

**FILED
Court of Appeals
Division II
State of Washington
2/6/2020 4:02 PM**

NO. 53723-1

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

SIMON'S WAY DEVELOPMENT, INC., a Washington corporation,

Appellant/Petitioner,

v.

CLARK COUNTY, WASHINGTON,

Respondent,

SCOTT and ANJA O'NEIL, ERIC and MELISSA WALDAL,
ROY and DELLA MASSIE, ALAN and KATHRYN HOLTZ-OLSON,
RYAN and LINDA ROSENLUND, and BRIAN and JANET WOLF,

Respondent / Other Parties.

**AMICUS BRIEF OF WASHINGTON DEPARTMENT
OF NATURAL RESOURCES**

ROBERT W. FERGUSON
Attorney General

PHILIP M. FERESTER
Senior Counsel
WSBA No. 21699
Natural Resources Division
PO Box 40100
Olympia, WA 98504-0100
(360) 586-3202

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	IDENTITY AND INTEREST OF AMICUS	1
III.	STATEMENT OF THE CASE.....	3
	A. The Record Below Amply Demonstrates That the Waldal Parcel Converted From Forestland to a Home Site.	3
	B. Roth Withdrew Its Challenge to DNR’s Notice of Conversion, Conceding That a Conversion Occurred Under Its Forest Practices Permit.	5
	C. The Record Before the Hearings Examiner Contained Abundant Evidence That the Road Crossed Agricultural Lands.....	6
IV.	ARGUMENT	7
	A. This Court Can Affirm on Any Basis Supported by the Record.....	7
	B. DNR Regulates Commercial Forestry, While Local Governments Regulate Conversions to Non-forestry Land Uses.....	8
	1. Key Forest Practices Act and Rule Provisions, and the Important Local Government Role in Conversions.	8
	2. The Forest Practices Application at Issue Clearly Involved Forestland That Converted.....	13
	C. The Superior Court Correctly Determined That DNR Lacks Authority Over Roads Constructed Across Agricultural Land.....	16
V.	CONCLUSION	19

TABLE OF AUTHORITIES

Cases

<i>Alpine Lakes Prot. Soc’y v. Dep’t of Ecology</i> , 135 Wn. App. 376, 144 P.3d 385 (2006), <i>review denied</i> , 162 Wn.2d 1014 (2008).....	9
<i>Cingular Wireless, LLC v. Thurston Cty.</i> , 131 Wn. App. 756, 129 P.3d 300 (2006).....	8
<i>Dep’t of Nat. Res. v. Marr</i> , 54 Wn. App. 589, 774 P.2d 1260 (1989).....	8
<i>Failor’s Pharmacy v. Dep’t of Soc. & Health Servs.</i> , 125 Wn.2d 488, 886 P.2d 147 (1994).....	18
<i>Hashlund v. City of Seattle</i> , 86 Wn.2d 607, 547 P.2d 1221 (1976).....	18
<i>LaMon v. Butler</i> , 112 Wn.2d 193, 770 P. 2d 1027 (1989).....	8
<i>Noel v. Cole</i> , 98 Wn.2d 375, 655 P.2d 245 (1982).....	18
<i>Ord v. Kitsap Cty.</i> , 84 Wn. App. 602, 929 P.2d 1172 (1997).....	12, 13
<i>State v. Hutsell</i> , 120 Wn.2d 913, 845 P.2d 1325 (1993).....	17
<i>Wash. State Comm’n Access Project v. Regal Cinemas, Inc.</i> , 173 Wn. App. 174, 293 P.3d 413 (2013).....	8
<i>Wenatchee Sportsmen Ass’n v. Chelan Cty.</i> , 141 Wn.2d 169, 4 P.3d 123 (2000).....	14, 19
<i>William E. Buchan, Inc. v. City of Sammamish</i> , No. 75467-0-1, slip op. (Dec. 26, 2017) (unpublished).....	8

Statutes

RCW 43.21C.037(1).....	3
RCW 76.09.010(1).....	8
RCW 76.09.020(2).....	2
RCW 76.09.020(8).....	9
RCW 76.09.020(15).....	9, 16, 17, 18
RCW 76.09.020(20).....	17
RCW 76.09.030	13
RCW 76.09.030(3).....	13
RCW 76.09.030(3)(b)	13
RCW 76.09.040(1)(a)	2
RCW 76.09.040(1)(c)	2, 9
RCW 76.09.050(1).....	3, 15
RCW 76.09.050(7)(b)	10
RCW 76.09.060(3)(b)	passim
RCW 76.09.060(3)(d)	11
RCW 76.09.060(3)(f).....	11
RCW 76.09.070(1).....	5
RCW 76.09.070(4).....	12
RCW 76.09.090	4
RCW 76.09.205	2

