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Court of Appeals Div. III No. 282481

NO. 82399-5 and NO. 82400-2 (Consolidated)

SUPREME COURT OF THE STATE OF WASHINGTON

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

Appellants,

v.

THE EASTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD, et al., (No. 82399-5)

and

DOUGLAS COUNTY; DOUGLAS COUNTY BOARD OF
COUNTY COMMISSIONERS; WASHINGTON STATE
DEPARTMENT OF TRANSPORTATION; WASHINGTON STATE
PARKS AND RECREATION COMMISSION; and PUBLIC UTILITY
DISTRICT NO. 1 OF CHELAN COUNTY, (No. 82400-2)

Respondents.

DIRECT APPEAL FROM RELATED APA and LUPA RULINGS OF
THE SUPERIOR COURT FOR DOUGLAS COUNTY

Honorable John Hotchkiss, Presiding
(Douglas County Case No. 08-2-00311-3 and No. 08-2-00151-0)

APPELLANTS' REPLY BRIEF

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I. INTRODUCTORY COMMENTS

It is stunning that in the eighty-nine (89) combined pages of Responding Briefs, neither of the Respondents showed this Court where — in the Comprehensive Plans — authority exists for a rezone to Recreational Overlay (“R-O”). Since Eastern Washington Growth Management Hearing Board jurisdiction [or lack of jurisdiction] depended entirely upon the existence of such rezone authority, it does seem that the Respondents might have met that issue head-on rather than avoiding it entirely. It appears that the Respondents had no choice but to agree with Appellants that no such authority exists in the comprehensive plan, as is required by RCW 36.70B.020(4) if they hope to avoid GMA compliance scrutiny.

The Responding Briefs amplify the need for direct review by this Court. Respondents do not pretend that Douglas County met its obligation owed to its Baker Flats Agricultural Resource Area. Instead, Respondents argue that no tribunal has jurisdiction to require it to do so, and that the County is free to thumb its nose at express requirements of state general law.

If this case only involved issues over what the State’s statutes and case law require regarding general zoning process, Respondents’ arguments would merely be wrong, but the case would not involve the same public urgency. The urgency requiring direct review by this Court exists because this case involves undecided but urgent questions involving the limitations of local zoning power when tampering with Agricultural

Resource Area protections, local process that must be used when adopting, amending or eliminating those protections, and preservation of accountability without which these rights are illusory.

For example, what might be considered a “site-specific” rezone outside an Agricultural Resource Area cannot be considered “site-specific” within a protected Agricultural Resource Area because of the over-laying public interest created by RCW 36.70A.177. Within such a protected area there is no such thing as a rezone that is unique to a specific property. So that rezone can not be classified as “site-specific.” Similarly, while rezones outside an Agricultural Resource Area might be accomplished in appropriate circumstances by approving a “project permit,” RCW 36.70A.060 *requires* that Agricultural Resource Area protections come in the form of “development regulations.” If conflict exists between a provision dealing generally with a subject, and another provision addressing the subject specifically, the specific provision prevails. *Seattle First Nat’l Bank v. Snell*, 29 Wn.App. 500, 629 P.2d 454 (1981)

To reach their incorrect result, the Respondents’ argue that RCW 36.70B.020(4) — a statute generally addressing site-specific rezones — overrides the specific Agricultural Resource Area requirements of RCW 36.70A.060 and RCW 36.70A.177 which require that counties protect Agricultural Resource Areas through development regulations. Even as they claim to rely upon RCW 36.70B.020(4), the Respondents mostly ignore or distort the two-part RCW 36.70B.020(4) statutory requirement

necessary to qualify a "rezone" as a "project permit."

