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Court of Appeals Div. III No. 282481

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No. 82399-5, 82400-2 (Consolidated)

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

Respondents.

RESPONDENT'S BRIEF BY DOUGLAS COUNTY

Steven M. Clem, WSBA #7466
Douglas County Prosecuting Attorney
Douglas County Courthouse
P.O. Box 360
Waterville, WA 98858
(509) 745-8535

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I. INTRODUCTION

The County will collectively refer to the appellants, Mr. and Mrs. Feil, Mr. and Mrs. Tonz and The Right to Farm Association of Baker Flats, as "the Association."

The County cites to the record throughout this brief. These cases have been consolidated and there is some confusion as to the CP reference numbers for materials contained within the record before the Growth Management Hearings Board in No.83299-5 and within the record before the County for the LUPA appeal in No. 82400-2. In order to guide the Court to the appropriate areas of the record, the County will cite to the Clerk's Papers using what it believes to be the accurate CP number, and will also include this Court's case number, the volume number assigned by the Clerk, a description of the document from the applicable Designation of Clerk's Papers, and the Bates stamp number on the document, if any.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Douglas County proposes the following counter-statement of the issues presented by the Association's appeal:

Issue No 1. Is the proposed Rocky Reach Trail a site-specific project action authorized under the County's

comprehensive plan and, therefore, a "project permit" or "project permit application" as defined in RCW 36.70B.020(4)? (Association's Assignment of Error No. 1)

Issue No. 2. May the superior court review a county's comprehensive plan, development regulations and related land use decision under the Land Use Petition Act to determine compliance with the Growth Management Act? (Association's Assignment of Error No. 1)

Issue No. 3. Did the Association fail to meet the burden of proof under the LUPA standards of review? (Association's Assignment of Error No. 2)

Issue No. 4. Did the superior court properly hold that Rocky Reach Trail project was not subject to further SEPA review where SEPA review was approved by the superior court during a previous challenge to the project involving the same litigants and the proposed Rocky Reach Trail project has not subsequently changed? (Association's Assignment of Error No. 3)

Issue No. 5. May a county's comprehensive plan, development regulations and decision based thereon be challenged in an independent declaratory judgment action in superior court as unconstitutional for non-compliance with the Growth Management

Act, where the 60 day limitation to request review of the comprehensive plan and development regulations by the Growth Management Hearings Board has expired? (Association's Assignment of Error No. 4)

Issue No. 6. Is the County entitled to an award of reasonable attorney's fees and costs for successfully defending this appeal? (County's Request at IV. Argument, F)

III. SUMMARY OF ARGUMENT

The Recreational Overlay permit and Site Plan Development permit issued by the County and authorizing the construction of the Rocky Reach Trail constitute a "project permit" or "project permit application" under RCW 36.70B.020(4). The Rocky Reach Trail is a site specific project action and, if characterized as a rezone, is authorized by the County's comprehensive plan.

The Growth Management Hearings Board properly decided that it did not have subject matter jurisdiction to review the Rocky Reach Trail project, because the project constitutes a "project permit" or "project permit application" under RCW 36.70B.020(4). *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000); RCW 36.70A.030(4) and (7).

The superior court properly decided the Recreational Overlay permit and Site Plan Development permit issued by the County constitute a "project permit " or "project permit application" under RCW 36.70B.020(4) and that the court did not have subject matter jurisdiction under the Land Use Petition Act (LUPA) to review the County's comprehensive plan, development regulations and related land use decision for compliance with the Growth Management Act (GMA). *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007).

The superior court properly held that the Association failed to meet its burden of proof regarding the standards of review under LUPA and the Administrative Procedures Act (APA).

The superior court properly held that review of the Rocky Reach Trail under the State Environmental Policy Act (SEPA) had been previously reviewed and approved by the court and that there were no changes to the proposed action requiring additional SEPA review.

The superior court properly held that the Association failed to meet its burden of proof for declaratory judgment.

These decisions should be affirmed.

IV. ARGUMENT

A. Standards of Review

1. LUPA Standards of Review

In case No. 82399-5, the Association challenges the County's issuance of permits for the Rocky Reach Trail project alleging errors under RCW Chapter 36.70C, the Land Use Petition Act (LUPA). The Association alleges the permits violate RCW Chapter 36.70A, the Growth Management Act (the GMA), do not comply with the County's comprehensive plan and development regulations, and are not supported by substantial evidence. RCW 36.70C.130(1)(b), (c) and (d). The superior court held that the Association failed to meet its burden of proof under LUPA and dismissed the petition.

The party seeking relief under LUPA has the burden of proving error under the standards of review. RCW 36.70C.130(1). The appellate court sits in the same position as the superior court and applies the LUPA standards of review directly to the record for the County's land use decision. *Griffin v. Thurston County*, 165 Wn.2d 50, 196 P.3d 141 (2008); *Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751, 49 P.3d 867 (2002).

When the sufficiency of the evidence is challenged under LUPA, the appellate court reviews the land use decision under the substantial evidence standard, which has been defined as a “sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true.” *Woods v. Kittitas County*, 162 Wn.2d 597, 616, 174 P.3d 25 (2007); *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Substantial evidence has also been defined as “evidence sufficient to convince a rational, unprejudiced person.” *Griffin v. Thurston County*, *supra*, at 55; *Isla Verde International Holdings, Inc. v. City of Camas*, *supra*, at 751-752. Conversely, when the interpretation and application of the law is challenged under LUPA, the appellate court reviews the alleged errors of law *de novo*. *Griffin v. Thurston County*, *supra*, at 55; *Isla Verde International Holdings, Inc. v. City of Camas*, *supra*, at 751.

The Association has the burden of proof and must demonstrate to this Court that the County’s action is based on errors of law and a lack of substantial evidence.

2. APA Standards of Review

In case No. 82400-2, the Association challenges the Growth Management Hearings Board (GMHB) decision that the permits

issued for the Rocky Reach Trail project constituted a “project permit application” under RCW 36.70B.020(4), and, therefore, the Board lacked subject matter jurisdiction under RCW 36.70A.030(7) and RCW 36.70A.280(1). Judicial review of a GMHB decision is conducted pursuant to the Administrative Procedures Act, RCW Chapter 34.05 (the APA). The burden of demonstrating the invalidity of the Board’s decision is on the party challenging the decision. RCW 34.05.570(1)(a). The superior court held that the Association failed to meet its burden of proof under the APA and the court affirmed the Board’s decision.

An appellate court applies the APA standards of review to the record before the GMHB. *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 45, 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 a GMHB 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 Association has the burden of proof and must demonstrate to this Court that the GMHB erroneously interpreted and applied the GMA when holding the Board lacked subject matter jurisdiction.

B. *The Woods v. Kittitas County and Wenatchee Sportsmen Cases are Controlling Authorities*

In December of 2007, the Supreme Court issued its decision in *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007). Kittitas County had rezoned approximately 250 acres of forest and range resource lands to low density residential. Woods challenged the county's action under LUPA and alleged the county's rezone violated the GMA. The superior court agreed. The Court of Appeals reversed the superior court. The Supreme Court affirmed the Court of Appeals.

In *Woods v. Kittitas County*, the Supreme Court discussed its decision in *Wenatchee Sportsmen, supra*, as well as the Court of Appeals decision in *Somers v. Snohomish County*, 105 Wn.App. 937, 21 P.3d 1165 (2001). The Supreme Court analyzed the

relationship between the GMA and LUPA, as applied to site-specific development projects:

GMHBs do not have jurisdiction to decide challenges to site-specific land use decisions because site-specific land use decisions do not qualify as comprehensive plans or development regulations. Former RCW 36.70A.030(7); RCW 36.70B.020(4); *Wenatchee Sportsmen*, 141 Wash.2d at 179, 4 P.3d 123. A challenge to a site-specific land use decision should be brought in a LUPA petition at superior court. *Wenatchee Sportsmen*, 141 Wash.2d at 179 n. 1, 4 P.3d 123.

Woods v. Kittitas County, at 610, ¶ 20.

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

Woods v. Kittitas County, at 615-616, ¶ 32.

The Association asserts that *Woods v. Kittitas County* has been misapplied in this case because the Association has been precluded from challenging the County's action under the GMA. The Supreme Court's decision in *Woods v. Kittitas County* could not be more explicit regarding the GMHB's lack of "project permit" jurisdiction and the superior court's lack of jurisdiction to consider GMA compliance under LUPA. The Supreme Court expressly recognized the future impact of its decision:

This [inapplicability of the GMA to site-specific projects] presents a potential problem. Assuming that a project permit must be consistent with development regulations or a comprehensive plan, there is the potential that the actual regulations or plan are not consistent with the GMA. As noted above, a comprehensive plan or development regulation's compliance with the GMA must be challenged within 60 days after publication. RCW 36.70A.290(2). Once adopted, comprehensive plans and development regulations are presumed valid. RCW 36.70A.320(1). Thus, if a project permit is consistent with a development regulation that was not initially challenged, there is the potential that both the permit and the regulation are inconsistent with the GMA. **While this is problematic, the GMA does not explicitly apply to such project permits and the GMA is not to be liberally construed. *Skagit Surveyors*, 135 Wash.2d at 565, 958 P.2d 962. This court's "role is to interpret the statute as enacted by the Legislature ... we will not rewrite the [GMA]." *Id.* at 567, 958 P.2d 962. Because the GMA does not provide for it, we hold that a site-specific rezone cannot be challenged for compliance with the GMA.**

(Emphasis added)

Woods v. Kittitas County, at 614, ¶ 28.

