

FILED
Court of Appeals
Division II
State of Washington
10/28/2019 10:32 AM

No. 53723-1-II
(Clark County Superior Court No. 19-2-00512-06)

COURT OF APPEALS
DIVISION II
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,

Respondents/Other Parties.

BRIEF OF APPELLANT

LeAnne M. Bremer, P.C.
MILLER NASH GRAHAM & DUNN LLP
500 Broadway Street, Suite 400
Vancouver, Washington 98660
360.699.4771

Attorneys for Appellant/Petitioner
Simon's Way Development, Inc.

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ASSIGNMENT OF ERROR	4
A. Issue No. 1 Presented	4
B. Issue No. 2 Presented	5
III. STATEMENT OF THE CASE.....	5
IV. ARGUMENT	14
A. Standard of Review	14
B. Applicable Regulations: State Preemption	15
1. DNR Regulates Forest Roads, Which Are Roads That Cross Forestland, as a Forest Practice.....	15
2. State Law Prohibits County Regulation of Forest Practices Except in Limited Circumstances Not Relevant Here.	17
3. County Code Exempts Forest Practices From Critical Area and Storm Water Requirements.	19
C. Hearings Examiner Decision	19
D. Superior Court Decision	21
V. CONCLUSION.....	27

TABLE OF AUTHORITIES

	Page
Cases	
<i>Applewood Estates Homeowners Ass'n v. City of Richland</i> , 166 Wn. App. 161, 269 P.3d 388 (2012).....	27
<i>Cedar River Water & Sewer Dist. v. King Cty.</i> , 178 Wn.2d 763, 315 P.3d 1065 (2013).....	27
<i>Chelan Cty. v. Nykreim</i> , 146 Wn.2d 904, 52 P.3d 1 (2002).....	26
<i>Durland v. San Juan Cty.</i> , 182 Wn.2d 55, 340 P.3d 191 (2014).....	27
<i>Ferguson v. City of Dayton</i> , 168 Wn. App. 591, 277 P.3d 705 (2012).....	27
<i>Samuel's Furniture v. Dep't of Ecology</i> , 147 Wn.2d 440, 54 P.3d 1194 (2002).....	26
<i>Skamania Cty. v. Columbia River Gorge Comm'n</i> , 144 Wn.2d 30, 26 P.3d 241 (2001).....	27
<i>Twin Bridge Marine Park, L.L.C. v. Dep't of Ecology</i> , 162 Wn.2d 825, 175 P.3d 1050 (2008).....	27
<i>Wenatchee Sportsmen Ass'n v. Chelan Cty.</i> , 141 Wn.2d 169, 4 P.3d 123 (2000).....	15, 22, 26

Statutes, Regulations, and Codes

16 U.S.C. § 544m(a)27

RCW 36.70C.130(1).....14

RCW 36.70C.130(1)(b), (c), (d), and (e)15

RCW 76.09.020(15).....4, 15, 23

RCW 76.09.020(17).....16

RCW 76.09.020(20).....16

RCW 76.09.240(6).....17, 18

UDC 40.260.08010

UDC 40.440.010(B)(1)(b)10

UDC 40.440.010-111

UDC 40.450.040(A)(1).....10

WAC 222-16-010.....8, 15

WAC 222-20-010(8).....21

I. INTRODUCTION

The Washington Department of Natural Resources ("DNR") regulates timber harvests on private land. A property owner wishing to harvest timber on the owner's land, and construct a forest road to facilitate the harvest, must obtain a forest practices permit from DNR. While Clark County receives notice of forest practices permit applications, it regulates neither the timber harvest activity nor the construction of a forest road, except for Class IV conversion permits, an exception that does not apply in this case.

In 2014, Roth Investments, LLC obtained a Class III forest practices permit to conduct a timber harvest and construct a 1,500-foot-long forest road on property it owned. DNR accepted the forest practices permit application as complete and approved the forest practices described in the application, including the forest road. Clark County received notice of the forest practices permit approving the timber harvest and the construction of the forest road, and did not appeal the permit. Later, after Roth had conducted the timber harvest and constructed the forest road, Clark County sought to impose its wetland, habitat, storm water, and grading regulations on the forest road after the fact through issuance of

notice and orders because Roth had paved the forest road. Roth did the paving during the term of the forest practices permit.

Roth's successors, including appellant/petitioner, Simon's Way Development, Inc., and other property owners, challenged the notice and orders, claiming that DNR regulations preempted County regulations because they did not apply to the DNR-approved forest road under a Class III forest practices permit.

