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**DIVISION III OF THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON**

**84369-4**

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 COMMISION; and PUBLIC UTILITY  
DISTRICT NO. 1 OF CHELAN COUNTY, (No. 82400-2)  
Respondents.

**Consolidated on Appeal**

APPEAL FROM RELATED APA and LUPA RULINGS  
OF THE SUPERIOR COURT FOR DOUGLAS COUNTY  
Honorable John Hotchkiss, Presiding  
(Douglas County Case No. 08-2-00311-3 and No. 08-2-00151-0)  
and  
FROM THE COURT OF APPEALS RULING IN  
*Feil v. EWGMHB*, 153 Wash. App. 394, 220 P.3d 1248 (2009)

**PETITION FOR REVIEW TO STATE SUPREME COURT  
[RAP 13.4(a)]**

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PETITION FOR REVIEW

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## I. IDENTITY OF PETITIONERS FILING THIS PETITION

The Petitioners are JACK FEIL and DELAPHINE FEIL, husband and wife, JOHN TONTZ and WANDA TONTZ, husband and wife, and the RIGHT TO FARM ASSOCIATION OF BAKER FLATS, a Washington nonprofit association.

This Petition is filed on their behalf by their attorneys of record Robert C. Rowley and James J. Klauser of Rowley & Klauser, LLP.

## II. CITATION TO COURT OF APPEALS DECISION

Petitioners — referred to collectively as “the farmers” — seek review of a December 3, 2009 decision of Court of Appeals, Division III, for the State of Washington in *Fiel et al. v. Eastern Washington Growth Management Hearings Board, et al.*, 153 Wash. App. 394, 220 P.3d 1248 (2009). An order denying reconsideration was entered February 19, 2010.

A copy of the Court of Appeals decision and its order denying reconsideration are attached hereto collectively at Appendix “A.”

## III. ISSUES PRESENTED FOR APPEAL

### ISSUE No. 1:

**Did the Eastern Washington Growth Management Hearings Board have RCW 36.70A.280-290 jurisdiction to review Douglas County’s creation of a Recreational Overlay (“R-O”) zoning district necessary to develop an active recreational project within the County’s previously designated [and still designated] BAKER FLATS AGRICULTURAL RESOURCE AREA OF LONG TERM COMMERCIAL SIGNIFICANCE?**

**1.1 Did the zoning change constitute the amendment of a devel-**

opment regulation as defined in RCW 36.70A.030(7)?

1.2 Did the zoning change constitute (1) a site-specific rezone that was (2) authorized in the comprehensive plan, such that it constituted a “project permit” as defined in RCW 36.70B.020(4)?

1.3 Where the county’s comprehensive plan identified permissible zoning districts, but does not even mention a "recreational overlay" zoning district, can the comprehensive plan be construed to have “authorized” establishment of a recreational overlay zoning district?

1.4 Does the Growth Management Act—RCW 36.70A.177—impress broad public interest upon the entirety of a designated Agricultural Resource Area of Long Term Commercial Significance such that rezones of protected agricultural land to allow non-agricultural uses cannot be deemed “site-specific?”

1.5 If a comprehensive plan does not mention recreational overlay zones, is the time for taking an appeal to the Growth Management Hearings Board over such a recreational overlay zone triggered years earlier by the adoption of the comprehensive plan or by the later amendment of development regulations to actually authorize the rezone?

**ISSUE No. 2:**

**Regardless of *when* Douglas County first authorized a rezone of land to recreational overlay within an Agricultural Resource Area of Long Term Commercial Significance, did RCW 36.70A.177 delegate limited county zoning authority which the county exceeded?**

**ISSUE No. 3:**

**When a county adopts and implements a comprehensive plan and development regulations that directly conflict with express requirements of a general law of the State of Washington, is the local law void for violating Washington Constitution Art. Eleven § 11 whether or not an administrative GMA compliance hearing is available?**

**ISSUE No. 4:**

**Did Douglas County fail to study, develop and describe alternatives as required by RCW 43.21C.030(2)(e) where resource conflicts were unresolved?**

**ISSUE No. 5:**

**If the underlying zoning decision is void or reversed, must development permits also be reversed?**

**ISSUE No. 6:**

**Where a local government's actions on a project resulted in three (3) judicial appeals, the first two (2) of which the farmers prevailed in, was it reversible error for the Court of Appeals to hold that the Respondents had prevailed "in all prior judicial proceedings" and award RCW 4.84.370 attorney fees against these farmers?**

**IV. STATEMENT OF THE CASE**

In 2000, National Environmental Policy Act ["NEPA"] review was conducted of a proposal by Respondent State Parks and Recreation Commission ["Parks" hereafter] to develop a recreation trail in Douglas County. The proposed recreational trail would traverse Baker Flats

through the Agricultural Resource Area. Parks' project proposal culminated in a NEPA Environmental Assessment ["EA"] dated April 1, 2001. (824200-2, Vol. 4 CP-0448) The project had been launched nearly three years earlier with a County "pre-application" meeting notice in 1998. (82400-2, Vol. 4 page 507) The EA described the trail as a "public recreation trail" for pedestrians and bicyclists. (82400-2, Vol. 4 page 450) It recognized that the proposal would require Shoreline Development permits, a zoning conditional use permit, and a rezone from "agricultural" to "recreational overlay." (82400-2, Vol. 4 page 456) The EA disclosed that the "purpose" of the trail was to "increase public access and recreational opportunities" and to provide pedestrian / bicycle access, including handicapped access, to Lincoln Rock State Park in the North from the East Wenatchee Urban Growth Area in the South. (82400-2, Vol. 4 page 457) The EA acknowledged that the project would require rezoning land in the corridor to "R-O" (82400-2, Vol. 4 page 458) and acknowledged that 24 acres of orchard "currently" [in 2000] was growing within what would become the trail corridor. (82400-2, Vol. 4 page 464) The EA also acknowledged that the rezone to "R-O" was necessary to ensure "consistency" with the comprehensive plan. The EA located the source of the rezone authority in the County's zoning code, not in its comprehensive plan. (82400-2, Vol. 4 page 465-466) Parks subsequently issued a Declaration of Non-Significance under SEPA, based upon the EA.

While this specific rezone battle was raging, the County was also amending in wholly unrelated proceedings—and on multiple occasions—

its Greater East Wenatchee Area Comprehensive Plan. The record begins with the comprehensive plan version first adopted in 1996 as amended in January 2004 (“GEWA Plan—2004”), which was the plan utilized when the first application was filed in 2003. (82400-2, Vol. 8 CP page 1323) That 2004 GEWA plan generally discusses bicycle/pedestrian and other types of trails and speaks generally about the need to connect trails to existing trails, but makes absolutely no comment concerning rezoning authority. (82400-2, Vol. 8 page 1394 )

The GEWA Plan was amended on March 28, 2006 (82400-2, Vol. 20 CP page 3755), only four (4) days after Parks filed its third trail application and its second zoning application. The 2006 version of that plan also addressed pedestrian / bicycle trails. This time however, the plan added the following language: “The current trail system should be increased to extend north to connect with Lincoln Rock State Park. The equestrian trail system should be increased by 50 miles.” (82400-2, Vol. 21 CP page 3811) That amended plan did not mention this particular trail, did not suggest or select a route for connecting to Lincoln Rock State Park, did not mention zoning or rezoning authority in general, and did not mention “R-O” zones or rezones at all. The amended GEWA plan did not eliminate, reduce, or otherwise change the Baker Flats Agricultural Resource designation.

The proposed trail corridor was proposed for development within unused right-of-way owned by the State of Washington Department of Transportation [“WSDOT”]. WSDOT had condemned the 200-foot right-

of-way in the late 1950's from land belonging to the farmers and/or their predecessors for the purpose of developing a limited access highway along the Columbia River. WSDOT's highway proposal was rejected by the State Shorelines Hearings Board. WSDOT has leased back the right-of-way to the farmers since the "taking," and these farmers have mature orchards growing within the right-of-way and on both the East and West sides of the right-of-way.