The Supreme Court's decisions in *Woods v. Kittitas County* and *Wenatchee Sportsmen* are controlling authorities regarding the jurisdiction of the GMHB over site-specific projects and the superior court's LUPA jurisdiction regarding "project permit" compliance with the GMA.

C. The Growth Management Hearings Board Case Was Properly Dismissed for Lack of Subject Matter Jurisdiction

The GMHB dismissed the Association's petition for review for lack of subject matter jurisdiction.¹ The Board held, *inter alia*, that the permits for the Rocky Reach Trail were site-specific, were authorized by the County's comprehensive plan and development regulations, and constituted a "project permit application" under RCW 36.70B.020(4). The Board rejected the Association's

¹ The EWGMHB dismissed a previous petition for review challenging the Rocky Reach Trail filed by the Association on this same basis: lack of subject matter jurisdiction. *Feil, et al. v. Douglas County, et al.*, EWGMHB Case No. 06-1-0012, Order on Motion to Dismiss (February 16, 2007) (Attached at Appendix C, Exhibit 7). 82400-2, CP 6577, Vol. 34, CD Copy of Record, Litigation Chronology and Exhibits, Bates stamp 4884-4889. The decision of the EWGMHB was appealed under the APA and affirmed by the superior court in *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 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.

argument that the permits must be expressly authorized by the County's comprehensive plan to qualify as a "project permit application." 82399-5, Vol. I, CP 2-36, Petition for Review, Exhibit A (Attached at Appendix A). The superior court affirmed the Board's decision. 82399-5, Vol. III, CP 544-547, Agreed Final Order.

An administrative agency has only such authority as is expressly conferred or necessarily implied by statute. *Jackstadt v. Washington State Patrol*, 96 Wn.2d 501, 512-513, 976 P.2d 190 (1999). The authority of the GMHB is found at RCW 36.70A.280(1):

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

(a) That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW; or

(b) That the twenty-year growth management planning population projections adopted by the office of

financial management pursuant to RCW 43.62.035 should be adjusted.

The terms "plan" and "development regulations" are defined at RCW 36.70A.030(4) and (7):

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

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

(Emphasis added)

The term "project permit application," as referenced in RCW 36.70A.030(7), is defined at RCW 36.70B.020(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)

The Supreme Court first reviewed this statutory framework in *Wenatchee Sportsmen, supra*, at 179. (GMHB did not have subject matter jurisdiction to review rezone of approximately one square mile to rural residential, as the action constituted a site-specific rezone). As discussed above, the Supreme Court followed its *Wenatchee Sportsmen* decision in *Woods v. Kittitas County, supra*. The Supreme Court clarified the relationship between a site-specific action, the applicable comprehensive plan, the GMA and LUPA:

Thus, the GMA indirectly regulates local land use decisions through comprehensive plans and development regulations, both of which must comply with the GMA. Comprehensive plans serve as “guide[s]” or “blueprint[s]” to be used in making land use decisions. Thus, a proposed land use decision must only **generally conform**, rather than strictly conform, to the comprehensive plan. A comprehensive plan does not directly regulate site-specific land use decisions. Instead, local development regulations, including zoning regulations, directly constrain individual land use

decisions. Such regulations must be consistent with the comprehensive plan and be sufficient in scope to carry out the goals set forth in the comprehensive plan.

A site-specific rezone authorized by a comprehensive plan is treated as a project permit subject to the provisions of chapter 36.70B RCW. In reviewing a proposed land use project, a local government must determine whether the proposed project is consistent “with applicable development regulation, or in the absence of applicable regulations the adopted comprehensive plan.” While standards are explicitly provided for making the determination of whether a proposed project is consistent with the development regulations, or, in their absence, the comprehensive plan, there is no explicit requirement that the project permit be consistent with the GMA. Instead, the land use planning choices reflected in the comprehensive plan and regulations “serve as the foundation for project review.”

(Citations omitted; Emphasis original)

Woods v. Kittitas County, supra, at 613-614, ¶¶ 26-27.

1. *The Rocky Reach Trail is a Site Specific Project*

The Association argues that permits R-06-01 and SPD 06-2 issued to State Parks constitute an area-wide rezone, not a development permit or site-specific rezone, and do not meet the definition of a “project permit application” under RCW 36.70B.020(4).

A “site specific rezone” occurs when specific parties request a classification change for a specific tract of land. *Woods v. Kittitas*

County, supra, at 612, FN7, citing *Cathcart-Maltby-Clearview Cmty. Council v. Snohomish County*, 96 Wn.2d 201, 212, 634 P.2d 853 (1981).

Permits R-06-01 and SPD 06-2 issued to State Parks are expressly limited in scope. These permits narrowly apply to a right-of-way owned by The Washington State Department of Transportation (WSDOT) and land owned by Public Utility District No. 1 of Chelan County (Chelan County PUD). The authority granted to State Parks is limited to the construction of the Rocky Reach Trail and buffers on this specific public land. Numerous conditions are imposed regarding design, construction, and usage, all specific to the Rocky Reach Trail and this public land. No development rights are granted to any other persons or entities, or for any other properties. The underlying zoning of the land within or adjacent to the Rocky Reach Trail project is not changed by the County's action. Finally, the County's action imposes future review of all required mitigation measures to assure effectiveness of those measures. Resolution No. TLS-08-09B; 82400-2, Vol. 1, CP 2-35, Petition/Complaint for LUPA Review, Exhibit A (Attached at Appendix A).

It is absolutely clear that these permits were requested by specific owners for a specific use on specific property, and imposed specific restrictions and mitigation measures on the proposed use. No area-wide zoning is involved. Permits R-06-01 and SPD 06-2 are site specific.

2. *The Rocky Reach Trail Project is Consistent With the County's Comprehensive Plan and Development Regulations*

If this site-specific land use decision is characterized as a site-specific rezone, rather than a site-specific development permit, then the next inquiry is whether the County's action generally conforms to the County's comprehensive plan and development regulations.

The comprehensive plan and development regulations adopted by Douglas County are consistent with and support construction of the Rocky Reach Trail, as are policies adopted by the State of Washington.²

² This Respondent's Brief includes excerpts from State and County planning documents, as well as County plans and ordinances, all of which were before the GMHB by being set out in the County's Respondent's Memorandum submitted on the Motion to Dismiss. Pursuant to WAC 242-02-660, the GMHB takes official notice of State actions and the County's plans, ordinances and resolutions as part of the record used for its decision. Respondent's Memorandum, pp. 9-16; 82399-5, Vol. II, CP 339.

The State has placed emphasis on trails as part of its multimodal approach to meeting the State's transportation needs:

The state-interest component of the statewide multimodal transportation plan shall **include a bicycle transportation and pedestrian walkways plan**, which shall propose a statewide strategy for addressing bicycle and pedestrian transportation, including the **integration of bicycle and pedestrian pathways with other transportation modes; the coordination between local governments, regional agencies, and the state** in the provision of such facilities; the role of such facilities in reducing traffic congestion; and an assessment of statewide bicycle and pedestrian transportation needs. This plan shall satisfy the federal requirement for a long-range bicycle transportation and pedestrian walkways plan.

(Emphasis added)

RCW 47.06.100.

In fact, the Rocky Reach Trail has been specifically identified by WSDOT as meeting the bicycle and pedestrian transportation needs and service objectives of WSDOT's bicycle transportation and pedestrian walkways plan. 82400-2, CP 3251, Vol. 17, CD Copy of Record, *Washington Bicycle and Pedestrian Plan*, WSDOT, 1997, Bates stamp 1558 (Attached at Appendix B).

Also, the State encourages the inclusion of bicycle and pedestrian trails as part of the Transportation Element of every GMA comprehensive plan. WAC 365-195-325(2)(a)(iii) provides:

(2) Recommendations for meeting requirements. The following steps are recommended in preparing the transportation element:

(a) Local and regional transportation goals and policies for the following transportation modes, where applicable:

(i) Roadways;

(ii) Transit: Fixed route and demand response;

(iii) **Nonmotorized travel: Bicycle and pedestrian;**

(Emphasis added)

In response to the policies of the State and the vision of Douglas County's citizens, trails have also been emphasized throughout the County's land use policies, plans and development regulations over the last 30 years.

Douglas County's countywide planning policies required by the GMA are contained in the Douglas County Regional Policy Plan (March 2002), and include transportation policies supporting trails:

E. POLICIES ON COUNTYWIDE TRANSPORTATION FACILITIES AND STRATEGIES

The Growth Management Act requires that transportation planning be coordinated among local and state agencies. . . . The intent of the following policies is to encourage inter-regional and intra-regional coordination among transportation and land use planning agencies.

POLICY E- 1: The county and cities/towns will plan for a balanced transportation system that provides for

a variety of mobility options for differing land use needs and promotes the mobility of goods and people. The transportation system shall address the following minimum components as appropriate:

- Highways, arterials and collector systems
- **Non-motorized facilities**
- General aviation airports
- Transit systems
- Transportation Demand Management actions

(Emphasis added)

Douglas County Regional Policy Plan, p. 10.