On appeal of the notice and orders to the Clark County hearings examiner, the examiner agreed with Simon's Way that the road Roth had built was a "forest road" located on "forestland," as those terms are defined by state law, but then ruled that the forest road was not a "forest practice" because Roth had not listed all tax parcel numbers of the property over which the road traversed in its forest practices application—an application that DNR had deemed complete and processed, and under which it had issued a permit. Accordingly, because of his conclusion that the DNR permit for a forest practice did not include the forest road, the examiner ruled that the forest road was subject to County regulations.

Upon Simon's Way's appeal of the examiner's decision to Clark County Superior Court, the Court ruled in favor of Simon's Way and

reversed the examiner's conclusion on the only issue on appeal, finding the existence of a forest practice. Specifically, the Court ruled that the examiner's decision on the absence of a forest practice—due to missing tax parcel numbers in the forest practices application—was an erroneous application of the law. The Court, however, went further. Even though DNR had approved a forest road identified in a forest practices application, in a final, unappealed, forest practices permit, the Superior Court ruled, *sua sponte*, that the road was not a forest road because it did not cross forestland. The Superior Court's decision is in error because the subject property meets the statutory definition of "forestland," and, more importantly, because DNR approved a forest practices application for a forest road—which by definition crosses forestland—in a final, unappealed forest practices permit.

Both the examiner and Superior Court failed to focus on the true issue that Roth appealed in the first place: whether Clark County regulations apply to a Class III DNR-approved forest road. DNR's approval of a forest practices permit for a forest road across forestland became a final land use decision once the appeal period passed. Any decision that seeks to undo that permit, and dispute DNR's recognition and

approval of a forest road as a permitted forest practice, is an impermissible, collateral attack on a final land use decision. The bases for the examiner's and Superior Court's decisions (e.g., the absence of a valid forest practice or forest road) would have been more appropriate in an appeal of the forest practices permit, which did not happen. This Court should overturn the Superior Court's decision and grant Simon's Way's appeal.

II. ASSIGNMENT OF ERROR

The Clark County Superior Court erred when it ruled that a forest road crossing forestland, and approved by DNR as a forest practice, is subject to Clark County regulations because of its conclusion that the road did not cross "forestland" as defined in RCW 76.09.020(15).

A. Issue No. 1 Presented

Clark County does not regulate Class III forest practices. A forest practice includes a forest road. Is a forest road, identified in a forest practices application, located on forestland, and approved and permitted by DNR—the agency with jurisdiction over Class III forest practices—a forest practice exempt from County regulations?

B. Issue No. 2 Presented

Did the Superior Court have jurisdiction to invalidate DNR's approval of a forest road across forestland issued in a final forest practices permit, and on a basis not before it on appeal?

III. STATEMENT OF THE CASE

Simon's Way and the other parties in the appeal below own the lots as shown on the map:



This property is also collectively known as White Clover. In 2014, Roth owned all the property. The forest road is shown as N.E. 180th Court

and N.E. 266th Street on the map above. On May 8, 2014, Roth filed a forest practices application with DNR.¹ Roth sought a permit to harvest timber on what is now the Waldal property, and on property north of the Waldal property. Section 15 of the forest practices application requires applicants to fill out a table "[i]f constructing or abandoning forest roads."² In this table, Roth identified the forest road as Spur E, 100 feet in length.³ Roth also indicated in this table that it would not abandon the forest road.⁴

Other key statements in the application include the following:

1. There would be no Road Maintenance and Abandonment Plan.⁵
2. There would be reforestation on the Waldal parcel.⁶
3. This application did not involve a conversion to a nonforestry use on the five-acre parcel.⁷

¹ CP0061.

² CP0064.

³ *Id.*

⁴ *Id.*

⁵ CP0063.

⁶ CP0065.

⁷ *Id.*

DNR approved the forest practice described in the application in a decision dated June 6, 2014.⁸

On June 13, 2014, Roth submitted a Request to Amend Forest Practices Application to DNR.⁹ Section 3 of the amended application requires the applicant to "[d]escribe the proposed amendment to the original FPA/N."¹⁰ Roth filled out this section with the following: "Actual road construction to remove timber is approximately 1,500 feet to an established roadway. See attached documents."¹¹ The attached documents include Roth's amended Section 15 of the original forest practices application, which states that Spur E is 1,500 feet in length. And Roth again indicated that it would not abandon the forest road.¹² The only reason that Roth filed the amended application was to obtain approval from DNR for a 1,500-foot forest road.

