

No. 84369-4

SUPREME COURT OF THE STATE OF WASHINGTON

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

Appellants,

v.

(No. 82399-5)

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,

and

(No. 82400-2)

DOUGLAS COUNTY, DOUGLAS COUNTY BOARD OF COUNTY
COMMISISONERS, WASHINGTON STATE DEPARTMENT OF
TRANSPORTATION, WASHINGTON STATE PARKS AND
RECREATION COMMISSION, and PUBLIC UTILITY DISTRICT
NO. 1 OF CHELAN COUNTY,

Respondents.

ANSWER TO PETITION FOR REVIEW BY DOUGLAS COUNTY

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STATE OF WASHINGTON
SUPERIOR COURT
DOUGLAS COUNTY

TABLE OF CONTENTS

I. COUNTER-STATEMENT OF THE CASE 1

II. ARGUMENT 6

 A. *Considerations for Accepting Review* 6

 B. *There is No Conflict Between Decisions* 6

 C. *There is No Significant Question of Law Under the Washington Constitution* 10

 D. *There Are No Issues of Substantial Public Interest that Should be Decided by the Supreme Court* 12

 E. *The County is Entitled to an Award of Additional Attorney's Fees and Expenses* 15

III. CONCLUSION 15

TABLE OF AUTHORITIES

Table of Cases

Feil v. Eastern Washington Growth Management Hearings Board,
153 Wn.App. 394, 220 P.3d 1228 (2009) 5, 11

King County v. Central Puget Sound Growth Management Hearings Board,
142 Wn.2d 543, 14 P.3d 133 (2000) 7, 8, 9

Thurston County v. Western Washington Growth Management Hearings Board,
164 Wn.2d 329, 190 P.3d 38 (2008) 12

Wenatchee Sportsmen Association v. Chelan County,
141 Wn.2d 169, 4 P.3d 123 (2000) 3, 7, 8, 9

Woods v. Kittitas County,
162 Wn.2d 597, 174 P.3d 25 (2007)6, 7, 8, 9, 12, 13

Statutes

RCW 4.84.370 13, 15
RCW Chapter 34.05
 Administrative Procedures Act (APA) 3
RCW Chapter 36.70A
 Growth Management Act (GMA) Passim
RCW 36.70A.030(4) 3
RCW 36.70A.030(7) 3
RCW 36.70A.177(1) 9, 10, 11
RCW Chapter 36.70B
 Land Use Petition Act (LUPA) Passim
RCW 36.70B.020(4) 2
RCW Chapter 43.21
 State Environmental Policy Act (SEPA) Passim

Washington Constitution

Const. art. XI, §11 6, 10

Court Rules

RAP 13.4(b) 6, 12, 15
RAP 18.1(j) 15

Washington Administrative Code

WAC 197-11-600(3)(b) 14

Respondent Douglas County hereby answers the Petition for Review filed and served by the Appellants.

I. COUNTER-STATEMENT OF CASE

This case involves a challenge to development permits issued by Douglas County to the Washington State Parks and Recreation Commission (State Parks) for construction of the Rocky Reach Trail. State Parks' application for a Recreational Overlay and Site Development Permit were approved by Resolution No. TLS-08-09B adopted by the Douglas County Board of County Commissioners (BOCC) on March 25, 2008. CP Vol. I, 2-36, Ex A to Petition/Complaint for LUPA Review and Declaratory Judgment.

The Rocky Reach Trail is a proposed multi-modal, non-vehicular trail along the Columbia River in the East Wenatchee area between the Odabashian Bridge and Rocky Reach Dam located to the north. The Rocky Reach Trail will be constructed by State Parks over Washington State Department of Transportation (WSDOT) right-of-way and Chelan County Public Utility District (PUD) land.

Appellants Feil, Tontz and the Association (the Orchardists)¹ currently lease and farm the WSDOT right-of-way over which the Rocky Reach Trail will be constructed.

The permitting of the Rocky Reach Trail has a long litigation history involving appeals by the Orchardists to the Shorelines Hearings Board, the Eastern Washington Growth Management Hearings Board, the Douglas County Superior Court, the Court of Appeals and the Supreme Court. CP Vol. 26, 4814-4898.

The Orchardists filed an action under RCW Chapter 36.70B, the Land Use Petition Act (LUPA), in the Douglas County Superior Court, No. 08-2-00151-0, challenging Resolution No. TLS-08-09B. The Orchardists contemporaneously sought review of Resolution No. TLS-08-09B by the Eastern Washington Growth Management Hearings Board (EWGMHB), Case No. 08-1-0011, under RCW Chapter 36.70A, the Growth Management Act (GMA).

