and limited land segregations*;
- c. Revisions to the Neighborhood Commercial designation including a new designation purpose statement and implementation criteria;
- d. Adoption of a new Rock Island Urban Growth Boundary and removal of county land use designations within the UGA;
- e. Adoption of a revised comprehensive plan and land use map; and
- f. Deletion of Critical Areas policy linking wetlands to riparian areas." (emphasis added)

Notably missing from the SEIS list of "preferred alternatives" is any mention of an alternative that describes amending the Comprehensive Plan or development regulations as the BOCC did in Resolution TLS 07-9B. The only basis for even representing this SEIS as applicable to Resolution 07-9B is its inclusion by County planning staff in the administrative record for this case. Whatever else one might conclude about this SEIS, it is an inescapable conclusion that the County did not discuss relevant alternatives or otherwise describe and resolve the "tension" between the Agricultural Resource Area and the aviation uses at issue in TLS 07-9B.

Second, RCW 43.21C.030(2)(e) provides a wholly independent requirement that the County produce a study discussing the dispute between agricultural and airport uses. It is interesting that Douglas County now attempts to avoid RCW 43.21C.030(2)(e) by suggesting that Appellants failed to demonstrate that resource conflicts existed. This line of County argument is faulty for two reasons:

- (1) RCW 43.21C.030(2)(e) does not impose a requirement on any citizen to either identify the resource conflict or produce the study. That statute unambiguously places that burden on the County; and
- (2) The legal justification offered by the County for extending airport zoning restrictions further into the Agricultural Resource Area was ostensibly to make the resource area "compatible" with the airport. RCW 36.70A.510. Having used "conflict" as its jurisdictional hook, the County cannot now deny conflict to avoid required RCW 43.21C.030(2)(e) resource alternatives studies. The existence of conflict was self-evident.

G. Reply to the County's "substantial evidence" argument
(County's Brief at pp. 40-41)

At page 40 of its Response Brief the County argues that factual issues have not been joined or fleshed out sufficiently to support reversal of any "finding of fact." While the BOCC and the EWGMHB both adopted what they referred to as "facts," those actually constituted conclusions-of-law. This appeal does not argue the absence of "substantial evidence." It argues the absence of any evidence to demonstrate that

the County acted, or not, as required by the GMA. The presumption of BOCC compliance with state law can be overcome by the lack of evidence in the record that supports the action taken by the local government or lack of proper consideration by the decision maker. *Mahr v. Thurston Co.*, *WWGMHB* No. 94-2-0007, *supra*.

Beginning in 2007 and through three (3) tribunals, the Appellants have demonstrated the lack of evidence in the record showing that the BOCC properly attended to its obligations owed to the Agricultural Resource Area. One need only examine the SEIS and the Resolution TLS 07-9B to establish that the Agricultural Resource Area was not even mentioned, much less protected. The County could have shown where in the record such evidence exists, but it has been unable to do so. Douglas County's record earns high grades for enhancing the airport, but earns failing grades for protecting, conserving or enhancing the Agricultural Resource Area or in assuring that adjoining uses do not impact historical farming practices. RCW 36.70A.060

H. Reply to the County's Declaratory Judgment Argument
(County's Brief at pp. 41-48)

Douglas County does not respond to Appellants' justiciability argument. In fact, the County now argues that a constitutional challenge was justiciable at least as far back as the year 2000, after which time the County argues it was time-barred. Douglas County assumes — without mentioning and without providing a record to support the argument — a number of facts. Did Appellants own their land in 2000? Where is the

record to establish the fact? Did the then existing overlays impact their land? Where is the record to establish the fact? No record is provided.

It is not clear why the County argues as it does at pages 42-43 that a Uniform Declaratory Judgment Act ["UDJA"] claim raising a constitutional claim must be brought within the same time period as the period for taking an administrative appeal. Appellants raised the constitutional questions within sixty (60) days of BOCC adoption of Resolution TLS 07-9B in their Petition to the EWGMHB [see EWGMHB Index of Record, item No. 1]. Similarly, the County overlooks that a declaratory ruling is appropriate in an APA appeal [RCW 34.05.574] but that such a request cannot be made until such time as administrative remedies have been exhausted, which in this case occurred at the conclusion of the EWGMHB proceedings. RCW 34.05.534. Appellants complied with all of these time requirements. The prayer of Appellants APA Petition [at CP 3-51] states: "D, declaratory ruling pursuant to RCW 34.05.574 and RCW 7.24:

- "1.
2. That Douglas County's May 9, 2007 Resolution TLS 07-9B is unconstitutionally vague, includes an unconstitutional delegation of legislative power to unspecified administrative officials, and is therefore void as a matter of law."

