Case No. 31941-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

SPOKANE COUNTY,

Respondent,

v.

FIVE MILE PRAIRIE NEIGHBORHOOD ASSOCIATION, and FUTUREWISE,

Appellants,

and

HARLEY C. DOUGLASS, INC.,

Respondent,

and

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD,

Respondent.

REPLY BRIEF OF APPELLANTS FIVE MILE PRAIRIE NEIGHBORHOOD ASSOCIATION & FUTUREWISE

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I. INTRODUCTION

This Reply Brief of Appellants Five Mile Prairie Neighborhood Association and Futurewise (Five Mile Prairie Reply) is being filed to address the arguments raised by the Respondent Spokane County's Response Brief (Spokane County Response Brief) and the Brief of Respondent Harley C. Douglass, Inc. (Douglass, Inc. Respondent's Brief). As this brief will show, the respondent's arguments fail. The Growth Management Hearings Board (Board) correctly determined that Spokane County Amendment No. 11-CPA-05 failed to comply with the Growth Management Act (GMA), *Spokane County Comprehensive Plan* policies that require adequate public facilities and services and include other standards for new development, and Spokane County's development regulations. Therefore, the Five Mile Prairie Neighborhood Association and Futurewise (Five Mile Prairie) Appellants respectfully request that this Court uphold the Board's Final Decision and Order.

II. ASSIGNMENTS OF ERROR

The Five Mile Prairie assignments of error were on pages 3 through 5 of the Brief of Appellants. Neither Spokane County nor Douglass, Inc. assigned error to any of the Board's factual

determinations.[1] Consequently, the Board's factual determinations are verities on appeal.[2]

III. STANDARD OF REVIEW

The Brief of Appellants Five Mile Prairie Neighborhood Association and Futurewise (Five Mile Prairie Brief of Appellants) identified the standard of review on appeal on pages 8 through 10. On pages 6 through 13, the Douglass, Inc. Respondent's Brief argues that the courts reviewing Board decisions are to "apply the 'clearly erroneous' test to local agency planning decisions, and the 'substantial evidence' test for judicial review of facts under the [Administrative Procedure Act] APA is incompatible with the test."[3]

This argument fails for four reasons. First, the courts review the Board's decision, not the local planning decision.[4]

Second, the decision that Douglass, Inc. primarily relies on, *City of Arlington v. Central Puget Sound Growth Management Hearings Board*, does not stand for the proposition that the courts use "substantial

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[1] Spokane County's Response Brief p. 4; Douglass, Inc. Respondent's Brief pp. 2 – 50.
[2] *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279, 1282 (1980); *Manke Lumber Co., Inc. v. Central Puget Sound Growth Management Hearings Bd.* 113 Wn. App. 615, 628, 53 P.3d 1011, 1018 (2002), review denied *Manke Lumber Co. v. Central Puget Sound Growth Management Hearings Board*, 148 Wn.2d 1017, 64 P.3d 649 (2003).
[3] Douglass, Inc. Respondent's Brief p. 13.
[4] *City of Arlington v. Central Puget Sound Growth Management Hearings Bd.*, 164 Wn.2d 768, 779, 193 P.3d 1077, 1082 (2008).

evidence" as their standard of review. Instead, the *City of Arlington* Court used the standard of review in the APA, chapter RCW 34.05, to determine whether the Board properly applied the Board's substantial evidence standard of review. The *Arlington* court did identify that the Board's substantial evidence standard of review writing that "[t]he Board 'shall find compliance' unless it determines that a county action 'is clearly erroneous in view of the entire record before the board and in light of the goals and requirements' of the GMA. RCW 36.70A.320(3)."[5] However, the courts do not use the substantial evidence standard when reviewing the Board's decisions. As the *City of Arlington* court wrote right after setting out the Board's standard of review:

> On appeal, we review the Board's decision, not the superior court decision affirming it. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000) (hereinafter referred to as Soccer Fields). "'We apply the standards of RCW 34.05 directly to the record before the agency, sitting in the same position as the superior court.'" *Id.* (quoting *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*,136 Wn.2d 38, 45, 959 P.2d 1091 (1998) ...).[6]

The *City of Arlington* court then wrote that while the board owed deference to local government planning decisions, the courts owe substantial weight to the Board's interpretations of the GMA.[7] The

[5] *Id.* at 164 Wn.2d at 778, 193 P.3d at 1082.
[6] *Id.* at 164 Wn.2d at 779, 193 P.3d at 1082.
[7] *Id.* at 164 Wn.2d at 779, 193 P.3d at 1082.