Pages 7 through 10 of Appellants' Opening Brief demonstrate that in the Environmental Assessment ["EA"], and for the first three (3) years of the process below, the Respondents understood the need for a rezone to "R-O" in order to "make the proposal consistent with the Comprehensive Plan." In 2003, the Respondents struck a deal to avoid the recognized need for a rezone:

"...At that meeting I merely suggested that the Rocky Reach Trail project be pursued by the proponents as a multi-modal transportation component of US2/97, rather than an unrelated recreational use. **I opined that the development of the right-of-way for transportation purposes would eliminate the need for a zoning change involving a recreational overlay.** My suggested approach was adopted." (emphasis added) [Opening Brief page 13, 82400-2 Vol. 3 CP page 215]

That agreement to eliminate the requirement for a zoning change to "R-O" failed on appeal. On remand, the EA's recognition of the existence of an "inconsistency" between the Comprehensive Plan and the proposed recreation trail magically disappeared from Respondents' radar screen. In place of "inconsistency" with the Comprehensive Plan, the Respondents now claimed that the Comprehensive Plan actually had previously authorized a rezone to "R-O," even though the Comprehensive Plan does not even mention the existence of any "R-O Zone." Despite the fact that the Comprehensive Plan expressly designates the Agricultural Resource Area and expressly identifies the AC-5 and AC-10 agricultural

zones as the zones authorized within the Agricultural Resource Areas, Respondents illogically claim that the Comprehensive Plan contradictorily implies recreational rezone authority beyond the zoning discretion delegated to the County [see Appellants' Opening Brief at page 34].

Respondents argue that they are now free to thumb the local nose at State general law without recourse. They argue that "GMA compliance" review jurisdiction was lost because a 60-day appeal period provided in RCW 36.70A.290 expired with nobody having filed an appeal to the Eastern Washington Growth Management Hearings Board ["EWGMHB"]. Even though nobody — including the County — ever claimed that R-O rezone authority existed in the Comprehensive Plan until years into this dispute, the County claims that the farmers should have somehow anticipated the future County assertion of implied rezoning authority and that failure of the farmers' "crystal ball" has now freed the County to ignore explicit requirements of State general law without fear of accountability for the failure.

However, even in the unlikely event that this Court agrees that no EWGMHB jurisdiction exists, the local legislation cannot stand in the face of direct conflicting requirements imposed by general law.

"Compliance review" under the GMA differs from "conflict review" under Washington Constitution Article Eleven § 11. State general law values agriculture over recreation in such protected areas, and requires local law to secure those express values. Local legislation to the contrary cannot stand, and only this Court can authoritatively establish

that local jurisdictions cannot so easily evade the requirements of state general law.

II. REPLY TO “DEVELOPMENT PERMIT” ARGUMENTS

A. Context For The EWGMHB “Jurisdiction” Debate

1. Statutory Obligations Owed To Agricultural Resource Areas:

These Farmer Appellants appealed Douglas County development regulation approvals creating a Recreational Overlay (“R-O”) [DCC 18.46] land use zone within a Douglas County Agricultural Resource Area of Long Term Commercial Significance. Douglas County had previously established protections for the agricultural area by adopting protective *development regulations* — as required by RCW 36.70A.060 — in the form of zoning regulations as authorized by RCW 36.70A.177.

The County's development regulations created AC-5 [DCC 18.34] and AC-10 [DCC 18.36] agricultural zoning districts to protect the agricultural interest, the agricultural zoning districts required by the Comprehensive Plan to be utilized within Agricultural Resource Areas [see Appellants’ Opening Brief at page 34]. The County’s development regulations also discouraged locating trails within an Agricultural Resource Area. DCC 18.16.150(I) [see Appellants’ Opening Brief page 34-36]. Douglas County now adopts new development regulations to eliminate the protections previously accorded by prior agricultural zoning.

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

recognized that the GMA imposed five (5) mandatory requirements on counties regarding their Agricultural Resource Area obligations:

- (1) Counties must designate agricultural lands of long-term commercial significance;
- (2) Counties must assure the conservation of agricultural land;
- (3) Counties must assure that the use of adjacent lands does not interfere with their continued use for agricultural purposes;
- (4) Counties must conserve agricultural land in order to maintain and enhance the agricultural industry; and
- (5) Counties must discourage incompatible uses. *King County*, supra @ p 558.

In addition to these five (5) affirmative requirements, the Court recognized that the required RCW 36.70A.060 local *development regulations* might take the form of zoning regulations if those zoning regulations “conserved agricultural lands and enhanced the agricultural economy.” RCW 36.70A.177(1) The Court also emphasized that RCW 36.70A.177(1) required that zoning provisions allowing for “nonagricultural” uses within such a protected zone be limited to “lands with poor soils” or on “lands not otherwise suitable for agricultural purposes.”