Trails have been supported throughout the Douglas County Countywide Comprehensive Plan (DCCCP) and the Greater East Wenatchee Area Comprehensive Plan (GEWACP), which is a sub-area plan adopted by Douglas County:

In addition to the road system in Douglas County, there is a developing trail system in the East Wenatchee Area, which provides an alternative mode of transportation, especially within the larger Wenatchee Valley area.

(Emphasis added)

DCCCP, Purpose and Authority, Transportation System, 1-10.

3.4.1 General Land Use Goals & Policies

Goal: Maintain and improve the quality of life, attitude, and character of Douglas County by encouraging the long-term public commitment to the stewardship of historical/cultural resources, natural resources, critical

areas and the full range of land uses desired by the public.

Policies.

* * *

G-14 Promote public access to lakes, rivers, creeks and other water bodies through signage, maps, public information programs, trails, scenic overlooks, picnic areas and other mechanisms.

(Emphasis added)

DCCCP, General Land Use Goals and Policies, 3-9, 3-11.

6.1 TRANSPORTATION

* * *

The transportation system has a range of different modes of transportation, including public transit, air and rail transport, and trails for non-motorized uses such as bicycles, pedestrians and horses. All components of the transportation system are vital to the economic health and viability of Douglas County and its communities and needs to be maintained and in order to efficiently provide a full range of service to the area and enhance the overall quality of life of its residents.

(Emphasis added)

DCCCP, Transportation Element, 6-1.

6.1.1 Transportation Goals and Policies

GOAL: Provide efficient use of existing and future transportation facilities through a systematic approach of monitoring and maintaining the road system, **integrating all types of transportation systems and facilities**, by coordinating transportation facilities planning with other elements of the comprehensive plan, and coordination with other federal, state and local agencies.

Policies:

* * *

T-7. Ensure that alternative transportation modes, particularly trails for pedestrians and non-motorized users, airport and rail facilities, are identified and considered in the transportation element.

T-8. In reviewing development proposals, and as new and existing roadways are improved and built, safe bicycle and pedestrian systems as well as protection of airport runways and operations will be considered.

* * *

T-10. Work in partnership with other service providers to identify and invest in transit facilities, operations and road and pedestrian improvements that support the reliability and safety of the public transportation system, and to provide linkages between Urban Growth Areas and Rural Service Centers throughout the County.

T-13. Promote coordinated bicycle, equestrian, and pedestrian way improvements, emphasizing access to schools, parks, employment and service centers, and shorelines.

(Emphasis added)

DCCCP, Transportation Element, Goals and Policies, 6-1 and 6-2.

T-10. Encourage the development of a bicycle/walkway system for the City and the East Wenatchee area to allow for non-motorized travel; including linkages to transit routes.

T-11. Preserve right-of-ways for the future creation of non-motorized travel lanes and trails.

T-12. Wherever possible, develop pedestrian and bicycle facilities separate from the vehicle travel lanes.

T-13 Provide safe, well-marked walkways and trails with universal access features between neighborhoods, commercial and employment centers, parks, schools and community facilities.

(Emphasis added)

GEWACP, Transportation Element, Goals and Policies, 8-8, 8-9.

Linear Bicycle/Pedestrian Trails, Jogging Trails, Equestrian Trails

Description: **A variety of different types of trail systems should be provided.** Trail systems should be designed to accommodate high, medium and light use activities and be handicap accessible. They should also be designed to the level and type of activity anticipated.

The current trail system should be increased to extend north to connect with Lincoln Rock State Park.

(Emphasis added)

GEWACP, Open Space and Recreation, 5-3.

RECREATIONAL FACILITIES

Improved recreational parks should provide a wide variety and selection of facilities to accommodate residents and tourists throughout the region. . . . **Trail systems should provide a range of options for the public including: bicycle/pedestrian, jogging, equestrian, and hiking.**

The Parks and Recreation maps denote general locations and types of parks in the Greater East Wenatchee Area. The following descriptions are types of facilities anticipated in the future to include needed recreation facilities:

Regional Parks

Description: Regional parks or recreation sites provide active and passive recreation opportunities and fee recreation, designed to accommodate residents and tourist from throughout the region. Three general areas have been selected as being suitable for regional park needs.

Base: These facilities should be designed with the following components:

- Sixty acres or larger, depending on amenities and adjacent facilities
- Highway or arterial access
- **Connecting paths and trail systems serving community access**

(Emphasis added)

GEWACP, Open Space and Recreation, 5-4.

In addition to the specific policies and goals of Douglas County's comprehensive plan, the Douglas County's Shorelines Master Program, adopted in 1975, and the Shorelines Design Area Plan, adopted in 1992, support trails. The Shorelines Design Area Plan specifically supports the Rocky Reach Trail. RCW 36.70A.480(1) specifically incorporates shoreline planning and regulation in the County's GMA comprehensive plan and development regulations.³

³ RCW 36.70A.480(1): For shorelines of the state, the goals and policies of the shoreline management act as set forth in RCW 90.58.020 are added as one of the goals of this chapter as set forth in RCW 36.70A.020 without creating an order of priority among the fourteen goals. The goals and policies of a shoreline master program for a county or city approved under chapter 90.58 RCW shall be

The Shorelines Master Program has adopted policies supporting trails:

Scenic corridors with public roadways should have provisions for safe **pedestrian and other non-motorized travel**. Also, provision should be made for sufficient viewpoints, rest areas, and picnic areas in public shorelines.

(Emphasis added)

Section XX, Transportation, Policy C.

The linkage of shoreline parks and public access points through the use of linear access should be encouraged, such as hiking paths, bicycle trails and/or scenic drives.

(Emphasis added)

Section XXIII, Recreation , Policy D.

Douglas County adopted the Shoreline Design Area Plan in 1992 after a long process of citizen involvement and review. The Plan provides extensive policies and design details for development of trails along the Columbia River, including the Rocky Reach Trail from the Odabashian Bridge to Lincoln Rock State Park. The following are limited excerpts:

considered an element of the county or city's comprehensive plan. All other portions of the shoreline master program for a county or city adopted under chapter 90.58 RCW, including use regulations, shall be considered a part of the county or city's development regulations.

COMMUNITY NEEDS GOAL:

To maintain and improve the quality of life, attitude, and character of the community by encouraging long term public commitment to the stewardship of the shoreline; and by ensuring adequate facilities, and cooperation between public and private entities.

Policies:

* * *

22. Trail systems established north of Odabashian Bridge should occur in a manner that will be compatible with orchard operations. This may include establishing adequate buffering between these uses through landscaping and fencing.

(Emphasis added)

Shoreline Design Access Plan, pp. 16-18.

TRAIL SYSTEM

A pedestrian/non-motorized trail network is addressed in Chapter 4. It includes a trail along the Columbia River from Rocky Reach Dam to Rock Island Dam, and also incorporates the existing Wenatchee Reclamation District irrigation canal and natural drainages as part of the network linking the community. These linkages would directly tie to the Columbia River shoreline, and to residential, recreational, and commercial areas. This Plan takes this concept one step further by providing specific design and construction criteria.

* * *

The improved pedestrian/non-motorized path is proposed to extend from Lincoln Rock State Park to Rock Island Hydro Park in order to provide linkages between recreational sites, development

activities, and individual neighborhoods or communities.

* * *

Trail systems established north of the Odabashian Bridge should occur in a manner that will be compatible with orchard operations. This may include establishing adequate buffering between these uses through landscaping and fencing.

(Emphasis added)

Shoreline Design Access Plan, p. 35.

TRANSPORTATION GOAL:

To provide and integrate an overall circulation and access system which takes into account safety, and the efficient, economic, and orderly development of the shoreline Design Area and influence area. Promote short and long-range solutions for present and future land use needs.

POLICIES:

2. Promote safety through adequate sight distance, channelization, **separation of vehicles and pedestrian/non-motorized traffic**, and avoidance of difficult turning and merging patterns.

9. **Encourage the development of the shoreline trail as a multi-modal element of the transportation network.**

DESIGN CRITERIA:

5. Accommodate disabled persons' access at intersections and crosswalk locations and along the shoreline trail.

6. Assure convenient access to residential neighborhoods, and to employment and retail centers by providing linkage of local, collector, and arterial streets, **and other multi-modal systems.**

(Emphasis added)

Shoreline Design Access Plan, pp. 53-55.

Turning to Douglas County's development regulations, trails are specifically included within the definition of transportation facilities at DCC 14.98.861:

"Transportation facilities" means those structures and developments that aid in the movement of people, goods and services across land and water surfaces. They include roads, streets and highways, bridges and causeways, bikeways, **trails**, railroad facilities, ferry terminals, airports and other related facilities.

(Emphasis added)

Contrary to the Association's argument in the Appellants' Opening Brief, page 36, the Douglas County Code specifically authorizes construction of trails in resource lands at DCC 19.18.035:

Construction of public and private trails and trail-related facilities, such as picnic tables, benches, interpretive centers and signs, viewing platforms and campsites **may be authorized within designated resource lands and critical areas**, subject to the following minimum standards:

1. Trail facilities shall, to the extent feasible, be placed on existing road grades, utility corridors, or any other previously disturbed areas;
2. Trail facilities shall minimize the removal of trees, shrubs, snags and important habitat features;
3. Viewing platforms, interpretive centers, campsites, picnic areas, benches and their associated access shall be designed and located to minimize disturbance of wildlife and/or critical characteristics of the affected conservation area;
4. All facilities shall be constructed with materials complimentary to the surrounding environment; and
5. Trail facilities shall be located at least a distance equal to the width of the trail corridor away from the wetland edge, as established by the approved wetland boundary survey or aquatic habitat conservation area.