⁸ CP0079.

⁹ CP0083.

¹⁰ *Id.*

¹¹ *Id.*

¹² CP0084.

DNR approved the amended forest practices application that dealt solely with the forest road with no conditions.¹³ DNR sent its decision on the amended forest practices application approving a 1,500-foot-long forest road to Clark County, as the local governmental entity ("LGE").¹⁴ Parties receiving notice of a forest practices permit decision may appeal that decision to the Pollution Control Hearings Board.¹⁵ No party, including the County, appealed DNR's approval of Roth's forest road described in its amended forest practices application.

In its forest practices application, Roth drew on a map that DNR includes in its application form and requires applicants to complete.¹⁶ The map is entitled "Forest Practice Activity Map." In its application, Roth shows habitat boundaries, ditches, and pasture fencing on the map. Roth also shows the forest road highlighted below for emphasis (the road roughly matches the road shown on the map above):

¹³ CP0081.

¹⁴ WAC 222-16-010; *see* CP0081 which refers to the LGE.

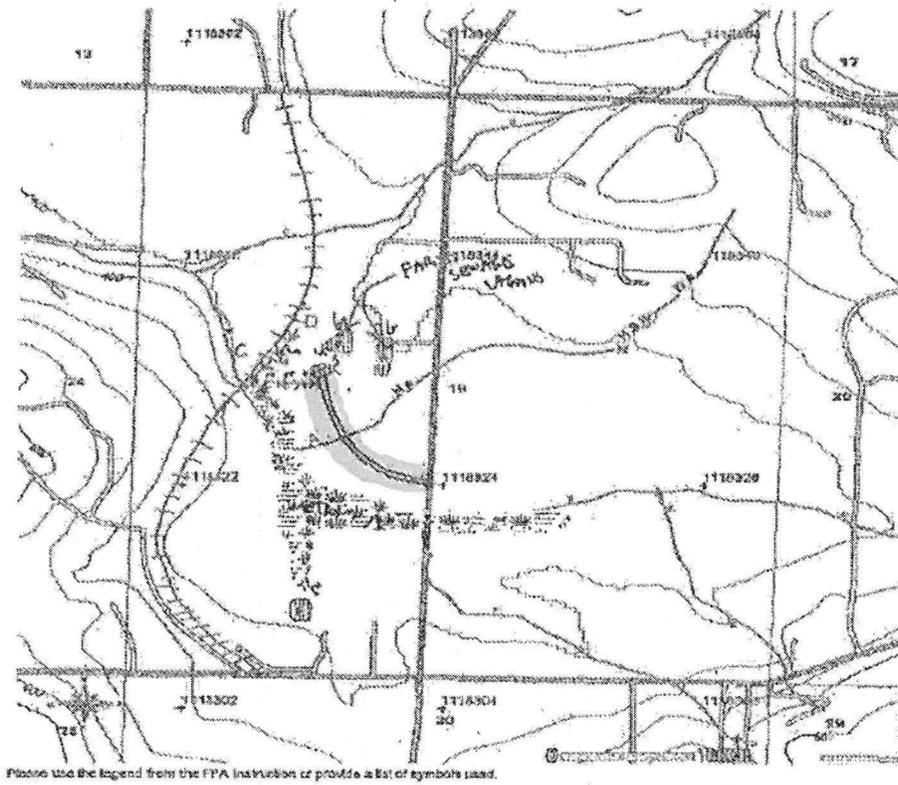
¹⁵ CP0080.

¹⁶ CP0069. Simon's Way directs the Court to the record for a clearer version of the map.

FOREST PRACTICE ACTIVITY MAP

TOWNSHIP 4 NORTH HALF 0, RANGE 3 EAST (W.M.) HALF 0, SECTION 18

Application #: 29,28500



In accordance with the amended forest practices permit, Roth constructed the 1,500-foot-long forest road, and eventually paved the forest road while the forest practices permit was still in effect.¹⁷ Roth used

¹⁷ The original forest practices permit expired on June 6, 2017 (CP0079); the amended forest practices permit does not appear to have changed the expiration date.

the forest road to reforest the Waldal property, and the forest road will continue to provide access to the Waldal property to manage the timber as it grows.¹⁸ Roth built the forest road before selling any of its lots to individual lot owners, and before any of those owners applied for building permits for residences on those lots.¹⁹