A summary, by no means exhaustive, of the impacts upon these farmers and upon the agricultural economy by State Parks' proposed trail development within the Agricultural Resource Area of Long Term Commercial Significance follows:

- Farmer: My Honey Bees — currently "yarded" in and distributed from Baker Flats — cannot coexist with trail pedestrians and will be eliminated; (82400-2, Vol. 5 CP page 759)
- Farmer: There will be spray drift liability for exposed pedestrians, loss of acreage, loss of farm labor income; ((82400-2, Vol. 5 CP page 764)
- Horticulturist: There will be risk to users and liability to farmers of spray drift vastly understated in the application materials; (82400-2, Vol. 5 CP page 773-775)
- Farmer: Spray drift will cause lost acreage and the creation of frost pockets by planting these buffers; (82400-2, Vol. 5 CP page 779)
- Farmer: We'll loose helicopter/airplane spraying; a danger from eaten sprayed fruit, liability high—Parks won't accept liability and can't afford to patrol for vandals; (82400-2, Vol. 5 CP page 782)
- Beekeeper: I will be put out of business because Baker Flats is the only flat area near water that my bees need, but the recreation trail is a conflict that I can't survive because of the significant risk of

bee stings to the public; (82400-2, Vol. 5 CP page 785 and 793)

- Farmer: My orchard operations are divided by this trail; spray drift liability and danger; frost pockets created; conflict with bee yards; danger of flung rocks from mowers; loss of helicopter spraying; vandalism in remote area; (82400-2, Vol. 5 CP page 787)
- Woman orchardist: I'm concerned for my safety when frost controlling all night long alone and unprotected; (82400-2, Vol. 5 CP page 788-790)
- Farmer: There will be actual spray drift danger and frost pockets; (82400-2, Vol. 5 CP page 791-792)
- Three beekeepers: We'll will move if this trail goes in—high liability/ risk of vandalism; (82400-2, Vol. 5 CP page 793-795)
- Two helicopter spray / rain control companies: We won't operate in Baker Flats if this trail goes in—liability and complaints; (82400-2, Vol. 6 CP page 801-803)
- Farm Bureau opposition: Warns of spray drift, insecticide application, health risks and liability problems; says the bifurcated orchards will increase farming costs and there will be danger of farm equipment crossing trail; (82400-2, Vol. 6 CP page 844-851)
- Farmer: Please reroute the trail through available SR 2/97 rights-of-way between Lincoln Rock State Park at the Loop trail — don't cross my orchards; (82400-2, Vol. 7 CP page 1043)
- Farmer: I need to farm; I did not subdivide my land under prior law; I favored Ag. Resource designation as a protection of my right to farm. This trail destroys my farming; (82400-2, Vol. 7 CP page 1072)
- County Commissioners: This decision on the trail is premature. There will be long-term impacts on agriculture that need more study; (82400-2, Vol. 14 CP page 2410)
- Electrician: In doing irrigation pump repairs, I have experience from trail users elsewhere—they tore limbs of ripe cherries out of trees & carried them off on their bicycles; bicyclist defecating in orchard, and confrontation from cyclists challenging my and grower right to be in proximity to "their" trail; (82400-2, Vol. 14

CP page 2412)

- Farmer: Locate this trail on SR 2/97 alternate routes away from this Ag. Resource Area; (82400-2, Vol. 14 CP page 2418)
- Farmer: I own a 30-acre orchard on—and on both sides of—the right-of-way since before its condemnation. Soil, weather and growing conditions not just good for orchard—they are perfect! Trail will bisect my orchard and I'll lose 5 acres of fruit. The public will use that 5 acres to pass through the center of my remaining orchard. Wind in this area swirls. Trail doubles exposure to public and spray drift exposure risks and spray application flagging costs. Farming costs are up—long equipment runs bisected, crossings restricted, needless lateral movement of equipment to crossing points and double equipment turns—now all on my property. The proposed 3 strand fence protects trail users from my equipment, but not me from the trail users. Travel to crossing points and waiting to cross will increase farming costs for fuel, time and wear and tear. No plans to control pests and noxious weeds in the 5 acres that I currently control; (82400-2, Vol. 14 CP page 2430-2431)
- Woman farmer: I'm worried about physical safety and spray drift. I can educate my workers but I can't educate public. There will be vandalism, littering and frost pockets. Frost now good, but frost pockets will require added costs for wind machines or I'll go out of business; (82400-2, Vol. 14 CP page 2432-2434)
- Farmer: I agree with all of the above concerns. There's been one lawsuit over spray drift, even if no merit. This will put me out of business where my family has farmed since 1908. Fruit theft is a growing problem — boxes at a time — and I can't protect my farm from trail users; (82400-2, Vol. 14 CP page 2440-2441)
- Horticulturist: This recreation trail and orchards are incompatible. Spray is a huge problem—less spray drift with helicopters, but aircraft won't spray near a trail. He describes the duration and types of spray plus the trail user conflict in a varied fruit growing area like Baker Flats that is perfect for growing numerous fruit varieties but with differing pests and a patchwork of differing spray regimens; (82400-2, Vol. 14 CP page 2443-2449)

- Farmer: I will lose nearly 500 trees and \$74,000.00 in income — I'll have increased costs and will be required to reconstruct my irrigation system; (82400-2, Vol. 14 CP page 2451-2453)
- Farmer: I will lose 5 of my 26 acres of fruit (20%) I have fruit on both sides of the trail. My lost income, increased costs, and the threat of liability for spray costs will cause me to pull out my existing orchard. There is simply too little profit to survive this bike trail. Please run the trail easterly across highway 2 / 97 in the Urban Growth Area; (82400-2, Vol. 14 CP page 2454-2455)
- Farmer: The existing SR 2/97 right-of-way between East Wenatchee and Lincoln Rock State Park is sufficient to accommodate both additional lanes of traffic for motorized vehicles and a pedestrian/bicycle trail. If this bike trail gets approved, it will drive me out of business. (82400-2, Vol. 14 CP page 2563)

When adopting its GMA Comprehensive Plan, the Douglas County Board of County Commissioners addressed the competition and conflict between recreational and agricultural uses for the valuable farm land located along the Columbia River [including Baker Flats] in the following terms:

“Recreational developments are generally occurring along the Columbia River corridor from Trinidad in the south to Bridgeport in the north and in the Badger Mountain Area. Recreational activities include a host of differing passive and active uses ranging from recreational subdivisions, to improved park developments, boating opportunities, racing, camping hiking, water skiing, and golf. The diversification of uses contributes to the County’s tourist industry further diversifying the County’s economic base. *However, as there is increasing pressure for this type of development, the incidence of agricultural and residential/recreational uses conflicting with each other also increases. As a result, it generally becomes more difficult for the agricultural use to continue, and pressures are placed on the agricultural base to convert to other uses, particularly the orchards along the Columbia River . . .*

(82400-2, Vol. 8 CP page 1527)

The government Respondents herein and the trail proponents are now utterly disinterested in enhancing, preserving and conserving the Baker Flats Agricultural Resource Area of Long Term Commercial Significance, which they actively seek to subordinate to their recreational interests. For example, State Parks Commissioner Eliot Scull testified:

*“Let us consider our own East Wenatchee and Douglas County. While the tree fruit industry will always be an important part of our economy, we only have to look at the changes along the river front and out Grant Road to see the future. East Wenatchee’s growing, and it will continue to grow. I was out in the back Baker Flats area this past week, and the number of new houses where orchards existed even a year ago impressed upon me how fast the change has been and how it is accelerating. The future of this community lies in diversification and an economy that will support family-wage jobs and businesses that offer them.”* (82400-2, Vol. 40 CP 7650, VT 2-25-08, at CP page 7663, emphasis added)

In 1996, Douglas County resolved this conflict in favor of the agricultural economy by designating the Baker Flats Agricultural Resource Area of Long Term Significance. Today, the County and the lower courts have resolved this conflict in favor of an active recreational use [while still maintaining the Ag. Resource designation binding only the farmers]. Practically before the ink was dry on its commitment to agriculture, Douglas County began collaborating with state officials to break its commitment to the farmers and to the agriculture industry.