(Emphasis added)

The County's comprehensive plan and development regulations clearly support the construction of trails. The Greater East Wenatchee Area Comprehensive Plan, the applicable subarea plan, goes even further and expressly supports the specific construction of the Rocky Reach Trail proposed by State Parks and approved by the County's action:

The current trail system should be increased to extend north to connect with Lincoln Rock State Park.

(Emphasis added)

GEWACP, Open Space and Recreation, Section 5-3.

The Rocky Reach Trail is site-specific, whether or not the County's land use decision is characterized as a development permit or a rezone. If characterized as a rezone, it is absolutely clear that the Rocky Reach Trail not only generally conforms to the County's comprehensive plan, but is expressly authorized and implements the community's vision under GMA planning.

Permits R-06-01 and SPD 06-2 issued to State Parks constitute a "project permit application" under RCW 36.70B.020(4).

The Supreme Court decisions in *Woods v. Kittitas County* and *Wenatchee Sportsmen* are directly on point and controlling. The GMHB properly held that it did not have subject matter jurisdiction to review the County's action. The superior court properly affirmed the Board's decision.

D. *The LUPA Petition Was Properly Dismissed*

1. *The Superior Court Lacked Subject Matter Jurisdiction to Decide Whether the Permits Complied with the GMA*

In the LUPA proceeding, the Association asserted that the issuance of permits to State Parks violated the GMA. The superior court followed the Supreme Court's decision in *Woods v. Kittitas County, supra*, and declined to review the permits for GMA compliance.

As discussed above, Permits R-06-01 and SPD 06-2 issued to State Parks constitute a "project permit application" under RCW 36.70B.020(4), because the County's approval of the Rocky Reach Trail project is a site-specific land use decision. Even if characterized as a site-specific rezone, the County's action was authorized by the County's comprehensive plan and development regulations.

The Supreme Court's holding in *Woods v. Kittitas County* is directly on point and controlling. A challenge to a site-specific land use decision cannot be based upon violations of the GMA and review is limited to compliance with the comprehensive plan and/or development regulations. *Woods v. Kittitas County, supra*, at 616, ¶ 32. The superior court should be affirmed.

2. Environmental Review Was Previously
Determined to Be Sufficient by the Superior Court

State Parks was the lead agency for review of the Rocky Reach Trail project under RCW Chapter 43.21C, the State Environmental Policy Act (SEPA). The Association asserts that State Parks failed to conduct adequate environmental review because it failed to study "appropriate alternatives" under the

general environmental guidelines set forth at RCW
43.21C.030(2)(e):

[A]ll branches of government of this state, including state agencies, municipal and public corporations, and counties shall:

* * *

(e) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

The Association asked the superior court to assume that “unresolved conflicts” exist, even though it is clear from the record, and acknowledged by the Association before the superior court, that State Parks did consider and reject alternatives during SEPA review. 82400-2, CP 3106-3135, Vol. 16, CD Copy of Record, Bates stamp 1413-1444. The Association failed to demonstrate any evidence that “unresolved conflicts” exist.

Further, the superior court considered and approved the SEPA review conducted by State Parks in prior proceedings challenging the Rocky Reach Trail project. In 2004, the appellants in this case, together with others, filed a LUPA petition in *McNeal, et al., vs. Douglas County, et al.*, Douglas County Superior Court, No. 04-2-00045-6, appealing a 2004 decision of the Hearing Examiner and SEPA review. The appellants in this case, together with others,

also filed a Petition for Review with the Shorelines Hearings Board under *McNeal, et al. vs. Douglas County, et al.*, No. 04-002, appealing the Hearing Examiner's issuance of a Substantial Development Permit under the Shorelines Management Act for construction of the Rocky Reach Trail and challenging SEPA review.

On March 4, 2005, the Shorelines Hearings Board issued its Findings of Fact, Conclusions of Law, Order, and Order on Reconsideration after hearing multiple days of testimony and argument at a *de novo* hearing. The Shorelines Hearings Board held that the proposed Rocky Reach Trail was consistent with the Shorelines Management Act and the County's Shoreline Master Program, that the impacts alleged by the Association were addressed by the conditions imposed under the permit, and that the issuance of a Substantial Development Permit for the trail was proper. The Shorelines Hearings Board also held that State Park's SEPA review was proper and complied with law. 82400-2, CP 6520, Vol. 34, CD Copy of Record, Litigation Chronology and Exhibits, Findings of Fact Conclusions of Law and Order (March 4, 2005), Bates stamp. 1939-1967, 4827-4855 (Attached at Appendix C, Exhibit 2).

The decision of the Shorelines Hearings Board was appealed by the Association and reviewed by the superior court in *Feil, et al. vs. State of Washington, et al.*, Douglas County Superior Court, No. 05-2-00121-3. On September 13, 2005, the superior court affirmed the decision of the Shorelines Hearings Board in all respects, held that SEPA review was proper, and held that no further SEPA review was required. 82400-2, CP 6555, Vol. 34, CD Copy of Record, Litigation Chronology and Exhibits Order (September 13, 2005), Bates stamp 4862-4864 (Attached at Appendix C, Exhibit 4).

On that same day, the superior court entered an Order in the LUPA case and held at Paragraph I:

[N]o further review is necessary under the State Environmental Policy Act unless there are changes to the proposed project that would result in probable significant adverse environmental impacts.

82400-2, CP 3661, Vol. 20, CD Copy of Record, Order Reversing and Remanding Land Use Decision (September 13, 2005), Bates stamp 1968-1972, 4865-4869 (Attached at Appendix C, Exhibit 5).

The Association has not presented any evidence of changes to the proposed Rocky Reach Trail project subsequent to SEPA review approval. The proposed project has not been changed. No

further SEPA review is required. WAC 197-11-600(3)(b). The Association "had its day in court" in 2004 through 2005 to challenge State Parks' SEPA review and was unsuccessful.

The superior court should be affirmed. There was no error.

3. The County's Action Complied With
the County's Development Regulations

The Association asserts the County's action did not comply with its development regulations regarding buffers, permit applications and scope of approval.

i. Buffering Was Proper

The State Parks permit application proposed a variety of measures to address impacts to adjacent landowners, including enhanced setbacks, enhanced buffers, gating and fencing, additional security and weed control. 82400-2, CP 1694-1843, CD Copy of Record, Bates stamp 1-150. Those mitigation measures were approved and adopted by the County's action. Resolution TLS-08-09B; 82400-2, Vol. 1, CP 2-35, Petition/Complaint for LUPA Review, Exhibit A (Attached at Appendix A).

The County's action also incorporated all Conditions of Approval contained in Substantial Development Permit granted to State Parks and reviewed by the Shorelines Hearings Board in

McNeal, et al. v. Douglas County, et al., Case No. 04-002. Resolution No. TLS-08-09B; 82400-2, Vol. 1, CP 2-35, Petition/Complaint for LUPA Review, Exhibit A. The Shorelines Hearings Board found the conditions mitigated the impacts alleged by the Association and assured compatibility between the Rocky Reach Trail and agricultural uses. 82400-2, CP 6520, Vol. 34, CD Copy of Record, Litigation Chronology and Exhibits Findings of Fact Conclusions of Law and Order (March 4, 2005), Bates stamp 1939-1967, 4827-4855 (Attached at Appendix C, Exhibit 2).⁴

Finally, the County's action included additional buffering conditions of approval imposed by the Hearing Examiner and the Board of County Commissioners. Resolution No. TLS-08-09B; 82400-2, Vol. 1, CP 2-35, Petition/Complaint for LUPA Review, Exhibit A (Attached at Appendix A).

The Douglas County Code imposes buffering requirements for recreational uses:

The review of an application shall be based on the potential impacts of a proposed development on surrounding properties, the environment, resource lands, critical areas and the orderly development of the county. The following

⁴ The Shorelines Hearings Board decision on the Shoreline Development Permit issued for the Rocky Reach Trail construction was affirmed by the superior court in *Feil, et al. vs. State of Washington, et al.*, No. 05-2-00121-3; 82400-2, CP 6555, Vol. 34, CD Copy of Record, Litigation Chronology and Exhibits, Order (September 13, 2005), Bates stamp 4862-4864.

standards shall be applied at an appropriate level in order to protect public health, safety and welfare:

A. Buffering shall be required in a form adequate to provide site screening, noise attenuation, safety separation and reduction of light and glare. Acceptable methods of buffering include undulated berms, planting, sight-obscuring fencing, security fencing or any combination thereof. At least two buffering methods shall be used to off-set impacts to surrounding properties for high intensity uses. Buffer and landscaping shall meet the minimum provisions as set forth in DCC Chapter 20.40.

(Emphasis added)

DCC 18.46.070.A.

A. General Character. Development within the R-O district shall be designed with an interior road network, perimeter landscaping or buffering mechanisms.