Although Roth built the forest road with the permission of and under the jurisdiction of DNR, on August 11, 2016, Clark County issued its first code enforcement letter.²⁰ In this letter, the County claimed that the forest road must comply with the County's critical areas ordinances under Clark County Unified Development Code ("UDC") 40.450.040(A)(1) and 40.440.010(B)(1)(b). Roth objected to these requirements, in part relying on UDC 40.450.010(C)(1)(i), which exempts the following from the County's wetland protection ordinance:

- i. Forest practices regulated by the State of Washington Department of Natural Resources (DNR) under the Forest Practices Rules (WAC Title 222), or regulated under Clark County Code Section 40.260.080, Forest Practices, except forest conversions and conversion option harvest plans.²¹

¹⁸ CP0195.

¹⁹ CP0211.

²⁰ CP0189.

²¹ There is a similar exemption from the habitat protection ordinance: "Forest practices in habitat areas that are regulated by the Washington Department of Natural Resources under the Forest Practices Rules or regulated under Clark County Code

The County apparently agreed that the exemption applied because it did not pursue that matter.

On September 19, 2017, Simon's Way received a second code enforcement letter from the County.²² In that letter, the County explained that the improvement of the forest road triggered the grading and storm water provisions of the County code:

2015 aerials from after your logging project show a freshly rocked road, which has subsequently been paved. Clark County codes 14.07 and 40.386 require a grading permit and stormwater review for this type of activity.

Since that time, the County has consistently maintained that Simon's Way needs to obtain a grading permit and storm water review for the forest road. Ultimately, the County issued a series of notice and orders against Simon's Way and the other parties for allegedly violating the County's ordinances.²³

Simon's Way, the Olsons, the Rosenlunds, and the Wolfs appealed the applicable notice and orders to the Clark County hearings examiner, alleging, among other things, that (a) DNR approved construction of a 1,500-foot long forest road, (b) Roth must fully comply with all state

Section 40.260.080, Forest Practices, except conversions or conversion option harvest plans (COHPs)." UDC Table 40.440.010-1.

²² CP0085.

²³ CP0086-108.

regulations applicable to a forest road, including regulations related to critical areas, grading, and storm water, (c) there is no prohibition on paving a forest road, and (d) Clark County has no authority to apply its grading and storm water regulations retroactively to a forest road regulated by DNR.²⁴

The examiner denied Simon's Way's appeal solely on the basis that the forest road, approved by DNR as a forest practice in a final forest practices permit, was in fact not a forest practice.²⁵ Simon's Way filed a motion for reconsideration, which the examiner denied.²⁶

Simon's Way appealed a single issue to Clark County Superior Court: the examiner's conclusion that the forest road across forestland is not an approved forest practice because of missing tax parcel numbers in the application even though DNR found the application complete and issued the permit, and no party appealed the permit. Clark County did not challenge the examiner's findings that there exists a forest road over forestland.

²⁴ CP0234; CP0154-62.

²⁵ CP0218.

²⁶ CP0282-85.

In the Land Use Petition Appeal ("LUPA"), the Superior Court ruled in Simon's Way's favor and reversed the examiner, finding a forest practice:

The hearing examiner's finding at (CC0185) that "the access road **meets the definition** of a "forest road" (1.a.) and the "access road **does not qualify** as a forest road and a forest practice" (1.b.) are inconsistent with each other. [Emphasis added.] The deciding factor in denying Simon's Way appeal of the notice & order was that the 1,500 foot access road was not a forest practice. This decision is an erroneous application of the law. The applicant provided all necessary information to DNR for the FPA. Access to the logging sites on the identified lots required an access road (Spur E). There is no dispute that the access road was necessary to enable forest practices on the timbered lots. As such, if the access road is defined as a "forest road" over "forestland" then it qualifies as a "forest practice". The hearing examiner's finding that the access road was not a forest practice is incorrect and this court reverses that conclusion.²⁷

Despite finding a forest practice, the Superior Court then ruled that there was no "forest road," as the law defines that term, because the road did not cross forestland, contradicting the examiner's unappealed conclusions of the existence of a forest road across "forestland." The lower court's conclusion hinged not on the statutory definition of

²⁷ CP0342-43.

forestland, but on the fact that Roth mentioned in the forest practices application that the road would cross a cow pasture.²⁸

IV. ARGUMENT

A. Standard of Review

Under LUPA, Simon's Way has the burden to meet one of the following standards to overturn the examiner's decision:

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

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

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

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

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

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

RCW 36.70C.130(1).

