

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 APPELLANTS' MOTION TO STRIKE STATEMENT
OF ADDITIONAL AUTHORITIES**

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STATE OF WASHINGTON
SUPERIOR COURT
DOUGLAS COUNTY
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Respondent Douglas County hereby answers the Appellants' Motion to Strike the County's Statement of Additional Authorities.

ARGUMENT

RAP 10.8 provides that a party may file a statement of additional authorities prior to the filing of a decision on the merits. *Plum Creek Timber Co., L.P. v. Washington State Forest Practices Appeals Bd.*, 99 Wn.App. 579, 993 P.2d 287 (2000).

The Growth Management Hearings Board granted the County's motion to dismiss the Appellants' petition for review for lack of subject matter jurisdiction.¹ The Appellants challenged the Board's decision under the Administrative Procedures Act (APA), RCW Chapter 34.05. This Court has summarized the issues before the Court, as follows:

Whether the Growth Management Hearings Board had jurisdiction to consider a challenge to a site-specific recreational overlay permit for a public recreation trail within lands designated agricultural by the local comprehensive plan, and if so, whether the county property granted the permit.

The appellate court applies the APA standards of review to the record before the Board. *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 45,

¹ *Feil, et al. v. Douglas County, et al.*, EWGMHB Case No. 08-1-0011, Order on Respondent's Motion to Dismiss (June 17, 2008), EWGMHB Index of Record, 384-404. Attached at Appendix A.

959 P.2d 1091 (1998); *Thurston County v. Coopers Point Association*, 148 Wn.2d 1, 7-8, 57 P.3d 1156 (2002).

Where an APA challenge alleges the Board erroneously interpreted or applied the law, the appellate court reviews issues of law *de novo*. The appellate court accords deference to the Board's interpretation of the GMA, but is not bound by the Board's interpretation. *Quadrant Corporation v. Growth Management Hearings Board*, 154 Wn.2d 224, 233, 110 P.3d 1132 (2005); *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, *supra*, at 46; *Thurston County v. Coopers Point Association*, *supra*, at 8.

The issues of res judicata and collateral estoppel were raised before the Board in the County's motion to dismiss and were argued by the parties.² The County's motion was based, in part, on the Board's earlier decision issued in *Feil, et al. v. Douglas County, et al.*, EWGMHB Case No. 06-1-0012. That decision held permits RO-06-01 and SPD-06-02 constituted a site-specific project permit

² Respondent's Motion to Dismiss for Lack of Subject Matter Jurisdiction, *Feil, et al. v. Douglas County, et al.*, EWGMHB Case No. 08-1-0011, EWGMHB Index of Record, 33-58; Respondent's Memorandum, *Feil, et al. v. Douglas County, et al.*, EWGMHB Case No. 08-1-0011, EWGMHB Index of Record, 166-213; Petitioners' Response/Objection to Douglas County's Dismissal Motion, *Feil, et al. v. Douglas County, et al.*, EWGMHB Case No. 08-1-0011, EWGMHB Index of Record, 151-159; Respondent's Reply Memorandum, *Feil, et al. v. Douglas County, et al.*, EWGMHB Case No. 08-1-0011, EWGMHB Index of Record, 341-348. See also, Respondent's Brief by Douglas County, p. 11, filed in this Court.

application and, therefore, the Board did not have jurisdiction to hear the Appellants' petition for review.³

In this case, the Board discussed the res judicata and collateral estoppel issues in its Order on Respondent's Motion, but did not decide the issues. Instead, the Board again held RO-06-01 and SPD-06-02 constituted a site-specific project permit application and it did not have jurisdiction to hear the Appellants' petition.⁴

Subsequent to the Board's decision, this Court issued its opinions in *Gold Star Resorts v. Futurewise*, 167 Wn.2d 723, 222 P.3d 791 (2009), and *City of Arlington v. Central Puget Sound Growth Management Hearings Board*, 164 Wn.2d 768, 193 P.3d 1077 (2008). The *Gold Star Resorts* opinion cited *City of Arlington* and quoted its discussion of res judicata and collateral estoppel. In *City of Arlington* this Court declined to apply res judicata or collateral estoppel to the specifics of that case, but did discuss their applicability to the Growth Management Hearings Boards:

Resurrecting the same claim in a subsequent action is barred by res judicata. Under the doctrine of res judicata, or

³ The 2006 case before the Board involved the same parties and the same permits, RO-06-01 and SPD-06-02. *Feil, et al. v. Douglas County, et al.*, EWGMHB Case No. 06-1-0012, Order on Motion to Dismiss, p. 6, (February 16, 2007); CP 6577, Vol. 34, CD Copy of Record, Litigation Chronology and Exhibits, Bates stamp 4884-4889. Attached as Appendix B.

⁴ *Feil, et al. v. Douglas County, et al.*, EWGMHB Case No. 08-1-0011, Order on Respondent's Motion to Dismiss (June 17, 2008), EWGMHB Index of Record, 384-404. Attached as Exhibit A.

claim preclusion, a prior judgment will bar litigation of a subsequent claim if the prior judgment has a concurrence of identity with [the] subsequent action in (1) subject matter, 2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.

When a subsequent action is on a different claim, yet depends on issues which were determined in a prior action, the relitigation of those issues is barred by collateral estoppel. Collateral estoppel, or issue preclusion, requires (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.

In addition, the issue to be precluded must have been actually litigated and necessarily determined in the prior action.

City of Arlington, supra, at 791-792. (Citations omitted)

In the current case before this Court there is an identity of:

1. Subject matter (Douglas County permits RO-06-01 and SPD-06-02);
2. Cause of action (GMA challenge of permits RO-06-01 and SPD-06-02 to GMHB);
3. Parties (Feil, Tontz and The Right to Farm Association of Baker Flats challenging the County's action, and Douglas County, Washington State Department of Transportation, Washington State Parks and Recreation Commission, and Public Utility District No. 1 of Chelan County as respondents);
4. Issue (Lack of GMHB jurisdiction based upon County action constituting site-specific project permit application); and
5. Finality (prior GMHB decision affirmed on APA appeal to superior court).⁵

⁵ *Feil, et al., v. Eastern Washington Growth Management Hearings Board, et al.*, Douglas County Superior Court, No. 07-2-00100-7, Decision of the Court (July

The record before the Growth Management Hearings Board properly raised issues of res judicata and collateral estoppel, but the Board did not have the benefit of this Court's decisions in *Gold Star Resorts* and *City of Arlington*. The Board did not decide the res judicata and collateral estoppel issues.