## V. ARGUMENT

The Douglas County Comprehensive Plan does not mention "recreational overlay" districts, which are defined and created strictly as part

of the County's zoning code, DCC Title 18. DCC 18.12.020 recognizes a category "C1" zoning district — recreational overlay — but it is created and established according to DCC 18.46 which states the purpose of the recreational overlay zone:

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**18.46.010 Purpose and intent.**

The purpose of the R-O recreational overlay district is to provide for the continuance of public and private parks and other outdoor recreational facilities in order **to encourage the development of additional active recreational facilities** in Douglas County, and to maintain adequate buffers between recreational developments and surrounding land uses. (emphasis added)

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In *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 562, 14 P.3d 133 (2000) [*Soccer Fields*], this Court held:

“When read together, RCW 36.70A.020(8), .060(1), and .170 evidence a legislative mandate for the conservation of agricultural land. Further, **RCW 36.70A.177 must be interpreted to harmonize with that mandate. Nothing in the Act permits recreational facilities to supplant agricultural uses on designated lands with prime soils for agriculture.**

The County's amendments, which allow **active recreational uses on designated agricultural lands, do not comply with the GMA**, and the land in question does not qualify for innovative zoning techniques under RCW 36.70A.177.” (emphasis added)

In keeping with the requirements of the GMA and this Court's *Soccer Fields* decision, the Douglas County Code at DCC 18.16.150 (I) provides:

“Pedestrian / bicycle access corridors **shall be discouraged** in areas designated as agricultural lands of long-term commercial significance.” (emphasis added)

Despite the facts that:

- (1) no recreational overlay zone is mentioned in the comprehensive plan,
  - (2) DCC 18.16.150(I) imposes a negative mandate, and
  - (3) recreational overlay zones are strictly creatures of the zoning code,
- these Respondents argued — and the lower courts found — that the County's Comprehensive Plan “authorized” this recreational overlay rezone.

Why go through this struggle? If the recreational overlay zone was not authorized in the comprehensive plan, then the rezone decision could not possibly constitute an RCW 36.70B.020(4) “project permit.” It would necessarily constitute an RCW 36.70A.030(7) amendment of development regulations, which must comply with the GMA, a matter within Growth Management Hearings Board jurisdiction.

On the other hand, the Respondents argued that if the rezone qualified as a “project permit,” then they were free to ignore any duty to comply with the GMA. In that event, they argued, the Growth Management Hearings Boards lack jurisdiction to review “permit” decisions, and the superior court lacked jurisdiction to review for “compliance with the GMA,” and so an appeal to test the “rezone authorization” for GMA compliance was time-barred.

It is important for the Court to recognize that the Respondents make absolutely no pretense that their project complies with any obligations owed the Agricultural Resource Area under the GMA. Theirs is

strictly a legal argument — that *Woods v. Kittitas County*, 162 Wash.2d 597, 174 P. 3d 25 (2007), relieves the County of any duty to comply with the GMA obligations explained by this Court in the *Soccer Fields* case [*King County v. CPSGMHB*, supra.]

The farmers argue that *Woods v. Kittitas County* cannot apply to this action specifically, or generally to actions taken within protected Agricultural Resource Areas. The farmers also argue that, even if *Woods* applied to prevent a “compliance” appeal to a Growth Hearings Board, the Respondents are not thereby freed to thumb their collective noses at the farmers, at County citizens, and at the State of Washington. The Respondents' project decisions — and the inconsistent local plans and development regulations thought to authorize what the State law prohibits within the Agricultural Resource Area — are void for violating Washington Constitution Article Eleven § 11.

**A. The Decision Below Conflicts With Decisions of the State Supreme Court. (ISSUE NO. 1)**

In *King County v. CPSGMHB*, supra [*Soccer Fields*], this Court could not have more explicitly declared the inferiority of GMA recreational projects or the supremacy of agricultural uses within designated Agricultural Resource Areas of Long Term Commercial Significance:

” [12] The GMA’s plain language and ordinary meanings are critical to interpreting these provisions. Contrast the requirements that counties and cities identify lands useful for recreation and encourage the development of recreational opportunities with the requirements that local governments designate agricultural land and conserve such land in order to maintain and enhance the agricultural industry. Although the planning

goals are not listed in any priority order in the Act, the verbs of the agricultural provisions mandate specific, direct action. The County has a duty to designate and conserve agricultural lands to assure the maintenance and enhancement of the agricultural industry.” *King Co., supra*.

The Court could not have been more clear. The GMA prohibits development regulations that allow active recreational uses in Agricultural Resource Areas, at least when they are located on prime soil and interfere with the agricultural economy.

The decisions below also conflict with this Court’s decision in *Woods v. Kittitas County*, 162 Wash.2d 597, 174 P. 3d 25 (2007). *Woods* correctly applied RCW 36.70B.020(4) to the facts of that case. But, RCW 36.70B.020(4) does not apply to this case. Why? There are two reasons:

1. *Woods* did not involve a designated Agricultural Resource Area of Long Term Commercial Significance. RCW 36.70A.020, RCW 36.70A.060 and RCW 36.70A.177 impose express zoning delegation restrictions not existent in *Woods* ; and
2. The comprehensive plan reviewed in *Woods* actually authorized the zone being challenged, whereas the Douglas County Comprehensive Plan does not even mention, much less authorize, a “recreational overlay” zone use or rezone.

No provision in the Douglas County comprehensive plans existed to inform any person that the plan — when adopted — “authorized” a recreational overlay rezone. In fact, the plans did designate the Baker Flats Agricultural Resource Area of Long Term Commercial Significance, a designation completely at odds with putting a recreational project

there. Given the County plans' silence on the issue of zoning authority, the question of "authority to rezone" could not then have met the three elements of justiciability, i.e., (1) An actual, present and existing dispute as distinguished from a possible or speculative disagreement, (2) involving interests that must be direct and substantial, rather than potential or abstract, and (3) a judicial determination of which will be final and conclusive. *First United Methodist Church of Seattle v. Hearing Exam'r*, 129 Wn.2d 238, 245, 916 P.2d 374 (1996)

The related doctrine of ripeness exists to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until an administrative decision has been formalized and its effect felt in a concrete way by the challenging parties. *Asarco, Inc. v. Department of Ecology*, 145 Wn.2d 750, 43 P.3d 471 (2007)

Until local government specifically expresses its policy, the doctrines of justiciability and ripeness should be applied to prevent the commencement of the 60-day GMHB review period.

The Growth Board's ruling that these farmers' challenge is time-barred should be reversed.

**B. A Significant Question of Law Under Washington Constitution Article Eleven §11 Exists. (ISSUES No. 2 and No. 3)**

Douglas County's zoning code is explicitly based upon the authority contained in the Planning Enabling Act and the Growth Management

Act. That zoning code contemplates that more rigorous comprehensive plan provisions will control less stringent zoning ordinances and that plans will directly impact land use decisions.

Where a local government chooses or is required to zone under a zoning enabling act it may not zone under its general constitutional police power. *Byers v. Board of Clallam Co. Comm'rs*, 84 Wn.2d 796, 529 P.2d 823 (1974)

Though the delegation of zoning discretion to local governments is normally quite broad—even under the GMA—that is not true where the zoning power is to be exercised within an Agricultural Resource Area of Long Term Commercial Significance. The legislature imposed affirmative statutory obligations on local governments when adopting development regulations required to protect such Agricultural Resource Areas. The legislature imposed restrictions on local discretion when adopting development regulations (zones and rezones) to protect the Agricultural Resource Areas designated pursuant to RCW 36.70A.170.

