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SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners,

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

**SUPPLEMENTAL BRIEF OF RESPONDENTS WASHINGTON
STATE PARKS AND RECREATION COMMISSION AND
WASHINGTON STATE DEPARTMENT OF TRANSPORTATION**

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I. INTRODUCTION

This case involves an application to Douglas County seeking approval to construct a non-motorized transportation alternative to State Route (SR) 2/97 by means of a recreational trail on publicly owned land along the Columbia River (Project). The crux of the case is whether the permit application approved by Douglas County was an amendment to its comprehensive plan and/or development regulations, or a project permit as defined under RCW 36.70B.020. This distinction is crucial because legislative amendments to comprehensive plans and development regulations are reviewed for consistency with the Growth Management Act (GMA), RCW 36.70A, while project permits are reviewed for consistency with the adopted comprehensive plan and development regulations under the standards and timelines of the Land Use Petition Act (LUPA), RCW 36.70C.

In two separate sets of appeals, the Eastern Washington Growth Management Hearings Board (EWGMHB) and the superior court have held that the permit application is a project-specific application that is subject to review exclusively under LUPA. In the most recent appeals, the Court of Appeals affirmed both the EWGMHB and superior court, applying this Court's decision in *Woods v. Kittitas County*, 162 Wn.2d

597, 174 P.3d 25 (2007). This Court should affirm the Court of Appeals and reject the Petitioner's attempts to avoid the limitations of LUPA.

II. STATEMENT OF THE ISSUES

Did the EWGMHB and superior court properly conclude that the proposed project application is a project permit, as defined in RCW 36.70B.020, where the proposal is to construct a transportation and recreational use project generally authorized by an existing zoning ordinance on a narrow corridor of publicly owned land?

III. STATEMENT OF THE CASE

This case involves an application submitted by State Parks to construct a Project¹ along the Columbia River from Odabashian Bridge north to Lincoln State Park. Administrative Record (AR), Vol. 35, CP 1-6671. The Project will run approximately 5.1 miles along a narrow corridor over two contiguous parcels of publicly owned land: one parcel owned by the Washington State Department of Transportation (WSDOT); the other parcel owned by a local public utility district. No private land is used for the Project. As Petitioners point out, the corridor was condemned in the 1950s after payment of full compensation by the State to the former landowners. Petition at 5-6. The State has leased the corridor to adjacent orchardists on a

¹ The Project is formally referred to as a public, non-motorized transportation and recreational project. Basically, it is a ten-foot wide asphalt path with gravel edging. AR Vol. 35, CP 1-6692 to 6701.

year-to-year basis pending development of an appropriate transportation use for the corridor. The Project was deemed an appropriate use of the State's transportation corridor by WSDOT. WSDOT then authorized State Parks to submit the application. CP Vol. 23, 0-4393.

Most of the Project is located within 200 to 400 feet of the Columbia River. AR Vol. 35, CP 1-6657, 1-6671. It is intended, in part, to provide an alternative transportation route to Lincoln State Park for pedestrians and bicyclists who might otherwise be forced to use SR 2/97 to get to Lincoln State Park. CP Vol. 25, 0-4729 to 4731. This Project also will provide recreational access to the river consistent with the county shoreline master program. CP Vol. 23, 0-4309. The Project will run through several land-use zones: Tourist Recreation Commercial Zone, Low-Residential Zone, Commercial Agriculture 5 Zone, and Commercial Agriculture 10 Zone. AR Vol. 35, CP 1-6657.

This Project has a long procedural history. In 2004 a hearings examiner approved a shoreline substantial development permit for this Project. AR Vol. 35, CP 1-6671. The Petitioners here appealed that approval to the State Shorelines Hearings Board, which affirmed the hearing examiner's decision. AR Vol. 35, CP 1-6671. The superior court affirmed the Board on the substantial development permit but directed State Parks to apply for a land-use permit as well. AR Vol. 35, CP 1-6672.