Washington State Supreme Court went on to detail the APA standards the courts apply to the Board's order including whether the Board's order is "supported by evidence that is substantial when viewed in light of the whole record before the court (RCW 34.05.570(3)(e)) …."[8] The Washington State Supreme Court cited to the *City of Redmond* decision when it defined "substantial evidence."[9]

The *City of Arlington* court did "find the Board erred in concluding the County committed clear error in determining the land in question has no long-term commercial significance for agricultural production. There is evidence in the record supporting the County's determination on this point, and the Board wrongly dismissed this evidence."[10] The Board wrongly dismissed this evidence because it misapplied the *City of Redmond*[11] decision when the Board concluded that a planning report submitted by the applicant supporting the agricultural land dedesignation contained "reflections, if not direct expressions, of 'landowner intent' and assigned it

[8] *Id.* at 164 Wn.2d at 779 – 80, 193 P.3d at 1082 – 83. The court included this statement of RCW 34.05.570(3)(e) under the allegations by the city, county, and landowner but set it out under the heading "standard of review" subheading under the "Analysis" heading.
[9] *Id.* at 164 Wn.2d at 780 fn. 8, 193 P.3d at 1083 fn. 8 citing "*City of Redmond,* 136 Wn.2d at 46, 959 P.2d 1091 (*quoting Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510 (1997))."
[10] *City of Arlington*, 164 Wn.2d at 782, 193 P.3d at 1084.
[11] *City of Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 136 Wn.2d 38, 53, 959 P.2d 1091, 1097 – 98 (1998).

'the appropriate weight.'"[12] That dismissal was an erroneous application of the *City of Redmond* decision because

> All *City of Redmond* holds is that a landowner cannot control whether land is primarily devoted to agriculture by taking his or her land out of agricultural production. It does not say the Board may dismiss evidence supporting the County's decision if it was obtained at the request of an interested party. The Board erroneously used *City of Redmond* as a tool with which to dismiss of an important piece of evidence that supported the County's position with regards to whether Island Crossing was agricultural land of long-term commercial significance. To the extent this evidence supports the County's conclusion that the land was not of long-term commercial significance to agricultural production, and we find that it does, the Board would be required under the GMA to defer to the County and affirm its decision redesignating the land urban commercial.[13]

While the *City of Arlington* majority did not apply labels to the Board's errors, because it involved a misinterpretation of the *City of Redmond* decision the Board made an error of law. Further, when this error of law was corrected the decision can be fairly read as then concluding the Board's order was "not supported by evidence that is substantial when viewed in light of the whole record before the court" as the APA in RCW 34.05.570(3)(e) requires.[14] This was not an example of the court applying the substantial evidence test to the county's decision.

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[12] *City of Arlington*, 164 Wn.2d at 788, 193 P.3d at 1087 (internal quotes omitted).
[13] *Id.* at 164 Wn.2d at 788, 193 P.3d at 1087.
[14] Quoting the statement of the standard of review from *City of Arlington*, 164 Wn.2d at 779, 193 P.3d at 1083.

This was underlined by Justice Chambers' concurring opinion which stated that [t]he majority has passed by the fact that we review the hearing board's decision for substantial evidence. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000). Nothing in our opinion today should be read to change that."[15] So the *City of Arlington* decision does not support Douglas, Inc.'s argument.

Third, the interpretation *City of Arlington* in this Reply is consistent with the GMA which provides in part in RCW 36.70A.320(3) that "[t]he board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of this chapter." This standard of review is directed at the Board, not the courts.

The Douglas, Inc. Respondent's Brief on page 8 refers to RCW 36.70A.270(7) as providing that if there is a conflict with the APA the GMA controls. But there is no conflict with the APA, the Board has its standard of review and the courts have theirs which the courts can use to determine if the Board properly applied its standard of review. Further, RCW 36.70A.270(7) does not apply to the courts or to judicial review, it

[15] *Id.* at 164 Wn.2d at 796, 193 P.3d at 1092.

applies to the Board providing in part that: "Except as it conflicts with specific provisions of this chapter, the administrative procedure act, chapter 34.05 RCW, and specifically including the provisions of RCW 34.05.455 governing ex parte communications, shall govern the practice and procedure of the board." The APA does apply to judicial appeals of Board decisions,[16] although RCW 36.70A.270(7) does not unless it is alleged that the Board failed to follow proper procedures.