”A county or a city may use a variety of innovative zoning techniques in areas designated as agricultural lands of long-term commercial significance under RCW 36.70A.170. The innovative zoning techniques should be **designed to conserve agricultural lands and encourage the agricultural economy. A county or city should encourage nonagricultural uses to be limited to lands with poor soils or otherwise not suitable for agricultural purposes.**” RCW 36.70A.177(1) (emphasis added)

This Court has held that the GMA provisions cited above limit the discretion of local governments, most especially when proposing changes to local development regulations or comprehensive plans to authorize

active recreational projects within their previously designated Agricultural Resource Areas. *King County v. CPSGMHB*, supra. [*Soccer Fields*].

**“After properly designating agricultural lands in the APD, the County may not then undermine the Act’s agricultural conservation mandate by adopting ‘innovative amendments’ that allow the conversion of entire parcels of prime agricultural soils to an unrelated use. The explicit purpose of RCW 36.70A.177 is to provide for creative alternatives that conserve agricultural lands and maintain and enhance the agricultural industry.”** *King County*, 142 Wn.2d at page 561. (emphasis added)

It is an inescapable reality that Douglas County’s decisions below, which impose a four-mile long swath directly through the Baker Flats orchards, directly conflict with express provisions of the GMA, a “general law” of the State.

The Respondents argued that, if their local decision is not appealed within sixty (60) days from the date of the local decision, the consequence is that their conflicting local law is unassailable. But, where GMA requirements constitute an expressed mandate regarding restrictions of development within Ag. Resource Areas, Washington Constitution Article Eleven §11 independently prohibits the conflicting local legislation and renders it void.

Where the State has asserted its policy jurisdiction over a given subject matter, conflicting local legislation must give way. *Yakima v. Gorham*, 200 Wash. 564, 94 P.2d 189 (1939).

A local ordinance conflicts with a state statute within the meaning of Washington Constitution Article Eleven § 11 when the local ordinance permits that which the state forbids or prohibits. *State v. Halvorsen*, 30

Wn.App. 772, 638 P.2d 124 (1981). *Weden v. San Juan County*, 135 Wn.2d 68, 958 P.2d 273 (1998)

Local governments are powerless to enact laws which conflict with the general laws of the State, and such conflicting local legislation cannot survive. *Stephanus v. Anderson*, 26 Wn.App. 326, 613 P.2d 533 (1980).

**C. Issues Involving Broad Public Interest State-wide Are Involved**

Issues concerning the duty of local governments to comply with mandatory provisions of state law and to comply with the state constitution — ISSUE Nos. 1, 2, and 3 discussed above — clearly implicate broad public interest. With the failure of the zoning decision, it follows that the site plan decision must also fail (ISSUE No. 5).

Issues No. 4 and No. 6 both involve issues of first impression that implicate the broad public interest and should be decided by this Court.

**1. RCW 43.21C.030(2)(e) Requirements Were Not Met**

RCW 43.21C.030(2)(e) provides that a county must:

“(e) Study, develop, and describe appropriate **alternatives** to recommended courses of action **in any proposal which involves unresolved conflicts concerning alternative uses of available resources;.....**” (emphasis added)

So long as an unresolved resource dispute exists — as it does here — the legislature mandated that all viable alternatives to avoid or eliminate the dispute be studied and reported. The farmers have made the point, for example, that room exists in the Highway 2 right-of-way within the Baker Flats Industrial Urban Growth Area to connect the trail to Lincoln

Rock State Park, and thereby avoid the Baker Flats Agricultural Resource Area altogether. But, no study analyzing or studying such an alternative was prepared by Douglas County or the state agencies.

**2. RCW 4.84.370 Attorney Fees Were Not Properly Awarded**

The Court of Appeals concluded that Douglas County and the state agencies were the “substantially prevailing party” for RCW 4.84.370 attorney fee purposes, even though:

- (1) there had been multiple judicial proceedings and the Respondents did not prevail in all of them; and
- (2) this was an appeal of a zoning decision — not a project permit application.

The Respondents never appealed either of their prior two trial court defeats.

RCW 4.84.370 specifically requires a showing that the County and State agencies demonstrate that they were the prevailing party “in all prior judicial proceedings.” RCW 4.84.370(1)(b) The record in this case demonstrates that three (3) judicial proceedings occurred and in the first two, these Petitioner Farmers prevailed.

Moreover, Douglas County adopted a new zoning district, an appeal of that decision to the Growth Management Board was appropriate, and RCW 4.84.370 does not apply to such legislative decisions. Thus, an award of attorney fees to the County and to the state agencies was completely inappropriate.

This Court should accept review and reverse the Court of Appeals decision in *Feil v. EWGMHB*, supra.

## VI. CONCLUSION

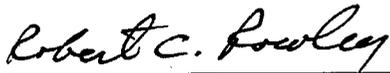
These Petitioners and their families have farmed Baker Flats on the shores of the Columbia River — some of the best orchard land in the state — for over a century. For well over ten years, they have been fighting in administrative tribunals and the lower courts to save their farms and their livelihoods. They have relied on state law and this Court's prior decisions to protect their orchards from State Parks' development project.

State Parks' plan to build a recreational trail through the middle of the Baker Flats Agricultural Resource Area of Long Term Commercial Significance is in direct conflict with the Growth Management Act. State Park's plan for a bike trail is no less in conflict with the GMA than the soccer fields this Court prevented in its *King County [Soccer Fields]* decision.

These farmers are bound by the GMA Resource designation never to develop, but State Parks is now free to develop. Petitioners ask the Court to accept review and reverse the Court of Appeals' *Feil v. EWGMHB* decision. They request the matter be remanded to the growth hearings board to conduct GMA compliance review. In the alternative, they ask the Court to strike Douglas County's zoning decision — and its dependent approvals — for Parks' trail project within the Baker Flats Agricultural Resource Area.

DATED this 19th day of March 2010.

ROWLEY & KLAUSER, LLP

  
Robert C. Rowley, WSBA #4765

  
James J. Klauser, WSBA #27530

Co-counsel to Petitioners Feil, Tontz, and  
The Right to Farm Association of Baker Flats

**APPENDIX No. 1**

Court of Appeals, Division III,  
**PUBLISHED OPINION**

in

*Fiel et al. v. Eastern Washington  
Growth Management Hearings Board, et al.,  
No. 28248-1-III*

153 Wash. App. 394, 220 P.3d 1248 (2009)  
dated  
December 3, 2009

and

Court of Appeals, Division III,  
**ORDER DENYING  
RECONSIDERATION**

in

*Fiel et al. v. Eastern Washington  
Growth Management Hearings Board, et al.,  
No. 28248-1-III*

153 Wash. App. 394, 220 P.3d 1248 (2009)  
dated  
February 19, 2010

**FILED**

DEC - 9 2009

In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**JACK FEIL and DELAPHINE FEIL,  
husband and wife; JOHN TONTZ and  
WANDA TONTZ, husband and wife;  
and THE RIGHT TO FARM  
ASSOCIATION OF BAKER FLATS,**

**Appellants,**

**v.**

**THE EASTERN WASHINGTON  
GROWTH MANAGEMENT  
HEARINGS BOARD; DOUGLAS  
COUNTY; WASHINGTON STATE  
DEPARTMENT OF  
TRANSPORTATION; WASHINGTON  
STATE PARKS AND RECREATION  
COMMISSION; and PUBLIC  
UTILITY DISTRICT NO. 1 OF  
CHELAN COUNTY,**

**Respondents.**

-----  
**JACK FEIL and DELAPHINE FEIL,  
husband and wife; JOHN TONTZ and  
WANDA TONTZ, husband and wife;  
and THE RIGHT TO FARM  
ASSOCIATION OF BAKER FLATS,**

**Appellants,**

**No. 28248-1-III**

**Division Three**

**PUBLISHED OPINION**

v.