²⁸ CP0343.

In reviewing an administrative decision, an appellate court stands in the same position as the Superior Court.²⁹

This case involves the interpretation of the law and DNR regulations. No material facts are in dispute. The Court should overturn the Superior Court's decision under RCW 36.70C.130(1)(b), (c), (d), and (e).

B. Applicable Regulations: State Preemption

1. DNR Regulates Forest Roads, Which Are Roads That Cross Forestland, as a Forest Practice.

RCW 76.09.020(15) states:

"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. Forestland does not include agricultural land that is or was enrolled in the conservation reserve enhancement program by contract if such agricultural land was historically used for agricultural purposes and the landowner intends to continue to use the land for agricultural purposes in the future.³⁰

In WAC 222-16-010, "forest road" is defined as follows:

"Forest road" means ways, lanes, roads, or driveways on **forest land** used since 1974 for **forest practices**. "Forest road" does not include skid trails,

²⁹ *Wenatchee Sportsmen Ass'n v. Chelan Cty.*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

³⁰ The subject property is not, and never was, enrolled in a conservation reserve enhancement program.

highways, or local government roads except where the local governmental entity is a forest landowner. For road maintenance and abandonment planning purposes only, "forest road" does not include forest roads used exclusively for residential access located on a small forest landowner's forestland.³¹

Finally, "forest practice" is defined as follows:

"Forest practice" means any activity conducted on or directly pertaining to forestland and relating to growing, harvesting, or processing timber, including but not limited to:

(a) Road and trail construction, including forest practices hydraulic projects that include water crossing structures, and associated activities and maintenance[.]³²

As these definitions demonstrate, an owner's receiving forest practices approval from DNR to build a forest road to harvest timber on forestland, culminating in a forest practices permit, means that the road is an approved forest practice exempt from County regulations. Here, DNR's approval of the forest road includes its recognition that it crossed forestland; otherwise, it would not be a DNR-approved forest road.

³¹ (Emphasis added.) The statutory definition of "forest road" is limited to roads for "the operation of the road maintenance and abandonment plan element of the forest practices rules on small forest landowners," which is not relevant in this case. RCW 76.09.020(20).

³² RCW 76.09.020(17).

2. State Law Prohibits County Regulation of Forest Practices Except in Limited Circumstances Not Relevant Here.

The relevant statute, RCW 76.09.240(6), provides:

For those forest practices over which the board and the department maintain regulatory authority no county, city, municipality, or other local or regional governmental entity shall adopt or enforce any law, ordinance, or regulation pertaining to forest practices, except that to the extent otherwise permitted by law, such entities may exercise any:

(a) Land use planning or zoning authority: PROVIDED, That exercise of such authority may regulate forest practices only where the application submitted under RCW 76.09.060 as now or hereafter amended indicates that the lands are being converted to a use other than commercial forest product production: PROVIDED, That no permit system solely for forest practices shall be allowed; that any additional or more stringent regulations shall not be inconsistent with the forest practices regulations enacted under this chapter; and such local regulations shall not unreasonably prevent timber harvesting.

The forest practices application in this case was a Class III permit, not a Class IV conversion permit.³³ If Roth had submitted a Class IV forest practices permit application, it would signal to DNR and the County

³³ CP0079.

that it would be converting the forestland to another use. Under RCW 76.09.240(6), if there is a conversion, County regulations apply.

Here, instead, Roth's application stated that its activity was not a conversion and that replanting would occur.³⁴ Moreover, DNR specifically approved the permit as a Class III permit, not a Class IV conversion permit (DNR checked the box for a Class III permit in its Notice of Decision).³⁵ Clark County received notice of the forest practices permit³⁶ and claimed neither that harvesting timber from an existing five-acre lot accessed by a 1,500-foot road was a conversion, nor that the road itself was a conversion. Importantly, the County has acknowledged that the harvested Waldal property has continuing forestry obligations even with construction of a single-family residence on it.³⁷

³⁴ CP0065.

³⁵ CP0079.

³⁶ CP0081.

³⁷ CP0195.