The fourth reason the argument fails is that despite the Douglas, Inc. Respondent's Brief's argument on pages 11 through 13 that the many GMA decision references to "substantial evidence" are *dicta*, the substantial evidence quotes are not *dicta*. Many of the GMA decisions do cite the clearly erroneous standard, as the *City of Arlington* decision did, but they cite it as the Board's standard of review.[17] The courts also cite the judicial standard of review from the APA, again as the *City of Arlington* decision did.[18] And these citations are not *dicta.* For example, in the *Kittitas County* decision, the Washington State Supreme Court concluded four times that substantial evidence supported the Board's order.[19]

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[16] *Kittitas County v. Kittitas County Conservation Coalition*, 176 Wn. App. 38, 46 – 47, 308 P.3d 745, 748 (2013).
[17] *City of Arlington*, 164 Wn.2d at 778, 193 P.3d at 1082.
[18] *Id.* 164 Wn.2d at 779 – 80, 193 P.3d at 1082 – 83.
[19] *Kittitas County v. Eastern Washington Growth Management Hearings Bd.*, 172 Wn.2d 144, 159, 161, 170, 172, 256 P.3d 1193, 1200, 1201, 1205, 1206 (2011). The supreme court also found that for several of these issues the Board properly interpreted the GMA. See for example *id.* at 172 Wn.2d at 159, 256 P.3d at 1200.

IV. ARGUMENT

A. The Board had subject matter jurisdiction over both the comprehensive plan amendment and rezone approved by Amendment No. 11-CPA-05. (Five Mile Prairie Assignment of Error 1 and Issue 1)

The Brief of Appellants Five Mile Prairie Neighborhood Association and Futurewise showed on pages 11 through 15 that the Board had subject matter jurisdiction over the comprehensive plan amendment and rezone at issue in this case. On pages 14 through 18, the Douglass, Inc. Respondent's Brief argues that this Court's 2013 *Spokane County* and *Kittitas County* decisions finding that the Board has jurisdiction over concurrent comprehensive plan amendments and rezones were wrongly decided.[20]

In Washington State "the doctrine of *stare decisis* 'requires a clear showing that an established rule is incorrect and harmful before it is abandoned.'"[21] The Douglass, Inc. Respondent's Brief makes neither showing.

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[20] *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 176 Wn. App. 555, 570 – 72, 309 P.3d 673, 680 – 81 (2013) *review denied Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 179 Wn.2d 1015, 318 P.3d 279 (2014); *Kittitas County v. Kittitas County Conservation Coalition*, 176 Wn. App. 38, 52, 308 P.3d 745, 751 (2013).

[21] *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930, 935 (2004) citation omitted.

The Douglass, Inc. Respondent's Brief argues these decisions are based on "the erroneous assumption that only a rezone authorized by an "**existing"** comprehensive plan" is a project permit because "existing" is not included in the definition of project permit in RCW 36.70B.020(4).[22] However, RCW 36.70B.020(4) includes in the definition of project permit "site specific rezones authorized by a comprehensive plan or subarea plan, …" Authorized is the past tense of authorize.[23] A site specific-rezone is not authorized by a comprehensive plan if that comprehensive plan provision is not adopted and in effect when the rezone is approved. So the Court's use of "existing" in *Spokane County I* is grounded in the plain language of RCW 36.70B.020(4).[24] Douglass, Inc.'s argument that rezones must always be appealed to superior court under the Land Use Petition Act (LUPA) even if they are not authorized by a comprehensive plan writes that language out of RCW 36.70B.020(4) and violates the requirement that a "court must not 'simply ignore' express terms when interpreting a statute …"[25] Further, the *Spokane County I* holding that rezones are only project permits when authorized by an existing comprehensive plan was not *dicta*,

[22] Douglass, Inc. Respondent's Brief p. 16.
[23] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY p. 146 (2002).
[24] *Spokane County v. Eastern Washington Growth Management Hearings Bd. (Spokane I)*, 160 Wn. App. 274, 281, 250 P.3d 1050, 1053 (2011) *review denied Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 171 Wn.2d 1034, 257 P.3d 662 (2011).
[25] *Spokane County*, 176 Wn. App. at 570 – 71, 309 P.3d at 680.

as Douglas erroneously characterizes the language. The language was part of the Court's analysis addressing the argument of one of the parties that the rezone in that case "was a site-specific rezone over which the Hearings Board had no jurisdiction."[26]

The Douglass, Inc. Respondent's Brief, on page 17, argues that the rule that a rezone must be authorized by an existing comprehensive plan creates jurisdictional problems and unresolved ambiguities. However, this is not the case. After all, RCW 36.70A.320(1) provides that comprehensive plan amendments are "presumed valid upon adoption," not before adoption. A comprehensive plan amendment becomes part of an existing comprehensive plan when it is adopted and goes into effect. This is a clear demarcation. The legislature, by granting the Board jurisdiction over both the comprehensive plan amendments needed to authorize rezones and the rezones, reduces the likelihood of inconsistent outcomes on appeal. It also conserves judicial and administrative resources because only one appeal is required, not two. In summary, Douglass, Inc. has not

[26] *Spokane I*, 160 Wn. App. at 280, 250 P.3d at 1053 citations omitted. Strangely, the Douglass Inc. Respondent's Brief on pages 15 and 16 cites the *Coffey* decision for the proposition that concurrent comprehensive plan amendments and rezones must be appealed separately even through *Coffey* only addressed a comprehensive plan amendment and its statements related to rezones are *dicta*. *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 176 Wn. App. 555, 572, 309 P.3d 673, 681 (2013).

shown that the *Spokane County* and *Kittitas County* decisions were wrongly decided and harmful. This Court should not overrule them.