RCW 76.09.240(6).....	9
RCW 76.09.240(6)(a)	9, 15
RCW 76.09.460	12, 15
RCW 76.09.460(2).....	12
RCW 76.09.470	11
RCW 76.09.470(2)(b)(i)	11
RCW 76.09.470(2)(b)(iii).....	11
RCW 79.09.240(6).....	15

Other Authorities

<i>Washington Real Property Deskbook Series: Vol. 6 Land Use Development</i> , ch. 14 (Wash. St. Bar Assoc. 4th ed. 2012 & Supp. 2016).....	3, 10
--	-------

Rules

RAP 2.5(a)	8
------------------	---

Regulations

WAC 197-11-938(4)(c)	11
WAC 222-08-025(2).....	2
WAC 222-12-010.....	9
WAC 222-16-010.....	10
WAC 222-16-050(2).....	10
WAC 222-16-050(2)(a)	3, 15

WAC 222-20-020(9)..... 13

WAC 222-24-020..... 13

I. INTRODUCTION

This case involves an access road used for a five-acre timber harvest that was upgraded to residential standards to support a small housing development after the timber harvest. The Department of Natural Resources (DNR) urges this Court to affirm the superior court. The court correctly determined that the road did not cross “forestland,” but instead crossed non-forested pasturelands, and thus was properly subject to local rather than DNR regulation. More importantly, the harvested five-acre parcel was developed into a home site, which conflicted with the forest practices permit and constituted an illegal forestland conversion. DNR issued a Notice of Conversion to Nonforest Use concerning this forest practices application, making clear that even if the road crossed forestland, local government regulation is proper.

Either due to the conversion of forestland, or because DNR never had proper forest practices jurisdiction over a road crossing a pasture, the County had lawful regulatory authority over the residential streets at issue in this case.

II. IDENTITY AND INTEREST OF AMICUS

Amicus DNR occupies a fundamental role under the Forest Practices Act (Act). DNR shares regulatory authority under the Act with two other administrative agencies. The Forest Practices Board adopts the

rules that implement the Act. RCW 76.09.040(1)(a). DNR provides staff support to the Forest Practices Board and administers the Act through a permitting and regulatory enforcement program. RCW 76.09.040(1)(c); WAC 222-08-025(2) (defining Board staff). Appeals from DNR determinations under the Act are reviewed by the Pollution Control Hearings Board (PCHB), and DNR participates in the quasi-judicial decisions issued by that body. RCW 76.09.020(2); RCW 76.09.205. Where, as in this case, the Court will apply the Act's provisions to determine the proper scope of local governmental regulatory authority, DNR has a strong interest in how the Court arrives at its decision.

Both issues in this case raise the proper balance of authority between DNR and local governments under the Act. Simon's Way claims the Act preempts the County's attempts to regulate the now-residential streets, because the Act restricts local government regulation of commercial forestry and the access road was originally constructed as a forest road under a Class III forest practices application. But conversions of forestland end the Act's preemption of local government authority and bring local land use regulatory controls to bear upon the new land uses.

The other issue in this case concerns whether pasturelands constitute "forestlands," a jurisdictional question at the heart of DNR's regulatory authority under the Act. All actions that DNR takes under the Act could be

affected by this Court's interpretation of what constitutes "forestland." So DNR has a strong interest in this issue as well.

In sum, DNR's interest in the interpretation of the Act and its implementing rules relates to all of the issues briefed in this case.

III. STATEMENT OF THE CASE

DNR generally agrees with and adopts Clark County's Statement of the Case. This brief calls out a few salient facts with record references.

A. **The Record Below Amply Demonstrates That the Waldal Parcel Converted From Forestland to a Home Site.**

This case began with a forest practices application to harvest a five-acre timbered site. Simon's Way repeatedly states that the application was a Class III, non-conversion proposal "exempt" from local government processes, or that it was not a Class IV-General application involving a conversion of forestland to other land uses.¹ Br. Appellant at 1-4, 10-11, 15-20, 26, and 28. Simon's Way wrongly constructs this appeal upon the false factual premise that no conversion occurred.