State Parks complied with that direction and applied for a recreational overlay permit in 2006, as provided in the Douglas County zoning code. AR Vol. 35, CP 1-6672. The hearing examiner approved the Project. AR Vol. 35, CP 1-6673. The Petitioners appealed the hearing examiner's decision, filing petitions both to the EWGMHB under the GMA and to the superior court under LUPA. The EWGMHB concluded that this Project was a project permit under RCW 36.70B.020 because it involved a specific project by specific parties for a specific use. CP Vol. 1, Sup. Ct. No. 82400-2, CP 0-0019, Finding of Fact (FOF) No. 18. The EWGMHB dismissed for lack of jurisdiction. CP Vol. 1, Sup. Ct. No. 82399-5, CP 0-0029. The superior court affirmed the EWGMHB determination. CP Vol. 1, Sup. Ct. No. 82400-2, CP 0-0019, FOF No. 19. The superior court, however, ruled that the permit decision could not have been delegated to a hearing examiner and remanded for consideration by the Board of County Commissioners.² AR Vol. 40, CP 1-7603 to 7608.

In 2008 the Douglas County Board of County Commissioners (County Commissioners) unanimously approved the Project as consistent with local laws and good for the county. During the course of this process, county staff twice analyzed the Project for consistency with the county's

² As explained below at page 12, the superior court's ruling rested on a decision that had been superseded by statute. To avoid the delay associated with an appeal, State Parks elected to submit its application to the Board of County Commissioners.

land use laws. CP Vol. 23, 0-4307, AR Vol. 35, CP 1-6656. Douglas County Code (DCC) 18.46.070 imposes certain development standards: buffering, outdoor light, off-street parking, access, refuse collection, signs, fire safety, emergency assistance, provision for public health, and restrictions on sound amplification. Ultimately, staff recommended approval with conditions such as buffers, fencing, security, and intermittent trail closure to minimize the impact to adjacent agriculture lands. AR Vol. 35, CP 1-6666 to 6669.

Staff determined that the requirements for parking, access, refuse, and water were satisfied by the proximity of the trail to Lincoln Rock State Park. AR Vol. 35, CP 1-6664. The project also included an emergency response and fire safety plan. AR Vol. 35, CP 1-6664.

The traffic benefits were discussed at length. The project would remove pedestrian and bicycle traffic from the five-mile section of SR 2/97. CP Vol. 25, 0-4729 to 4731.

A consultant for State Parks addressed compatibility of the Project with adjacent agricultural use. AR Vol. 35, CP 1-6701. Recognizing that DCC 18.16 discourages pedestrian/bike trails in areas designated as agricultural lands, the consultant's report analyzed the projected impact of the Project. The Project would convert only 24 acres of orchards on leased public land. AR Vol. 35, CP 1-6701. With buffers, fencing, and

controls on opening and closing times, the impact on adjacent agricultural uses could be lessened. AR Vol. 35, CP 1-6702. The impact to bee activity was thoroughly discussed and addressed through trail closures. AR Vol. 36, CP 1-6802 to 6804. Impacts on helicopter spraying were discussed and also addressed through temporary trail closures. AR Vol. 36, CP 1-6806. Vandalism was discussed and addressed with signage and patrols. AR Vol. 36, CP 1-6804 to 6805. Frost pockets were discussed and addressed by landscape design. AR Vol. 36, CP 1-6810. County staff summarized the various concerns and mitigation measures to address those concerns, including buffering in the form of setbacks, fences where appropriate, and trees to prevent spray drift. AR Vol. 36, CP 1-6812.

Over 1,500 people signed petitions submitted to the County Commissioners supporting the Project. CP Vol. 32, 0-6078 to Vol. 33, 0-6282. The County Commissioners held a lengthy public hearing on February 25, 2008. CP Vol. 30, 0-5773. After a month of deliberation, the County Commissioners unanimously approved the Project.

As before, Petitioners appealed the Commissioners' decision to both the EWGMHB under the GMA and the superior court under LUPA. The EWGMHB again dismissed for lack of jurisdiction, finding that the Project was a project permit as defined under RCW 36.70B.020, and thus outside its

jurisdiction. In the LUPA proceeding, the superior court also found that the Project was a project permit, and it affirmed the county decision under LUPA. In consolidated appeals, the Court of Appeals affirmed both the EWGMHB and the superior court.

IV. ARGUMENT

A. **This Permit Involves A Permit Application That Is Reviewable Exclusively Under LUPA.**

With exceptions not relevant here, a growth management hearings board has jurisdiction only over comprehensive plans and development regulations adopted under the GMA and amendments to any such comprehensive plan or development regulation. RCW 36.70A.280(1). *See also Wenatchee Sportsmen Ass'n v. Chelan Cy.*, 141 Wn.2d 169, 178, 4 P.3d 123 (2000). As defined in RCW 36.70A.030(7), a “development regulation” does not include “a decision to approve a project permit application, as defined in RCW 36.70B.020, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city.” A project permit application as defined in RCW 36.70B.020 thus is not subject to review for consistency with the GMA, and the EWGMHB lacks jurisdiction to review it under the GMA. *Woods v. Kittitas Cy.*, 162 Wn.2d 597, 610, 174 P.3d 25 (2007).