The County's sole contention appears to be that this same challenge could have been — and should have been — raised seven (7) years earlier when a prior version of the DCC 18.65 was adopted. Had Appellants intended to challenge a 2000 Comprehensive Plan amendment — assuming one even existed — and the 2000 development regulation the

County might have a point. But Appellants have challenged the 2007 version of the Comprehensive Plan and development regulation amendments. As argued above, there is not even a scintilla of evidence in the record to establish that the Appellants owned property that was affected by the 2000 development regulation. Moreover, it is abundantly clear that the 2007 amendment of the Comprehensive Plan and the development regulations enlarged the reach of the AP-O and included new development standards — population densities for example — that are simply incomprehensible, creating ambiguities that cause the illusory "exemption" for agriculture in DCC 18.65.040E to assume more serious and sinister impacts.

Similarly, Douglas County argues "standing" in the abstract, without taking into account the statutory definition of standing relating to an APA appeal. RCW 34.05.530 defines a three-part standing requirement which was met below for all declaratory and appellate relief requested.

Appellants' arguments in their Opening Brief on the substance of the constitutional challenges are clear and persuasive. Douglas County offers no credible response, so Appellants will rely on their opening argument.

I. Reply to Attorney Fee Request
(County's Brief at pp. 48-49)

RCW 4.84.370 does not support an award of attorney fees to Douglas County in this appeal. That statute, which applies only to appeals

of "land use decisions," provides:

"RCW 4.84.370. Appeal of land use decisions -- Fees and costs.

(1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a **decision by a county, city, or town to issue, condition, or deny a development permit**" (emphasis added)

A "land use decision" is defined at RCW 36.70C.020:

"RCW 36.70C.020 Definitions . . .

(1) "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...**" (emphasis added)

A "project permit" is defined at RCW 36.70B.020(4):

"4) **"Project permit"** or "project permit application" means any land use or environmental permit or license required from a local government for a project action, including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, site-specific rezones authorized by a comprehensive plan or subarea plan, **but excluding the adoption or amendment of a comprehensive plan, subarea plan, or development regulations** except as otherwise specifically included in this subsection." (emphasis added)

"Comprehensive Plan" is defined at RCW 36.70A.030(4).

"Development Regulation" is defined at RCW 36.70A.030(7).

This case involves no project permit or application, and thus does not involve an RCW 4.84.370 land use decision. *Tugwell v. Kittitas*

County, 90 Wash.App. 1, 951 P.2d 272 (Div. 3,1997) It involves a challenge to an amendment of Douglas County Comprehensive Plan and development regulations, which are categorically excluded from the operation of RCW 4.84.370.

III. REPLY TO CITY OF EAST WENATCHEE

At page 3 of its Response Brief, Respondent the City of East Wenatchee appears to adopt the legal argument of Douglas County, the Eastern Washington Growth Hearings Board, and the letter opinion of the Thurston County Superior Court. Essentially, the City merely asks this Court to affirm the decisions below, without providing any responding argument to support such a result. Passing treatment of an issue or lack of reasoned argument is insufficient to allow for meaningful review by an appellate court. *State v. Stubbs*, 144 Wash.App. 644, *supra*.

The City also violates this requirement to provide argument supported by legal authority in Part 1 "Standard of Review" where it merely recites the provisions of RCW 34.05.570(1) without providing any argument to support its conclusory statement that "Appellants have failed to meet their burden."

The City asks for statutory attorney fees under RAP 18.1 and RAP 14.3. But the City adds an additional request for an award of "reasonable" attorney fees pursuant to RCW 4.84.185, which reads as follows:

"RCW 4.84.185. Prevailing party to receive expenses for opposing frivolous action or defense

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counter-

claim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the non-prevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the non-prevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order."

This statute obviously authorizes an award of attorney fees in the trial court, not in the appellate court in the first instance. RAP 18.9 constitutes the appropriate authority for requesting reasonable attorney fees for the filing of "frivolous" appeals, but the City made no effort to comply with its requirements.

In addition, the record shows that no RCW 4.84.185 "motion" was ever filed by the City with the trial court. Motions filed more than 30 days after the trial court ruling are time-barred.

The City provides no argument whatsoever concerning why this Court should decide that some or all of the Appellants' issues or claims are "frivolous" within the purview of this statute. The statute requires the City to demonstrate that the entire action, not just one or more claims, is frivolous. *Koch v. Mutual of Enumclaw Ins. Co.*, 108 Wn.App. 500, 31 P.3d 698 (2001); *Forster v. Pierce Co.*, 99 Wn.App. 168, 991 P.2d 687, review denied 141 Wn.2d 1010, 10 P.3d 407 (2000)

The City of East Wenatchee provides no argument why any of Appellants' claims should be considered frivolous. The City's attorney fee request must be denied.