It is true that Simon Way's predecessor (Roth Investments, LLC, hereafter Roth) received a forestry-only permit that promised to completely

¹ Class III permits are not subject to State Environmental Policy Act (SEPA) review. RCW 76.09.050(1) (last line); RCW 43.21C.037(1). Class IV-General permits are subject to SEPA review and receive this classification when the landowner declares that some portion of their harvest will have a non-forestry use after the harvest. WAC 222-16-050(2)(a). See generally *Washington Real Property Deskbook Series: Vol. 6 Land Use Development* 14-14 to 14-15 (Wash. St. Bar Assoc. 4th ed. 2012 & Supp. 2016).

reforest the five-acre harvest site. Roth submitted its forest practices application stating that the property would not be converted to non-forestry uses within three years of the timber harvest. CP 67 (application question 27). Roth affirmed that the statements in its application were true, submitting it in May 2014. CP 61, 67. The forest practices permit primarily pertained to the harvest of timber on Parcel No. 233512-000. CP 62.²

Roth sought to amend its permit days after DNR approved it. The amendment sought to construct a longer, 1,500-foot access road called “Spur E” to Parcel No. 233512-000. CP 83-84. The amendment clarified Roth’s intent to reach “an established roadway” (NE 182nd Avenue) from Parcel No. 233512-000. CP 83. DNR approved this change in an administrative order called a Notice to Comply, which could only be appealed by a timber operator, landowner, or timber owner. CP 81-82; RCW 76.09.090.

Roth built Spur E in gravel and conducted the timber harvest from July 2014 to April 2015. CP 85, 118, 155, and 220 (Finding No. 4). Satellite images showed that *after the timber harvest* and between April 2015 and July 2016, Roth paved Spur E and installed street lights and other utilities, making it “consistent with improvements found in residential

² The timbered parcel appears at the top of the 2014 White Clover aerial photograph, and then with the timber removed in the 2016 aerial photograph. CP 49-50.

subdivisions . . . rather than a standard logging road.” CP 118, 220 (Finding No. 5), and 221 (Finding No. 7).

Roth eventually sold Parcel No. 233512-000 to the Waldals (hereafter the Waldal parcel) in January 2017. CP 54, 220 (Finding No. 6(d)). By the end of 2017, the Waldals completed construction of a 2,899-square-foot home, with an attached 840-square-foot garage, and a 1,600-square-foot detached garage. CP 197. The building values alone exceed \$500,000. CP 54. These portions of the original five-acre lot cannot possibly be reforested.

B. Roth Withdrew Its Challenge to DNR’s Notice of Conversion, Conceding That a Conversion Occurred Under Its Forest Practices Permit.

Reforestation typically occurs within three years from harvest completion. RCW 76.09.070(1). DNR learned of the Waldal home construction, and on December 11, 2018, it issued a Notice of Conversion to Nonforest Use under RCW 76.09.060(3)(b) concerning Roth’s forest practices permit. CP 308-11. Roth appealed the Notice to the PCHB (CP 312-15), but it voluntarily dismissed that appeal in August 2019.³

³ The case disposition information can be found at the PCHB’s case search page by entering either “Roth Investments” or the case number (P19-003). See http://www.eluho.wa.gov/Decision/Search_Cases (last visited Jan. 28, 2020).

C. The Record Before the Hearings Examiner Contained Abundant Evidence That the Road Crossed Agricultural Lands.

The forest practices application contained direct statements about the lands that the access road crossed to reach the Waldal parcel. Roth represented that the access road would run “through cow pasture” (CP 67), and that a stream crossing beneath the access road should be re-typed (to reduce the buffers for it) because the stream was a “farm ditch.” CP 71-72, 191. Additionally, Question 18 of the forest practices application requires applicants to list the areas where they intend to remove timber. Roth indicated they were removing timber from one, five-acre unit – the Waldal parcel. CP 65. Question 18 required detailing a unit number and timber volume from the right of way if the road crossed timbered areas to get to the five-acre harvest unit. *Id.*⁴ But Roth *did not* indicate that any timber volume would be removed from the road right of way leading to the five-acre unit, indicating that no timber stood where the road was constructed.⁵

Finally, several photographs in the record also document that the access road ran across flat, treeless terrain. CP 45-47. Aerial photos in 2014

⁴ The second column in the chart that forms Question 18 specifically refers to a harvest type as including a right of way. CP 65. Roth understood that a “right of way” pertained to the road location, as evidenced by its answer to Question 26, which indicated that the road right of way was “[n]ot marked, though cow pasture.” CP 67.

⁵ Roth signed its forest practices application under an affirmation that the information it provided was true. CP 67.

show the agricultural field to the south and east of the timbered Waldal parcel, and then in 2016 after the timber was removed from the Waldal parcel. CP 49-50. The same field can be seen in an attachment to DNR's Notice of Conversion to Nonforest Use, in a 2018 picture, which also shows the newly constructed Waldal home. CP 311.⁶

No factual evidence in the record supports Simon Way's assertion that Spur E crossed timbered lands prior to reaching the Waldal parcel.

IV. ARGUMENT

A. This Court Can Affirm on Any Basis Supported by the Record.

This case boils down to a legal dispute, not a factual one. It is clear that Roth had a Class III, non-conversion forest practices permit to remove timber and to build an access road. It is equally clear from the record that the haul road was upgraded from a traditional, gravel forest road into a paved and lighted residential street and that a home was constructed on the Waldal parcel. This case asks the Court to resolve legal questions concerning the County's jurisdiction over the upgraded road, while considering the applicable authorities under the Act.