If this Court for any reason holds permits RO-06-01 and SPD-06-02 are not a site-specific project permit application and the Board does have jurisdiction, without also considering the issues of res judicata and collateral estoppel, on remand the Growth Management Hearings Board will be bound by its prior decision in *Feil, et al., v. Douglas County, et al.*, EWGMHB Case No. 06-1-0012. This Court's review and decision in this case will not be dispositive.

The County's Statement of Additional Authorities did not exceed the scope of RAP 10.8. The Statement of Additional Authorities clearly identified the issues of res judicata and collateral estoppel. The County did not present argument. Appellants Motion to Strike asserts that the County failed to appeal the failure of the Growth Management Hearings Board to decide the issues of res

31, 2007) (Attached at Appendix C, Exhibit 8). 82400-2, Vol. 34, CP 6583, CD Copy of Record, Litigation Chronology and Exhibits, Bates stamp 4890.

judicata and collateral estoppel. However, the County was not aggrieved by the decisions of the Board, the superior court or the Court of Appeals. Only an aggrieved party may seek review by an appellate court. RAP 3.1.

Appellants' Motion to Strike should be denied.

Dated: January 25, 2011

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steven M. Clem", written over a horizontal line.

Steven M. Clem, WSBA #7466
Douglas County Prosecuting Attorney
For Respondent Douglas County

APPENDIX A

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**State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON**

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

Petitioners,

v.

DOUGLAS COUNTY; DOUGLAS COUNTY BOARD OF COUNTY COMMISSIONERS; WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, (WSDOT); WASHINGTON STATE PARKS AND RECREATION COMMISSION; and PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, (PUD),

Respondents.

Case No. 08-1-0011

ORDER ON RESPONDENT'S MOTION TO DISMISS; ORDER ON PETITIONERS' MOTION TO SUPPLEMENT THE RECORD AND MOTION TO PRODUCE THE RECORD

I. PROCEDURAL HISTORY

On April 14, 2008, JACK and DELAPHINE FEIL et al., by and through their representative, Jim Klauser, filed a Petition for Review (PFR). With this PFR, Petitioners challenge Douglas County's adoption of Resolution No. TLS 08-09B.

1 On April 18, 2008, the Board received Respondent's (County) Motion to Dismiss
2 Petition for Lack of Subject Matter Jurisdiction.

3 On May 1, 2008, the Board received Respondent's (State's) Washington State Parks
4 and Recreation Commission's (WSP&R) and Washington State Department of
5 Transportation's (WSDOT) Joint Response to Douglas County's Motion to Dismiss.

6 On May 5, 2008, the Board received Petitioners' Response/Objection to Douglas
7 County's Dismissal Motion; Motion to Supplement the Record; and Declaration of James
8 Klauser in Support of Petitioners' Response/Objection to Douglas County's Dismissal Motion;
9 and Motion to Supplement the Record; Petitioners' Objection and Motion to Strike the
10 "Response" of WSP&R and WSDOT. The Board also received Douglas County's Respondents
11 Memorandum.

12 On May 6, 2008, the Board received Respondents WSP&R and WSDOT's Joint
13 Response to Petitioner's Motion to Strike.

14 On May 7, 2008, the Board received Respondent's Index of Record.

15 On May 8, 2008, the Board received Petitioners' Objection to, Motion to Strike, and
16 Response to WSDOT & WSP&R "Response" to Petitioners' Motion to Strike and Petitioners'
17 Objections to and Motion to Strike the Douglas County May 1, 2008, "Respondent's
18 Memorandum".

19 On May 13, 2008, the Board held the telephonic Prehearing conference. Present
20 were John Roskelley, Presiding Officer, and Board Members, Dennis Dellwo and Joyce
21 Mulliken. Present for the Petitioners were Robert Rowley and James Klauser. Present for the
22 Respondents were Steve Clem, Douglas County, Steve Klasinski, WSDOT, Jim Swartz,
23 WSP&R, and Matt Kernutt, WSP&R. During the Prehearing conference the Board heard
24 arguments from the parties concerning the Respondents' Motion to Dismiss and Petitioners'
25 Objections and Motion to Strike. The Board provided a briefing schedule for responses to
26 the Respondent's Motion to Dismiss in the prehearing order.

1 On May 27, 2008, the Board received Petitioners' Supplemental Response to Douglas
2 County/State Dismissal Motion; Motion to Supplement the Record; and Motion to Produce
3 the Record.

4 On May 29, 2008, the Board received Respondent's Reply Memorandum on Motion to
5 Dismiss and Controverting Petitioners' Motion to Produce Record and WSP&R and WSDOT's
6 Reply Regarding Subject Matter Jurisdiction.

7 On June 9, 2008, the Board received Petitioners' Objections to Reply Briefs and
8 Motion to Supplement the Record.

9 II. FACTS

10 On March 27, 2006, the Washington State Parks and Recreation Commission
11 (WSP&R) filed a combined Land Development Permit Application for a recreational overlay
12 district and site plan development to construct a public multi-modal trail facility that will be
13 located on a Washington State Department of Transportation (WSDOT) right-of-way and
14 lands owned by the Chelan County PUD. This application was made after the Douglas
15 County Superior Court ordered WSP&R to apply for and obtain land use permits as may be
16 required by the Douglas County Code.

17 The recreational overlay district, as issued by Douglas County, does not change the
18 underlying zoning. It permits an activity to take place within a zoning district that does not
19 expressly authorize or only conditionally allows such activity. No changes were made to the
20 Douglas County Comprehensive Plan or its development regulations.

21 On November 3, 2006, Douglas County Hearing Examiner, Andrew L. Kottkamp,
22 issued a final decision on the combined application and approved Permit Nos. RO-06-01 and
23 SPD 06-02. The Douglas County Code authorizes the Hearing Examiner to do so. (Chapter
24 2.13.070).

25 On November 20, 2006, the Petitioners filed a Land Use Petition Act (LUPA), RCW
26 36.70C, petition in Douglas County Superior Court appealing the decision of the Hearing
Examiner and requesting a Declaratory Judgment that the Hearing Examiner was without

1 jurisdiction to approve a recreational overlay.¹ Seven days later, the Petitioners filed a
2 Petition for Review (PFR) with the Eastern Washington Growth Management Hearings Board
3 (Board), which the Board dismissed on February 16, 2007, holding that the recreational
4 overlay was a site specific project permit application and the Board did not have jurisdiction
5 over the Hearing Examiner's decision.² The Board's decision was affirmed by the Douglas
6 County Superior Court on July 31, 2007.³

7 Also on July 31, 2007, the Douglas County Superior Court entered an order in the
8 LUPA case holding that the recreational overlay granted for the Rocky Reach Trail
9 constituted a rezone and that the Hearing Examiner did not have the authority to grant a
10 rezone.