B. Buffering. When a use, lot, or parcel is situated within the R-O district and adjoins an agricultural district, all uses, including the storage of materials, shall be set back a minimum of one hundred feet from the property line. Buildings, structures and/or uses may be set back a minimum of sixty feet from the property line, provided the applicant submits an enhanced alternative buffering method for approval by the review authority.

(Emphasis added)

DCC 18.46.080.A and B.

Contrary to the Association's assertion, the County's action not only addressed the "adequate" buffering requirement of DCC 18.46.070.A, but imposed enhanced buffering. The County's

development regulations were properly applied in issuing the permits to State Parks. There was no error.

ii *The Permit Application Was Complete*

The Association asserts the approval of the Rocky Reach Trail project must be reversed because WSDOT did not sign the permit application form. The Association does not cite to the record and does not demonstrate a factual basis for this assertion.

As is well known to the Association, WSDOT issued a letter to the County on March 22, 2006, that authorized State Parks to submit the application for the Rocky Reach Trail project. 82400-2, CP 1698, Vol. 10, CD Copy of Record, Bates stamp 5 (Attached at Appendix B). As is clear from the record before this Court, WSDOT has supported the application and has fully participated as a party throughout permit review and the lengthy history of litigation that followed.

The County's Director of Land Services has the authority to carry out the County development regulations, including the adoption of instructions, policies and forms. DCC 18.04.090;⁵ DCC

⁵ DCC 18.04.090: The director of land services or his/her designee shall have the authority and duty to administer the provisions of this title. The director may adopt, and revise as required, such instructions, policies and forms as are necessary to carry out the provisions of this title.

14.06.010.A.⁶ Further, the County, through the Land Services Director, determines when an application is complete. RCW 36.70B.070.⁷

The Association provides no legal authority requiring absolute compliance or preventing the County from accepting a separate signature of WSDOT authorizing the application.

WSDOT was aware of the application affecting its property, specifically authorized the application in writing, and has participated at every level of permit review supporting the application, including litigation. The permit application was complete. There was no error.

iii. *The Scope of Approval Was Proper*

The Association asserts that the required buffers and other mitigation measures exceed the scope of the Recreational Overlay approving the 20 foot wide Rocky Reach Trail.

⁶ DCC 14.06.010.A: An application shall be made using the appropriate form adopted by the department.

⁷ RCW 36.70B.070: (1) Within twenty-eight days after receiving a project permit application, a local government . . . shall mail or provide in person a written determination to the applicant, stating either: (a) That the application is complete; or (b) That the application is incomplete and what is necessary to make the application complete.

* * *

(2) A project permit application is complete for purposes of this section when it meets the procedural submission requirements of the local government and is sufficient for continued processing

As is clear from the record, the County's action in March of 2008 involved the issuance of two permits: a Recreational Overlay permit (RO-06-01) and a Site Plan Development permit (SPD-06-02). The Recreational Overlay permit approved trail construction within a 20 foot wide corridor. DCC Chapter 18.46, which authorizes the use of the Recreational Overlay, imposes numerous requirements exceeding the scope of the actual recreational use in order to mitigate impacts on adjacent property, including set-backs, buffers, fencing, dust control, lighting limitations, signage and other impacts. DCC 18.46.070; DCC 18.46.080.

The Recreational Overlay permit and Site Plan Development permit addressed one project, the Rocky Reach Trail, and imposed several conditions and mitigation measures within the WSDOT property and PUD property adjacent to the Rocky Reach Trail. There is no inconsistency between the Douglas County Code and the scope of the County's action. There was no error.

4. Substantial Evidence Supported the County's Action

In the space of a little more than five pages in the Appellants' Opening Brief, the Association concludes its argument with challenges to over 70 of the County's findings. The Association's *Assignments of Error* do not assign error to any specific findings by

the County. The Association's *Issues Pertaining to Assignments of Error* do not address any specific factual issues and only generally challenge the sufficiency of the record. The Association's argument does not set out challenged findings verbatim, nor does it summarize each challenged finding. The Association's argument does not cite to evidence in the record and does not present legal authority, other than an occasional unexplained statute or ordinance citation.

As discussed above, an appellate court reviews a LUPA decision standing in the position of the superior court. A challenge to the sufficiency of the evidence is reviewed under the substantial evidence standard. The evidence in the record, and the inferences from such evidence, are viewed in a light most favorable to the party that prevailed in the highest fact-finding forum. *Woods v. Kittitas County, supra*, at 617, ¶35; *Benchmark Land Co. v. City of Battleground*, 146 Wn.2d 685, 694, 49 P.3d 860 (2002); *Wenatchee Sportsmen, supra*, at 176. The parties entitled to the benefit of this inference are the County, State Parks and WSDOT.

The Association has the burden of proof. The Supreme Court has addressed the failure to present adequate assignments of error and argument when reviewing the adequacy of the evidence. In

Matter of Estate of Lint, 135 Wn.2d 518, 531-532, 957 P.2d 755

(1998), the Court held:

As a general principle, an appellant's brief is insufficient if it merely contains a recitation of the facts in the light most favorable to the appellant even if it contains a sprinkling of citations to the record throughout the factual recitation. It is incumbent on counsel to present the court with argument as to why specific findings of the trial court are not supported by the evidence and to cite to the record to support that argument. See RAP 10.3. For the most part counsel has not done this.

Strict adherence to the aforementioned rule is not merely a technical nicety. Rather, the rule recognizes that in most cases, like the instant, there is more than one version of the facts. If we were to ignore the rule requiring counsel to direct argument to specific findings of fact which are assailed and to cite to relevant parts of the record as support for that argument, we would be assuming an obligation to comb the record with a view toward constructing arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings. This we will not and should not do.

The Association has failed to provide citations to the record, meaningful argument, or any other analytical framework by which this Court could review the record and conclude that there is insufficient evidence "to persuade a reasonable person" that the County's findings are true. The Association has not met its burden of proof under LUPA.

E. *The Declaratory Judgment Action Was Properly Dismissed*

The superior court dismissed the Association's declaratory judgment action challenging the constitutionality of the County's comprehensive plan, development regulations and issuance of the permits to State Parks. The superior court held that the Association failed to prove the Association had standing to bring a declaratory judgment, failed to identify and prove the existence of any "statutory right expressly provided" to the Association, failed to prove that any "police, sanitary and other regulation" of the County conflicted with general law; and failed to prove constitutional invalidity beyond a reasonable doubt. 82400-2, Vol. 43, CP 8374-8378, Order and Judgment Dismissing Petition/Complaint.

As in their case before the superior court, the Association does not cite to the record to support their declaratory judgment action. Further, the Association does not submit any legal basis for reversing the decision of the superior court, nor does the Association submit any argument specifically supporting the declaratory relief requested.

1. *The County's Comprehensive Plan, Development Regulations and Action Cannot Be Challenged Using a Declaratory Judgment Action*

The GMA is part of the statutory scheme of land use planning laws adopted by the Legislature. The requirements of the GMA are

not constitutionally mandated. The Supreme Court has made clear that local government decisions under the GMA are presumed valid and the GMA is *not* to be liberally construed to invalidate local actions. *Thurston County v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 329, 342, 190 P.2d 38 (2008); *Woods v. Kittitas County*, *supra*, at 614, ¶ 28; *Wenatchee Sportsmen*, *supra*, at 182; *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit Valley*, 135 Wn.2d 542, 958 P.2d 962 (1998).

The Association seeks declaratory judgment relief as a means of circumventing the long-expired limitation on initiating GMHB review of the County's challenged comprehensive plan and development regulations. Challenges must be brought within 60 days after the County's publication of notice of the adopted plans and/or development regulations. RCW 36.70A.290(2).

Challenges to the County's comprehensive plan and development regulations are within the exclusive jurisdiction of the GMHBs. *Woods v. Kittitas County*, *supra*, at 614-615, ¶ 29. When no timely challenge is filed with the GMHB, the County's comprehensive plan and development regulations are presumed valid and entitled to finality. *Thurston County v. Western Washington Growth Management Hearings Board*, *supra*, at 344. Therefore,

GMA comprehensive plans and development regulations that have not been properly challenged through review by the GMHB are valid enactments of local government under the GMA and under the general laws of the State of Washington.

Even if the Association could meet all requirements necessary to pursue a declaratory judgment action, the Association cannot use the guise of a constitutional challenge to challenge the County's comprehensive plan and development regulations. *Woods v. Kittitas County, supra*, at 614, ¶29.

In the Appellant's Opening Brief, the Association argues for the first time that it is not barred by the 60 day limitation of RCW 36.70A.290(2). The Association bases its argument upon justiciability and ripeness. This issue was not raised or argued before the GMHB or the superior court. Issues not raised before an agency may not be subsequently raised during an APA appeal. RCW 34.05.554. An appellate court may refuse to review claims of error not raised in the trial court. RAP 2.5(a).

Even if this argument could properly be made on appeal, the Association's reliance upon the two cases cited as support for its argument is misplaced. The two cases are clearly distinguishable from this case.