B. The Board properly dismissed Harley C. Douglass, Inc. from the case. (Five Mile Prairie Assignment of Error 2 and Issue 2)

The Five Mile Prairie Brief of Appellants argued on pages 16 to 21 that this Court should affirm the Board's dismissal of Harley C. Douglass, Inc. for three reasons. First, the Board complied with WAC 242-03-710(1). Second, Douglass, Inc. did not exhaust the administrative remedies available to it before the Board and so Douglass, Inc. never should have filed its petition for review challenging the Board's order. Third, no party raised the issue of Douglass, Inc.'s dismissal before the Board and it cannot be raised for the first time on appeal.

Douglass, Inc. first argues that Five Mile Prairie did not defend the Board's decision dismissing Douglass, Inc. in superior court or in its opening brief. That is not correct. Five Mile Prairie argued that the Board correctly dismissed Douglass, Inc. in its superior court brief and at oral argument.[27] The Five Mile Prairie Brief of Appellants argued that the Board correctly dismissed Douglass, Inc. on pages 16 and 17.

The Douglass, Inc. Respondent's Brief on pages 45 and 46 argues that Douglass, Inc. did not violate any rules or orders of the Board. But

[27] See CP 361 – 63, The Five Mile Prairie Neighborhood Association's and Futurewise's Response Brief Spokane Sup. Ct. Case No. 12-2-03759-5 pp. 59 – 61.

Douglass, Inc. failed to attend the hearing on the merits and failed to file a brief.[28] That is sufficient cause for dismissal under WAC 242-03-710.

The Douglass, Inc. Respondent's Brief on page 46 argues that there was "no good reason" for the Board to dismiss Douglass, Inc. and that no party was prejudiced or asked the Board to dismiss Douglass, Inc. But the Board had a good reason, Douglass, Inc. chose not to file a brief in the case before the Board, failed to attend the Board's oral argument, and failed to contact the Board or any party to indicate that Douglass, Inc. was not planning to file a brief or attend the hearing on the merits but still wanted to remain a party.[29] WAC 242-03-710 does not require prejudice to a party or that a party must move to dismiss, the Board can dismiss on its own motion.

The Douglass, Inc. Respondent's Brief on page 47 argues no written order of dismissal was issued as required by WAC 242-03-710. However, as the Five Mile Prairie Brief of Appellants documented on pages 16 and 17, the Final Decision and Order complied with all of the requirements of WAC 242-03-710(1). Douglass argues that the language

[28] Certified Administrative Record Page Number (CR) 001018, *Five Mile Prairie Neighborhood Association & Futurewise v. Spokane County*, GMHB Case No. 12-1-0002, Final Decision and Order (Aug. 23, 2012), at 9 of 26 (hereinafter FDO); Hearings Board Hearing on the Merits Transcript pp. 4 – 5, pp. 75 – 76.
[29] CR 001018, FDO p. 9 of 26; Hearings Board Hearing on the Merits Transcript pp. 4 – 5, pp. 75 – 76.

of the Final Decision and Order, that the Board "entered an Order of Dismissal" is inconsistent with it being an order of dismissal. But WAC 242-03-710(1) specifically provides that "[a]ny order" can grant a motion to dismiss. In this case the Board passed a motion dismissing Douglass, Inc. at the hearing on the merits and then reduced the decision made in the motion to writing in the Final Decision and Order.[30] This complies with WAC 242-03-710.