11 On March 25, 2008, in response to the Court's decision, the Douglas County Board of
12 County Commissioners adopted Resolution No. TLS 08-09B and approved the application of
13 WSP&R and affirmed the Hearing Examiner's decision with two additional Conditions of
14 Approval.

15 **III. DISCUSSION**

16 **Preliminary Matters:**

17 At the Pre-hearing conference on May 13, 2008, the following objections and motions
18 were discussed by the parties and Board, and action was taken during the Pre-hearing
19 conference or will be addressed in this Order:

20 (1) The Petitioners' May 5, 2008, Response/Objection to Douglas County's Dismissal
21 Motion was discussed and noted. The Petitioners' Motion to Supplement the Record was
22 GRANTED and attachments reviewed by the Board pursuant to WAC 242-02-650.

23 _____
24 ¹ *Feil, et al., v. Douglas County, et al.*, Douglas Co. Cause No. 06-2-00410-5, July 31, 2007.

25 ² *Feil, et al., v. Douglas County, et al.*, EWGMHB Case No. 06-1-0012, Order on Motion to Dismiss (Feb. 16, 2007).

26 ³ *Feil, et al. v. EWGMHB, et al.*, Cause No. 07-2-00100-7.

1 (2) The Petitioners' May 8, 2008, Objections to (and Motion to Strike) the Douglas
2 County May 1, 2008 "Respondent's Memorandum" were noted, and the Petitioners' Motion
3 to Strike portion DENIED pursuant to WAC 242-02-030(3) and WAC 242-02-522.

4 (3) Petitioners' May 8, 2008, Objection to, Motion to Strike, and Response to
5 Washington Department of Transportation and State Parks and Recreation Commission
6 "Response" to Petitioners' Motion to Strike was noted, and Petitioners' Motion to Strike
7 portion DENIED pursuant to WAC 242-02-030(3) and WAC 242-02-522.

7 **Motions and Supplement Briefs Filed Subsequent to Pre-hearing Order:**

8 On June 9, 2008, the Petitioners filed their Objection to "Reply" Briefs. With this
9 objection, the Petitioners move to strike the County and the State's reply briefs as being
10 unresponsive to arguments asserted by the Petitioners' in their Supplemental Response
11 brief. The Board notes this objection, but finds it is the duty and responsibility of the Board
12 to weigh the arguments presented by the parties and determine whether or not the party
13 carrying the burden of proof has adequately presented its case. The Board gives every brief
14 and every argument the weight it is entitled to. In that regard, the Petitioners' objection is
15 noted.

16 Included with the Objection to Reply Briefs was a Motion to Supplement the Record,
17 Declaration of James Klauser, and attachments, with the stated purpose being to refute
18 statements made by the County in its reply brief. The Board finds that this declaration and
19 its attachments are not necessary or of substantial assistance to the Board in making its
20 determination. Therefore, pursuant to WAC 242-02-540, the Petitioners' June 9, 2008
21 Motion to Supplement is DENIED.

21 **Current Matters:**

22 **Motion to Supplement the Record (May 29, 2008):**

23 The Respondents⁴ did not reply to this motion. The Petitioners'⁵ move to supplement
24 the Record with four documents: (1) Attachment A is a copy of an e-mail exchange

25 ⁴ Douglas County, WSDOT, WSP&R Commission, and Public Utility District No. 1 of Chelan County.

1 between the Board and the Petitioners; (2) Attachment B is a copy of the Index to the
2 Record for Case No. 06-1-0012; (3) Attachment C is the Greater East Wenatchee Zoning
3 Map; and (4) Attachment D is excerpts from the Greater East Wenatchee Comprehensive
4 Plan. The Board, pursuant to WAC 242-02-660, shall take official notice of Attachments C
5 and D, as these are legislative enactments of the County. As for Attachments A and B, the
6 Board, pursuant to WAC 242-02-540, does not find these to be necessary or of substantial
7 assistance to the Board in reaching its decision. Therefore, the Board GRANTS, in part, and
8 DENIES, in part, the Petitioners' Motion to Supplement. Attachment C and D shall become
9 part of the Record of this proceeding.

9 **Motion to Produce a Legible/Audible Record (May 29, 2008):**

10 **Position of the Parties:**

11 **Petitioners:**

12 According to the Petitioners, RCW 36.70A.290(4) requires the Board to base its
13 decision on the record by the County. The Petitioners claim the Record provided to the
14 Board has not been provided to the Petitioners and requests that no further action should
15 be taken in this case until a legible/audible copy has been provided. The Petitioners move
16 the Board to: (1) order the County to provide the Petitioners with a legible/audible copy of
17 the CD/DVD provided to the Board and other parties; or (2) for the Board to copy its own
18 legible/audible copy and provide it to the Petitioners.⁶

18 **Respondents Douglas County:**

19 The County contends it has no affirmative obligation to provide a copy of the entire
20 record to the Petitioners. The County has a duty to make the record available to the
21 Petitioners for inspection. The County notes, if Petitioners request copies of the record
22 and/or portions of the record and pay for such copies, the County will provide these

23 ⁵ Jack and Delaphine Feil, John and Wanda Tontz, and The Right To Farm Association of Baker Flats.

25 ⁶ Petitioners' Supplemental Response to Douglas County/State Dismissal Motion at 3.

1 documents. The County served the Index of Record on the Petitioners and mailed copies of
2 the Record and audio recordings to the Board and counsel of record in digital format (DVD)
3 as a courtesy. The County further contends it has no affirmative obligation to provide a
4 copy of the entire Record to the Petitioners, but rather it has a duty to make the Record
5 available to the Petitioners for inspection and will provide copies at the Petitioners expense.
6 The County claims it has not received any communication from the Petitioners regarding
7 any problems with the courtesy copies and learned of the problem through an e-mail
8 authored by the Presiding Officer.

8 **Board Discussion:**

9 WAC 242-02-520 requires the County to file with the Board and serve a copy on the
10 parties an *index of all material* used in taking the action which is the subject of the petition
11 for review within thirty days of service of the petition. The written or tape-recorded record
12 of the legislative proceedings where action was taken shall also be *available to the parties*
13 *for inspection*.

14 The County sent legible/audible recordings in CD/DVD format to the Board and a
15 courtesy copy to the parties of record. The County has made the record available to the
16 parties for inspection as required by WAC 242-02-520. Therefore, the Petitioners' motion is
17 DENIED.