In *First United Methodist Church of Seattle v. Hearing Examiner*, 129 Wn.2d 238, 916 P.2d 374 (1996), the church challenged its nomination as a landmark designation under Seattle's city code. The church asserted that the nomination unconstitutionally infringed upon the free exercise of religion by restricting its use of the property. The Supreme Court held that there was a justiciable controversy because, even though the actual landmark designation had not been issued, the nomination did restrict use of the property and, therefore, affected the substantive rights of the church.

In *Asarco, Inc. v. Department of Ecology*, 145 Wn.2d 750, 43 P.3d 471 (2007), Ecology identified Asarco as a "potentially liable person" under the Model Toxics Control Act, RCW Chapter 70.105D. No final determination of liability was yet made. Asarco asserted an "as applied" challenge to the constitutionality of the Model Toxics Control Act. The Supreme Court held that the controversy was not ripe and that, without the specifics of a final liability determination, any decision resulting from litigation would be advisory.

Both cases cited by the Association involve direct governmental actions against property owners directly affecting the

owner's property rights. The challenge by the Association in this case involves the constitutionality of the County's comprehensive plan and development regulations, as adopted and as applied to adjacent property owners. There is no direct County action against the Association or the properties of its members or the individual appellants.

The ability of adjacent landowners to challenge site-specific land use decisions was clearly addressed in *Woods v. Kittitas County*, at 616, ¶32:

An adjacent property owner must challenge a local jurisdiction's site-specific decisions by filing a LUPA petition in superior court. But a challenge to a site-specific land use decision can be only for violations of the comprehensive plan and/or development regulations, but not violations of the GMA.

The Association's challenge to the County's comprehensive plan, development regulations and actions cannot be brought under the guise of a declaratory judgment action. The superior court's dismissal of the Association's declaratory judgment action should be affirmed. There was no error.

F. The County is Entitled to an Award of Attorney's Fees and Costs

The County is entitled to an award of reasonable attorney's fees and costs based upon successfully defending this appeal.

RCW 4.84.370 provides as follows:

(1) Notwithstanding any other provisions of this chapter, **reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal** before the court of appeals or the supreme court **of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision**

* * *

(2) In addition to the prevailing party under subsection (1) of this section, **the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.**

(Emphasis added)

The County requests that this Court award the County reasonable attorney's fees and costs pursuant to RCW 4.84.370.

V. CONCLUSION

The Recreational Overlay permit and Site Plan Development permit issued to State Parks authorizing the construction of the Rocky Reach Trail constituted a "project permit application."

No error of law was committed by the County and the County's land use decision was supported by substantial evidence. The permits were properly issued by the County.

The Eastern Washington Growth Management Hearings Board lacked subject matter jurisdiction over the Association's petition for review and did not commit an error of law. The superior court properly affirmed the decisions of the County and the GMHB.

These decisions made below should be affirmed and the County should be awarded reasonable attorney's fees and costs.

Respectfully submitted this 16th day of April, 2009,


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

VI. INDEX TO APPENDICES

- Appendix A - Board of County Commissioners Resolution TLS-08-09B, with incorporated attachments (March 25, 2008); 82399-5, Vol. 1, CP 2-36, Petition for Review, Exhibit A.
- Appendix B - Letter from WSDOT to Douglas County (March 22, 2006); 82400-2, CP 1698, Vol. 10, CD Copy of Record, Bates stamp 5
- Appendix C - Memorandum Re: Rocky Reach Trail - Litigation Chronology, with Exhibits (February 26, 2008); 82400-2, CP 6520, Vol. 34, CD Copy of Record, Bates stamp 4814-4898.

Exhibit 1 – Douglas County Hearing Examiner, Notice of Action, Permit SP 87, Shoreline Substantial Development Permit (January 14, 2004), Bates stamp 4818-4826.

Exhibit 2 – Shorelines Hearings Board, SHB No. 04-002, *McNeal, et al., v. Douglas County, et al.*, Findings of Fact, Conclusions of Law, and Order and Order on Reconsideration (March 4, 2005), Bates stamp 4827-4855.

Exhibit 3 – Douglas County Superior Court, No. 04-2-00045-6, *McNeal, et al., v. Douglas County, et al.*, Court's Decision on LUPA Appeal (August 2, 2005), Bates stamp 4856-4861.

Exhibit 4 – Douglas County Superior Court, No. 05-2-00121-3, *Feil, et al., v. State of Washington Shorelines Hearings Board, et al.*, Order (September 13, 2005), Bates stamp 4862-4864.

Exhibit 5 - Douglas County Superior Court, No. 04-2-00045-6, *McNeal, et al., v. Douglas*

County, et al., Order Reversing/Remanding Land Use Decision (September 13, 2005), Bates stamp 4865-4869.

Exhibit 6 - Douglas County Hearing Examiner, Permits RO-06-01 and SPD 06-02, Findings of Fact, Conclusions of Law, Decision and Conditions of Approval (November 3, 2006), Bates stamp 4870-4883.

Exhibit 7 – Eastern Washington Growth Management Hearings Board, Case No. 06-1-0012, *Feil, et al., v. Douglas County, et al.*, Order on Motion to Dismiss (February 16, 2007), Bates stamp 4884-4889.

Exhibit 8 – Douglas County Superior Court, No. 07-2-00100-7, *Feil, et al., v. Eastern Washington Growth Management Hearings Board, et al.*, Decision of the Court (July 31, 2007), Bates stamp 4890.

Exhibit 9 - Douglas County Superior Court, No. 06-2-00410-5, *Feil, et al., v. Douglas County, et al.*, Decision of the Court (July 31, 2007) and Decision on Reconsideration (September 13, 2007), Bates stamp 4891-4898

BOARD OF COUNTY COMMISSIONERS
DOUGLAS COUNTY, WASHINGTON

Resolution No. TLS-08-09B

Resolution Approving the Rocky)
Reach Trail Extension) LAND SERVICES
RO-06-01 and SPD 06-02)

Notice of Hearing Resolution No. TLS-08-09A.

WHEREAS, the applications were previously considered at a public hearing before, and approved by, the Douglas County Hearing Examiner. Upon appeal under the Land Use Petition Act (RCW Chapter 37.70C), the Superior Court in and for Douglas County directed that the Douglas County Board of Commissioners take final action on the proposal; and

WHEREAS, notice of all public hearings and public meetings on this matter have been published according to law.

BE IT RESOLVED, that the Board of County Commissioners hereby adopts the Findings of Fact and Conclusions established by the Douglas County Hearing Examiner in his decision dated November 3, 2006, entering those findings and conclusions into the record as their own and incorporating them in this resolution by this reference as though fully set forth herein.

BE IT FURTHER RESOLVED, that the Board of County Commissioners hereby adopts the Findings of Fact set forth in Attachment A.

BE IT FURTHER RESOLVED, that the decision of the Douglas County Hearing Examiner is affirmed and the Rocky Reach Trail Extension (RO-06-01 and SPD-06-02) is APPROVED subject to the Conditions of Approval set forth in Attachment B and the Hearing Examiners decision dated November 3, 2006.

This resolution shall be effective immediately.

Dated this 25th day of March 2008 in East Wenatchee, Washington.

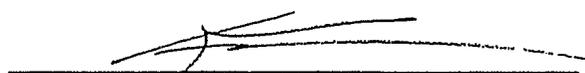
BOARD OF COUNTY COMMISSIONERS
DOUGLAS COUNTY, WASHINGTON



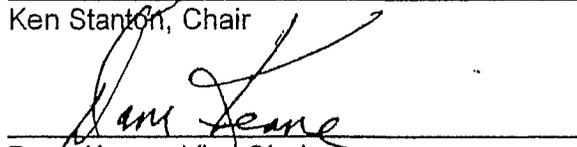
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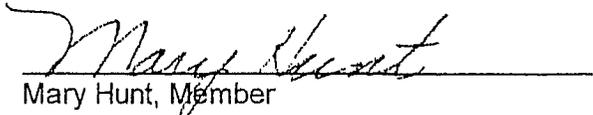
Dayna Prewitt
Clerk of the Board



Ken Stanton, Chair



Daré Keane, Vice Chair



Mary Hunt, Member

Resolution No. TLS-08-09B

ATTACHMENT A

Findings of Fact:

1. The Rocky Reach Trail was proposed as a multi-modal non-motorized transportation facility and will constitute additional transportation infrastructure within Douglas County providing linkage among Rocky Reach Dam, Lincoln Rock State Park, the Bakers Flat industrial area, the Apple Capital Loop Trail, SR 2/97, and the residential and commercial areas within the Wenatchee Valley.
2. The Rocky Reach Trail will be constructed on public property owned by the Washington State Department of Transportation and Chelan County Public Utility District No. 1.
3. The property owned by the Washington State Department of Transportation was acquired in the 1950's as highway right-of-way and has not yet been developed as a transportation infrastructure. The property remains highway right-of-way. Portions of the right-of-way continue to be used as orchards under lease agreements with adjacent property owners.
4. The property owned by Chelan County Public Utility District No. 1 was acquired as a result of the construction, ownership and operation of Rock Island Dam and Rocky Reach Dam and is adjacent to the Columbia River. The property includes property within or adjacent to the Rocky Reach Dam project.
5. Douglas County does not review or require permits for transportation facilities under the Douglas County Code, even though such facilities may also be used for recreation.
6. All transportation facilities have a recreational component because they are used by pedestrians, bicyclists, and pleasure motorists.
7. The Washington State Department of Transportation could develop the proposed Rocky Reach Trail corridor as a state highway without obtaining any permits under the Douglas County Code, even though such state highway may be used by pedestrians, bicyclists and pleasure motorists.
8. The Rocky Reach Trail is a transportation facility, even though the Rocky Reach Trail will be used for recreation, as well as for transportation.
9. Douglas County has a long history of issuing Recreational Overlay District permits for site specific developments and all such permits have been reviewed, approved, conditioned and granted by the Hearing Examiner since the establishment of the office of the Hearing Examiner in 1993.
10. The Board has received this matter as a result of the remand issued by the Douglas County Superior Court and the Court's decision holding that the Hearing Examiner does not have authority to issue a Recreational Overlay District permit because it is a legislative action.
11. The Board of County Commissioners is hearing this Recreation Overlay permit because the Parks' application was remanded to the Board by the Douglas County Superior Court.
12. The Recreational Overlay District, as applied to the application of Parks, is a site specific development permit limited to the subject property and the proposed use for a non-motorized multi-modal transportation facility - the Rocky Reach Trail.