The admonition in DCC 19.18.035 does not “authorize” the construction of trails in Agricultural Resource Areas, as the County improperly argues at page 28 of its responding brief. DCC 19.18.035 implements the “lands with poor soils” or on “lands not otherwise suitable for agricultural purposes” requirement of RCW 36.70A.177(1). The

question is not whether trails are categorically prohibited in Agricultural Resource Areas. There is no such categorical prohibition. The question is: Under what limited circumstances may a trail be allowed within the mandates imposed and the limited zoning discretion delegated by the GMA?

In the proceedings below, Douglas County ignored all of these statutory obligations except the requirement to designate the protected area in the first instance. In the *King County* case, this Court also held that RCW 36.70A.177 limited the zoning discretion of a county within an Agricultural Resource Area, striking down a King County effort to authorize soccer fields within such a protected Agricultural Resource Area in King County. *King County*, supra at page 561.

2. **The County Rezone Constitutes The Adoption Or Amendment Of A Development Regulation Reviewable By The EWGMHB.**

The Respondents are not so bold as to suggest that the Appellants' Opening Brief inaccurately states GMA obligations and zoning limitations applicable to the County. Instead, the Respondents argue that those obligations and limitations — once required of the County — can no longer be enforced against Douglas County.

Despite the fact that no Douglas County Comprehensive Plans even mention the existence or the creation of a "Recreational Overlay (R-O)" land use zoning district, the Respondents fantasize that the County's comprehensive plans authorized an "R-O rezone." They locate the unexpressed "authority to rezone" in the fact that the County's

comprehensive plans' open space and recreation section lists a "trail" in its inventory of worthy recreational projects. From the fact of the trail's inclusion on that inventory, Respondents infer that the Comprehensive Plan "authorizes" the adoption of any rezone — even if the zone is not even mentioned in the Comprehensive Plan — necessary to the ultimate development of the inventoried public recreational project. They make this unwarranted argument for "implied rezone authority" even though:

- (1) The same comprehensive plans contradictorily and explicitly create the Agricultural Resource Area and expressly provide for its protection by adopting development regulations consisting of AC-5 and AC-10 zones [see page 34 of Appellants' Opening Brief and Appendix G, H and I thereto];
- (2) Comprehensive Plan open space and recreation inventories are statutorily classified as inferior to the Agricultural Resource Area obligations imposed by the GMA to adopt zoning within such Agricultural Resource Areas in order to protect the agricultural economy [*King County*, supra @ page 558];
- (3) The R-O "zoning authority" sought to be "implied" exceeds the Agricultural Resource Area zoning discretion delegated to the County by the state legislature [*King County*, supra @ page 561];
- (4) State law requires that counties protect Agricultural Resource Areas directly through the adoption of development regulations in the form of zoning laws, not indirectly in comprehensive plans [RCW 36.70A.060, RCW 36.70A.177];

- (5) The local County development regulations recognize that the Comprehensive Plan does not include R-O rezone authority, and that R-O rezone authority is a creature of the County development regulations [DCC 18.12.060 and DCC 18.46, and see Appellants' Opening Brief page 14]; and
- (6) The County development regulations superceded any authority, express or implied, that may exist to the contrary in the County Comprehensive Plans [see Appellants' Opening Brief at pages 34-36].

Similarly, the Respondents simply ignored Appellants' argument. Appellants argued that RCW 36.70A.177 required zoning within Agricultural Resource Areas (1) to conserve agricultural lands, (2) to enhance the agricultural economy and (3) to confine non-agricultural uses to poor soils or soils not suitable for farming. Thus, RCW 36.70A.177 has imposed a paramount public interest upon all regulatory decisions within the protected Agricultural Resource Area for the primary purpose of enhancing the agricultural economy. The typically private and narrow interests that lie at the foundation of traditional "site-specific" rezone rationale dissolve into the legislatively-declared public interest within an Agricultural Resource Area. So no rezone within such a protected zone can be considered "site-specific."