The Douglass, Inc. Respondent's Brief on page 48 argues that since the Final Decision and Order does not indicate Douglas, Inc. can file an objection to dismissal under WAC 242-03-710(2) that it was not a written order of dismissal. But no law or rule requires to the Board to include a notice that a party can file an objection to the dismissal in an order dismissing a party and the Douglas Brief does not cite to any authority that states such a notice must be included.[31]

The Douglass, Inc. Respondent's Brief on pages 48 through 50 argues that Douglass, Inc. did not have to file the objection to the order of dismissal authorized by WAC 242-03-710(3) because this objection is "akin to a motion for reconsideration."[32] This argument fails because the APA specifically provides, in RCW 34.05.470(5), that "filing of a petition

[30] *Id.*
[31] RCW 36.70A.300; WAC 242-03-700 – 720.
[32] Douglas Brief of Respondent p. 49.

for reconsideration is not a prerequisite for seeking judicial review." There is no such exception in the APA or another statute for an objection to an order of dismissal authorized by WAC 242-03-710(3). Instead, as the Five Mile Prairie Brief of Appellants documented, on pages 17 through 19, the APA, in RCW 34.05.534, requires that "[a] person may file a petition for judicial review under this chapter only after exhausting all administrative remedies available within the agency whose action is being challenged …." One of the exceptions to this requirement is when the APA "or another statute states that exhaustion is not required;"[33] such as the APA does for motions for reconsideration. But as the Five Mile Prairie Brief of Appellant's documented, on pages 17 through 19, none of the exceptions in RCW 34.05.534 apply to Douglass, Inc.'s failure to file the objection allowed by WAC 242-03-710(3).

Mellish v. Frog Mountain Pet Care is not inapposite. In that decision one of the provisions at issue was RCW 36.70C.060(2)(d) which provides that for a person, other than the owner of the land affected by a land use decision, one of the requirements to have standing to file a Land Use Petition Act (LUPA) judicial appeal is that "[t]he petitioner has exhausted his or her administrative remedies to the extent required by

[33] RCW 34.05.534(2).

law." The Supreme Court wrote that "[i]n Mellish's case, a motion for reconsideration was optional, i.e., not 'required by law' for purposes of RCW 36.70C.060[2](d). See JCC 18.40.310 ("party ... may seek reconsideration")."[34]

But as we have seen, the operative language in the APA is different. A judicial appeal can be filed "only after exhausting all administrative remedies available within the agency …."[35] The APA exception only applies "to the extent that this chapter [the APA] or another statute states that exhaustion is not required[.]"[36] While the Board's rule at issue does use "may"[37] like *Mellish*,[38] the Board's rule is not in the APA and it is not another statute. So under RCW 34.05.534, the Board's rule cannot provide an exception to the APA's exhaustion of administrative remedies requirement. Therefore under the APA, which applies here, Douglass, Inc. had to exhaust its administrative remedies before it could appeal.

The Douglass, Inc. Respondent's Brief on page 50 argues that filing the objection would have been a futile useless act. In the next

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[34] *Mellish v. Frog Mountain Pet Care*, 172 Wn.2d 208, 218, 257 P.3d 641, 646 (2011). Black's Law Dictionary defines "law" as "a body of rules of action or conduct prescribed by controlling authority, and having binding legal force." BLACK'S LAW DICTIONARY p. 795 (1979). So the county code is a law.
[35] RCW 34.05.534.
[36] RCW 34.05.534(2).
[37] WAC 242-03-710(3).
[38] *Mellish v. Frog Mountain Pet Care*, 172 Wn.2d 208, 218, 257 P.3d 641, 646 (2011).

sentence Douglass, Inc. concedes that the dismissal, at best, would have been reversed. So the objection would not have been futile because Douglass, Inc. could have legally appealed the Board's order after the Board again made them a party by reversing the dismissal.

The Douglass, Inc. Brief on page 50 argues that since Five Mile Prairie did not request that Douglas, Inc. be dismissed, under RCW 34.05.554 and RAP 2.5(a), Five Mile Prairie cannot argue the Board's decision was correct. But it is Douglass, Inc. that is raising the issue that it should not have been dismissed, not Five Mile Prairie. It is Douglass, Inc. whose issue is barred by those provisions.

C. The Medium Density Residential comprehensive plan amendment and rezone in Amendment No. 11-CPA-05 violated the GMA and was inconsistent with the *Spokane County Comprehensive Plan*. (Five Mile Prairie Assignment of Error 3 and Issue 3)

1. Amendment No. 11-CPA-05 is inconsistent with the *Spokane County Comprehensive Plan* Policy UL.2.16.

The Five Mile Prairie Brief of Appellants, on pages 23 through 26, showed that property at issue in this case does meet the location criteria in *Spokane County Comprehensive Plan* Policy UL.2.16 because the site is 0.9 miles from the nearest commercial comprehensive plan designation,[39]

[39] Scaled from CR 000245, *Spokane County Comprehensive Plan Chapter 2 Urban Land Use* Spokane County Comprehensive Plan Map (2008 Printing) and provided to the Board. CR 1022, FDO at p. 13 of 26.

the site is not near a public open space,[40] and the site does not have good access to major arterials.[41]