IV. CONCLUSION

Respondents' response briefs failed to answer Appellants' argument that the County failed to comply with the mandatory RCW 36.70A.130 requirement for "once annual" and "concurrent" consideration of amendments to its Comprehensive Plan. That response also failed to answer Appellants' argument that the County improperly neglected both RCW 43.21C.030(2)(c) and RCW 43.21C.030(2)(e) State Environmental Policy Act ["SEPA"] review obligations. The responses likewise failed to answer Appellants' argument that the record includes no evidence of County compliance with its mandatory obligation to describe, to consider and to balance the competing Agricultural Resource Area and airport directives of the GMA.

Respondents also failed to properly answer Appellants' arguments concerning the inapplicability of RCW 36.70A.510 and/or RCW 36.70.547. No response was made about the fact that the County had already complied with — and was under no existing compulsion related to — its airport interests. There was no justification presented by the County to ignore or subordinate agricultural resource obligations to airport interests.

The response failed to answer Appellants' argument that the County exceeded the power delegated by RCW 36.70A.177 when acting

within an Agricultural Resource Area of Long Term Commercial Significance, and that it exceeded RCW 36.70A.060 limitations on discretion when acting upon uses adjoining the Agricultural Resource Area. The response failed to answer Appellants' argument that the County BOCC failed to provide advance notice to the state department under RCW 36.70A.106 and that it failed to hold its own "hearing" as required by local law prior to considering and approving its own version of the Comprehensive Plan and development regulations required by its own County Code.

Respondents' response failed to answer Appellants' argument that neither the EWGMHB nor the trial court had discretion to excuse the County from complying with the mandatory requirements of the GMA and SEPA.

TLS 07-9B — on its face — violates United States Constitution Fourteenth Amendment and Washington Constitution Article One § 3 due process, vagueness and legislative delegation requirements. Those constitutional flaws are manifestly related to the GMA violations raised in the APA appeal because they delegate arbitrary power to an unidentified official to apply or to withhold application of the vague "standards" included in TLS 07-9B. Clearly, Appellants' have standing to bring this justiciable declaratory claim, over which the trial court had jurisdiction pursuant to both the UDJA and the APA.

The Respondents are not entitled to an award of attorney fees or costs because they cannot prevail on the merits and because the statutes they rely on do not apply to an appeal of a Growth Management Hearings

Board decision. “Land use decisions,” to which RCW 4.84.370 applies, are appealed to superior court through the Land Use Petitions Act [RCW 36.70C], not to the Growth Management Hearings Board through the GMA.

Respectfully submitted this 19th day of August 2009.

ROWLEY & KLAUSER, LLP

Handwritten signatures of Robert C. Rowley and James J. Klauser in black ink.

Robert C. Rowley, WSBA #4765 James J. Klauser, WSBA #27530

Co-counsel to Appellants Dudek and Baguley

No. 38577-5-II

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II

BRITT DUDEK and BRUCE BAGULEY,

Appellants,

v.

THE EASTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD; DOUGLAS COUNTY; CITY OF EAST
WENATCHEE; PANGBORN MEMORIAL AIRPORT;
THE PORT OF CHELAN COUNTY; and
THE PORT OF DOUGLAS COUNTY,

Respondents.

APPEAL FROM EASTERN WASHINGTON GROWTH
MANAGEMENT HEARINGS BOARD DECISION AFFIRMING
DOUGLAS COUNTY'S AMENDMENT OF ITS GMA
COMPREHENSIVE PLAN AND DEVELOPMENT REGULATIONS
AND APPEAL FROM THURSTON COUNTY SUPERIOR COURT
DECISION AFFIRMING THAT DECISION AND DISMISSING
DECLARATORY JUDGMENT CLAIM

(Thurston Co. Case No. 08-2-00074-2, EWGMHB Case No. 07-1-0009)
The Honorable Gary Tabor, Presiding

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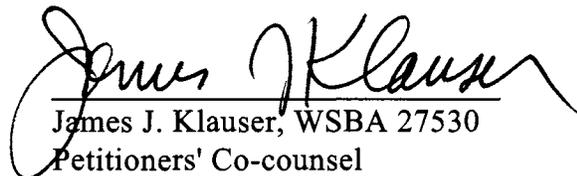
ORIGINAL

I declare under penalty of perjury under the laws of the State of Washington that copies of Appellants' (1) Reply Brief and (2) this Proof of Service were served this date on the following Respondents:

- for **Douglas County Washington**: Steven M. Clem, Prosecuting Attorney, Douglas County, P.O. Box 360, Waterville, WA 98858
by First Class US Mail
- for **City of East Wenatchee**: Devin Poulson, City Attorney, 271 9th St. NE, East Wenatchee, WA 98802
by First Class US Mail
- for **Pangborn Memorial Airport, Port of Douglas County, & Port of Chelan County**: Jay A. Johnson , Davis Arneil Law Firm, LLP, 617 Washington Street, P.O. Box 2136, Wenatchee, WA 98807
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- for **EWGMHB**: Martha Lantz, Asst. AG of Wash., P.O. Box 40110, Olympia, WA 98504-0110,
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DATED this 19th day of August 2009.

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