This Court reviews issues of law de novo in LUPA matters. *Cingular Wireless, LLC v. Thurston Cty.*, 131 Wn. App. 756, 768 ¶ 24,

⁶ Because this picture became obscured when the record was copied, Appendix A to this brief is a clearer, color version of the same picture at CP 311.

129 P.3d 300 (2006). It may affirm based upon any legal ground supported by the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P. 2d 1027 (1989); *Wash. State Comm'n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 223 ¶ 123, 293 P.3d 413 (2013); accord RAP 2.5(a).⁷

The record here provides ample evidence that enables the Court to conclude either that a conversion occurred, or that the road in question never crossed “forestland,” and hence was never properly within DNR’s jurisdictional reach in the first place. Either pathway results in the County having proper land use jurisdiction over the road in question, which now has a residential character.

B. DNR Regulates Commercial Forestry, While Local Governments Regulate Conversions to Non-forestry Land Uses.

1. Key Forest Practices Act and Rule Provisions, and the Important Local Government Role in Conversions.

The Act and implementing rules regulate forest practices on public and private forestland. *Dep’t of Nat. Res. v. Marr*, 54 Wn. App. 589, 593, 774 P.2d 1260 (1989). The Act provides a system of laws designed both to ensure a viable commercial timber industry and to protect the state’s natural resources. RCW 76.09.010(1); *Alpine Lakes Prot. Soc’y v. Dep’t of*

⁷ See also *William E. Buchan, Inc. v. City of Sammamish*, No. 75467-0-1, slip op. at 9 (Dec. 26, 2017) (unpublished and nonbinding per GR 14.1) (available at: <http://www.courts.wa.gov/opinions/pdf/754670.pdf>, last visited Jan. 30, 2019) (applying same legal principal in LUPA case).

Ecology, 135 Wn. App. 376, 387 ¶ 22, 144 P.3d 385 (2006), *review denied*, 162 Wn.2d 1014 (2008). DNR has primary regulatory authority over the permitting and enforcement of commercial forestry operations. RCW 76.09.040(1)(c); WAC 222-12-010. DNR's authority over commercial forestry is also exclusive – local government regulations are preempted under the Act, except for a few specific areas. RCW 76.09.240(6) (“no county, city, municipality, or other local or regional governmental entity shall adopt or enforce any law, ordinance, or regulation pertaining to forest practices”). One of the specific exemptions from local preemption pertains to lands being converted to uses other than commercial forestry, the effect of which calls upon local governmental authority to regulate the new land use emerging from the forest. RCW 76.09.240(6)(a).

The Act specifically defines “forestland” and “conversion to a use other than commercial timber operation.” “‘Forestland’ means all land which is capable of supporting a merchantable stand of timber and is not being actively used for a use which is incompatible with timber growing.” RCW 76.09.020(15). A “conversion” “means a bona fide conversion to an active use which is incompatible with timber growing” RCW 76.09.020(8). RCW 76.09.060(3)(b) directs DNR to issue a Notice of Conversion to Nonforestry Use if it becomes aware of undeclared

“conversion activities” on *any lands* covered by a forest practices application.⁸ WAC 222-16-010 defines “conversion activities” in broad and open-ended terms that include things such as grading previously forested areas, preparing to or installing utilities, or the improvement of roads to standards greater than needed to conduct forest practices. WAC 222-16-010 (“conversion activities”).

The forest practices application form specifically asks about conversions and contains a statement above the signature making sure landowners understand the significance of their representations in the application. CP 67. Landowners who have plans to convert part of the land under an application must indicate “yes” to the conversion question. Conversions receive a Class IV-General classification. WAC 222-16-050(2)). Importantly, local governments have specific authority in the Act to reject conversion proposals, highlighting and recognizing the local government’s regulatory role in such situations. RCW 76.09.050(7)(b).

Indicating that some land will be converted brings other local government planning and permitting authorities to bear.⁹ Local

⁸ Below, Simon’s Way argued that as long as some land on a parcel remained in forestry, the lands could still be “forestlands.” CP 212-13. This is true as far as it goes. But RCW 76.09.060(3)(b) expressly directs DNR to issue a Notice of Conversion to Nonforest use when “*any lands*” subject to a forest practices application convert, indicating that a Class IV-General permit must be obtained by a landowner under these circumstances.