13. The proposal before the Board is a permit, or as interpreted by the Superior Court an amendment to the development regulations. Permits and amendments to development regulations are not comprehensive plan amendments and are not subject to the timing limitations of RCW 36.70A.130(2).
14. The environmental review, analysis and determination required by the State Environmental Policy Act (SEPA) has been completed by Parks as the lead agency having jurisdiction and has been reviewed and affirmed by the Shorelines Hearings Board in *McNeal, et al. vs. Douglas County, et al.*, No 04-002, and by the Douglas County Superior Court in *McNeal, et al., vs. Douglas County, et al.*, No. 04-2-00045-6 and *Feil, et al. vs. State of Washington, et al.*, No. 05-2-00121-3.
15. The Shorelines Hearings Board, in *McNeal, et al. vs. Douglas County, et al.*, No 04-002, issued its Findings of Fact, Conclusions of Law, Order, and Order on Reconsideration on March 4, 2005, holding that the proposed trail was consistent with the Shoreline Management Act and the County's Shoreline Master Program and that a Substantial Development Permit for the trail was proper.
16. The decision of the Shorelines Hearings Board was affirmed by the Douglas County Superior Court on September 13, 2005, in *Feil, et al. vs. State of Washington, et al.*, No. 05-2-00121-3.
17. On September 13, 2005, the Douglas County Superior Court in *McNeal, et al., vs. Douglas County, et al.*, No. 04-2-00045-6, held that no further review is necessary under SEPA unless changes are made to the trail project that would result in significant adverse environmental impacts.
18. The Eastern Washington Growth Management Hearings Board issued a decision on February 16, 2007, in *Feil, et al. vs. Douglas County, et al.*, Case No 06-1-0012, holding that the Recreation Overlay District designation granted to Parks for the Rocky Reach Trail was a site specific project permit application and rejected argument that the designation was a "rezone."
19. The decision of the Eastern Washington Growth Management Hearings Board was affirmed by the Douglas County Superior Court on July 31, 2007, in *Feil, et al. vs. Eastern Washington Growth Management Hearings Board, et al.*, No. 07-2-00100-7.
20. Parks has applied for a Recreation Overlay permit for the Rocky Reach Trail pursuant to an order of the Douglas County Superior Court that "Parks apply for and obtain Permits as may be required by the Douglas County Code" and, in the view of the Board and the Douglas County Land Services Director, a Recreational Overlay permit is not required under the Douglas County Code for this transportation facility.
21. The Board of County Commissioners, in spite of its disagreement with the characterization of Park's Recreational Overlay permit as a rezone, has reviewed the entire record of the proposed project, including decisions of the Shorelines Hearings Board, the Eastern Washington Growth Management Hearings Board, and the Douglas County Superior Court, has received written and oral comments from the applicant, the opponents of the project, and the general public, and has considered the proposed project in light of all the information received, the policies of the Greater East Wenatchee Area Comprehensive Plan, the County's

Shoreline Master Plan and related shorelines planning documents, and the requirements of the Douglas County Code.

22. A multi-modal non-motorized trail from Odabashian Bridge to Lincoln Rock State Park is addressed in the Greater East Wenatchee Area Comprehensive Plan adopted in 1996 and in the Shoreline Design Area Plan adopted in 1992 and also adopted in 1996 as a chapter of the Greater East Wenatchee Area Comprehensive Plan.
23. RCW 36.70B.030 states in part that "Fundamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review." In its statement of intent for RCW 36.70B.030 the state legislature declares that "...planning choices made in applicable regulations or plans...should not be reanalyzed during project permitting."
24. Parks has complied with all requirements of the Douglas County Code.
25. The Board of County Commissioners finds that conditions placed upon the Recreational Overlay permit sought by Parks, as imposed by the decisions of the Hearing Examiner and as included in the application filed by Parks, mitigate impacts on adjacent agricultural lands, uses and practices, and that the Rocky Reach Trail and adjacent agricultural uses and practices are compatible.
26. The application for a Recreational Overlay permit shall be granted. Such permit is a site specific development permit for the Rocky Reach Trail and shall confer no other rights of development to any other persons. No amendment of the Greater East Wenatchee Area Comprehensive Plan or any other plan adopted under the Growth Management Act, the Shoreline Master Program or any other plan adopted under the Shoreline Management Act, or the Douglas County Code, is caused or required by the granting of this Recreational Overlay permit.

Attachment B

Conditions of Approval

All Conditions of Approval shall apply to the applicant, and the applicant's heirs, successors in interest and assigns.

1. A buffer less than that proposed in the application is acceptable without an alternative vegetated buffer in those instances where there is agreement between WSDOT as lessor, WA State Parks as a lessee, and an adjacent orchardist as a lessee. The agreement shall acknowledge that a conflict between the agricultural use and the trail use is not created as a result of the modified buffer.
2. Two years after the Rocky Reach Trail has been opened for use, the Douglas County Hearing Examiner shall hold a public hearing to review and consider the effectiveness of the mitigation measures required by this approval. The review shall be performed in accordance with the procedures in place at that time and shall determine whether or not the mitigation measures should be modified.

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Douglas County Hearing Examiner
Andrew L. Kottkamp, Hearing Examiner

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Douglas County

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NOV 06 2006

ROWLEY & KLAUSER,
557 Roy St., #160
Seattle, WA 98106

IN THE MATTER OF)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
RO-06-01 and SPD 06-02)	DECISION AND
Rocky Reach Trail Extension)	CONDITIONS OF APPROVAL

THIS MATTER having come on for hearing in front of the Douglas County Hearing Examiner on September 12, 2006, the Hearing Examiner having taken evidence hereby submits the following Findings of Fact, Conclusions of Law, Decision and Conditions of Approval as follows:

I. INTRODUCTION / PROCEDURAL DEVELOPMENTS

- 1.1 This is an application submitted by the Washington State Parks and Recreation Commission for the construction a public, multi-modal trail facility that will follow generally north-south oriented eastern shore of the Columbia River starting from the Odabashian Bridge and continuing approximately 5.1 miles north to Lincoln Rock State Park within Washington State Department of Transportation right-of-way and property owned by the Chelan County Public Utility District Number 1.
- 1.2 On January 12, 2004, the Douglas County Hearing Examiner approved a shoreline substantial development permit for this proposed Rocky Reach Trail Extension. The approval identified that the proposed project was consistent with the Shoreline Management Act, the Douglas County Shoreline Master Program and the Shoreline Design Area Plan.
- 1.3 This decision was appealed to the State Shoreline Hearings Board on January 26, 2004. Additionally, a separate appeal was filed in Douglas County Superior Court under the Land Use Petition Act on January 26, 2004.
- 1.4 On March 4, 2005, the State Shoreline Hearings Board affirmed the decision of the Douglas County Hearing Examiner.
- 1.5 The State Shoreline Hearings Board decision was then appealed to the Douglas County Superior Court.

RO-06-01 and SPD 06 02
Rocky Reach Trail Extension
Page 1 of 14

- 1.6 On September 13, 2005, Douglas County Superior Court affirmed the Shoreline Hearings Board decision and ruled on the Land Use Petition Action appeal, directing the Washington State Parks and Recreation Commission to apply for and obtain land use permits as may be required by the Douglas County Code.
- 1.7 On or about March 23, 2006, the Washington State Parks and Recreation Commission filed a land development permit application for a recreational overlay designation for property covered by the Rocky Reach Trail Extension.
- 1.8 An open record public hearing on this application was held on September 12, 2006. At this hearing, the Hearing Examiner took testimony and admitted exhibits into the record.
- 1.9 In lieu of direct cross-examination by Mr. Jack Feil's attorney against the applicant and Douglas County Transportation and Land Services personnel, Mr. Feil's attorney agreed to submit written questions to the applicant and to Douglas County Transportation and Land Services personnel on or before September 20, 2006.
- 1.10 The Hearing Examiner ordered that the responses to those questions must be provided by September 29, 2006.
- 1.11 The Hearing Examiner believes that he made it very clear that no additional public comment or testimony would be admitted during this interim period.
- 1.12 The Hearing Examiner further ordered that his decision would be made by October 13, 2006.
- 1.13 Unfortunately, additional public comments were received in violation of this order apparently due to confusion in interpretation of the Hearing Examiner's oral ruling at the September 12, 2006, hearing.
- 1.14 In order to clarify the record and to admit into the record these public comments that were submitted after September 12, 2006, but before September 29, 2006, the Hearing Examiner issued an order dated October 11, 2006.
- 1.15 In that order, the Hearing Examiner is very clear that no public comment from Mr. Feil or any other member of the public submitted after September 29, 2006, would be admitted into the record. The Hearing Examiner opened the public record from September 29, 2006, through October 20, 2006, for the sole purpose of allowing the applicant to provide any additional rebuttal evidence that they may wish to submit.