The EWGMHB reached a decision first and held Resolution No. TLS-08-09B involved a “project permit” or “project permit application” under RCW 36.70B.020(4).² Applying RCW

¹ The Court of Appeals referred to the Appellants as “the Orchardists” throughout its decision.

² RCW 36.70B.020. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

36.70A.030(4) and (7),³ and this Court's decision in *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000), the EWGMHB dismissed the Orchardists' petition for lack of subject matter jurisdiction. The Orchardists appealed the EWGMHB's decision under the Administrative Procedures Act, RCW Chapter 34.05 (APA), to the Douglas County Superior Court, No. 08-2-00311-3.

On September 9, 2008, the superior court entered its Order and Judgment dismissing the LUPA action and the declaratory judgment action, holding:

* * *

(4) "Project permit" or "project permit application" means 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. (Emphasis added.)

³ RCW 36.70A.030. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

* * *

(4) "Comprehensive land use plan," "comprehensive plan," or "plan" means a generalized coordinated land use policy statement of the governing body of a county or city that is adopted pursuant to this chapter.

* * *

(7) "Development regulations" or "regulation" means **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. (Emphasis added)

1. The superior court did not have subject matter jurisdiction under LUPA to review the County's comprehensive plan, development regulations and related land use decision for compliance with the GMA;
2. The Orchardists failed to meet their burden of proof regarding the standards of review under LUPA;
3. The Orchardists failed to meet their burden of proof under RCW Chapter 43.21C, the State Environmental Policy Act (SEPA), and that no changes were made to the project subsequent to previous SEPA litigation;⁴ and
4. The Orchardists failed to demonstrate standing and failed to meet their burden of proof for a declaratory judgment action challenging the constitutional validity of the County's comprehensive plan and development code.

CP Vol. 43, 8374-8378.

The Orchardists moved for reconsideration. The superior court issued a lengthy written decision denying reconsideration on October 9, 2008. CP Vol. 44, 8411-8413.

⁴ *McNeal, et al., vs. Douglas County, et al.*, Douglas County Superior Court No. 04-2-00045-6, and *Feil, et al., vs. State of Washington, et al.*, Douglas County Superior Court No. 05-2-000121-3.

On October 14, 2008, the superior court affirmed the decision of the EWGMHB dismissing the case for lack of subject matter jurisdiction. CP Vol. III, 544-547.

The Orchardists sought direct appeal of the superior court's orders to this Court and filed a Statement of Grounds for Direct View, case No. 82399-5 and case No. 82400-2. On January 12, 2009, this Court's Commissioner consolidated the cases for review under case No. 82399-5. On July 7, 2009, the Supreme Court declined to accept direct review and transferred this case to Division III of the Court of Appeals.

The Court of Appeals heard oral argument on October 12, 2009. On December 3, 2009, the Court of Appeals issued its opinion affirming the superior court. *Feil v. Eastern Washington Growth Management Hearings Board*, 153 Wn.App. 394, 220 P.3d 1228 (2009). The Orchardists filed a Motion for Reconsideration on December 17, 2009. The Court of Appeals denied the Motion for Reconsideration on February 19, 2010.

The Orchardists now seek review by this Court.

II ARGUMENT

A. Considerations for Accepting Review

RAP 13.4(b) provides a petition for review will be accepted by the Supreme Court only if:

- (1) The decision of the Court of Appeals is in conflict with a decision of the Supreme Court;
- (2) The decision of the Court of Appeals is in conflict with another decision of the Court of Appeals;
- (3) A significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) The petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The Orchardists seek review of 6 issues. The Orchardists allege the Court of Appeals decision conflicts with decisions of the Supreme Court. The Orchardists also allege their petition raises a significant question under Const. art. XI, §11,⁵ and issues of “broad public interest.”

B. There is No Conflict Between Decisions

The Orchardists allege a conflict between the Court of Appeals’ decision in this case and this Court’s decisions in *Woods*

⁵ Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.

v. Kittitas County, 162 Wn.2d 597, 174 P.3d 25 (2007), and *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 14 P.3d 133 (2000).

In *Woods*, this Court held a GMA challenge to a site-specific rezone of approximately 250 acres of forest and range resource land to residential uses could not be brought under a LUPA proceeding because the superior court lacked subject matter jurisdiction under LUPA to determine GMA compliance. This Court also discussed its decision in *Wenatchee Sportsmen Ass'n, supra*, where this Court held the GMHBs lack jurisdiction to consider GMA challenges to site-specific land use decisions. This Court recognized the potential for conflicts between the GMA and LUPA:

This presents a potential problem. Assuming that a project permit must be consistent with development regulations or a comprehensive plan, there is the potential that the actual regulations or plan are not consistent with the GMA. As noted above, a comprehensive plan or development regulation's compliance with the GMA must be challenged within 60 days after publication. RCW 36.70A.290(2). 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. *Skagit Surveyors*, 135

Wash.2d at 565, 958 P.2d 962. This court's "role is to interpret the statute as enacted by the Legislature ... we will not rewrite the [GMA]." *Id.* at 567, 958 P.2d 962. Because the GMA does not provide for it, we hold that a site-specific rezone cannot be challenged for compliance with the GMA.