⁹ See *Washington Real Property Deskbook* at 14-35 to 14-38.

governments perform SEPA lead agency duties if the subsequent land use requires local permits. WAC 197-11-938(4)(c). The Legislature has often wrestled with the best way to address conversions and to prevent unauthorized conversions. If Roth had indicated in its application that the land would be converted within three years of its timber harvest, Clark County would have had clear regulatory authority over both the road paving as well as the Waldal home site.

Sometimes landowners indicate that a parcel will not convert, but change their minds. The Act sets forth a specific process for the landowner to declare their new intent. RCW 76.09.060(3)(f); RCW 76.09.470. In doing so, landowners must follow local regulations and bring their land into full compliance with them. RCW 76.09.470(2)(b)(iii). If the local government finds that the project fails to comply with local regulations, it must develop a mitigation plan to address those violations. *Id.* The landowner must also fully comply with SEPA. RCW 76.09.470(2)(b)(i). Thus, local governments have authority to regulate development under both SEPA and their local ordinances or code provisions, regardless of whether a landowner declares their conversion up front or within six years of receiving their forest practices permit. RCW 76.09.060(3)(d), (f).

Sometimes, a forest practices applicant states that they will not convert their property, but they seek to do so without informing DNR. The

Act also addresses these situations and still provides for local government authority over the conversion. RCW 76.09.060(3)(b) directs DNR to issue a Notice of Conversion to Nonforest Use when it observes unpermitted “conversion activities,” which include site grading, stump removal, adding utilities, and unnecessary road upgrades, among other things. The Notice triggers a “moratorium” on local government permit issuance until the properties covered by the forest practices application have come into compliance with local rules, the SEPA process has been completed on the development, and until the landowner resolves any other Act violations should they exist. RCW 76.09.460. The moratorium statute requires that a landowner work with the local government to complete SEPA requirements and comply with all local development regulations in order to have the moratorium waived, and to mitigate for past violations. RCW 76.09.460(2).¹⁰

The Act’s conversion provisions act “as a check against a developer’s clear-cutting property under the Forest Practices Act and then immediately seeking local approval for a different land use” *Ord v. Kitsap Cty.*, 84 Wn. App. 602, 606, 929 P.2d 1172 (1997). The *Ord* Court found that the Act’s provisions “directly grants local governments authority

¹⁰ A landowner cannot escape these burdens by selling their property, unless they expressly state to the purchaser the nature of the ongoing obligations under the Act. RCW 76.09.070(4). Thus, the legal obligations created by the Act survive a sale.

to impose RCW 76.09.030(3)(b) [sic] restrictions on land subject to a forest practices application if the application failed to say the land was to be converted.” *Ord*, 84 Wn. App. at 606-07.¹¹ Thus, the presence of converting forestland gives rise to local governmental authority.

2. The Forest Practices Application at Issue Clearly Involved Forestland That Converted.

Simon’s Way seeks to avoid local regulatory authority over the White Clover residential development’s roads, in direct contradiction to the regulatory structure discussed above. It is true that Roth applied for and received a Class III non-conversion forest practices application. But its *conduct* under the application matters. It seeks to have this Court ignore that (a) a \$500,000 house was constructed on the Waldal parcel, converting a substantial portion of the previously forested five-acre area, (b) Roth upgraded the road beyond forest practices standards *after the timber was removed*,¹² and (c) DNR issued a Notice of Conversion to Nonforest Use

¹¹ The *Ord* opinion mistakenly referred to RCW 76.09.030(3) and .030(3)(b). RCW 76.09.030 creates the Forest Practices Board, which was not addressed or relevant in *Ord*. However, the Court referred to RCW 76.09.060(3)(b) (dealing with conversions, the subject of the *Ord* case) in the paragraph before the mistaken citations. *Ord*, 84 Wn. App. at 606.

¹² WAC 222-24-020 provides standards for forest road location and design. That rule indicates that forest roads must “[u]se *the minimum design standard* that produces a road sufficient to carry the anticipated traffic load with reasonable safety.” WAC 222-20-020(9) (emphasis added). Spur E was originally covered in gravel and used in that form to *complete* the timber harvest. CP 85, 118, 155, and 220 (Finding No. 4). The road was only upgraded *after* the timber was removed. CP 118, 220 (Finding No. 5); and 221 (Finding No. 7). The record reveals no forestry-related reason to pave the road and install residential streetlights or other utilities.

under RCW 76.09.060(3)(b). Roth, Simon Way's predecessor in interest, voluntarily dismissed its challenge to the Notice and allowed it to become final. See n.3, *supra*. Simon Way's "head in the sand" approach ignores these facts, leading this Court down flawed analytical pathways that seek to sanction the illegal conduct.