Spokane County's Response Brief, on page 15, asks this Court to take judicial notice of a map on the County's website purporting to show that Waikiki Road is an "Urban Principal Arterial." All of the County's evidence in the record before the Board, including the Staff Report, the Board of County Commissioner's findings, and the County's briefing before the Board stated that Waikiki Road is designated as an Urban Minor Arterial and Five Mile Road is not designated as an arterial.[42] The County's request is contrary to the APA which provides that the review of the Board's decision is on the record before the Board.[43] RCW 34.05.562 allows a court to receive new evidence only if it relates to the validity of the agency action at the time it was taken and meets one of three exceptions.[44] However, Spokane County does not argue that the map meets

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[40] CR 000278, *Spokane County Comprehensive Plan Chapter 9 Parks and Open Space* "Open Space Corridors" map (2008 Printing).
[41] CR 000222, Spokane County *Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05* p. 5 of 9; CR 000013, Spokane County Resolution 11-1191 p. 7 Finding 23; CR 000218, *Spokane County Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05* p. 1 of 9; CR 000321, Spokane County Prehearing Brief in Response to Petitioner's Prehearing Brief p. 24 of 34.
[42] *Id*.
[43] *Kittitas County v. Eastern Washington Growth Management Hearings Bd.*, 172 Wn.2d 144, 155, 256 P.3d 1193, 1198 (2011); RCW 34.05.558.
[44] *Herman v. State of Washington Shorelines Hearings Bd.*, 149 Wn. App. 444, 455 – 56, 204 P.3d 928, 933 (2009).

the requirements of RCW 34.05.562 and none of the exceptions apply to this case.

Douglass, Inc. argues that since "major arterials" is not defined in the comprehensive plan, the word is a "merely descriptive term."[45] However, *Spokane County Comprehensive Plan* Policy UL.2.16 encourages locating medium and high density residential comprehensive plan designations "on sites with good access to major arterials."[46] The Board of County Commissioners specifically found that Waikiki Road "is designated as an Urban Minor Arterial."[47] An arterial cannot be both a major and a minor arterial at the same time.

2. Amendment No. 11-CPA-05 is inconsistent with the *Spokane County Comprehensive Plan* policies on the design and capacity of public facilities and services.

(a) Amendment No. 11-CPA-05 is inconsistent with the *Spokane County Comprehensive Plan* Policy UL.2.20.

The Five Mile Prairie Brief of Appellants, on pages 27 through 30, showed that Amendment 11-CPA-05 was inconsistent with *Spokane County Comprehensive Plan* Policy UL.2.20 because the area proposed

[45] Douglass Inc. Respondent's Brief pp. 21 – 22.
[46] CR 000247, *Spokane County Comprehensive Plan Chapter 2 Urban Land Use* p. UL-6 (2008 Printing).
[47] CR 000013, Spokane County Resolution 11-1191 p. 7 Finding 23.

for development was not arranged in a pattern of connecting streets and blocks.[48]

Spokane County argues that property is topographically isolated from the developments across Five Mile Road and to the Southwest. This argument has two problems. First, topographical isolation is not one of the reasons allowing for a disconnected set of streets in Policy UL.2.20, the topography must make the "connecting systems impractical."[49] Second, the site is not typographically isolated, existing single-family homes are at same contours as the 22.3 acres redesignated and rezoned "Medium Density Residential."[50]

The Douglass, Inc. Respondent's Brief, on page 27, criticizes the Board for concluding that not be easy to get around by foot, bicycle, bus, or car, but that is exactly the standard that Policy UL.2.20 includes.[51] Substantial evidence supports that conclusion as the Five Mile Prairie Brief of Appellants documented on pages 27 through 29.

The Spokane County Response Brief, on pages 26 through 30, argues that the record demonstrates the developer will be required to

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[48] CR 000248, *Spokane County Comprehensive Plan Chapter 2 Urban Land Use* p. UL-7 (2008 Printing).
[49] *Id.*
[50] CR 000190, "Figure 1 Site Location Map Redstone Subdivision" (Jan. 31, 2006); CR 000046, Spokane County Resolution 11-1191 "Proposed Comprehensive Plan Amendment and Zoning Map Change: 11-CPA-05."
[51] CR 000248, *Spokane County Comprehensive Plan Chapter 2 Urban Land Use* p. UL-7 (2008 Printing).

mitigate traffic impacts and make required improvements to public streets. But a review the provisions quoted by the Spokane County Response Brief shows that none of those provisions require the development to be arranged in a pattern of connecting streets and blocks as Policy UL.2.20 requires.[52] In addition, it is unclear if improvements will be made to Five Mile Road. Neither the County nor the developer had any plans for transportation improvements to Five Mile Road at least when the Spokane County Planning Commission made its recommendation on the comprehensive plan amendment and rezone.[53] The Spokane County Response Brief seems to concede as much stating that "the developer will be required to improve Waikiki Road and/or Five Mile Road …."[54]

(b) Amendment No. 11-CPA-05 is inconsistent with the *Spokane County Comprehensive Plan* Policy CF.3.1.