The Respondents simply ignore the absence in this record of the two (2) RCW 36.70B.020(4) "rezone" requirements — i.e., (1) site-specific and (2) authorized by a comprehensive plan — for a rezone action

to qualify as a “project permit” rather than the adoption or amendment of development regulations. RCW 36.70B.020(4) sets forth the requirements:

(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)

Respondents’ urge this invalid argument upon the Court because they know that their rezone decision cannot withstand scrutiny on appeal for the reason that the decision violates every County obligation owed to the Baker Flats Agricultural Resource Area. But, no matter how the Respondents parse RCW 36.70B.020(4), this “R-O” rezone of a 4-mile length of the Agricultural Resource Area was not site-specific, was not authorized in the comprehensive plan, is controlled by *King County*, supra, and is not controlled by *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007). The County decision constituted the adoption/amendment of an RCW 36.70A.030(7) development regulation, not the approval of an RCW 36.70.B.020(4) project permit. The EWGMHB had jurisdiction to review the adoption of this RCW 36.70A.060 development regulation/RCW 36.70A.177 rezone.

**B. "PROJECT PERMIT" ARGUMENTS
(County Response at page 8, State's Response at page 9)**

Many blatant inaccuracies populate the Responding Briefs. For example, at page 13 of the State's Response, the State Respondents improperly state that the trail "affects only 24 acres of land currently leased from two governmental entities." The record shows that:

- 24 acres of mature orchard will be destroyed [Opening Brief p. 9];
- 44 acres of "prime and unique soils would be lost [Opening Brief p. 10];
- The five mile by 200-foot corridor occupies over 120 acres of land; and
- The trail will adversely affect adjoining orchards on privately owned land on either side of the trail for its four mile length within the Agricultural Resource Area [Opening Brief, pages 15-19]

The County's Responding Brief at page 11 [in footnote #1] references a Superior Court ruling in *Feil v. EWGMHB* [copy attached to County Brief at Appendix ("C") Exhibit 8] "affirming" a decision of the EWGMHB that the Growth Board lacked jurisdiction to review the Hearing Examiner's "permit" decision in view of the remand decision made that same day by the Superior Court in the LUPA appeal. The implication made by the County is that by "affirming" that the EWGMHB had no jurisdiction to review a Hearing Examiner's Order, the trial court somehow predetermined that the EWGMHB would have no jurisdiction to subsequently review the coming legislative decision of the Board of County Commissioners following remand. The order had no such effect.

As usual, the refutation of a careless or inaccurate contention takes

multiple times the briefing space of the contention being refuted. Appellants must necessarily rely on the record and law referenced in their Opening Brief, and are unable to make detailed repetition in this Reply. Silence on such obvious Respondent errors is a consequence of space limitation, not a concession.

The Appellants' Opening Brief discussed the statutory limits imposed upon the power of local governments to zone and rezone. Appellants pointed out at page 27 of their Opening Brief that Chapter 36.70 RCW — the “Planning Enabling Act”— requires approval of zones and rezones by the County legislative authority. Even where the County creates a Hearing Examiner system [as Douglas County did], the Planning Enabling Act prohibits a county from giving a hearing examiner's rezone decision “the effect of a final decision of the legislative authority.” RCW 36.70.970(2)(c) requires that a rezone decision of a hearing examiner, though made after conducting a hearing concluded with findings-of-fact and conclusions-of-law [“quasi-judicial”] be advisory only, and that the final rezone approval must be made by the county legislative authority. The responding briefs of both the County and the State do not even mention RCW 36.70.970, much less respond to the requirement.

Chapter 36.70B RCW — the “Regulatory Relief Act” — gave counties some narrow relief from the previous requirement that the legislative authority make every rezone decision in every instance. In the limited situation where a legislative authority has “authorized a site-specific rezone within its GMA comprehensive plan,” the requisite

legislative approval exists, and the approval can be implemented by the development permit process. RCW 36.70B.020(4)

Because no prior “legislative approval” existed in the record in any form to authorize this rezone, the Douglas County Superior Court [in *Feil, et al., v. Douglas County, et al* No. 06-2-00410-5] remanded to Douglas County to supply the missing legislative authorization by the Board of County Commissioners [“BOCC” hereafter].