17 **Motion to Dismiss:**

18 **Position of the Parties:**

19 **Respondent Douglas County:**

20 With its Motion to Dismiss, the County claims: (1) the Board does not have subject
21 matter jurisdiction because the decision challenged by the Petitioners constitutes a site-
22 specific development permit or, in the alternative, a site-specific rezone, and is not within
23 the jurisdiction conferred by RCW 36.70A.280(1); and (2) the Board lacks subject matter
24 jurisdiction pursuant to RCW 36.70A.280(1) under principles of *res judicata* and collateral
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1 estoppel based upon the Board's prior decision in *Feil, et al. v. Douglas County, et al.*⁷ The
2 County listed numerous facts supporting its argument, including Douglas County Resolution
3 No. TLS-08-09B; the Superior Court LUPA decision in *Feil, et al. v. Douglas County*,⁸ and the
4 Board's decision in *Feil, et al. v. Douglas County, et al.*, Case No. 06-1-00012.⁹

5 The County's request for dismissal of the Petition for lack of subject matter
6 jurisdiction is pursuant to the following authorities: (1) RCW 36.70A.280(1), RCW
7 36.70A.030(7), and RCW 36.70B.020(4); (2) WAC 242-02-020(2); (3) *Wenatchee*
8 *Sportsmen Assoc. v. Chelan County*¹⁰; (4) *Feil, et al. v. Douglas County, et al.*¹¹; (5)
9 *Chipman v. Chelan County*¹²; and (6) *Wilma, et al. v. City of Colville*¹³.

10 **Washington State Parks and Recreation Commission and Washington State
11 Department of Transportation's (State) Joint Response:**

12 The State, which includes both the WSP&R and WSDOT, concurs with and joins in
13 the County's motion to dismiss and contends a LUPA action in Superior Court is the proper
14 forum to challenge the issuance of this site-specific permit. According to the State, the
15 Board granted the State of Washington's motion to dismiss a similar challenge in *Feil, et al.,*
16 *v. Douglas County, et al.*¹⁴, holding that the Recreational Overlay (R/O) permit at issue was
17 a project permit application as defined in RCW 36.70B.020. In a subsequent action by the
18 Douglas County Superior Court, the Court held that the R/O permit constituted a rezone
19 which required legislative approval and only the Board of County Commissioners (BOCC)

20 ⁷ *Feil, et al., v. Douglas County, et al.*, EWGMHB Case No. 06-1-0012, Order on Motion to Dismiss (Feb. 16, 2007).

21 ⁸ *Feil, et al., v. Douglas County, et al.*, Douglas Co. Cause No. 06-2-00410-5, July 31, 2007.

22 ⁹ *Feil, et al.*, footnote 2.

23 ¹⁰ *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000).

24 ¹¹ *Feil, et al.*, footnote 2.

25 ¹² *Chipman v. Chelan County*, EWGMHB Case No. 05-1-0002, Order of Dismissal (Jan. 31, 2006).

26 ¹³ *Wilma v. City of Colville*, EWGMHB Case No. 02-1-0007, FDO on Amended Petition for Review (Dec. 5, 2002).

¹⁴ *Feil, et al.*, footnote 2.

1 had the power to approve such an application. The BOCC unanimously approved the project
2 permit.

3 The State contends an administrative agency, such as the Board, has only that
4 authority expressly granted or necessarily implied by RCW 36.70A.280(1). As such, the
5 Board does not have the jurisdiction to decide challenges to site-specific land use decisions
6 because site-specific land use decisions do not qualify as CP's or development regulations.
7 Citing *Woods*¹⁵, the State argues such a challenge must be brought under LUPA in Superior
8 Court.

9 The State argues the R/O permit issued by the County is a site-specific land use
10 decision and claims the Superior Court has already ruled this application is a site-specific
11 proposal.¹⁶ According to the State, the number of acres involved, which total 29 acres, is
12 not relevant as argued by the Petitioners because the courts and the Board have found
13 much larger projects to be site-specific land use decisions.¹⁷

14 The State claims the Petitioners cannot create subject matter jurisdiction by alleging
15 violations of the GMA by implication. The County's resolution, according to the State, is not
16 an amendment adopted under the GMA process. The State contends RCW 36.70A.280(1)
17 does not convey jurisdiction over implied amendments, but over adopted amendments to
18 the CP or development regulations.

19 The State also claims the Petitioners failed to challenge the CP and development
20 regulations in a timely manner, which is 60 days after publication of the ordinance that
21 adopts the CP or development regulations or amendments thereto. The time has passed to
22 appeal the CP or development regulations.

23 **Petitioners:**

24 ¹⁵ *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007) at 612 (citing *Wenatchee Sportsmen*).

25 ¹⁶ *Feil, et al.*, footnote 1.

26 ¹⁷ WSP&R, et al. Joint Response to Douglas County's Motion to Dismiss at 4.

1 As requested by the Board's Pre-hearing Order, the Petitioners filed a timely
2 response brief to the Respondents Motion to Dismiss. In their May 27, Response, the
3 Petitioners: (1) rely upon their previously submitted April 30, 2008, Response and
4 the declaration of James J. Klauser, together with their May 6, 2008, objections
5 to the Douglas County brief and the State brief; (2) ask that the documents they
6 rely upon be admitted as "supplements to the record" in accordance with RCW
7 36.70A.290(4) in a Motion to Supplement the Record; (3) move the Board for
8 alternative relief relative to the "record" in a Motion to Produce a
9 Legible/Audible Record; and (4) respond to the County's argument for
10 dismissal.¹⁸

11 With their response, the Petitioners argue the following: (1) the burden of
12 proof is on the moving party, Douglas County¹⁹; (2) the doctrines of collateral
13 estoppel and *res judicata* do not apply²⁰; and (3) *Wenatchee Sportsmen Association v.*
14 *Chelan County*²¹ and *Woods v. Kittitas County*²² do not support the motions to dismiss.

15 Under sub-section (1) above, the Petitioners claim the petition facially complies with
16 the requirements of RCW 36.70A.280 and RCW 36.70A.290. According to the Petitioners,
17 the moving parties (County and State) have the burden to establish lack of jurisdiction and
18 contend the County and State have failed to do so.²³

19 Under sub-section (2) above, the Petitioners contend the County fails to provide
20 briefing to support collateral estoppel or *res judicata*. According to the Petitioners, the
21 County fails to provide legal authority to support its claim an earlier ruling of the Board,
22 where the Board found it lacked jurisdiction to review a hearing examiner decision,

23 ¹⁸ Petitioners' Supplemental at 2-8.

24 ¹⁹ Petitioners' Supplemental at 3.

25 ²⁰ Ibid at 3-4.

26 ²¹ *Wenatchee Sportsmen Association*, footnote 10.