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, )  
Respondents. )

SWEENEY, J. — This is a land use case. Douglas County approved something called a recreational overlay district to accommodate an extension of a bicycle/pedestrian trail. The recreational district will “overlay” and border agricultural land used for orchards. Area orchardists objected to the overlay district and raised a number of legal and factual challenges to the county commissioners’ decision to approve the overlay. We conclude that the recreational overlay district is not an amendment to the county’s comprehensive plan and that, even if it was, any challenge to the comprehensive plan comes too late. We conclude that the recreational overlay district does not run afoul of state statutes that encourage the preservation of agricultural land. And we conclude that the decision to permit the overlay is amply supported by the findings of the commissioners, including those they adopted from the hearing examiner. We therefore

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affirm the decision of the superior court that dismissed the challenges of the orchardists to the recreational overlay district.

#### FACTS

The Washington State Parks and Recreation Commission (State Parks) applied to Douglas County (County) for a permit to build a five-mile, non-motorized recreation trail along the Columbia River in the Baker Flats area of East Wenatchee, Washington. The proposed trail will link with a current trail system and extend a bicycle and pedestrian path. All of the trail will be built on public property, including a right-of-way owned by the Washington State Department of Transportation and property owned by the Chelan County Public Utility District No. 1. The Greater East Wenatchee Area Comprehensive Plan designates the property over which the trail will run as "Tourist Recreation Commercial," "Residential Low," "Commercial Agriculture 5 acres," and "Commercial Agriculture 10 acres." Clerk's Papers (CP) at 1-6626, 1-6658. Trail systems are permitted in the tourist recreation district and are also allowed in districts zoned residential low, commercial agriculture 5, and commercial agriculture 10 under a recreational overlay district permit.

Orchardists Jack and Delaphine Feil and John and Wanda Tontz lease portions of the Baker Flats public properties that abut their orchards and they grow fruit trees on those public lands. The proposed trail, including a 10-foot-wide asphalt top plus gravel

edging, and 60 to 100 foot buffers would require that nearly 24 acres of mature fruit trees be removed.

In 2004, a County hearing examiner concluded that the trail was permitted in all zoning districts as a "transportation facility" and issued a shoreline development permit to State Parks. The Feils, the Tontzes, and the Right to Farm Association of Baker Flats (we will refer to them as the Orchardists) appealed the decision to issue the permit to the shoreline hearings board. C.F. McNeal, Betty McNeal, and others filed a petition under the Land Use Petition Act (LUPA) in superior court and challenged the decision to issue the permit. In March 2005, the shoreline hearings board approved the trail permit subject to conditions. The Orchardists then petitioned the superior court for further review. The court affirmed the shoreline hearings board's decision. The Orchardists appealed that decision to this court but later abandoned that appeal. The superior court on the LUPA petition disagreed with the examiner's conclusion that the trail was a transportation facility (that would be permitted in any zone) and reversed. The court remanded with directions to State Parks to apply for permits required by the County code.

In March 2006, State Parks then applied for a recreational overlay district permit. A recreational overlay district does not change the underlying zoning. It allows recreational activities in other zoning classifications. In November 2006, the County hearing examiner held a hearing, granted the recreational overlay designation, and issued a site plan development permit for the trail. The hearing examiner conditioned approval

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of the permit on a number of conditions. The examiner required that State Parks provide:

- (1) an agreement with beekeepers to mitigate contact between trail users and bees; (2) a trail design that will minimize "frost pockets" affecting the abutting orchards; and
- (3) additional steps to ensure that trail users are protected from agricultural activities (such as pesticide application) and that the orchards are protected from the trail users.

In November 2006, the Orchardists petitioned under LUPA to the superior court and challenged the hearing examiner's authority to issue a recreational overlay permit. They also petitioned for review with the Eastern Washington Growth Management Hearings Board (Hearings Board) and argued that the hearing examiner's decision to grant the overlay violated the Growth Management Act (GMA). In February 2007, the Hearings Board concluded that it had no jurisdiction to review this permit, since it was a site-specific project, and dismissed the Orchardists' GMA petition. The Orchardists appealed that decision to the superior court; the court affirmed the dismissal of the GMA petition in July 2007. The court also concluded that the recreational overlay designation amounted to a rezone and therefore the County hearing examiner did not have authority to grant the permit because the rezone required legislative action by the County commissioners. The court then remanded for further proceedings.

The County commissioners adopted the findings and conclusions of the hearing examiner, added some of their own, and approved the overlay district. The Orchardists again petitioned for relief under LUPA in the superior court; and they again petitioned for

review by the Hearings Board. Once again, the Hearings Board ruled that it did not have jurisdiction to review a site-specific rezone and dismissed the petition. The Orchardists appealed this ruling to the superior court. The superior court affirmed the County commissioners' decision to issue the permit and dismissed the LUPA petition. The following month, the superior court dismissed the petition for review of the Hearings Board's decision.

Both decisions were appealed directly to the Washington State Supreme Court. That court consolidated the appeals and transferred them here for our review.

#### DISCUSSION

##### JURISDICTION OF THE HEARINGS BOARD TO PASS ON THE COMMISSIONERS' DECISION TO ISSUE A RECREATIONAL OVERLAY PERMIT

The Orchardists first contend that the Hearings Board erred, as did the trial court, when it concluded that it did not have authority to hear this petition because it was "site specific." They argue that the effect of this recreational overlay designation is to convert land that had been zoned agricultural into something other than agricultural in violation of the comprehensive plan and state law requiring, or at least encouraging, the preservation of agricultural land. The Orchardists agree that generally challenges to a comprehensive plan or development regulations must be made within 60 days of the decision by the Hearings Board. But here, they argue, there was no way to anticipate,

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under the comprehensive plan as adopted and approved, that this bicycle and pedestrian path would be approved in an agricultural zone.

The County responds that this is not a rezone; that it is accommodated by the current comprehensive plan and zoning regulations, whether it is a rezone or not; and that, therefore, the appropriate vehicle to challenge this land use action is a petition pursuant to LUPA. It argues that the challenge to the Hearings Board of the comprehensive plan comes too late. *Woods v. Kittitas County*, 162 Wn.2d 597, 614, 174 P.3d 25 (2007). The County continues that the recreational overlay is a site-specific project permit; therefore, it only requires authorization by statute and is not subject to review under the GMA. *Id.* at 610. And it urges that the permit meets the definition of a project permit application because it relates to a specific project for a specific use by a specific applicant that is authorized by existing zoning laws. RCW 36.70B.020(4); *Woods*, 162 Wn.2d at 613. Again, relying on *Woods*, the County urges that the superior court may review a project permit only by applying LUPA standards to decide whether the land use decision complies with a comprehensive plan and/or development regulations. *Woods*, 162 Wn.2d at 603.

The GMA was enacted in 1990 to stop uncoordinated, unplanned growth and the attendant threats to the environment. RCW 36.70A.010; *Woods*, 162 Wn.2d at 608. Toward that end, the legislature called for citizens, the local government, and the private sector to cooperate in “comprehensive land use planning.” RCW 36.70A.010. The GMA

required development of a comprehensive plan to address land use, housing, capital facilities, utilities, rural areas, and transportation. RCW 36.70A.040, .070; *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 547, 958 P.2d 962 (1998). This comprehensive plan must set out the governing body's general land use policy. RCW 36.70A.030(4); *Woods*, 162 Wn.2d at 608. The rural element of the comprehensive plan must permit rural development, forestry, agriculture, and a variety of rural densities. RCW 36.70A.070(5)(b).

Several planning goals in the GMA guide the development of a comprehensive plan and development regulations. RCW 36.70A.020; *Skagit Surveyors*, 135 Wn.2d at 547. Among these goals is the desire to “[m]aintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of . . . productive agricultural lands, and discourage incompatible uses.” RCW 36.70A.020(8). The comprehensive plan must designate an area for urban growth and a rural area outside the urban growth area. RCW 36.70A.110(1), .070(5)(b); *Woods*, 162 Wn.2d at 608-09.