“This does not mean that the rezone in this area cannot occur, but it means that the decision must be made by the legislative authority of the county.....As this is a legislative decision, the decision of the Hearing Examiner must be remanded to the County legislative authority for review and decision.” [see County Response Brief, Appendix (“C”), Exhibit 9 at Bates No. 4896]

The Respondents did not appeal this July 31, 2007 final order of the superior court, but proceeded to comply by procuring the missing legislative approval, which was finally given in the form of TLS -08-09B on March 25, 2008. The Appellants appealed that legislative decision to the EWGMHB within sixty (60) days of the legislative decision.

Appeals of final decisions on such requests for legislative approval are not taken under LUPA because such legislative decisions fall outside the definition of a “land use decision.” RCW 36.70C.020(1)(a) In fact, the entire argument made by the Respondents agrees with Appellants’ contention that the appeal of a legislative decision to authorize rezone authority must be taken to the EWGMHB. The only dispute about that question is one of timing. Appellants claim to have perfected their

EWGMHB appeal within 60 days of the only legislative decision authorizing the rezone. The Respondents argue that appeal rights expired years before, i.e., years before the Douglas County superior court remanded to procure legislative approval and years before the BOCC gave legislative authorization for the rezone.

Respondents' "timing" arguments rest solely on RCW 36.70B.020(4). That statute applies only if the BOCC (1) had previously authorized (2) a site-specific rezone in its comprehensive plan [see statutory discussion in Part "A" above]. Appellants' make two arguments for why RCW 36.70B.020(4) does not apply: first, the comprehensive plan does not mention R-O zones and therefore does not authorize any R-O zoning action; and second, the rezone cannot be considered "site-specific" because of size, reach and scope of impact, but also because the entirety of the agricultural economy is entitled to the Agricultural Resource Area protections. Action affecting any parcel cannot be considered specific only to a particular parcel or parcels within such a protected area.

The County's Response Brief simply ignores these arguments. The County mentions RCW 36.70B.020(4) in passing, but offers no analysis. The County might have attempted to demonstrate that the Comprehensive Plan included "rezone authorization," but it did not. It might have provided argument to refute Appellants' argument that RCW 36.70A.177 makes all rezones of area-wide significance within Agricultural Resource Areas, but it did not. Instead, the County's Response

plunged past the statute upon which it purports to rely, and into a discussion of *Woods v. Kittitas County*, supra and *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000), ignoring the fact that both of those cases did involve “rezones authorized in a comprehensive plan” and did not involve rezones limited by RCW 36.70A.177. Without making any attempt to demonstrate the applicability of either of those cases by first showing that the RCW 36.70.020(4) elements exist, the County argues in the abstract, ignoring the truth: i.e., the county comprehensive plan does not mention, much less authorize, R-O zones, a requirement for RCW 36.70B.020(4) classification as a “project permit.”

In some ways, the State Respondents' Brief on this issue is more puzzling than the County's. For example, at page 19 of its brief, the State mis-characterizes the Appellants' argument. These farmer Appellants arguments are not based upon their supposed “confusion” over the route a trail might take. The farmers object that the Comprehensive Plan *does not authorize a rezone* as is required by RCW 36.70B.020(4), and that to “imply” such authorization within an Agricultural Resource Area from the mere naming of a recreational trail project is not possible for a number of legal reasons, all of which the Appellants' Opening Brief elaborates, and which State's Response Brief ignores.

At page 10 of the State's Brief, it quotes RCW 36.70B.020(4) with its “site-specific” and “authorized in the comprehensive plan” requirements. One might have expected the State to respond to Appellants'

argument that there can be no such thing as a “site-specific” rezone of land within a protected Agricultural Resource Area, but the State did not. One might have expected the State Respondents to show that the Comprehensive Plan — all versions of which are part of the record — included “authorization for an R-O rezone,” but the State did not. One might have expected the State to respond to Appellants’ arguments that such “authority” cannot be implied to exist for rezones within an Agricultural Resource Area, but the State did not. Instead of meeting issues head on, the State Respondents argued irrelevancies:

- “The project application meets the definition of a project permit application because it is an application for a specific project for a specific use by a specific applicant that is authorized by existing zoning laws.” (State Brief at page 10)

The State does not explain what happened to “a site-specific rezone authorized in a comprehensive plan” statutory requirement;

- “If an existing zoning law authorizes the use but requires the county to approve the project to ensure that the project complies with the various standards set forth in the zoning code, the project is a project permit under RCW 36.70B.020.” (State Brief at page 11)

The State does not explain what happened to “a site-specific rezone authorized in a comprehensive plan” statutory requirement.”