Rather, a project permit application is reviewable only by a superior court under LUPA. *Woods*, 162 Wn.2d at 610. The superior court's jurisdiction is exclusive over "land use decisions," RCW 36.70C.030, which are defined to include project permit applications, RCW 36.70C.020(2). "Project permit" (or "project permit application") is defined in RCW 36.70B.020(4) to mean

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

In a review under LUPA, the superior court may decide only whether the project permit application complies with the existing comprehensive plan and/or development regulations. *Woods*, 162 Wn.2d at 603. A superior court is not authorized in a LUPA appeal to decide whether a project permit complies with the GMA. *Id.* at 613. Neither is the superior court authorized in a LUPA appeal to assess the GMA compliance of the applicable comprehensive plan and/or development

regulations because of the statutory presumption of their validity absent a timely challenge. *Id.* at 614 (citing RCW 36.70A.290(2), .320(1)).

The statutory definition of project permit focuses not on the adoption of comprehensive plans and development regulations, but on the subsequent act of submitting specific project applications for approval under those general plans and regulations. The land use planning choices reflected in the comprehensive plan and regulations “serve as the foundation for project review.” *Woods*, 162 Wn.2d at 613, quoting RCW 36.70B.030(1).

Where an existing zoning law authorizes a proposed use of land, but requires the county to approve the project to ensure that it complies with the various standards set forth in the zoning code, the application is a project permit under RCW 36.70B.020.

Here, the State’s project application to construct a recreational trail was submitted pursuant to an existing zoning regulation that authorized a recreational overlay district for the land at issue. DCC 18.46.

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.

DCC 18.46.010. That ordinance allows the creation of an overlay district as a permitted use in the zones at issue in this case; it does not change the

underlying zoning. An overlay district is considered a site-specific project map designation on individual property or a group of properties. DCC 18.12.060. This overlay district allows uses in addition to the specific provisions within an applicable zoning district. DCC 18.12.060. The overlay is authorized in all zones unless expressly prohibited. DCC 18.46.020. The county's obligation in reviewing a permit application for a recreational use in an overlay district is to ensure the recreational use project meets the standards set out in DCC 18.46.

The proposed Project will run through four zones: Tourist Recreation Commercial Zone, Low-Residential Zone, Commercial Agriculture 5 Zone, and Commercial Agriculture 10 Zone. AR Vol. 35, CP 1-6657. None of these zones prohibit a recreational overlay. AR Vol. 35, CP 1-6657. Specifically, neither commercial agriculture zone prohibits a recreational overlay. DCC 18.34.050, 18.36.050; AR Vol. 35, CP 1-6657. In summary, the current zoning designations remain in place in the zoning districts through which this Project will run, but additional recreational uses will be permitted in the narrow overlay permitted under DCC 18.46. The designation of the recreational overlay to the two publicly owned parcels at issue in this case is a site-specific application of an existing zoning ordinance, reviewable solely under LUPA for consistency with that ordinance.

Both the EWGMHB and the superior court held that the challenged project application was a project permit application as defined under RCW 36.70B.020 and thus reviewable only under LUPA. The Court of Appeals affirmed, holding that the recreational overlay regulation, DCC 18.46, did not change the zoning classification of the land underlying or contiguous to the overlay district. COA at 14.³ The overlay district simply authorizes an additional use within existing zones if such use can meet the conditions and standards set forth under the regulation. The defined Project across public land was a site specific permit. COA at 14.

B. This Project Permit Did Not Result In An Amendment Of The Comprehensive Plan Or Development Regulations.

Petitioners argue that the application required an amendment to the county's comprehensive plan and/or development regulations. They do so to avoid review under LUPA. Petitioners' theory is inconsistent with the GMA, its implementing regulations, and the case law regarding the generalized nature of zoning.