To implement the policies of the comprehensive plans, counties must adopt consistent development regulations. RCW 36.70A.040(3)(d), (4)(d); *Woods*, 162 Wn.2d at 609. Development regulations are “controls placed on development or land use activities by a county or city,” including zoning ordinances. RCW 36.70A.030(7). Development regulations do not include a decision to approve a project permit

application, “even though the decision may be expressed in a resolution or ordinance.”

*Id.* A site-specific rezone, authorized by a comprehensive plan, requires only a project permit application. RCW 36.70B.020(4).

Three growth management hearings boards enforce the GMA. *Woods*, 162 Wn.2d at 609. But the jurisdiction of these boards is limited. They can decide only those petitions that challenge comprehensive plans, development regulations, or permanent amendments to comprehensive plans or development regulations for compliance with the GMA. *Id.*; *Skagit Surveyors*, 135 Wn.2d at 549; RCW 36.70A.280(1)(a), .302. And a petition challenging a comprehensive plan or development regulation for violation of the GMA must be filed within 60 days after publication of the comprehensive plan or development regulation. RCW 36.70A.290(2).

The Orchardists contend that the recreational overlay permit approved here is a zoning amendment that they may challenge as a violation of the GMA. They note that chapter 14.32 of the Douglas County Code (DCC) requires that all zoning amendments must be reviewed for consistency with the GMA. DCC 14.32.030, .040, .050. They insist that even site-specific rezones constitute zoning amendments that must comply with the GMA and cite DCC 14.32.040:

A. Types of Amendments.

1. Site-specific map amendments.

Site-specific plan map amendments apply to a limited geographical area controlled either by an individual property owner or all property owners within the designated area. . . .

Applications for site-specific map changes should be reviewed by the planning commission at a public hearing in June. The planning commission will make a recommendation on the proposed amendments and transmit them for final action by the Board of Commissioners at the completion of the annual comprehensive plan amendment process.

DCC 14.32.040.

We disagree with the Orchardists. A recreational overlay district is not a zoning amendment. It is rather a special use overlay of existing zones. DCC 18.12.060. The County zoning regulations designate ten zoning districts and three overlay districts, including the recreational overlay. DCC 18.12.020. The purpose of the district overlay designation is "to implement comprehensive plan policies that identify recreational activities or special opportunities for achieving public benefits by allowing uses that differ from the specific provisions set forth within the applicable zoning district." DCC 18.12.060. These overlays "are generally applied to site specific proposals on an individual property or a group of properties." *Id.* The recreational overlay does not change the zoning, it allows a recreational use that is not otherwise allowed in a particular zone. *Id.* The commissioners did not violate the GMA by permitting this recreational overlay district in an agricultural zone.

WHETHER THE RECREATIONAL OVERLAY VIOLATES STATE LAW PROTECTING  
AGRICULTURAL LAND

The Orchardists next contend that this recreational overlay district violates state law calculated to protect agricultural land. And this, they argue, is so whether the

recreational overlay here is characterized as a site-specific rezone or simply a permitted use. We characterize this as a permitted use, for reasons we have already discussed. But it would not make any difference in the result if we were to characterize this as a site-specific rezone. RCW 36.70A.177(1) authorizes cities and counties to use “a variety of innovative zoning techniques” in agricultural areas to “conserve agricultural lands and encourage the agricultural economy.” Generally, a county or city should encourage nonagricultural uses in areas with poor soils or areas that are otherwise inappropriate for agriculture. RCW 36.70A.177(1). But whether, and to what extent, this recreational overlay, or any recreational overlay, impairs the use of this land for agriculture is, first of all, a factual question easily addressed in a LUPA action. Here, there was ample testimony to support the ultimate findings that the trail was not inconsistent with the use of this land for agriculture. We discuss this evidence in the section entitled “Substantial Evidence for Facts Supporting Recreational Overlay Designation” below.

Second, even if the use of a recreational overlay in the agricultural zone did violate RCW 36.70A.177, the Orchardists had to bring a challenge within 60 days of adoption of a comprehensive plan that accommodated the recreational overlay designation in the first place. RCW 36.70A.290(2); *Woods*, 162 Wn.2d at 614. The court in *Woods* recognized the potential that legislative authorities might permit uses beyond the 60-day challenge period that appeared to violate the GMA:

Once adopted, comprehensive plans and development regulations are presumed valid. RCW 36.70A.320(1). Thus, if a project permit is consistent with a development regulation that was not initially challenged, there is the potential that both the permit and the regulation are inconsistent with the GMA. While this is problematic, the GMA does not explicitly apply to such project permits and the GMA is not to be liberally construed.

*Woods*, 162 Wn.2d at 614.

The Orchardists did not timely challenge the zoning regulations (ch. 18.46 DCC), as running afoul of the GMA. And that code provides for these R-O Recreational Overlay Districts that specifically include as permitted uses "Recreational trail systems." DCC 18.46.040(J).

The Orchardists' essential challenge here implicates the application of these regulations, not the regulations themselves. But a hearings board's jurisdiction is limited to challenges of comprehensive plans, development regulations, and amendments to comprehensive plans and development regulations. RCW 36.70A.280(1)(a), .302; *Woods*, 162 Wn.2d at 609. The Hearings Board simply "does not have jurisdiction to hear a petition alleging that a site-specific rezone violates the GMA." *Woods*, 162 Wn.2d at 612. And that is what we are dealing with here.

LUPA is the exclusive means for judicial review of land use decisions that are not subject to review by quasi-judicial bodies such as the hearings boards. RCW 36.70C.030; *Woods*, 162 Wn.2d at 610. We therefore conclude that the Hearings Board

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properly ruled that it did not have jurisdiction to decide whether the site-specific recreational overlay adopted here complied with the GMA. *Woods*, 162 Wn.2d at 610.

The Orchardists rely nonetheless on two cases for the proposition that a hearings board cannot allow non-farm uses in an agricultural resource area if to do so undermines the GMA mandate to conserve farm lands. *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 495-97, 139 P.3d 1096 (2006); *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 552, 14 P.3d 133 (2000).

Neither case is helpful. First, each challenge in these cases apparently followed a timely challenge to adoption of development regulations and amendments to a comprehensive plan and zoning regulation—within 60 days. *Lewis County*, 157 Wn.2d at 495-97; *King County*, 142 Wn.2d at 551-52. Second, each case addresses whether the local jurisdiction's newly adopted development regulations (*Lewis County*) or amendments to the comprehensive plan (*King County*) qualified as “innovative zoning techniques” allowed under RCW 36.70A.177(1). *Lewis County*, 157 Wn.2d at 506-08; *King County*, 142 Wn.2d at 561-62. The recreational overlay permit here is not a new or recently-amended provision of a comprehensive plan or development regulation. Nor is it intended to be an “innovative zoning technique.”

The trial court was correct: the Hearings Board did not have jurisdiction to pass on whether the recreational overlay permit complied with the GMA.

OVERLAY DISTRICT—SITE-SPECIFIC—AUTHORIZED BY THE COMPREHENSIVE PLAN

The Orchardists next argue that the trail is not a “site-specific” rezone authorized by the comprehensive plan and does not, therefore, qualify for a project permit. They argue that a 200-foot wide corridor five miles long is hardly “site-specific.” Indeed, they urge that under pre-GMA cases, a 200-foot wide, five-mile long corridor zoned differently from the land on either side could never qualify as a site-specific rezone. They also note that the County’s comprehensive plan does not even mention recreational overlays.

The County responds that, first of all, the land use must only generally conform, not strictly conform, to the comprehensive plan, citing *Woods*, 162 Wn.2d at 613-14. And the permits here are narrowly applied. They focus on the trail surface and buffers on specific public land. The underlying zoning of the land within or adjacent to the trail does not change by the imposition of a recreational overlay district. No area-wide zoning is involved and so the permits are site-specific.