3. County Code Exempts Forest Practices From Critical Area and Storm Water Requirements.

Just as there is an exemption from the County's wetland and habitat ordinances for forest roads, cited above, there is a similar exemption from the County's storm water regulations under UDC 40.386.010:

C. Exemptions from the Requirements of this Chapter [County storm water code]. Exemption from the requirements of this chapter shall be granted for the following activities:

1. Forest practices regulated under WAC Title 222, except Class IV general forest practices that are conversions from timber land to other uses.

Again, the subject forest practices permit was not a Class IV general permit. By the plain meaning of this exemption, the exemption applied to Roth's Class III forest practices permit to build a forest road.

C. Hearings Examiner Decision

Even though the Superior Court overruled the basis for the examiner's denying Simon's Way's appeal, it is instructive to summarize the examiner's decision to reveal similar flaws in the Superior Court's reasoning for its decision on different grounds. The examiner's decision is also instructive because of his conclusion that there exists a forest road

over forestland. These findings and conclusions were not on appeal before the Superior Court.

The examiner's sole basis for concluding that County regulations apply to a forest road was that this forest road was not an approved "forest practice" (the exemption from County regulations applies only to forest practices). The examiner agreed that the access road is a forest road crossing forestland, but inexplicably ruled that this forest road approved by DNR in a forest practices application, shown on a forest practice activity map, was in fact not a forest practice, so County regulations apply.

The examiner's conclusion was based solely on the fact that Roth's forest practices application listed only the two tax parcel numbers of the harvest parcels, rather than all the tax parcel numbers of the property over which the forest road traversed.³⁸

The examiner believed that by including only two tax parcel numbers in the application, Roth failed to put DNR on notice of the extent of its forest practice as including the forest road.³⁹ Astonishingly, the examiner's conclusion completely ignored the significant evidence in the

³⁸ CP0225-26.

³⁹ *Id.*

record, where it was readily apparent that Roth was seeking approval for a 1,500-foot-long forest road,⁴⁰ best shown by DNR's approval of the forest road in the amended forest practices permit, the only project Roth asked DNR to approve in the amended application.

The Superior Court rightfully corrected the examiner's error, ruling that Roth had "provided all necessary information to DNR for the FPA"⁴¹ and concluding that DNR had approved a "forest practice."

D. Superior Court Decision

Despite finding that DNR had approved a forest practice, the Superior Court ruled that the approved forest practice did not include the forest road because it did not cross forestland.

⁴⁰ CP0230-33. Even if listing tax parcel numbers (in addition to describing the forest road and its length and showing it on a forest practice activity map) is required to make a forest practices application complete, the examiner did not have the jurisdiction to find that a forest practices application, which was accepted and processed by DNR, was deficient or incomplete because of missing tax parcel numbers. *See* WAC 222-20-010(8) ("Applications and notifications, if complete, will be considered officially received on the date shown on any registered or certified mail receipt, or the written receipt given at the date of personal delivery, or on the date of receipt by general mail delivery, or on the date of electronic receipt when the department develops an electronic business system. The department will immediately provide a dated receipt to the applicant. *Applications or notifications that are not complete, or are inaccurate will not be considered* officially received until the applicant furnishes the necessary information to complete the application." (Emphasis added.)).

⁴¹ CP0342.

Again, it bears repeating that DNR approved a forest practice permit for the 1,500-foot forest road, which necessarily means that it crossed forestland (otherwise, it would not be a forest road by definition). No party appealed that permit, and, accordingly, it became a final land use decision that no party can challenge, or decision-maker can undo, in later proceedings.⁴²

The Superior Court's sole basis for concluding that DNR did not approve a forest road was that it did not cross forestland:

Substantial evidence was supplied to the hearing examiner that the 1,500 foot access road traversed "pasture" and "cow pasture" land (CC0027 FPA 4/30/2014) to arrive at the timber harvesting lots. The hearing examiner concluded that the pasture land was capable of growing timber [and] therefore meets the definition of "forest land". However, to be forest land the various (pasture) lots must be capable of supporting merchantable timber **and not being actively used for a use incompatible with timber growing.** [Emphasis added.] To the contrary, the only evidence presented was that the multiple lots were marketed for home sites incompatible with timber growing. Therefore, the hearing examiner lacked substantial evidence to conclude the 1,500 foot access road was a forest road. As such, DNR did not have exclusive regulatory authority over the access road.⁴³

⁴² See, e.g., *Wenatchee Sportsmen Ass'n*, 141 Wn.2d at 176.

⁴³ CP0343.