The Five Mile Prairie Brief of Appellants, on pages 30 through 38, showed that Amendment 11-CPA-05 violated *Spokane County Comprehensive Plan* Policy CF.3.1 because the County did not determine "that public facilities and services will have the capacity to serve the

[52] CR 000248, *Spokane County Comprehensive Plan Chapter 2 Urban Land Use* p. UL-7 (2008 Printing).
[53] CR 000770, Spokane County Prehearing Brief in Response to Petitioner's Prehearing Brief (June 19, 2012) Attachment S – Planning Commission Findings of Fact and Recommendation (Oct. 7, 2011) Attachment A p. 9.
[54] Spokane County Response Brief p. 30 emphasis added.

development without decreasing levels of service below adopted standards."[55] The Brief of Appellants showed this was the case for all public facilities and services not reviewed for project level concurrency under the County's concurrency regulations including "[f]ire protection, police protection, parks and recreation, libraries, solid waste disposal and schools…"[56]

The Douglass, Inc. Respondent's Brief, on pages 31 through 33, argues that the Five Mile Prairie argument on this policy is fully disposed by this Court's *Spokane County v. Eastern Washington Growth Management Hearings Board* decision.[57] It is not.

First, the Court did not conclude that the comprehensive plan amendment and concurrent rezone in that *Spokane County* decision was not "development" as the *Spokane County Comprehensive Plan* uses that term in Policy CF.3.1 and related provisions.[58] While there were

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[55] CR 000276, *Spokane County Comprehensive Plan Chapter 7 Capital Facilities and Utilities* p. CF-7 (2008 Printing); CR 000224, *Spokane County Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05* p. 7 of 9; CR 000013, Spokane County Resolution 11-1191 p. 7.

[56] CR 000923, Spokane County Code (SCC) 13.650.102(c); CR 000196, Michael C. Dempsey, Spokane County Hearing Examiner, *RE: Application for the Preliminary Plat of Redstone, in the Low Density Residential (LDR) Zone; Applicant: Whipple Consulting Engineers File No. PN-1974-06* Findings of Fact, Conclusions of Law and Decision p. 22 (March 30, 2007).

[57] *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 173 Wn. App. 310, 340 – 42, 293 P.3d 1248, 1263 – 64 (2013).

[58] *Spokane County v. Eastern Washington Growth Management Hearings Bd.*, 173 Wn. App. 310, 334 – 40, 293 P.3d 1248, 1260 – 63 (2013).

references to "development" and "development proposals," the court recognized that "project review" was governed by chapter 36.70B RCW was the actual name for the permitting process.[59] And the court did not decide that the amendments were not development.[60]

Second, the Court concluded that the transportation facilities at issue in the *Spokane County v. Eastern Washington Growth Management Hearings Board* decision would be addressed by the transportation concurrency requirements the County would apply in the project review permitting process.[61] But as the Five Mile Prairie Brief of Appellants documented on pages 33 through 35, the County's concurrency regulations do not require project level review for "[f]ire protection, police protection, parks and recreation, libraries, solid waste disposal and schools ...."[62]

In footnote 20 on page 33, the Douglass, Inc. Respondent's Brief argues that we are ignoring the Washington State Environmental Policy Act (SEPA) which would consider population impacts. But the Spokane County Hearing Examiner reads the County's concurrency regulations as a

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[59] *Id.* at 173 Wn. App. at 339, 293 P.3d at 1262.
[60] *Id.* at 173 Wn. App. at 334 – 40, 293 P.3d at 1260 – 63.
[61] *Id.* 173 Wn. App. 310, 338 – 39, 293 P.3d at 1262.
[62] CR 000196, Michael C. Dempsey, Spokane County Hearing Examiner, *RE: Application for the Preliminary Plat of Redstone, in the Low Density Residential (LDR) Zone; Applicant: Whipple Consulting Engineers File No. PN-1974-06* Findings of Fact, Conclusions of Law and Decision p. 22 (March 30, 2007); CR 000923, SCC 13.650.102(c).