In approving this Project, the County Commissioners did not enact an ordinance of general applicability under the GMA. No amendments to zoning texts were required or requested. Although the superior court remanded this project to the County Commissioners for final approval

³ For the Court's convenience, a copy of the Court of Appeals' slip opinion is attached to this brief. This brief cites to that copy of the opinion.

based on *Lutz v. City of Longview*, 83 Wn.2d 566, 520 P.2d 1374 (1974),⁴ that remand did not change the character of the project. The application remained a site-specific project that had to be reviewed under DCC 18.46.

The application did not request an amendment of the County's Comprehensive Plan. Indeed, approval of the application specifically implements the plan: the purpose of the overlay district 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. The county specifically identifies numerous transportation policies, recreation policies, and shoreline management policies contained within the county-wide comprehensive plan and Greater East Wenatchee Area Comprehensive Plan that support this project. See County's Resp. Br. at 17-29.

The subarea plan for the Greater East Wenatchee area specifically encouraged development of the project: "The current trail system should be increased to extend north to connect with Lincoln Rock State Park."

⁴ Significantly, *Lutz* involved approval of a planned unit development. The *Lutz* court considered such approval to be a rezone requiring legislative action under the statutes existing at that time. *Lutz*, 83 Wn.2d at 568-69. In 1995, however, at the same time the Legislature enacted LUPA, it included planned unit development applications within the definition of project permit application in RCW 36.70B.020. Accordingly, an application for a planned unit development now is reviewed under LUPA, like any other site-specific application. Site-specific actions are not reviewed under the GMA. *Woods*, 162 Wn.2d at 603.

CP Vol. 21, 0-3811.⁵ The Project location was identified in a map as early as the 1988 comprehensive plan. CP Vol. 40A, 0-7674 (VT at 25 ll. 17-21). The location of the proposed Project was marked with a dotted line. CP Vol. 20, 0-3735. It ran along the river (*see* insert on map, CP Vol. 20, 0-3735). There was no need to amend the comprehensive plan as suggested by Petitioners.

Nor did the County Commissioners' decision amend a development regulation. A development regulation as defined in the GMA does not include a decision to approve a project permit application, as defined in RCW 36.70B.020. RCW 36.70A.030(7). Only a project permit application is at issue here. As explained above at page 4, the County's zoning code specifically allows for a site-specific permit application for a recreational overlay, and State Parks' application here requested no more than what was expressly permitted under the zoning code. The Board of County Commissioners, exercising its authority as a quasi-judicial entity, approved the project and imposed conditions as authorized by the existing regulations.⁶ No amendments to zoning texts were requested or approved.

⁵ The Greater East Wenatchee Area Comprehensive Plan is incorporated by reference into the Comprehensive Plan.

⁶ This approval was a quasi-judicial action, applying the existing development regulations to the facts of the permit application. The fact that the action was taken by the Board of County Commissioners does not convert it to a legislative action. *See* RCW 36.70.970; RCW 36.70B.020; RCW 36.70C.040(4)(b). A project permit can be approved by ordinance without changing the character of the approval into a legislative action. RCW 36.70A.030(7).

The size of this Project does not change the analysis. Petitioners argue that the Project could not be characterized as a project permit because the Project will cover a strip 5.1 miles long. The Project affects only a narrow strip currently leased from two governmental entities, and it affects only 24 acres of that land which has been leased year to year to the orchardists with the understanding that a transportation-related project ultimately would be constructed. AR Vol. 35, CP 1-6701. Courts have found much larger projects to be site-specific land-use decisions, even when the application involves a request to rezone the property.

For example, in *Woods*, four applicants requested a formal change of the underlying zoning—not just an overlay—from Forest and Range (natural resource lands) to Rural 3 for an area constituting 252 acres. *Woods*, 162 Wn.2d at 603. The 252 acres had already been subdivided into parcels ranging in size from 8 to 84 acres. *Woods*, 162 Wn.2d at 624. In *Wenatchee Sportsmen*, 141 Wn.2d at 179, the applicant requested a formal change in the underlying zoning to Recreational Residential (RR-1) for an area of over 350 acres of land.

Contrary to Petitioners' suggestion, a project approval is not converted into an amendment to the comprehensive plan or development regulation just because it results in a change to the land-use map. The applications at issue in *Woods* and *Wenatchee Sportsmen* were large enough

to have required a mapping change, but in both cases the Court found they were applications for site-specific actions that are reviewed under LUPA. The administrative function of remapping the sites in *Woods* or *Wenatchee Sportsmen* did not affect the analysis of the Court. By contrast, the recreational overlay district does not require a map change to the underlying zone because it only designates where an additional use is allowed within the zone. DCC 18.12.060 (the overlay “implements the comprehensive plan policies . . . by allowing uses that differ from the specific provisions set forth within the applicable zoning district.”).