²² *Woods v Kittitas County*, 162 Wn.2d 597, 610, 174 P.3d 25 (2007).

²³ Petitioners' Supplemental Response to Douglas County/State Dismissal Motion at 3.

1 precludes the Board from reviewing the most recent decision by the Douglas County BOCC.
2 The Petitioners claim the County cannot now provide the legal authority in a reply brief that
3 it was required to provide in its opening brief. The Petitioners argue the County might have
4 appealed the adverse decision from the Superior Court in the Court's July 31, 2007 decision
5 in *Feil, et al., v. Douglas County, et al.*,²⁴ but chose to comply with the Court's decision.²⁵

6 Under sub-section (3) above, the Petitioners argue the Court was applying a
7 legislatively created jurisdictional rule in the *Wenatchee Sportsmen* and the *Woods* cases,
8 not as the County would wish the Board to believe that the Court was enunciating a judicial
9 common law principal. The Petitioners claim, in both cases cited above, the courts found
10 express authorization in the CP for the site-specific rezones involved in those cases, but
11 "[S]uch is not so in this case."²⁶

12 The Petitioners contend the County's action constitutes an amendment by the County
13 to its development regulations that are required to enhance, preserve and protect the
14 agricultural lands of long-term commercial significance. The Petitioners cite *King County v.*
15 *Central Puget Sound Growth Management Hearings Board*²⁷ which the Supreme Court made
16 it clear all other uses in protected agricultural lands "must take a back seat" and that
17 "recreational projects, whether on public land or not, cannot be authorized."²⁸

18 The Petitioners claim the CP must authorize a site-specific rezone to a recreational
19 overlay zone, if this action is to be treated as a development permit rather than an
20 amendment to development regulations. The Petitioners argue that nowhere in the County's
21 CP is there a mention of a Recreational Overlay Zone and nowhere is there an expression of
22 any authority to rezone.²⁹

23 ²⁴ *Feil, et al., v. Douglas County, et al.*, Douglas Co. Cause No. 06-2-00410-5, July 31, 2007.

24 ²⁵ Petitioners' Supplemental at 4.

25 ²⁶ Ibid at 6.

26 ²⁷ *King Co. v. CPSGMHB*, 142 Wn.2d 543, 560, 14 P.3d 133, 142 (2000).

²⁸ Petitioners' Supplemental at 7.

²⁹ Ibid.

1 The Petitioners do agree that the Greater East Wenatchee Area CP identifies a
2 project, but is silent about zoning or rezoning. According to the Petitioners, the CP does not
3 authorize any site-specific rezones as required for a decision to qualify as a development
4 permit.

5 **Respondent Douglas County's Reply:**

6 Douglas County claims: (1) it has no affirmative obligation to provide a copy of the
7 record to the Petitioners, but it did mail courtesy copies of the Index of Record and audio
8 recordings to the parties³⁰ (decided above); (2) it filed and served its Motion to Dismiss in
9 compliance with WAC 242-02-570(2)³¹; (3) the action taken by Douglas County is a "project
10 permit application" as referenced in RCW 36.70A.030(7) and defined at RCW 36.70B.020(4)
11 that *Wenatchee Sportsmen and Woods* support the County's and States' position when
12 important language is not omitted³²; and (4) these same issues were considered by this
Board in *Feil et al., v. Douglas County*.³³

13 **Washington State Parks and Recreation Commission and Washington State**
14 **Department of Transportation's Reply:**

15 The State claims the project meets the definition of a site-specific project under RCW
16 36.70B.020 and both *Woods v. Kittitas County*³⁴ and *Wenatchee Sportsmen Assoc.*³⁵ held
17 the rezones involved in those cases need only be consistent with the CP to meet the
18 definition of a project permit. Citing *Woods*, the State argues once a CP and zoning
19 regulations are approved, subsequent site-specific land use decisions by a local jurisdiction
20 must be generally consistent with the CP.

21 _____
22 ³⁰ Respondent's Reply Memorandum on Motion to Dismiss, etc. at 2.

23 ³¹ Ibid at 3.

24 ³² Ibid at 4-7

25 ³³ *Feil, et. al., v. Douglas County*, EWGMHB Case No. 06-1-0012, Order on Motion to Dismiss (Feb. 16, 2007).

26 ³⁴ *Woods*, footnote 22.

³⁵ *Wenatchee Sportsmen Association*, footnote 10.

1 The State contends, absent an express provision in the zoning ordinances that would
2 require specific compliance with a CP, as was the case in *Woods*, a CP legally sets out only
3 the generalized coordinated policy statements of the governing body. According to the
4 State, a site-specific application of existing zoning laws, as is the case here, would qualify
5 as a site-specific rezone authorized by the CP, if the action is consistent with the general
6 policies of the CP. Contrary to the Petitioners' claim, neither the *Woods* Court or the
7 *Wenatchee Sportsmen* Court found express authorization in the CP's for the specific actions
8 at issue in those cases. According to the State, the Courts focused on whether the action
9 was approved pursuant to existing zoning laws, which placed the action within the exclusive
jurisdiction of the Superior Court under LUPA.

10 **Board Discussion:**

11 This petition is strikingly similar to *Feil, et al. v. Douglas County*, Case No. 06-1-0012,
12 where the Board dismissed the Petitioners' petition because it determined it did not have
13 jurisdiction.

14 Again, as in Case No. 06-1-0012, the Board must look to the Growth Management
15 Act (GMA) to determine if it has subject matter jurisdiction to hear this petition. RCW
16 36.70A.280(1) authorizes the Board to hear and determine only those petitions alleging
either:

17 1)(a) That a state agency, county, or city planning under this chapter is not in
18 compliance with the requirements of this chapter, ..., or chapter 43.21C RCW
19 as it relates to plans, development regulations, or amendments, adopted
under RCW 36.70A.040 ...

20
21 In other words, the Board has jurisdiction to decide challenges to comprehensive
22 plans, development regulations or amendments thereto. RCW 36.70A.030(4) defines
comprehensive land use plan as:

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

1 RCW 36.70A.030(7) defines development regulations as:

2 (7) "Development regulations" or "regulation" means the controls placed on
3 development or land use activities by a county or city, including, but not
4 limited to, zoning ordinances, critical areas ordinances, shoreline master
5 programs, official controls, planned unit development ordinances, subdivision
6 ordinances, and binding site plan ordinances together with any amendments
7 thereto. 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.

8 This definition is specific in that the Board's jurisdiction does not include project
9 permit applications as defined under RCW 36.70B.020 which provides:

10 (4) "Project permit" or "project permit application" means any land use or
11 environmental permit or license required from a local government for a project
12 action, including but not limited to building permits, subdivisions, binding site
13 plans, planned unit developments, conditional uses, shoreline substantial
14 development permits, site plan review, permits or approvals required by
15 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.

