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SUPREME COURT
STATE OF WASHINGTON
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NO. 84369-4

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SUPREME COURT THE STATE OF WASHINGTON

JACK and DELAPHINE FEIL, JOHN and WANDA TONTZ, and
THE RIGHT TO FARM ASSOCIATION OF BAKER FLATS,
Appellants,

v.

THE EASTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD, et al., (No. 82399-5)

and

DOUGLAS COUNTY; DOUGLAS COUNTY BOARD OF
COUNTY COMMISSIONERS; WASHINGTON STATE
DEPARTMENT OF TRANSPORTATION; WASHINGTON STATE
PARKS AND RECREATION COMMISSION; and PUBLIC UTILITY
DISTRICT NO. 1 OF CHELAN COUNTY, (No. 82400-2)
Respondents.

Consolidated on Appeal

**APPELLANTS' OBJECTIONS / REPLY TO RESPONDENT
DOUGLAS COUNTY'S "ANSWER" TO APPELLANTS'
PENDING OBJECTION / MOTION TO STRIKE
RESPONDENT DOUGLAS COUNTY'S RAP 10.8
"STATEMENT OF ADDITIONAL AUTHORITIES"**

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FILED AS
ATTACHMENT TO EMAIL

1. **Respondent Douglas County's "Answer" is not a RAP 17.4(e) response to Appellants' pending motion.**

Appellants' January 15, 2010 pending Objection to / Motion to Strike Respondent Douglas County's RAP 10.8 "Statement of Additional Authorities" argued that Douglas County's January 6, 2011 RAP 10.8 "Statement of Additional Authorities:"

- Violated RAP 10.8 prohibitions against raising new argument and new issues;
- Inappropriately abused RAP 10.8 by making additional references to the administrative record rather than citing "additional authorities;" and
- Violated RAP 13.7(d) briefing requirements.

Douglas County's January 25, 2011 "Answer" completely ignores the issues raised by the Appellants in their Objection/Motion to Strike and repeats the errors committed in the County's objectionable January 6, 2011 "Statement of Additional Authorities."

RAP 17.4(e) requires that the party responding to a motion submit an "answer to the motion." Douglas County's "Answer" does not "answer the motion." It is objectionable and should not be considered.

The fact that Douglas County did not answer Appellants' motion should be taken as an admission that Appellants' motion cannot be contested on the merits and that Appellants' motion should be granted by the Court.

2. **The County's "Answer" repeats the same RAP 10.8 and RAP 13.7 errors of the County's original objectionable "Statement of Additional Authorities."**

Rather than repeat the argument already made in Appellants' January 15, 2011 "Objection / Motion to Strike Douglas County's Statement of Additional Authority," Appellants incorporate that motion and its argument herein by this reference.

Douglas County's "Answer" to the Appellants' motion commits and attempts to compound the same RAP 10.8 and RAP 13.7 transgressions that prompted Appellants' motion in the first instance. It is objectionable, should not be considered, and should be stricken along with the County's improper "statement of additional authorities."

3. **Douglas County describes no equities or justification for its neglect.**

Douglas County offers no explanation, excuse or justification for its failure to identify or argue *re judicata* or "collateral estoppel" issues on three separate briefing occasions:

- its RAP 10.3 Responding Brief;
- its RAP 13.4(d) Answer to Petition For Review, and
- its RAP 13.7(d) Supplemental Brief.

Incredibly, rather than explain its own neglect, the County's "answer" suggests excusable neglect by the Growth Management Hearings Board, essentially arguing that the June 17, 2008 Eastern Washington Growth Management Hearings Board decision might have been decided on *res judicata* / collateral estoppel grounds if the Board had only been

aware of legal authority supposedly first announced in two cases decided after the June 17, 2008 EWGMHB decision. The County's argument is wrong, is irrelevant, and is misleading.

Douglas County cites to *Gold Star Resorts v. Futurewise*, 167 Wn.2d 723, 222 P.3d 791 (2009) and *City of Arlington v. Central Puget Sound Growth Management Hearings Board*, 164 Wn.2d 768, 193 P.3d 1077 (2008), implying that each of those decisions announced *res judicata* and collateral estoppel authority that did not exist on June 17, 2008 and was therefore not available to the Growth Board as legal authority. That contention is egregiously misleading. Both of those Supreme Court decisions affirmed Court of Appeal decisions on *res judicata* and collateral estoppel. The August 2007 Court of Appeals decision in *Gold Star Resorts* is found at 140 Wash. App. 378, 166 P.3d 748 (2007). The March 2007 Court of Appeals decision in *City of Arlington* is found at 138 Wash. App. 1, 154 P.3d 936 (2007). Ample legal authority existed on the issues for more than a year prior to June 17, 2008.

In any event, Douglas County's argument does not address the County's failure to raise or to argue *res judicata* issues in its appellate court briefing, and provides no justification for why it should now be permitted to raise and argue those issues for the first time in a RAP 10.8 submittal.

4. Allowing Douglas County to violate RAP 10.8 is inequitable and unjust.

It should be apparent to the Court that allowing Douglas County to

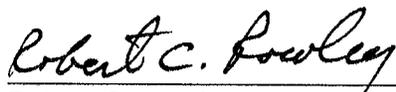
misuse RAP 10.8 to raise new issues and argument so near the time for oral argument is more than just inequitable . . . it is unjust. The County's own submittals show that only jurisdiction rulings are involved, that no Growth Board decision was made on the merits, that one ruling involved a decision by a hearing examiner — the other by the County Commissioners after additional Findings and Conclusions — and that a superior court ruling intervened between the two Growth Board decisions. That the County's new *res judicata* and collateral estoppel theories are plagued with difficulties on the merits is obvious, yet the same rules that make Douglas County's conduct improper also prevent these Appellants from submitting responsive briefing.

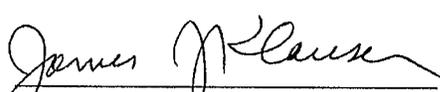
5. Conclusion

That Douglas County resorts to these rule violations betrays a lack of confidence in its position on the merits of issues properly raised and argued in the briefing. That it would withhold argument until after Appellants' ability to argue the merits betrays a lack of confidence in the new arguments it now makes. Douglas County's "Answer" is objectionable, is not responsive, and should be disregarded and stricken along with the improper Douglas County "Statement of Additional Authorities."

DATED this 28th day of January 2011.

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OBJECTION AND REPLY TO
"ANSWER" TO MOTION TO STRIKE -4-