- “This project application was submitted pursuant to existing zoning regulations that authorized recreational overlays.” (State Brief at page 11)

The State does not explain what happened to “a site-

specific rezone authorized in a comprehensive plan” statutory requirement.”

- “Appellants argue that it is evident that the DCC requires all rezones to be approved as an amendment to the comprehensive plan.....They cite to no part of the code that sustains this argument.” (State Brief at page 15)

On the contrary, the “citation to the code” was made. DCC Chapter 14.32 — Comprehensive Plan and Development Regulations Amendment Process — was attached at Appendix (“J”) to Appellants Opening Brief.

- “Having demonstrated that this *project* is site-specific, we will demonstrate that the *project* is also authorized by the comprehensive plan” — policies authorize the *project* — the *project* is consistent with policies. (State Brief at page 20-22)

Notice the subtle semantic shift? RCW 36.70B.020(4) requires a showing that a *rezone* is authorized, not that a *project* is authorized. Plus, it is “authorization” — not “consistency” — that must be shown.

At page 22 of the State's Response, the State Respondents wrongly claim that

“(t)his Court has held that, absent a specific requirement of the comprehensive plan to the contrary, site-specific rezones need only be consistent with the comprehensive plan to meet the definition of a project permit under RCW 36.70B.020. *Woods*, 162 Wn.2d at 616; *Wenatchee Sportsmen Ass'n v. Chelan Cy*, 141 Wn.2d at 179.”

This Court ruled no such thing. In both those cases this Court applied the RCW 36.70B.020 statutory definition. In both cases, the Court found that comprehensive plans authorized the rezone in question.

This Court did not replace the statutory “authorized in a comprehensive plan” requirement with a court-created “consistent with the comprehensive plan” substitute.

The mischief that results from taking such liberties as the State Respondents take is evident in the conclusion the State draws:

“As a result, any subsequent land-use decision involving site-specific applications of existing zoning laws, as is the case here, would qualify as a project permit if the action is consistent with the zoning laws and general policies of the comprehensive plan.”

The State Respondents wrongly claim that this Court judicially repealed the RCW 36.70B.020(4) “authorized in a comprehensive plan” requirement to qualify a rezone as a project permit, which is utter nonsense. That they take such liberties with this Court’s decisions is all the more reason for this Court to accept direct review, that they utterly disdain obligations owed to Agricultural Resource Areas and wrongly invoke decisions of this Court to justify that neglect.

**C. “GMA CONSISTENCY REVIEW” ARGUMENTS
(County's Response at page 30, State's Response at page 18)**

Both the County and the State Respondents argue that this rezone to R-O within the Baker Flats Agricultural Resource Area cannot be reviewed for “consistency” with the GMA. Actually, they misstate Appellants’ position, which is not that this Court should conduct the review, but that the EWGMHB must review the rezone decision for GMA “compliance” pursuant to RCW 36.70A.280-290. Appellants argue that a rezone constitutes an RCW 36.70A.030(7) “development regulation”—

which is within EWGMHB jurisdiction — unless the rezone qualifies as a “project permit” pursuant to RCW 36.70B.020(4), and this rezone to R-O is neither site-specific nor “authorized in the comprehensive plan.”

The GMA's “consistency / compliance” scrutiny which the Respondents seek to avoid is quite profound [see seven (7) explicit Agricultural Resource Area obligations inventoried on pages 6-7 above]. Considering that the Comprehensive Plan's recreational inventory includes a multitude of recreational projects, the County's determination to imply rezone authority from the mere presence of a project on that list will result in havoc within the County's designated Agricultural Resource Areas, and in the Agricultural Resource Areas of other counties around the state unless this Court authoritatively ends this charade and distortion.