Notably, what the Superior Court fails to include in its conclusion is application of the evidence in the record to the statutory definition of "forestland." The definition is repeated here for ease of reference:

RCW 76.09.020(15) states:

"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. Forestland does not include agricultural land that is or was enrolled in the conservation reserve enhancement program by contract if such agricultural land was historically used for agricultural purposes and the landowner intends to continue to use the land for agricultural purposes in the future.⁴⁴

It is true that Roth indicated in its forest practices application that the forest road crossed pasture, but this fact alone—the only fact that the Court identified from the record—does not mean that the land is not "forestland." It is undisputed that the subject land is not in a conservation reserve enhancement program, nor did the Court find that it was. This is the only fact that would automatically prevent land put to an agricultural use from qualifying as forestland. It is also worth noting that Roth constructed the forest road before it sold any lots, and before any

⁴⁴ RCW 76.09.020(15).

subsequent owner applied for building permits for houses. A pasture use is not incompatible with growing timber, as DNR recognized when it approved a forest road, and as the examiner found. Even if the subsequent use—after Roth built the forest road—is somehow relevant, which Simon's Way asserts it is not, according to the Clark County code, the property is in the Rural-5 zone that allows both single-family residences and forestry operations:

The rural districts are intended to provide lands for residential living in the rural area. Natural resource activities such as farming and forestry are allowed and encouraged in conjunction with the residential uses in the area. These areas are subject to normal and accepted forestry and farming practices.⁴⁵

Clark County made a legislative determination that single-family houses on five-acre lots are not incompatible with forestry operations. The examiner correctly found the existence of forestland according to substantial evidence in the record:

i. The access road was constructed over "forestland" as defined by RCW 76.09.020(15). At the time the road was constructed, the Properties were all capable of supporting a merchantable stand of timber and were not being actively utilized for uses incompatible with timber growing. The Rosenlunds planted 136 Leland

⁴⁵ UDC 40.210.020.A.

Cypress trees on their property. Leland Cypress may not be a merchantable timber species and the Rosenlunds planted the trees as landscaping. However, the trees are evidence that the land is capable of supporting merchantable timber. The fact that the properties where the road was constructed have been developed with residences is irrelevant. Residential uses in the rural area are not incompatible with timber growing. Forestry is expressly "[a]llowed and encouraged in conjunction with the residential uses . . ." in the R-5 zone. CC 40.210.010.A.

ii. The road is not used exclusively [for] residential access. The road also provides access for logging, replanting, and maintenance of the areas where timber harvesting occurred.⁴⁶

The Superior Court did not specifically refute these facts or the examiner's findings, but only stated, incorrectly and contrary to the above, that "the only evidence presented was that the multiple lots were marketed for home sites incompatible with timber growing."⁴⁷ Again, this ignores the fact that Roth built the road before it sold lots, the road will continue to support forestry operations, the evidence in the record demonstrates that the land can grow trees, and Clark County made a legislative determination that five-acre home sites are compatible with forestry operations. The property does meet the definition of "forestland" because

⁴⁶ CP0225.

⁴⁷ CP0343.

it can support merchantable timber, and its prior and current uses are not incompatible with timber growing.

Like the examiner, the Superior Court erred by issuing a ruling contrary to findings DNR made in a final, unappealed forest practices permit. DNR issued a final forest practices permit for a forest road over forestland. Under a long line of Washington cases, the Superior Court had the jurisdiction to disturb neither the findings in the permit nor the permit itself.⁴⁸ The only issue before both the examiner and the Superior Court below was whether, under the facts of this case, County regulations apply. The fact that Roth had a final Class III forest practices permit for a forest road across forestland means, unequivocally, that County regulations do not apply.⁴⁹

Second, the issue that served as a basis for the Superior Court's ruling was not before it on appeal. Clark County did not challenge the examiner's finding and conclusion that the subject property over which the forest road traversed was forestland, so this issue was not before the

⁴⁸ *Chelan Cty. v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002); *Wenatchee Sportsmen Ass'n*, 141 Wn.2d 169; *Samuel's Furniture, Inc. v. Dep't of Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2002).

⁴⁹ UDC 40.386.010.

Superior Court to decide. The finality doctrine applies for this reason too.⁵⁰

V. CONCLUSION

The Court should overturn the Superior Court's decision because the Superior Court failed to follow the law; it erroneously interpreted the law; the Court made a decision not supported by substantial evidence; the Court engaged in a clearly erroneous application of the law to the facts; and the Court made a decision outside its authority.