A site-specific rezone involves specific parties requesting a classification change for a specific tract. *Id.* at 611 n.7. Here, there is no change to the zoning classification of land underlying or contiguous to this overlay district. And a defined trail across public land is a site-specific tract. *Id.*

Again, a site-specific rezone is a project permit under RCW 36.70B.020(4) if it is authorized by a comprehensive plan or development regulations. *Woods*, 162 Wn.2d at

610. The Orchardists contend the recreational overlay district here is not authorized by the comprehensive plan because the County's comprehensive plan does not mention recreational overlays and specifically discourages non-agricultural uses in agricultural areas. See Douglas County Countywide Comprehensive Plan § 5.2.3 (Agricultural Goals and Policies) (amended Jan. 28, 2003). CP 0-1561. But a site-specific rezone need not be expressly included in a comprehensive plan as a permitted use. The comprehensive plan is a general blueprint for land use decisions; it does not directly regulate, nor was it intended to regulate directly, site-specific land uses. *Woods*, 162 Wn.2d at 613. "Thus, a proposed land use decision must only generally conform, rather than strictly conform, to the comprehensive plan." *Id.* (emphasis omitted).

And yes, the comprehensive plan here sets out a goal to preserve, enhance, and maintain agricultural uses "to the greatest extent possible." CP at 0-1561. But the same plan also encourages the "developing trail system" in East Wenatchee as an alternative mode of transportation. CP 0-1529. It encourages the commissioners to promote public access to bodies of water through trails. And the plan encourages coordinated bicycle and pedestrian ways for access to parks and shorelines.

The Greater East Wenatchee Comprehensive Plan supports extension of the trail system, citing the "healthy recreation opportunities" and the "personal mobility options" that will lighten the load on the transportation systems. CP at 0-0186. And the Greater East Wenatchee Comprehensive Plan specifically states that "[t]he current trail system

should be increased to extend north to connect with Lincoln Rock State Park.” CP at 0-0188. We then conclude that the extension of the trail here is consistent with the policies of both the Greater East Wenatchee and Douglas County Countywide Comprehensive Plans.

Moreover, the recreational overlay permit for the trail is authorized by County development regulations, including DCC 18.46.010. That code section specifically provides that

[t]he purpose of the R-O recreational overlay district is to provide for the continuance of public and private parks and other outdoor recreational facilities in order to encourage the development of additional active recreational facilities in Douglas County, and to maintain adequate buffers between recreational developments and surrounding land uses.

DCC 18.46.010. The same code permits these recreational overlay districts wherever they are not prohibited. DCC 18.46.020. And they are not prohibited where they are proposed here.

Recreational trails are a permitted use in a recreational overlay district. DCC 18.46.040(J). And these trails are not prohibited by agricultural development regulations. *See* DCC 18.34.050, DCC 18.36.050. The Orchardists are correct that “pedestrian/bicycle access corridors” are discouraged in agricultural lands of long term commercial significance. DCC 18.16.150(I). But the development standards of the recreational overlay regulations ensure that an application is reviewed for its potential effect on surrounding properties, including agricultural resource lands. DCC 18.46.070.

We conclude then that the recreational overlay district is both site-specific and consistent with the comprehensive plans and County development regulations. *Woods*, 162 Wn.2d at 613. This recreational overlay district was properly reviewed as a project permit rather than as a rezone. RCW 36.70B.020(4).

SUBSTANTIAL EVIDENCE FOR FACTS SUPPORTING RECREATIONAL OVERLAY  
DESIGNATION

The Orchardists next contend that the County commissioners' findings used to support their decision to approve the recreational overlay are not supported by substantial evidence. The commissioners adopted the November 2006 findings and conclusions of the hearing examiner and added their own findings and conclusions. The Orchardists assign error to the hearing examiner's findings (1) that rely on the decision of the shoreline hearings board; (2) that state that the Washington State Department of Transportation was a proper applicant; (3) that fail to show authorization by the comprehensive plans; (4) that use a "mitigation" standard rather than a "protection" standard for agricultural areas; (5) that ignore buffer requirements; (6) that say that the State Environmental Policy Act (SEPA) requirements were met; and (7) that beekeepers' concerns are mitigated. They also challenge the commissioners' findings because they (8) do not consider the GMA requirements for innovative zoning techniques; (9) fail to show that alternatives to the trail site were considered or that mandatory development

standards were met; and (10) approve a site plan that exceeds the scope of the recreational overlay zone.

We review land use decisions under LUPA. RCW 36.70C.130(1). We, like the superior court, apply the LUPA standards of review directly to the County commissioners' decision. *Henderson v. Kittitas County*, 124 Wn. App. 747, 752, 100 P.3d 842 (2004). The Orchardists must show that: (a) the entity that made the land use decision did not follow the correct process, unless the error was harmless; (b) the decision is an erroneous interpretation of the law, considering the deference given to local interpretation of the law; (c) the decision is not supported by substantial evidence; (d) the decision is a clearly erroneous application of the law to the facts; (e) the decision is outside the jurisdiction of the entity making the decision; or (f) the decision violates the constitutional rights of the party seeking relief. RCW 36.70C.130(1).

We review challenges to the factual findings that underlie the land use decision for substantial evidence. *J.L. Storedahl & Sons, Inc. v. Clark County*, 143 Wn. App. 920, 928, 180 P.3d 848, *review denied*, 164 Wn.2d 1031 (2008). And, just like other challenges to factual findings that come before this court, we view the evidence in a light most favorable to the party that prevailed. *Woods*, 162 Wn.2d at 617. State Parks and the County prevailed before the County commissioners and so we review the record that was before the commissioners in the light most favorable to the respondents. *Id.*

This record contains nearly 9,000 pages of administrative proceedings. It includes extensive testimony and exhibits that speak to the advantages and disadvantages of the trail extension proposed here. The hearing examiner reviewed the record after an open public hearing. And his findings are easily supported by the evidence.

Specifically, he correctly notes that the Greater East Wenatchee Comprehensive Plan “places significant importance on the protection of agricultural lands” and requires minimal disruption of agricultural activities. CP at 1-6628; *see* CP at 0-3859 (“[a]gricultural uses will be preserved, enhanced, and maintained to the greatest extent possible”). The hearing examiner lists a variety of measures that mitigate the effects on agriculture, including enhanced setbacks and buffers, gates at both ends of the agricultural area that can be closed during certain agricultural operations, fencing and additional security measures, elimination of noxious weeds, and coordination with beekeepers for trail closure during periods of peak bee activity. Certainly, a number of people testified that orchard activities were incompatible with this trail. But the hearing examiner found that “the more convincing testimony” was “that orchard activities, pedestrians and bicyclists can co-exist in the same proximity, just as they have for over 100 years.” CP at 1-6629.

The hearing examiner’s finding that State Parks complied with SEPA procedures is supported by the record and by a superior court ruling in *McNeal v. Douglas County*, No. 04-2-00045-6 (Douglas County Superior Court). CP at 0-1735, 0-3663, 0-7842. The

superior court ruled that compliance with SEPA need not be reviewed further unless there were changes to the proposed project that would adversely affect the environment. *See* WAC 197-11-600(3)(b) (an environmental document may be used by an agency until there are substantial changes that would likely have a significant adverse impact). No changes in this project would prompt a new SEPA review.

The Orchardists also argue that the hearing examiner and the County commissioners failed to make certain necessary findings, specifically regarding compliance with the GMA and with County buffering ordinances. But, again, neither the hearing examiner nor the commissioners had jurisdiction to consider compliance with the GMA. And, therefore, they had no duty to enter findings to address GMA requirements under RCW 36.70A.177. Buffers were adequately covered in the hearing examiner's findings and attached conditions of approval. The findings refer to the buffers established in the permit application, and the application in turn promises compliance with the buffer requirements of the County code. DCC 18.46.080.