bar to conditioning or denying project permits that are subject to indirect concurrency such as schools.[63] Further, the GMA requires comprehensive plan amendments to be internally consistent with the other provisions of the comprehensive plan and rezones are also to be consistent with the comprehensive plan.[64] SEPA requires disclosure of impacts, but does not require project denial or mitigation.[65] In contrast, Policy CF.3.1 requires a particular substantive result. Policy CF.3.1 requires that "[d]evelopment shall be approved only after it is determined that public facilities and services will have the capacity to serve the development without decreasing levels of service below adopted standards."[66] That is significantly different than the requirements of SEPA especially as Policy CF.3.1 uses the mandatory language "shall."[67]

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[63] CR 000196, Michael C. Dempsey, Spokane County Hearing Examiner, *RE: Application for the Preliminary Plat of Redstone, in the Low Density Residential (LDR) Zone; Applicant: Whipple Consulting Engineers File No. PN-1974-06* Findings of Fact, Conclusions of Law and Decision p. 22 (March 30, 2007) in Appendix B of this Brief of Appellants.

[64] RCW 36.70A.070; *Spokane County I*, 160 Wn. App. at 281, 250 P.3d at 1053; RCW 36.70A.130(1)(d).

[65] *Glasser v. City of Seattle*, 139 Wn. App. 728, 742, 162 P.3d 1134, 1140 (2007) *review denied Glasser v. City of Seattle*, 163 Wn.2d 1033, 187 P.3d 268 (2008) "SEPA is primarily a procedural statute that requires the disclosure of environmental information. SEPA does not demand a particular substantive result in government decision making; rather, it ensures that environmental values are given appropriate consideration." Footnotes and internal quotations omitted.

[66] CR 000276, *Spokane County Comprehensive Plan Chapter 7 Capital Facilities and Utilities* p. CF-7 (2008 Printing).

[67] *Save Our State Park v. Board of Clallam County Com'rs*, 74 Wn. App. 637, 641 fn. 3, 875 P.2d 673, 676 fn. 3 (1994) "The use of the word 'shall' generally imposes a mandatory duty."

Spokane County and Douglass, Inc. argues that the concurrency regulations address the impacts we are concerned about, but as we have seen they do not. They also argue that we are collaterally attacking the concurrency regulations or the County's failure to update its capital facility plan. We are not, we are only showing that those provisions will not bring Amendment No. 11-CPA-05 into compliance with Policy CF.3.1.

3. Amendment No. 11-CPA-05 does not comply with Spokane County Code 14.402.040, Criteria for Amendments.

The Five Mile Prairie Brief of Appellants, on pages 39 through 41, showed that Amendment 11-CPA-05 does not comply with Spokane County Zoning Code (SCZC) 14.402.040 because the amendment does not implement the goals and requirements of the comprehensive plan and, because duplexes are an allowed use in the "Low Density Residential" zone that formerly applied to this property. Therefore the construction of duplexes is not a change in circumstances that can justify the rezone. Spokane County argues that because the comprehensive plan map was amended, then the zoning map needed to be amended. But SCZC 14.402.040 requires compliance with the whole comprehensive plan, not just the comprehensive plan map. The County also argues that the change

in economic circumstances justifies the rezone, but that was not one of the Board of County Commissioners' Findings.[68]

D. The Board correctly found Amendment No. 11-CPA-05 invalid. (Five Mile Prairie Assignment of Error 4 and Issue 4)

The Five Mile Prairie Brief of Appellants, on pages 39 through 41, showed that the Board's determination of invalidity for Amendment 11-CPA-05 complied with the GMA. Douglass, Inc. argues that it is "absurd" that such a small piece of property would substantially interfere with the GMA. But the redesignation and rezone will increase the allowed development from 50 dwelling units to 200 dwelling units, a quadrupling of the allowed housing units.[69] And as was documented above, this will be done without a determination that there are adequate public facilities.

Respectfully submitted this 3rd day of June 2014.

Tim Trohimovich, WSBA No. 22367
Attorney for Five Mile Prairie
Neighborhood Association and Futurewise

[68] CR 000013, Spokane County Resolution 11-1191 p. 7 Finding 20.
[69] CR 000220, *Spokane County Staff Report Comprehensive Plan Annual Amendment Review File No.: 11-CPA-05* p. 3 of 9; CR 000239, Ex G Whipple Consulting Engineers, Inc. letter to the Spokane County Planning Commission p. 1 (Sept. 14, 2011).

CERTIFICATE OF SERVICE

I, Tim Trohimovich, declare under penalty of perjury and the laws of the State of Washington that, on June 3, 2014, I caused the electronic original and true and correct copies of the following document to be served on the persons listed below in the manner shown: Reply Brief of Appellants Five Mile Prairie Neighborhood Association and Futurewise in Case No. 31941-5-III.

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Certified and dated this 3th day of June 2014.

Tim Trohimovich, WSBA No. 22367