Simon's Way may try to use LUPA principles, such as the untimely challenge to an underlying decision expressed in *Wenatchee Sportsmen Association v. Chelan County*,¹³ to shield it from challenges to the application classification, contending that DNR authorized the Class III operation and that the County did not challenge it. *Wenatchee Sportsmen Association* stands for the proposition that challenges to an underlying decision (there, a rezoning decision) are time-limited and cannot be brought in a subsequent challenge to development that relied upon the rezoning decision. *Wenatchee Sportsmen Ass'n*, 141 Wn.2d at 180-82. But this case raises issues about *post-permit decision* noncompliance with the approved application and laws. LUPA provides no safe haven for these violations. This Court should strongly resist Simon's Way's attempts to improperly apply LUPA law in a manner that sanctions illegal behaviors and rewards unauthorized conduct.

¹³ 141 Wn.2d 169, 4 P.3d 123 (2000).

Neither the superior court nor the hearings examiner addressed conversion issues, despite the clear evidence of a conversion in the record. The hearings examiner unfortunately drew the inappropriate conclusion that “[t]he fact that the properties where the road was constructed have been developed with residences is *irrelevant*.” CP 225. But to the contrary, and as discussed above, whether a conversion occurred serves a pivotal role in resolving questions about local governmental regulatory authority under the Act. Put another way, Simon Way’s reliance on RCW 79.09.240(6) to claim the Act preempts local regulatory authority over commercial forestry (Br. Appellant at 17-18) fails completely where a conversion occurs under the terms of RCW 76.09.060(3)(b) and RCW 76.09.460.¹⁴

DNR regulates commercial forestry, but conversions are not solely commercial forestry proposals. The Act recognizes that local governments have an important regulatory role regarding converting land. RCW 76.09.060(3)(b), RCW 76.09.240(6)(a), and RCW 76.09.460 exist to clarify that local government regulations apply and are not preempted by

¹⁴ Simon’s Way concedes that “[u]nder RCW 76.09.240(6), *if there is a conversion, County regulations apply*.” Br. Appellant at 18 (emphasis added). Simon’s Way first argues that no conversion occurred, even though this point is obvious in the record. *Id.* Simon’s Way then contends that DNR did not check the box applicable to road conversion activity when it issued its Notice of Conversion to Nonforest Use. Reply Br. Appellant at 8-9. But this point is irrelevant: under the express terms of RCW 76.09.060(3)(b), a conversion occurs on a forestry proposal if “*any land covered by the application*” is converted. Thus, the whole proposal involved conversion and should have been a Class IV application. RCW 76.09.050(1) (Class IV); WAC 222-16-050(2)(a).

the Act on converting properties. Here, that authority covers the now-lighted and paved residential street.

This Court can affirm the ruling below based on any ground supported by the record. The record overwhelmingly reflects that a conversion occurred – it is the elephant in the room. Simon’s Way itself directly raises the conversion issue each time its briefs assert that the application at issue was Class III and not Class IV-General. Clark County has proper jurisdictional authority to require grading and Clean Water Act permits because the forest practices at issue involved a conversion.

C. The Superior Court Correctly Determined That DNR Lacks Authority Over Roads Constructed Across Agricultural Land.

The superior court determined that the access road crossed lands being used for another purpose incompatible with commercial timber growing (pasture), and as a result, the pasture was not “forestland” under RCW 76.09.020(15). CP 343. Simon’s Way mistakenly paints this analysis as an untimely challenge to DNR’s approval of the application amendment that included the forest road. Br. Appellant at 22. Rather than challenging the wisdom of DNR’s permitting decision, this was actually a *jurisdictional* ruling – because DNR only has jurisdiction over “forestland,” if the road crossed agricultural lands, DNR’s action in approving the road as an

amendment to the forest practices application was beyond its jurisdictional authority, ultra vires, and void.

Regretfully, DNR concedes that the superior court correctly decided this issue. The evidence indicates that the forest practices application repeatedly indicated that the proposed access road crossed a “cow pasture” (CP 67), that the stream the road crossed was a “farm ditch” (CP 71-72), and that the timber removal portion of the application listed no timber volume associated with the road right of way. CP 65. Consistent with that, the ground and aerial photographs of the site in the record reveal an absence of trees in the road pathway. CP 45-47, 49-50, 311 (and reprint in Appendix A). In fact, *no evidence* in the record establishes that road crossed land with trees on it. Simon’s Way simply makes the naked assertion that if the road was part of the forest practices application and DNR approved it as a permit amendment, the road must have been a “forest road” across “forestland.” Reply Br. Appellant at 7. Nothing in the record reflects that land the road crossed was *actually* forested.