Woods, at 614.

This Court went on to discuss the hierarchical, rather than parallel, relationship between the GMA and LUPA, and analyzed the distinctly separate processes for reviewing land use decisions:

Comprehensive plans and development regulations provide the general structure for a local jurisdiction's site-specific decisions. The comprehensive plan and development regulations are presumed to comply with the GMA. The comprehensive plan and development regulations may be challenged for violations of the GMA before a GMHB within 60 days of publication. Subsequent site-specific land use decisions by a local jurisdiction must be generally consistent with the comprehensive plan and development regulations. An adjacent property owner must challenge a local jurisdiction's site-specific decisions by filing a LUPA petition in superior court. But a challenge to a site-specific land use decision can be only for violations of the comprehensive plan and/or development regulations, but not violations of the GMA.

Woods, at 614-615.

In *King County*, this Court reviewed a GMHB decision involving a timely, direct challenge of amendments to the county's comprehensive plan and development regulations. The GMHB had determined the amendments failed to comply with GMA provisions

for “innovative zoning techniques” under RCW 36.70A.177(1),⁶ in that agricultural resource lands were not conserved. This Court reinstated the GMHB’s decision invalidating the county’s action.

In this case, the Orchardists improperly challenged the County’s GMA compliance in the context of a site-specific land use decision authorizing a development permit for the Rocky Reach Trail. This case does not involve amendments to the County’s comprehensive plan or development regulations. The Court of Appeals correctly analyzed the jurisdictional issues and easily distinguished and applied these cases.

No conflict between decisions exists. The EWGMHB did not have GMA subject matter jurisdiction to review the site-specific land use decision. *Wenatchee Sportsmen Ass’n, supra; Woods, supra*. The superior court had subject matter jurisdiction to review the land use decision for compliance with the county’s comprehensive plan and development regulations, but did not have LUPA subject matter jurisdiction to review GMA compliance.

⁶ RCW 36.70A.177(1). A county or a city **may** use a variety of innovative zoning techniques in areas designated as agricultural lands of long-term commercial significance under RCW 36.70A.170. The innovative zoning techniques **should** be designed to conserve agricultural lands and encourage the agricultural economy. Except as provided in subsection (3) of this section, a county or city **should** encourage nonagricultural uses to be limited to lands with poor soils or otherwise not suitable for agricultural purposes.

Woods, supra. The issue of conservation of agricultural lands under *King County* and GMA compliance under RCW 36.70A.177(1) was not properly before the EWGMHB or the superior court. This result was specifically acknowledged and discussed by this Court in its *Woods* decision.

There are no grounds for accepting review based upon a conflict between the decision of the Court of Appeals and Supreme Court decisions.

C. *There is No Significant Question of Law Under the Washington Constitution*

The Orchardists allege the County's comprehensive plan and zoning code authorizing the development permits for the Rocky Reach Trail granted to State Parks violate Const. art. XI, §11. This alleged conflict is based on the Orchardists allegation that the County's comprehensive plan and development regulations violate the GMA and, specifically, RCW 36.70A.177(1).⁷

The Orchardists characterize the provisions of the RCW 36.70A.177(1) as an "express mandate" and argue RCW

⁷ As has occurred through this litigation, the Orchardists do not identify any specific policies of the County's comprehensive plan or specific sections of the County's development code alleged to violate Const. art. XI, §11.

36.70A.177(1) forbids or prohibits policies and regulations in the County's comprehensive plan and development regulations.

The Orchardists included this challenge in their superior court LUPA action as a declaratory judgment action, but presented no evidence at the superior court hearing. Not surprisingly, the superior court held the Orchardists failed to demonstrate standing, failed to identify and prove a "statutory right expressly provided," failed to prove a conflict between general laws and "police, sanitary or other regulations" adopted by the County, and failed to prove the constitutional invalidity of the County's comprehensive plan and/or development code beyond a reasonable doubt. The superior court further held the Orchardists' action for declaratory relief could not confer subject matter jurisdiction where jurisdiction is expressly limited by statute. CP Vol. 43, 8374-8378, ¶¶7-11.