16 According to the County and State agencies, this appeal challenges a "site-specific
17 land development permit for a Recreational Overlay District (R/O permit) issued by Douglas
18 County to State Parks for a public, multi-modal transportation facility."³⁶ The County and
19 State have consistently maintained that whether the action taken by the County is a permit,
20 binding site plan or rezone is immaterial, as all three are included within the definition of a
21 "project permit application."³⁷

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³⁶ WSP&R, et al. Joint Response at 2.

³⁷ RCW 36.70B.020.

1 This Board held in *Feil, et al. v. Douglas County, et al.*,³⁸ that "[T]he application for a
2 R/O permit is a project permit application as defined in RCW 36.70B.020." The Board's
3 decision was affirmed by the Douglas County Superior Court on July 31, 2007, in *Feil, et al.*
4 *v. EWGMHB, et al.*³⁹ In a parallel case, the Douglas County Superior Court held that the R/O
5 permit constituted a rezone that required legislative approval. The Court's order read, in
6 part:

7 This recreational overlay is clearly a specific party requesting that a specific
8 piece of real property be treated in a particular manner.⁴⁰

9 The parties in this case disagree whether the R/O permit is a site-specific rezone, as
10 alleged by the County and State, or an amendment to the County's development
11 regulations, as alleged by the Petitioners. The parties do agree the Board does not have
12 jurisdiction to decide challenges to site-specific land use decisions because site-specific land
13 use decisions do not qualify as comprehensive plans or development regulations under the
14 Board's authority authorized by RCW 36.70A.280.⁴¹ A challenge to a site-specific land use
15 decision must be brought under LUPA in Superior Court.⁴²

16 Under *Woods v. Kittitas County* and *Wenatchee Sportsmen Assoc. v. Chelan County*,
17 a site-specific rezone not subject to the Board's jurisdiction must be authorized by a
18 jurisdiction's comprehensive plan. The CP is a guiding document or blueprint, not subject to
19 the specifics the Petitioners' seem to suggest by their comment, "express authorization in
20 the Comprehensive Plan."⁴³ In this case, the Rocky Reach permit application is authorized
21 by the Greater East Wenatchee Area Comprehensive Plan in the Plan's goals and policies.

22 ³⁸ *Feil, et al., v. Douglas County, et al.*, EWGMHB Case No. 06-1-0012, Order on Motion to Dismiss (Feb. 16, 2007).

23 ³⁹ *Feil, et al., v. Douglas County, et al.*, Douglas Co. Cause No. 06-2-00410-5, July 31, 2007.

24 ⁴⁰ *Feil, et al. v. EWGMHB, et al.*, Cause No. 07-2-00100-7.

25 ⁴¹ *Woods*, footnote 22.

26 ⁴² *Woods*, footnote 22, citing *Wenatchee Sportsmen Assoc.*, 141 Wn.2d 169, 179, 4 P.3d 123 (2000).

⁴³ Petitioners' Supplemental at 6.

1 The Greater East Wenatchee Area Comprehensive Plan is a sub-area plan adopted by
2 Douglas County.⁴⁴

3 The CP encourages and addresses the County's intent to develop trail systems to
4 provide for multi-modal transportation routes, as well as recreational opportunities.⁴⁵ The
5 proposal is located in an area designated as Agricultural Resource, Critical Areas and
6 Essential Public Facilities by the Greater East Wenatchee Area CP. The subject property is
7 located in the Tourist Recreation Commercial (C-TR), Residential Low (R-L), Commercial
8 Agriculture 5 acres (AC-5), and Commercial Agriculture 10 acres (AC-10) zoning districts.
9 Importantly, trail systems are an outright permitted use in the Tourist Recreation
10 Commercial district, while recreational trail systems are allowed in the other three zones
11 mentioned above by the issuance of a Recreational Overlay District permit.⁴⁶

12 The Petitioners' time to challenge the CP and development regulations concerning
13 recreational overlays was within 60 days of publication of these documents. The Board does
14 not have jurisdiction to review the CP, its regulations or actions performed pursuant to
15 these documents unless they are challenged within 60 days of the publication of their
16 adoption. That time has long since passed as required by RCW 36.70A.290(2).

17 The Petitioners argue that in *King County v. CPSGMHB*, the Supreme Court "made it
18 abundantly clear that, within such protected areas (agricultural land of long-term
19 commercial significance), all other uses must take a back seat to agricultural uses, and that
20 recreational projects, whether on public land or not, cannot be authorized."⁴⁷ The Court in
21 *King County* decided this case based on development regulations adopted pursuant to RCW

21 ⁴⁴ Respondent's Memorandum at 9.

22 ⁴⁵ Douglas County Regional Policy Plan, Policy E and E-1; Douglas County Countywide CP, 3.4.1 (G-14), 6.1
23 Transportation, 6.1.1 (T-7, T-8, T-10 through T-13); GEWACP Goals and Policies 8-8, 8-9, 5-3, 5-4; SMP goals and
24 policies; Douglas County development regulations, DCC 14.98.861, DCC 19.18.035.

25 ⁴⁶ Douglas County Hearing Examiner's Findings of Fact, Conclusions of Law, Decision and Conditions of Approval,
26 Nov. 3, 2006; Findings of Fact Nos. 3.6 – 3.7.

⁴⁷ Petitioners' Supplemental at 7.

1 36.70A.177, specifically "innovative techniques", not on whether a site-specific rezone, such
2 as an recreational overlay zone, is allowed in designated agricultural lands of long-term
3 commercial significance. This argument is not relative to this case.

4 **Conclusion:**

5 The Board agrees with the County and State agencies that "neither the *Woods* Court
6 nor the *Wenatchee Sportsmen* Court found express authorization in the comprehensive
7 plans for the specific actions at issue in those cases."⁴⁸ In order to qualify as a site-specific
8 rezone, not subject to the Board's jurisdiction, the rezone must be authorized by the CP.
9 The County and State agencies have shown that both the zoning laws and CP authorized
10 this action, placing it squarely in the exclusive jurisdiction of the Superior Court.

11 The application for a R/O permit is a project permit application as defined in RCW
12 36.70B.020. The land use permit was required by Douglas County and ordered to be
13 sought by the Douglas County Superior Court. This Board does not have jurisdiction to hear
14 this petition. The County's Motion to Dismiss this matter is GRANTED.