**D. “SUBSTANTIAL EVIDENCE” ARGUMENTS
(County's Response at page 40, State's Response at page 22)**

The biggest problem with the “substantial evidence” arguments of both the County and State Respondents is that they ignore the utter absence in the record of any evidence whatsoever to establish the statutory lynch-pin of their RCW 36.70B.020(4) “project permit” position. On a question of that importance, one would expect a comprehensive plan to say something like : 'Rezoning to Recreational Overlay are authorized in all zones and resource areas in the county.' That is the critical material evidence that is lacking to qualify this rezone as a “project permit” pursuant to RCW 36.70B.020(4).

With the failure of evidence to establish RCW 36.70B.020(4) project permit status, the County was currently obligated to provide a

record to demonstrate its compliance with the GMA's seven (7) explicit obligations described on pages 6-7 above. By improperly assuming its obligations away, the County spent eight (8) years and (3) three appeals, and produced reams of a basically irrelevant paper record to support immaterial "findings-of-fact," which Appellants discuss with particularity in their Opening Brief. The simple truth of the matter is that the Douglas County record was required to include one of two evidentiary showings:

1. A comprehensive plan authorizing the rezone; or
2. A record to demonstrate its current rezone satisfied the seven requirements applicable to zoning within Agricultural Resource Areas as set out on pages 6-7 above.

The record below lacked either evidentiary showing. Appellants' position is supported by more than "substantial evidence." It is supported by conclusive evidence.

III. "LOCAL PLANS / REGS" CONSISTENCY ARGUMENTS (County' Response page 17 & 35; State' Response page 20 & 28)

The County and State each make a "policy" and a "procedural" "consistency" argument. The "policy" argument is made by the County at pages 17-30 of its Responding Brief and by the State at pages 20-22 of its Responding Brief.

It does seem that — in the combined 17 pages of briefing comprehensive plan policies — the Respondents might have come up with some expression of the existence of "authority to rezone to R-O," but they were

unable to do that, an omission that is fatal to their argument concerning a lack of EWGMHB jurisdiction.

However, what is most telling is the utter lack of attention paid in their "policy consistency" analysis to the comprehensive plan policies and development regulation requirements applicable to Agricultural Resource Areas and Agricultural zones. All of their focus is directed toward a search for policies to support the recreational zone being approved, with no analysis of the agricultural policies being displaced.

Even if one accepts the notion that GMA compliance cannot be enforced and that the County was limited only by consistency requirements imposed by local plans and development regulations, such an analysis requires that all plans and policies be evaluated, not just those that are thought to be supportive of the rezone decision. That search requires an analysis of the plan policies and development regulations applicable to Agricultural Resource Areas of Long Term Commercial Significance, which very closely resemble the requirements announced by this Court in *King County*, supra. It is not possible to construe those Agricultural Resource Area policies to be consistent with the decision made in this case to approve a recreational rezone.

At pages 35-40 of the County brief and at pages 28-32 of the State's Brief, they respond to an assortment of Appellant issues regarding the failure to comply with specific requirements of the County Code. The arguments made in the Opening Brief are generally sufficient without further reply, so we summarize them here in this Reply Brief:

The Shoreline Hearings Board did not consider, much less approve, the requirements of the County Zoning Code. Those Code provisions are mandatory, not discretionary. If County staff believes the requirements are overly “technical,” then they should ask the BOCC to amend the development regulation to exclude the requirements rather than to administratively ignore those requirements. The Code required WSDOT, as a property owner, to sign the application. Neither the Planning Director nor the County Prosecutor was free to alter that or other mandatory requirements. Compliance with DCC 18.46.080A does not constitute compliance with DCC 18.46.070A. The former is a set-back requirement, whose “enhanced” buffering is only required to qualify for a reduced set-back. The “enhanced” alternative buffering can only mean an alternative to the DCC 18.46.070A buffering requirements. But the latter are specified by type, and are required to screen the entire site. The so-called “enhanced” buffering is illusory, since no buffering of any type is included for any part of the project except where the applicant wants to earn the right to reduce the set-back from one hundred (100) feet to sixty (60) feet.