The Court of Appeals affirmed and held RCW 36.70A.177(1) permissive and merely provides "statements of planning goals." *Feil*, at 416. The statute uses the words 'may' or "should" in its text. The statute does not forbid or prohibit anything.

The Orchardists sought declaratory judgment relief as a means of circumventing the long-expired limitation on initiating GMHB review of the County's comprehensive plan and

development regulations. Challenges to the County's comprehensive plan and development regulations are within the exclusive jurisdiction of the GMHBs. *Woods*, at 614-615. When a timely challenge is not filed with the GMHB, the County's comprehensive plan and development regulations are presumed valid and entitled to finality. *Thurston County v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 329, 344, 190 P.3d 38 (2008).

Therefore, the County's comprehensive plan and development regulations not properly challenged through GMHB review are valid enactments of local government under the GMA and under the general laws of the State of Washington. The Orchardists cannot use the guise of a declaratory judgment action to challenge the County's comprehensive plan and development regulations. *Woods v. Kittitas County*, at 614.

No significant question under the Washington constitution is presented by the Orchardists' petition for review.

D. *There Are No Issues of Substantial Public Interest that Should be Decided by the Supreme Court*

The Orchardists claim to raise issues that "clearly implicate broad public interest." The test under RAP 13.4(b)(4) is whether

the petition for review “involves an issue of substantial public interest that should be determined by the Supreme Court.” The Orchardists allege the following issues and/or errors meet this test:

1. The Court of Appeals’ incorrectly applied this Court’s decisions in *Woods*, *Wenatchee Sportsmen Ass’n*, and *Thurston County* to hold the EWGMHB laced subject matter jurisdiction of a site specific project and the superior court lacked subject matter jurisdiction under LUPA to determine GAM compliance;
2. The Court of Appeals incorrectly rejected the Orchardists’ challenges under SEPA, holding that SEPA had been reviewed and approved in prior superior court proceedings and that no further SEPA review was required; and
3. The Court of Appeals incorrectly awarded attorney’s fees and costs to State Parks and the County pursuant to RCW 4.84.370, although the Orchardists prevailed in other land use litigation involving the Rocky Reach Trail.

The Court of Appeals did not err. The alleged “conflict” between decisions does not present an issue of “substantial public interest.” This Court recognized in *Woods* that the legislative schemes of the GMA and LUPA create circumstances preventing

any GMA review of site-specific land use decisions. The Court of Appeals' SEPA decision merely applies clear Washington law and WAC 197-11-600(3)(b)⁸ where SEPA compliance has already been litigated. No issue of "substantial public interest" exists regarding SEPA. Finally, the award of attorney's fees and costs is correctly based upon the County and State Parks prevailing on all the Orchardists' judicial challenges to BCC Resolution No. TLS-08-09B. Judicial challenges to prior, different land use decisions involving the Rocky Reach Trail are not relevant. Again, there is no issue of "substantial public interest."

⁸ WAC 197-11-600 When to use existing environmental documents.

(1) This section contains criteria for determining whether an environmental document must be used unchanged and describes when existing documents may be used to meet all or part of an agency's responsibilities under SEPA.

* * *

(3) Any agency acting on the same proposal shall use an environmental document unchanged, except in the following cases:

(a) For DNSs, an agency with jurisdiction is dissatisfied with the DNS, in which case it may assume lead agency status (WAC 197-11-340 (2)(e) and 197-11-948).

(b) For DNSs and EISs, preparation of a new threshold determination or supplemental EIS is required if there are:

(i) Substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts (or lack of significant adverse impacts, if a DS is being withdrawn); or

(ii) New information indicating a proposal's probable significant adverse environmental impacts. (This includes discovery of misrepresentation or lack of material disclosure.) A new threshold determination or SEIS is not required if probable significant adverse environmental impacts are covered by the range of alternatives and impacts analyzed in the existing environmental documents.

E. The County is Entitled to an Award of Additional Attorney's Fees and Expenses

The County is entitled to an award of additional reasonable attorney's fees and expenses incurred responding to the Orchardists' petition for review. RAP 18.1(j).⁹

III. CONCLUSION

The Court of Appeals correctly decided this case. This case does not present any issues that meet the criteria for accepting review under RAP 13.4(b). The Orchardists' petition for review should be denied.

The County should be awarded additional attorney's fees and expenses incurred for responding to the Petition for Review, pursuant to RCW 4.84.370 and RAP 18.1(j).

Dated: April 5, 2010

Respectfully submitted,



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Douglas County Prosecuting Attorney
For Respondent Douglas County

⁹ RAP 18.1(j), reads, in part: (j) If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review. A party seeking attorney fees and expenses should request them in the answer to the petition for review.