The discussion of the rezones of site specific parcels in *Woods* or *Wenatchee Sportsmen* stands in stark contrast to the different treatment of broad area planning under the GMA. The GMA requires each county planning under the Act to designate “the proposed general distribution and general location and extent of the uses of land, where appropriate, for agriculture, timber production, housing, commerce, industry, recreation, open spaces, general aviation airports, public utilities, public facilities, and other land uses.” RCW 36.70A.070(1). These are legislative decisions by the county. See RCW 36.70A.040, .130(1). In contrast, a permit decision is the quasi-judicial application of ordinances to specific parcels. *Phoenix Dev., Inc. v. City of Woodinville*, 154 Wn. App. 492, 503, 229 P.3d 800 (2009), review granted, 169 Wn.2d 1006, 236 P.3d 206 (2010); *J.L.*

Storedahl & Sons, Inc. v. Clark Cy., 143 Wn. App. 920, 931, 180 P.3d 848 (2008). This Court has affirmed the statutory directive that site-specific rezones are to be treated as permit decisions. *Woods*, 162 Wn.2d at 610, citing RCW 36.70B.020(4).

Nor does the fact that the Project will traverse a strip of land owned by separate public owners (WSDOT and the local PUD) change the legal result. Nothing in the definition of project permit in RCW 36.70B.020 or the local zoning code requires that an application for a recreational overlay district be limited to a single owner. This Court should not read into RCW 36.70B.020 or the local code what the Legislature and local government did not intend. *Woods*, 162 Wn.2d at 614 (court's role is to interpret the statute as enacted by the Legislature, not to rewrite it), citing *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit Cy.*, 135 Wn.2d 542, 567, 958 P.2d 962 (1998).

The Douglas County land-use regulations set forth the development standards and criteria that will control subsequent applications for land use in various zoning classifications. If this Court were to construe the County Commissioner's approval of this Project as requiring an amendment to comprehensive plan or development regulations, then the distinction between the general nature of zoning under the GMA and the more specific application of land use under LUPA disappears.

Adopting the Petitioners' construction of this Project as an amendment to the zoning code would frustrate the basic goals of predictability in land use and timeliness in approving permits. *See Thurston Cy. v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 345, 190 P.3d 38 (2008). *See also City of Federal Way v. King Cy.*, 62 Wn. App. 530, 538, 815 P.2d 790 (1991) (the consistent policy in this state is to review decisions affecting use of land expeditiously so that legal uncertainties can be promptly resolved and land development not necessarily slowed or defeated by litigation-based delays). It also would be inconsistent with the legislative directive not to reexamine alternatives or hear appeals on the comprehensive plan or development regulations during project review. RCW 36.70B.030(2), (3).⁷

If the application for a project involves a specific request by specific parties for a specific use of specific tracts, which use is generally consistent with a comprehensive plan and authorized by a specific zoning regulation adopted pursuant to the GMA, the application is a project permit application reviewed only under LUPA.

⁷ In adopting this requirement, the Legislature made an explicit parallel finding, as if to emphasize the requirement. *See* Laws of 1995, ch. 347, § 403(1).

C. There Is No Conflict Under Article XI, Section 11 Of The Washington Constitution.

Petitioners allege a violation of article XI, section 11 of the Washington Constitution as an alternative theory upon which to challenge Douglas County's zoning code. Article XI, section 11 forbids local legislation that conflicts with a general state statute. There is no conflict.

The GMA provides an express mechanism for determining whether a county's development regulations conflict with the GMA. A challenge must be filed with the growth management hearings board within 60 days of the date the enactment is published. RCW 36.70A.290(2); *Thurston Cy. v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d at 344-45; *Woods*, 162 Wn.2d at 616. The GMA grants the board no authority to extend that deadline. *See Skagit Surveyors*, 135 Wn.2d at 558 (board has only authority granted by the GMA). If a timely challenge is filed, the board is authorized to determine whether the development regulation complies with the GMA. RCW 36.70A.280(1), .300. However, a development regulation (and comprehensive plan) is explicitly presumed valid upon adoption and is presumed to be compliant with the GMA absent a finding by the board that the development regulation is clearly erroneous in view of the entire record before the board and in light of the GMA's goals and requirements.