The evidence supports the existence of a forest road over forestland. A forest road by definition is a forest practice. A forest

⁵⁰ See *Twin Bridge Marine Park, L.L.C. v. Dep't of Ecology*, 162 Wn.2d 825, 844, 175 P.3d 1050 (2008) ("Here, Ecology had reasonable notice, did not appeal, and the building permits became valid and the right to construct vested due to Ecology's inaction."); *Skamania Cty. v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 26 P.3d 241 (2001) (construing a federal act, 16 U.S.C. § 544m(a), no collateral attack on a local final land use decision can be made when no timely appeal is filed); *Durland v. San Juan Cty.*, 182 Wn.2d 55, 60, 340 P.3d 191 (2014) ("This court has faced numerous challenges to statutory time limits for appealing land use decisions and has repeatedly concluded that the rules must provide certainty, predictability, and finality for land owners and the government. Petitioners offer us no mechanism that would permit them to assert their claim under LUPA's statutory framework."); *Cedar River Water & Sewer Dist. v. King Cty.*, 178 Wn.2d 763, 781, 315 P.3d 1065 (2013) ("Washington courts have rejected the argument that the LUPA time limit runs only against entities that had notice, had standing, or were aggrieved under the statute."); *Ferguson v. City of Dayton*, 168 Wn. App. 591, 595, 277 P.3d 705 (2012) ("A 'final determination' is one that ends an action between the parties."); *Applewood Estates Homeowners Ass'n v. City of Richland*, 166 Wn. App. 161, 170, 269 P.3d 388 (2012) ("Our holding is consistent with Washington's strong public policy supporting administrative finality in land use decisions.") (internal quotation marks and citations omitted).

practice is exempt from County regulations. DNR accepted Roth's application identifying the forest road as a forest practice as complete, processed the application, and issued the forest practices permit. The Superior Court did not have the jurisdiction to invalidate the forest practices permit because it was a final, binding land use decision, the basis for the invalidation was not before the Court on appeal, and the facts demonstrate that DNR approved a forest road across forestland, as a forest practice, in a final permit.

Simon's Way respectfully requests that this Court grant this appeal.

DATED this 28th day of October, 2019.

MILLER NASH GRAHAM & DUNN LLP

/s/ LeAnne M. Bremer, P.C. 

LeAnne M. Bremer, P.C.

WSB No. 19129

Attorney for Appellant/Petitioner
Simon's Way Development, Inc.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on October 28, 2019, I caused service of this Brief of Appellant on the following counsel of record and other parties as follows:

VIA E-MAIL AND HAND DELIVERY:

William Richardson, Deputy Prosecuting Attorney
Clark County Prosecutor's Office—Civil Division
Post Office Box 5000
Vancouver, Washington 98666-5000
E-mail: bill.richardson@clark.wa.gov

VIA U.S. MAIL:

Scott and Anja O'Neill
801 N.E. 26th Way
Battle Ground, Washington 98604

Eric and Melissa Waldal
26906 N.E. 180th Court
Battle Ground, Washington 98604

Roy and Della Massie
906 N.E. 11th Court
Battle Ground, Washington 98604

Alan and Kathryn Holtz-Olson
18111 N.E. 266th Street
Battle Ground, Washington 98604

Ryan and Linda Rosenlund
26805 N.E. 180th Court
Post Office Box 2002
Battle Ground, Washington 98604

Brian and Janet Wolf
3444 Shawnee Drive
Norco, California 92860

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 28th day of October, 2019, in Vancouver,
Washington.

/s/ LeAnne M. Bremer, P.C.
LeAnne M. Bremer, P.C., WSB No. 19129

4849-2348-5606.3

MILLER NASH GRAHAM & DUNN LLP

October 28, 2019 - 10:32 AM

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_20191028102021D2359443_9165.pdf
This File Contains:
Briefs - Appellants
The Original File Name was BriefofAppellant.pdf

A copy of the uploaded files will be sent to:

- Bill.Richardson@clark.wa.gov
- CntyPA.GeneralDelivery@clark.wa.gov
- kendra.hash@millernash.com
- thelma.kramer@clark.wa.gov

Comments:

Sender Name: Le Anne Bremer - Email: leanne.bremer@millernash.com
Address:
PO BOX 694
500 BROADWAY STE 400
VANCOUVER, WA, 98666-0694
Phone: 360-699-4771

Note: The Filing Id is 20191028102021D2359443