**IV. SEPA—“RCW 43.21.030(2)(e) COMPLIANCE” ARGUMENTS
(County's Response at page 31; State's Response at page 35)**

The County and the State Respondents take unacceptable liberties with the record in this case on this issue. At page 36 of the State's Response Brief, the State quotes the trial court, wrongly suggesting that the quoted trial court decision constituted approval of the County's

compliance with RCW 43.21C.030(2)(e). That question was not even before the court in that appeal and the ruling had to do only with the separate and distinct RCW 43.21C.030(2)(c) "detailed report" due upon the existence of "probable significant adverse environmental impacts." The State claims, in any event, that Respondent Parks complied with RCW 43.21C.030(2)(e). It does not point to any study that was developed or provide any descriptions of alternatives to its preferred alternative. Rather, the State points to an answer to a written cross-examination question posed after the oral testimony at the hearing before the hearing examiner and answered just as that record closed. The answer hardly constitutes a description or study of possible resolutions to resource disputes. At best, Respondent State Parks considered and discarded alternatives that did not suit it, did so "off the record," was unable to produce any study or description because it did not conduct one.

V. "DECLARATORY JUDGMENT" ARGUMENTS
(County's Response at page 43; State's Response at page 33)

Both the County and the State argue that if the adoption or amendment of a local development regulation is not appealed to the EWGMHB within 60 days, then the County legislation stands notwithstanding its lack of compliance with the GMA. There is authority to support that proposition where actual "site-specific rezone authority" was included in the comprehensive plan and the county action is not required by the GMA. *Woods v. Kittitas County*, supra, *Wenatchee Sportsmen Association v. Chelan County*, supra. However, in this case no "site-

specific rezone authority” is included in the Comprehensive Plan and the GMA expressly requires County protection of Agricultural Resource Areas from encroachment by recreational uses. It is interesting that in their response to this issue, both the County and the State ignore the fact that the zoning they claim to have authorized in the Comprehensive Plan exceeds the zoning discretion delegated to them by RCW 36.70A.177. Moreover, it is the original “rezone authorization” supposedly included in the Comprehensive Plan that offends the GMA, so whether the GMA does, or does not, apply to site-specific projects is irrelevant. The appropriate application of *City of Spokane v. Vaux*, 83 Wn.2d 126, 516 P.2d 209 (1973) is to the Respondents’ claims that the Comprehensive Plan should be “interpreted” to include authority to rezone to R-O, for it is that interpretation that unnecessarily creates the very constitutional conflict to be avoided.

VI. “ATTORNEY FEE” ARGUMENTS
(County's Response at page 48; State's Response at page 39)

The Respondents are not entitled to an award of attorney fees. Of the three (3) judicial appeals, they lost the first two (2). They will lose this appeal because the EWGMHB has jurisdiction.

RCW 4.84.370 is inapplicable because the rezone in this case was not authorized in a comprehensive plan and cannot consequently be considered an RCW 36.70B.020(4) project permit. The rezone constitutes the adoption of an RCW 36.70A.030(7) development regulation.

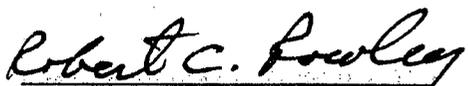
VII. CONCLUSION

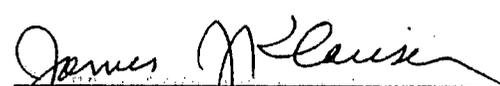
This Court should accept direct review. These farmer Appellants have already struggled for more than eight (8) years to preserve the Baker Flats Agricultural Resource Area against assault by the combined resources of two State agencies — State Parks & Recreation Commission and WSDOT — and Douglas County, who when defeated in one approach simply invented another.

Existing mature orchards are threatened. Judging from the Responding Briefs, it is clear that the State Respondents will ignore the farmers' interests and not renew the leases. Direct review is the only hope these farmers have for a successful outcome that protects their interests.

The Respondents' 2003 strategy to withdraw the Master Application — the one studied in their EA — launched a process of fragmented and sequential review, the effect of which . . . if not the intent . . . was to exhaust these Appellant farmers' resources. The Respondents' goal has been to avoid accountability under this Court's *King County* decision, while the farmers' goal has been to secure those very protections. Those rights will be secured when this Court reverses the jurisdictional decisions below and directs the EWGMHB to review the County's recreational overlay zoning decision on the merits.

Respectfully submitted this 18th day of May 2009.


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