Whether the land in question met the definition of “forestland” in RCW 76.09.020(15) is a question of law, subject to de novo review.¹⁵ Here,

¹⁵ If a term carries a legal implication, whether it has been established in a case is a conclusion of law. *State v. Hutsell*, 120 Wn.2d 913, 919, 845 P.2d 1325 (1993). The term “forest road” in RCW 76.09.020(20) depends upon the definition of “forestland” in RCW 76.09.020(15), so what is “forestland” is foundational to determining DNR’s jurisdictional reach.

the evidence, including Roth's own express representations to DNR concerning the road right of way, indicates that road crossed a "cow pasture." CP 67 (Question 26). The act of mowing and maintaining hay fields for cows clearly constitutes an ongoing use of the land incompatible with timber growing under RCW 76.09.020(15). Hence, the definition of "forestland" *expressly* excludes "agricultural land." RCW 76.09.020(15).¹⁶

Where an agency exercises jurisdiction beyond its statutory authority, its actions are ultra vires and void. *Noel v. Cole*, 98 Wn.2d 375, 378-79, 655 P.2d 245 (1982) (involving a DNR contract); *Failor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wn.2d 488, 499, 886 P.2d 147 (1994); *Haslund v. City of Seattle*, 86 Wn.2d 607, 622, 547 P.2d 1221 (1976) (unlawful permit).¹⁷ DNR admits its error concerning the application amendment that included the access road. However, Roth at least

¹⁶ Simon's Way argues that because the Waldal parcel was forested, the whole right of way must be considered forested. Reply Br. Appellant at 6. Here, the evidence demonstrated that the five-acre Waldal parcel supported a merchantable timber before it was harvested, but the 1,500-foot access road crossed a quarter mile on other parcels being used for agriculture, and was not growing trees. There is no rational basis under the Act to treat a non-treed parcel as a treed parcel just because a road eventually reaches a treed parcel. This would be an unwarranted expansion of DNR's jurisdiction under the Act.

¹⁷ *Haslund* teases out the difference between a permit in violation of city building codes and a jurisdictional shortfall. It found the City did *not* act in an ultra vires manner where it merely violated a code provision in issuing a permit. *Haslund*, 86 Wn.2d at 622. While DNR has jurisdiction to approve forest practices applications on "forestland," it cannot regulate conduct beyond "forestland." Thus, DNR's approval of the amendment that included the road across the cow pasture was void and ultra vires because it lacked the legal authority to regulate that conduct, and, unlike the City in *Haslund*, DNR's action involved something more than an inappropriate application of rule provisions.

contributed to the error by requesting the amendment for a road across lands it described as “cow pasture.”¹⁸

The superior court correctly determined that the access road was built across pastureland, and consequently, it was not built across “forestland.” As such, the access road was never properly subject to DNR’s jurisdictional reach, and its permit amendment addressing the road was both void and ultra vires. Had DNR identified the issue in a timely manner, we might not be here – this is a situation DNR regrets. Nevertheless, the County cannot lose proper regulatory authority over a residential roadway for purposes of critical Clean Water Act and other provisions based upon DNR’s improper exercise of jurisdiction.

V. CONCLUSION

The record below contains ample evidence that portions of the underlying forest practices permit area converted. Additionally, the record demonstrates that the road crossed non-forested pasturelands, and hence, it was beyond DNR’s jurisdictional reach. The now-residential streets serving the White Clover development fall within the County’s sphere of regulatory authority either way. County jurisdiction over conversions is particularly

¹⁸ Simon’s Way also relies on *Wenatchee Sportsmen Association* for its argument on this point. Br. Appellant at 22 n.42. However, *Wenatchee Sportsmen Association* does not stand for the proposition that an agency can make permanent, binding decisions over matters outside its jurisdictional authority. Simon’s Way cites to no such case in its briefing.

important under the Act, and Simon's Way's attempts to circumnavigate this reality should not be rewarded.

Environmental laws and regulations must be applied evenhandedly. Evaders of environmental regulations burden others who must comply disproportionately, for example, to meet the County's water quality standards for municipal stormwater discharges. Simon's Way's arguments here seek to pass these additional burdens to other Clark County residents. Clark County only seeks to have Simon's Way and the White Clover development comply with its local ordinances, just like its other law-abiding County residents.

For the reasons asserted in this brief and the County's brief, this Court should affirm the superior court's decision.

RESPECTFULLY SUBMITTED this 6th day of February, 2020.