RCW 36.70A.320(1), RCW 36.70A.320(3); *Thurston Cy.*, 164 Wn.2d at 345.

Petitioners' alleged conflict with the GMA fails because they did not timely challenge the zoning regulation of which they now complain. The 60-day period to challenge the Recreational Overlay regulation that authorized this permit passed several years ago. Because the GMA explicitly provides for the validity of an unchallenged regulation, the statute explicitly excuses any such putative noncompliance and there is no constitutional conflict.

D. Substantial Evidence Supports the County Commissioner's Decision.

Both the superior court and the Court of Appeals correctly analyzed this project under LUPA to determine if there was substantial evidence to support the decision. The substantial evidence standard is "highly deferential" to the agency fact finder. *ARCO Prods. Co. v. Wash. Utils. & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). The court will view the evidence in the light most favorable to the party who prevailed in the highest administrative forum to exercise fact-finding authority—in this case State Parks. *City of University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). There is ample discussion of

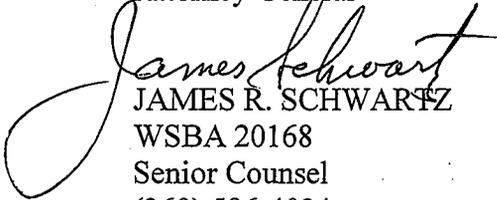
the evidence in the appellate briefs and the opinion by the Court of Appeals to support the Court of Appeals' determinations.

V. CONCLUSION

The Douglas County Board of Commissioners approved State Parks' permit application, finding it was consistent with and implemented the County's Comprehensive Plan and development regulations. The superior court properly analyzed the Board's approval under the standards set forth in the Land Use Petition Act and upheld the approval. The Court of Appeals properly rejected each of the challenges the Petitioners are now raising in this Court. This Court should affirm and dismiss Petitioners' appeal.

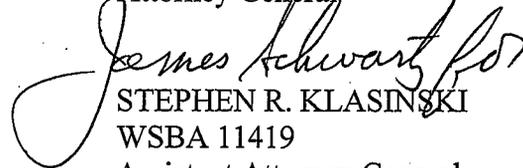
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DIVISION THREE

SLIP OPINION

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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

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

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

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

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

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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. . . .

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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

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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.*

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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

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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

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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.

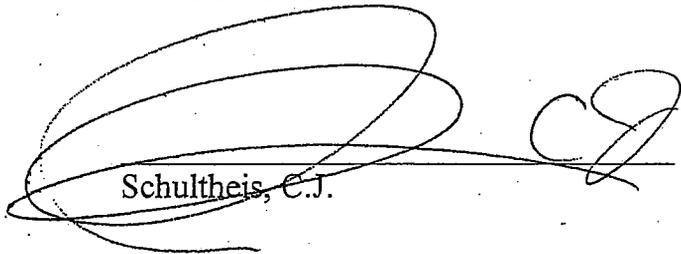
Article XI, section 11 of the state constitution allows local governments to adopt regulations that are not in conflict with general law. *State v. Kirwin*, 165 Wn.2d 818, 825, 203 P.3d 1044 (2009). A local regulation conflicts with general law if it permits what state law forbids or forbids what state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

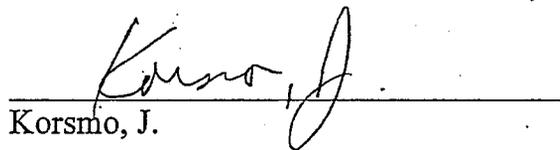
The Orchardists contend that the comprehensive plans and development regulations authorizing a recreational overlay in an agricultural resource area conflict with RCW 36.70A.177. This provision of the GMA states that a county or city *may* use innovative techniques to conserve agricultural lands and 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.

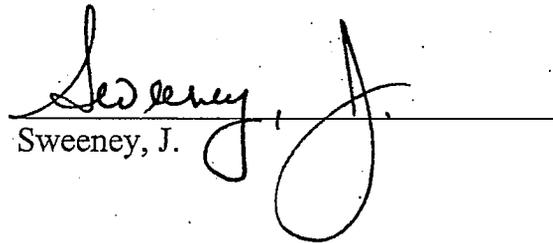
No. 28248-1-III
Feil v. E. Wash. Growth Mgmt. Hearings Bd.

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

WE CONCUR:


Schultheis, C.J.


Korsmo, J.


Sweeney, J.