14 **III. ORDER**

15 Based upon the Board's review of the GMA, prior decisions of the Boards, the Pre-
16 hearing Motion to Dismiss discussion, and briefings of the Parties, and having discussed and
17 deliberated on the matter, the Board finds:

- 18 1. The Board does not have jurisdiction over the subject matter of this
19 petition and, therefore, the County's Motion to Dismiss is GRANTED.
20 The Board enters an Order of Dismissal for Case No. 08-1-0011. RCW
21 36.70A.280.
- 22 2. The Petitioners' May 5, 2008, Objection to Douglas County's Dismissal
23 Motion was discussed and noted at the Pre-hearing conference and
24 Motion to Supplement the Record was GRANTED and attachments
25 reviewed by the Board. WAC 242-02-540.

25 ⁴⁸ WSP&R Reply at 3.

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- 3. The Petitioners' May 8, 2008, Objections to and Motion to Strike the Douglas County May 1, 2008, "Respondent's Memorandum" were noted. The Motion to Strike "Respondent's Memorandum" is DENIED.
- 4. The Petitioners' Objection to, Motion to Strike, And Response To States' "Response" to Petitioners' Motion to Strike is noted and Motion to Strike the States' Response is DENIED. WAC 242-02-522.
- 5. The Petitioners' May 29, 2008, Motion to Supplement the Record is GRANTED in part, DENIED in part. The Board will take official notice of Attachments C and D to the Declaration; supplementation of the Record with Attachments A and B will not be permitted. WAC 242-02-660. The Petitioners' Motion to Produce the Record is DENIED. WAC 242-02-520.
- 6. The Petitioners' June 9, 2008, Objection to "Reply" Briefs is noted, but the correlating Motion to Strike is DENIED. The Petitioners' Motion to Supplement the Record is DENIED. WAC 242-02-522 and WAC 242-02-540.

Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration:

Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this Order to file a petition for reconsideration. Petitions for reconsideration shall follow the format set out in WAC 242-02-832. The original and four (4) copies of the petition for reconsideration, together with any argument in support thereof, should be filed by mailing, faxing or delivering the document directly to the Board, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review:

Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial

1 review may be instituted by filing a petition in superior court according to the
2 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil.

3
4 **Enforcement:**

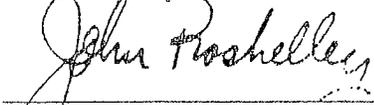
5 The petition for judicial review of this Order shall be filed with the appropriate
6 court and served on the Board, the Office of the Attorney General, and all parties
7 within thirty days after service of the final order, as provided in RCW 34.05.542.
8 Service on the Board may be accomplished in person or by mail. Service on the
9 Board means actual receipt of the document at the Board office within thirty
10 days after service of the final order.

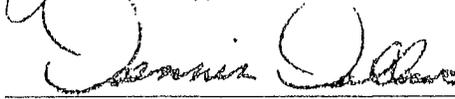
11 **Service:**

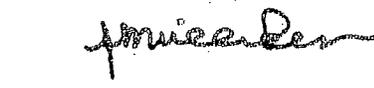
12 This Order was served on you the day it was deposited in the United States
13 mail. RCW 34.05.010(19)

14 **SO ORDERED** this 17th day of June 2008.

15 EASTERN WASHINGTON GROWTH MANAGEMENT
16 HEARINGS BOARD

17 
18 _____
19 John Roskelley, Board Member

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21 _____
22 Dennis Dellwo, Board Member

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24 _____
25 Joyce Mulliken, Board Member

APPENDIX B

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**State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON**

JACK & DELAHINE FEIL, JOHN & WANDA
TONTZ, & THE RIGHT TO FARM
ASSOCIATION OF BAKER'S FLAT,

Petitioners,

v.

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

Respondents.

Case No. 06-1-0012

ORDER ON MOTION TO DISMISS

I. PROCEDURAL HISTORY

On November 27, 2006, JACK & DELAHINE FEIL, JOHN & WANDA TONTZ, & THE RIGHT TO FARM ASSOCIATION OF BAKER'S FLAT, by and through their representatives, Robert Rowley and James Klauser, filed a Petition for Review.

On January 2, 2007, the Board held a telephonic Prehearing conference. Present were, Dennis Dellwo, Presiding Officer, and Board Members John Roskelley and Joyce Mulliken. Present for Petitioners was Robert Rowley. Present for Respondents was Steven Clem, Stephen Klasinski, Karolyn Klohe.

The Board, under WAC 242-02-020(3) raised a challenge as to the Board's jurisdiction over the issues presented and requested the parties provide briefing. The

1 Respondents were requested to provide their briefing on **January 17, 2007**, with the
2 Petitioners' response by **January 31, 2007**, and the Respondents' rebuttal **February 7,**
3 **2007.**

4 On January 4, 2007, the Board issued its Prehearing Order.

5 On January 17, 2007, the Board received Respondents' Joint Motion to Dismiss.

6 On January 31, 2007, the Board received Petitioners' Responding Brief to
7 Respondents' Joint Dismissal Motion.

8 On February 7, 2007, the Board received Respondents' Reply Brief in Support of
9 Respondents' Joint Motion to Dismiss.

10 On February 12, 2007, the Board received Petitioners' Objection to and Motion to
11 Strike Respondents' Reply Brief. The Board hear extensive arguments from the parties and
12 dismissed the Motion and found that the Board would consider only properly pled
13 arguments of the parties.

14 On February 13, 2007, the Board held a telephonic motion hearing. Present were,
15 Dennis Dellwo, Presiding Officer, and Board Members John Roskelley and Joyce Mulliken.
16 Present for Petitioners were Robert Rowley and James Klauser. Present for Respondents
17 were Steven Clem, Douglas County, Stephen Klasinski, Department of Transportation,
18 Matthew R. Kernutt, State Parks, and Karolyn Klohe, .

19 **II. FACTS**

20 On March 27, 2006, the Washington State Parks and Recreation Commission ("State
21 Parks") filed a combined "Land Development Permit Application for a recreational overlay
22 district and site plan development to construct a public multi-modal trail facility that will be
23 located on a WSDOT right-of-way and lands owned by the Chelan County PUD. This
24 application was made after the Douglas County Superior Court ordered State Parks "to
25 apply for and obtain land use permits as may be required by the Douglas County Code."

26 The recreational overlay district, as issued by Douglas County, does not change the
underlying zoning. It permits an activity to take place within a zoning district that does not

1 expressly authorize or only conditionally allows such activity. No changes were made to the
2 Douglas County Comprehensive Plan or its Development Regulations.

3 On November 3, 2006, Douglas County Hearing Examiner, Andrew L. Kottkamp,
4 issued a final decision on the combined application and approved Permit Nos. RO-06-01 and
5 SPD 06-02. The Douglas County Code authorizes the Hearing Examiner to do so. (Chapter
6 2.13.070).