ROBERT W. FERGUSON
Attorney General



PHILIP M. FERESTER
Senior Counsel
WSBA No. 21699

Attorneys for Amicus

Department of Natural Resources

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on February 6, 2020, as follows:

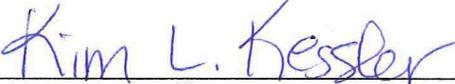
<p>LeAnne M. Bremer, P.C. Miller Nash Graham & Dunn LLP 500 Broadway Street, Suite 400 Vancouver, WA 98660</p> <p><i>Attorney for Appellant/Petitioner</i></p>	<p><input type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input type="checkbox"/> Email <input checked="" type="checkbox"/> Washington State Appellate Courts' eFiling Portal</p>
<p>William Richardson Deputy Prosecuting Attorney Clark County Prosecutor's Office Civil Division 1300 Franklin Street, Suite 380 Vancouver, WA 98660</p> <p><i>Attorney for Respondent Clark County</i></p>	<p><input type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input type="checkbox"/> Email <input checked="" type="checkbox"/> Washington State Appellate Courts' eFiling Portal</p>
<p>Scott and Anja O'Neil 801 NE 26th Way Battle Ground, WA 98604</p> <p><i>Other Party</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input type="checkbox"/> Email <input type="checkbox"/> Washington State Appellate Courts' eFiling Portal</p>

<p>Eric and Melissa Waldal 5215 NE 239th Street Battle Ground, WA 98604</p> <p><i>Other Party</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input type="checkbox"/> Email <input type="checkbox"/> Washington State Appellate Courts' eFiling Portal</p>
<p>Roy and Della Massie PO Box 1409 Bush Prairie, WA 98606</p> <p><i>Other Party</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input type="checkbox"/> Email <input type="checkbox"/> Washington State Appellate Courts' eFiling Portal</p>
<p>Alan and Kathryn Holtz-Olson 18701 SE 23rd Street Vancouver, WA 98683</p> <p><i>Other Party</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input type="checkbox"/> Email <input type="checkbox"/> Washington State Appellate Courts' eFiling Portal</p>

<p>Ryan and Linda Rosenlund 26805 NE 180th Court PO Box 2002 Battle Ground, WA 98604</p> <p><i>Other Party</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input type="checkbox"/> Email <input type="checkbox"/> Washington State Appellate Courts' eFiling Portal</p>
<p>Brian and Janet Wolf 3444 Shawnee Drive Norco, CA 92860</p> <p><i>Other Party</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input type="checkbox"/> Email <input type="checkbox"/> Washington State Appellate Courts' eFiling Portal</p>

I certify under penalty of perjury, under the laws of the state of Washington, that the foregoing is true and correct.

DATED this 6th day of February, 2020, at Olympia, Washington.



KIM L. KESSLER
Legal Assistant
Natural Resources Division

APPENDIX A

(Color Version of CP 311)

Forest Practices Risk Assessment Mapping (FPRAM)



Legend	
All Harvest	Other
FPAs by Classificatio...	Impoundments
II	Open
III	Freshwater
IV-General	Subject to Inundation
IV-Special	Glacier / Snowfield
FP Wetlands (DNR)	Wet Area
Forested	Open Saltwater
Type A	Artificial Feat'
Type B	Unknown / Unclassified
Other	Water Courses - Typed (DNR)
Water Bodies (DNR)	Type F
	Type N
	Type S
	U, unknown
	X, non-typed per WAC 222-16

Approximate Scale : 1:2,257

12/11/2018:56:26 PM

Coordinate System: NAD 1983 HARN StatePlane Washington South FIPS 4602 Feet



**WASHINGTON STATE DEPT OF
NATURAL
RESOURCES**

Extreme care was used during the compilation of this map to ensure accuracy. However, due to changes in data and the need to rely on outside information, the Department of Natural Resources cannot accept responsibility for errors or omissions, and therefore, there are no warranties which accompany this material.

Parcel #233512000 & 233477000 Sec. 19, T04N, R03E

ATTORNEY GENERAL'S OFFICE - NATURAL RESOURCES DIVISION

February 06, 2020 - 4:02 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53723-1
Appellate Court Case Title: Simon's Way Development, Inc, Appellant v. Clark County, Respondent
Superior Court Case Number: 19-2-00512-6

The following documents have been uploaded:

- 537231_Briefs_20200206155558D2358776_0319.pdf
This File Contains:
Briefs - Amicus Curiae
The Original File Name was AmicusBrief_2-6-20.pdf
- 537231_Motion_20200206155558D2358776_1421.pdf
This File Contains:
Motion 1 - Other
The Original File Name was MtnFileAmicus_2-6-20.pdf

A copy of the uploaded files will be sent to:

- Bill.Richardson@clark.wa.gov
- CntyPA.GeneralDelivery@clark.wa.gov
- heather.harmon@millernash.com
- leanne.bremer@millernash.com

Comments:

Sender Name: Kim Kessler - Email: kim.kessler@atg.wa.gov

Filing on Behalf of: Philip Michael Ferester - Email: phil.ferester@atg.wa.gov (Alternate Email: RESOlyEF@atg.wa.gov)

Address:
PO Box 40100
Olympia, WA, 98504-0100
Phone: (360) 586-3696

Note: The Filing Id is 20200206155558D2358776