The Orchardists also contend the hearing examiner failed to find that construction of the trail would comply with DCC 19.18.035(2). That code section states that trail facilities must "minimize the removal of trees, shrubs, snags and important habitat features." DCC 19.18.035(2). It is calculated to protect trees and shrubs naturally growing in the area. State Parks addressed this in the permit application; no native trees will be removed from this area.

The Orchardists label some findings as inappropriate. Appellants' Br. at 43-47. But those findings are not relevant to the decisions of the hearing examiner and County commissioners. For example, the Orchardists contend that the hearing examiner inappropriately relied on the decision of the shoreline hearings board. Not so. The hearing examiner merely includes the shoreline development permit process in his summary of the trail permit proceedings. And the County commissioners entered several findings that express their disagreement with the superior court's conclusion that the hearing examiner had no authority to issue the trail project permit. Yet the County commissioners considered the permit as ordered.

The Orchardists also contend that the County commissioners should have included findings that State Parks (1) failed to study appropriate alternatives to the trail site, (2) did not comply with County regulations on buffers (DCC 18.46.070(A)), and (3) should have required the signatures of each applicant and property owner on the project application (DCC 14.06.010(B)(7)). The hearing examiner, however, included findings on each of these points. His findings were adopted by the County commissioners. He found that State Parks considered alternative routes and has proposed buffers and setbacks to minimize the impact on agriculture. The Department of Transportation is a property owner, and the Orchardists complain that the department did not sign the application as required by DCC 14.06.010(B)(7). But we find no authority to impose what we conclude is a hypertechnical reading of the code. The Department of Transportation verified that it

was aware of the project and authorized the State Parks by letter to represent its interests in the application process. That is sufficient.

The findings here are supported by this record.

WHETHER THE SIZE OF THE TRAIL WITH BUFFERS EXCEEDS THE OVERLAY

The Orchardists next contend the County commissioners approved a site plan that is up to 220 feet wide, including buffers, and this exceeds the 20-foot-wide recreational overlay. They argue that approval of a recreational overlay district authorizes only the specific overlay proposed. DCC 18.46.030(A), cited by the Orchardists, states that approval of a recreational overlay application "shall be based on a specific site design authorizing only the specific development proposed, unless amended." The specific site design here includes buffers from 60- to 100-feet-wide on each side of the trail. The approved recreational overlay district did not exceed the scope of the proposed development.

WHETHER THE COMPREHENSIVE PLAN CONFLICTS WITH GENERAL LAWS OF THE STATE PROTECTING AGRICULTURAL LANDS

The Orchardists contend that the Douglas County Countywide and Greater East Wenatchee Comprehensive Plans and development regulations are void because they permit what the GMA prohibits: recreational zoning in an agricultural resource area of prime soil. And for that reason, the Orchardists urge that the commissioners have run afoul of article XI, section 11 of the state constitution.

Article XI, section 11 of the state constitution allows local governments to adopt regulations that are not in conflict with general law. *State v. Kirwin*, 165 Wn.2d 818, 825, 203 P.3d 1044 (2009). A local regulation conflicts with general law if it permits what state law forbids or forbids what state law permits. *Id.* An ordinance or regulation that conflicts with a statute is invalid. *Id.* at 826.

The Orchardists contend that the comprehensive plans and development regulations authorizing a recreational overlay in an agricultural resource area conflict with RCW 36.70A.177. This provision of the GMA states that a county or city *may* use innovative techniques to conserve agricultural lands and encourage the agricultural economy. RCW 36.70A.177(1). And the statute encourages a county or city to limit nonagricultural uses to areas of poor soil or otherwise unsuited to agriculture. *Id.* First, these are statements of planning goals; they do not prohibit nonagricultural uses in areas of good soil. *See Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 125, 118 P.3d 322 (2005) (the GMA is a framework that guides local jurisdictions in the formation of comprehensive plans and development regulations). County regulations that establish recreational overlay districts in agricultural areas do not then permit a land use that is prohibited by the GMA. Second, any potential interference with use of this land as agricultural can be, and was, addressed here with conditions and limitations imposed as part of the approval process. Accordingly, neither the development regulations nor the comprehensive plans here are constitutionally invalid. *Kirwin*, 165 Wn.2d at 826.

ATTORNEY FEES

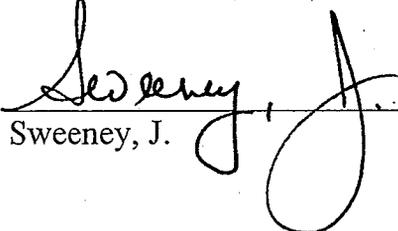
Both the County and State Parks request attorney fees and costs pursuant to RCW 4.84.370. The statute mandates fees and costs to the prevailing party or substantially prevailing party on appeal of a decision to issue, condition, or deny a development permit involving a site-specific rezone. RCW 4.84.370(1). An award under this statute is limited, however, to a prevailing party on appeal who was the prevailing party or substantially prevailing party in *all* prior judicial proceedings. RCW 4.84.370(1)(b).

The Orchardists note that State Parks and the County did not prevail in previous judicial proceedings. The superior court reversed the hearing examiner's approval of the trail as a transportation facility and reversed the hearing examiner's grant of the recreational overlay. In both cases, the court concluded that the hearing examiner did not have authority to make those decisions. Eventually, State Parks and the County obtained the recreational overlay permit and site plan approval from the County commissioners. State Parks and the County prevailed in the September 2008 superior court review of the recreational overlay resolution and in the October 2008 superior court review of the Hearings Board's dismissal of the petition for review.

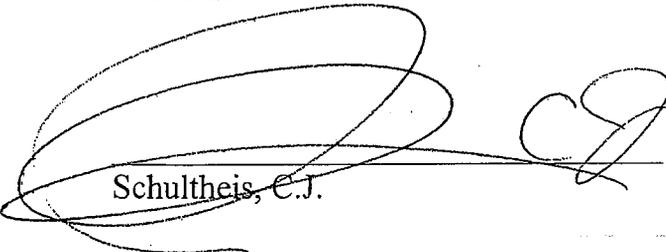
The appeal before this court is limited to the Orchardists' challenges to the County commissioners' resolution. State Parks and the County are then the prevailing parties and are entitled to the attorney fees and costs on appeal.

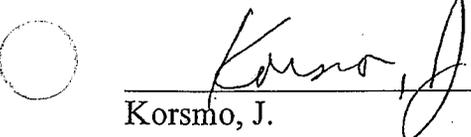
No. 28248-1-III  
Feil v. E. Wash. Growth Mgmt. Hearings Bd.

We affirm the decisions of the superior court that dismissed the challenges of the Orchardists to the recreational overaly district.

  
Sweeney, J.

WE CONCUR:

  
Schultheis, C.J.

  
Korsmo, J.

**RECEIVED**

**FILED**

FEB 22 2010

FEB 19 2010

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

**COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON**

JACK FEIL and DELAPHINE FEIL; et al., )

No. 28248-1-III

Appellants, )

v. )

ORDER DENYING

EASTERN WASHINGTON GROWTH )  
MANAGEMENT HEARINGS BOARD; DO )  
COUNTY; et al., )

MOTION FOR  
RECONSIDERATION

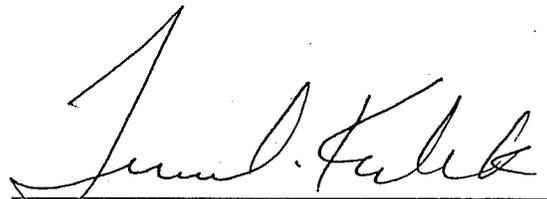
Respondents. )

THE COURT has considered appellant's motion for reconsideration, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's opinion of December 3, 2009, is denied.

DATED: February 19, 2010.

FOR THE COURT:



TERESA C. KULIK  
Chief Judge