7 **III. DISCUSSION**

8 **POSITION OF THE PARTIES**

9 The Respondents, Washington State Parks and Recreation Commission, Douglas
10 County and The Washington State Department of Transportation filed a motion seeking the
11 dismissal of the Petition in this matter. The Respondents are contending that the Eastern
12 Washington Growth Management Hearings Board (Board) lacks subject matter jurisdiction
13 over this matter.

14 The Respondents, in their joint memorandum, contend that the Board has only the
15 authority expressly granted or necessarily implied by statute. They go on to cite RCW
16 36.70A.280 (1), which provides that:

17 A growth management hearings board shall hear and determine only those
18 petitions alleging either:

19 (a) That a state agency, county, or city planning under this chapter is not in
20 compliance with the requirements of this chapter, ... as it relates to plans,
21 development regulations, or amendments, adopted under RCW 36.70A.040....

22 The Respondents contend the Board does not have jurisdiction to hear the petition unless
23 the petitioner alleges that a comprehensive plan, a development regulation or amendments
24 thereto are not in compliance with the requirements in the GMA.

25 The Respondents contend that the Petitioners are not challenging a development
26 regulation or a comprehensive plan or any amendments thereto. Instead, Petitioners
challenge a land development permit issued by Douglas County for a recreational overlay
district. Further, the Douglas County Code does not prohibit pedestrian/bicycle access

1 corridors within such areas. While discouraged, these uses are not prohibited, as is the case
2 of other uses throughout the Comprehensive Plan.

3 The Petitioners contend that the approval of the recreational overlay district is a
4 rezone. They cite to the "Land Development Permit Application" form which was filed by
5 State Parks. They also contend that there is no such thing as a "Recreational Overlay
6 permit" in the Douglas County Code. It is a land use zone, just the same as Residential,
7 Agricultural, etc. (DCC 18.12.020). They point out that the application filed by State Parks
8 was a combined application for the Overlay district and a Site Plan Development Permit.
9 The trail is five miles long, 220 feet wide, crossing four zoning districts and one Ag
10 Resource Area. They believe this is not a site specific zoning decision. They also disagree
11 with the Respondents' claim that such a trail use may be administratively inserted into an
12 Ag Resource Area. DCC 18.16.150(I) is quoted, indicating that pedestrian/bicycle access
13 corridors shall be discouraged in designated agricultural lands of long-term commercial
14 significance. The Petitioners contend that it is inconceivable that the high court would
15 embrace an argument which would allow administrative authority to jeopardize Ag Resource
16 Areas where no legislative authority to do so does or can exist.

16 The Petitioners contend that they never stated that the zoning decision constitutes a
17 comprehensive plan. It does, however, believe that it requires an interpretation and
18 application of Douglas County's Comprehensive Plan that will render it non-compliant. The
19 decision is claimed to be a development regulation because the authority to rezone an Ag
20 Resource Area for recreation purposes is not, and could not be, included in the County's
21 Comprehensive Plan or Subarea Plan.

21 The Respondents respond to the arguments of the Petitioners by first pointing out
22 that the Petitioners erroneously claim that the approval of the overlay district is a rezone.
23 The application form submitted lists two options next to the box checked – "Rezone" or
24 "Rec. Overlay", and only the "Rec. Overlay" is circled. Further, the Respondents contend
25 that they do not argue that the action is a "site-specific" rezone. This is a false statement.

26

1 The Respondents point out that they simply stated that "if" it was a rezone authorized by a
2 comprehensive plan, the Board would not have jurisdiction to hear the petition.

3 **BOARD DISCUSSION**

4 The Board must look to the Growth Management Act to determine if it has the
5 subject matter jurisdiction to hear this petition. The Petitioners are contending that we
6 have jurisdiction because the action taken is a "Rezone". However, there is nothing in the
7 record which supports such an allegation. The Comprehensive Plan has not been amended,
8 the Development Regulations have not been amended nor have the land use maps been
9 amended. The Petitioners seem to be contending that the "effect" of the issuance of the
10 subject permits is to rezone the property and thus must be considered a rezone. If this is in
11 fact a tool to avoid the proper procedure for the amendment of the Comprehensive Plan or
12 its regulations, this needs to be pursued in the proper forum. The Board does not have
13 jurisdiction to review the Comprehensive Plan, its regulations or actions performed pursuant
14 to those documents unless they are challenged within 60 days of the publication of their
15 adoption. That is not the case here. The Washington State Legislature established a
16 procedure for Superior Court review of local land use decisions not subject to review by the
17 Board. (RCW 36.70C). The Board finds that the Douglas County Code and its
18 Comprehensive Plan authorize the subject project.

19 The Petitioners' reference to RCW 36.07A.470 as the basis for the Board's jurisdiction
20 is misplaced. The purpose of that statute was to direct the Counties to develop a procedure
21 for consideration of amendments and improvements to the comprehensive plans separate
22 from the permit process. The Counties were directed not to make land use planning
23 decisions in the permitting process. While this is great advice, the Board does not find it
24 received additional jurisdiction from the Legislature through that statute. The Board's
25 jurisdiction is found in RCW 36.70A.280. That jurisdiction is further limited to hear only
26 petitions filed within 60 days after publication of the ordinance, or summary of the
ordinance, adopting the comprehensive plan or development regulation or amendment
thereto. (RCW 36.70A.290).

1 The application for a Recreational Overlay permit is a project permit application as
2 defined in RCW 36.70B.020. The land use permit was required by Douglas County and
3 ordered to be sought by the Douglas County Superior Court. This Board does not have
4 jurisdiction to hear the Petitioner's Petition and it should be dismissed.

5 **IV. ORDER**

6 Based upon the record, briefs and argument in this matter, the Board hereby enters
7 the following Order:

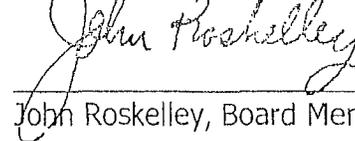
8 The Board finds that the Eastern Washington Growth Management Hearings Board
9 does not have jurisdiction over the subject matter of this Petition and Orders the Petition
10 dismissed.

11 **SO ORDERED** this 16th day of February 2007.

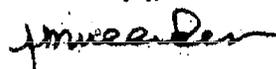
12 EASTERN WASHINGTON GROWTH MANAGEMENT
13 HEARINGS BOARD

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15 Dennis Dellwo, Board Member

16 

17 John Roskelley, Board Member

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19 Joyce Mulliken, Board Member