- 1.16 The Hearing Examiner further ordered that at 5:00 p.m. on October 20, 2006, the public record in this matter would close.
- 1.17 The Hearing Examiner made it very clear and ordered that all documents submitted by Mr. Feil, by members of the public and by attorneys in this matter up to September 29, 2006, would be included as a part of the record.
- 1.18 The Hearing Examiner further ordered, and made it very clear, that the reopening of the record from September 29, 2006, through October 20, 2006, was for the sole and limited purpose of allowing the applicant to provide rebuttal evidence, should they so desire. The record was not reopened for additional public comment, or argument.
- 1.19 Finally, the Hearing Examiner ordered that his decision would be made on or before November 3, 2006.

II. ITEMS IN THE RECORD

- 2.1 At the open record public hearing on September 12, 2006, the Hearing Examiner admitted the entire Planning Staff file for this matter into the record as it existed up to September 12, 2006.
 - 2.1.1 To be very clear, Douglas County Transportation and Land Services compiled a list of public comments received since September 6, 2006, which were compiled by memorandum dated September 6, 2006, and a second memorandum dated September 12, 2006, all of the items listed within both memorandums are included in the public record.
- 2.2 Additionally, the Hearing Examiner heard testimony from the following individuals:
 - 2.2.1 Mark Gillespie, of the Washington State Parks
 - 2.2.2 Bill Frazier, Eastern Region Park Manager and Project Coordinator
 - 2.2.3 Jon Ives, of Jones & Stokes, identified as the authorized agent in application materials and the environmental consultant
 - 2.2.4 Nina Villalobos, of Wenatchee
 - 2.2.5 David Zamora, of Wenatchee
 - 2.2.6 Dr. Walter Newman, of Wenatchee
 - 2.2.7 Karen Russell, of East Wenatchee
 - 2.2.8 Robert Parlette, of Wenatchee
 - 2.2.9 Andy Dappen, of Wenatchee
 - 2.2.10 Allison Haug, of Wenatchee
 - 2.2.11 Doug Pauley, of Wenatchee
 - 2.2.12 David Steipe, of Wenatchee
 - 2.2.13 Mary Cook, of Wenatchee
 - 2.2.14 Steve Godfrey, of Cashmere
 - 2.2.15 Mike Zanol, of East Wenatchee

- 2.2.16 Brittney Moline, of Wenatchee
 - 2.2.17 Jon Tontz, of East Wenatchee
 - 2.2.18 Blane Smith, of Monitor
 - 2.2.19 Bruce Smith, of Wenatchee
 - 2.2.20 Britt Dudek, of East Wenatchee
 - 2.2.21 Bob Strutzel, of Monitor
 - 2.2.22 Larry Letts, of East Wenatchee
 - 2.2.23 Shannon Huehn, of East Wenatchee
 - 2.2.24 Jack Feil, of East Wenatchee
 - 2.2.25 Dick Feil, of East Wenatchee
- 2.3 Additionally, after the September 12, 2006, meeting, during the period where the public record was kept open, the following additional comments were received:
- 2.3.1 Letter from attorneys Robert Rowley and James Klauser, co-counsel for Jack and Delaphini Feil, which contained questions directed to Curtis Lillquist of Douglas County Transportation and Land Services and questions directed to Mark Gillespie of Washington Parks and Recreation Commission
 - 2.3.2 Letter from James Klauser dated September 21, 2006, with enclosures which are now included into the public record
 - 2.3.3 September 29, 2006, letter from attorney James Klauser to the Hearing Examiner with attachments including a letter signed by 34 individuals
 - 2.3.4 Email from Jim Klauser to Andrew Kottkamp dated September 29, 2006
 - 2.3.5 Letter dated September 29, 2006, from Mark Gillespie to Mark Kulaas
 - 2.3.6 September 29, 2006, letter from Mark Gillespie to Robert Rowley and James Klauser with attachments. All attachments to that letter are admitted into the record which include Washington Parks and Recreation Commission responses to questions directed to Mark Gillespie by Mr. Feil's attorneys
 - 2.3.7 September 29, 2006, letter with attachments from Mark Gillespie to Andrew Kottkamp, Douglas County Hearing Examiner. Those attachments include a September 29, 2006, memorandum from Jonathan Ives of Jones & Stokes to Mark Gillespie (15 pages) with attachments including a color photograph with zoning districts overlayed, attachment 1 which includes transcript of proceedings of hearing before the Shoreline Hearings Board on SHB Cause No. 04-002, transcript of proceedings of September 12, 2006, open record public hearing on permit RO-06-01 which is the subject of this decision, and under attachment 3 miscellaneous land leases and "rental agreements," under attachment 4, Rocky Reach Hydroelectric Project FERC No. 2145-060 settlement agreement
 - 2.3.8 September 29, 2006, letter from Glen DeVries to Andrew Kottkamp with attachments:
 - (a) September 29, 2006, letter from Mark Gillespie to Robert Rowley and James Klauser with attachment

- (b) September 20, 2006, fax from Robert Rowley and James Klauser with questions from Jack Feil to Curtis Lillquist and Mark Gillespie
 - (c) September 20, 2006, letter from Jack Feil to Andrew Kottkamp
 - (d) Article, "State parks consider corporate sponsors"
 - (e) September 18, 2006, letter from Freeman Keller to Curtis Lillquist
 - (f) September 22, 2006, fax from James Klauser to Curtis Lillquist and Andrew Kottkamp with September 21, 2006, letter with attachments
 - (g) September 21, 2006, letter from James Klauser to Andrew Kottkamp with attachments
 - (h) September 25, 2006, letter from Bruce Smith to Andrew Kottkamp
 - (i) September 27, 2006, emails from Chip and Paige Balling to Curtis Lillquist, Glen DeVries and Stephen Neuenschwander
 - (j) September 22, 2006, letter from Mark Gillespie to Mark Kulaas with attachments
 - (k) November 23, 2004, Transcript of Proceedings, Day Two, SHB No. 04-002, filed May 20, 2005
 - (l) November 22, 2004, Transcript of Proceedings, Day One, SHB No. 04-002, filed May 20, 2005
 - (m) September 28, 2006, email from Susan Frieberg to Stephen Neuenschwander with attached September 28, 2006, letter to Andrew Kottkamp via email to Curtis Lillquist
 - (n) September 27, 2006, email from Drew and Cathy Gaylord to Curtis Lillquist
 - (o) September 27, 2006, email from Chip and Paige Balling to Curtis Lillquist
 - (p) September 21, 2006, email from Vicky Cibicki to Curtis Lillquist
 - (q) September 20, 2006, email from Andrew Kahn to Curtis Lillquist
 - (r) September 19, 2006, email from Eliot Tina to Curtis Lillquist
 - (s) Draft "Rocky Reach Trail Orchard Impacts"
 - (t) Draft "Lease Agreement" between Washington State Parks and Recreation Commission and Washington State Department of Transportation
 - (u) Draft "Trail Lease" between Washington State Parks and Recreation Commission and Washington State Department of Transportation
- 2.3.9 September 29, 2006, letter from Glen DeVries to Andrew Kottkamp
- 2.3.10 October 6, 2006, letter from AAG Carolyn Klohe to Andrew Kottkamp
- 2.3.11 October 18, 2006, letter from Mark Gillespie to Andrew Kottkamp

2.4 The following items were received after September 29, 2006, and are not part of the record:

2.4.1 October 3, 2006, letter from attorneys Rowley and Klauser.

2.4.2 October 19, 2006, letter from attorneys Rowley and Klauser to the Hearing Examiner, Mark Gillespie and Mark Kulaas.

III. FINDINGS OF FACT

- 3.1 The applicant is the Washington State Parks and Recreation Commission. Property owners signing the application are the Washington State Department of Transportation and Chelan County Public Utility District #1.
- 3.2 General Description: An application submitted by the Washington State Parks and Recreation Commission for the construction of a public, multi-modal trail facility that serves both transportation and recreation functions and will follow generally north-south oriented eastern shore of the Columbia River starting from the Odabashian Bridge and continuing north 5.1 miles to Lincoln Rock State Park within Washington State Department of Transportation right-of-way and property owned by Chelan County Public Utility District Number 1.
- 3.3 The property is located in a portion of Section 22, 15, 11, 10, and 2 within Township 23 North, Range 20 East, W.M., as well as Section 35 of Township 24 N., Range 20 East, W.M., Douglas County. The proposed Rocky Reach Trail would follow the generally North-South oriented eastern shore of the Columbia River, starting from the Odabashian Bridge and continuing North 5.1 miles to Lincoln Rock State Park. Douglas County Assessor Numbers for the subject property are 40400000001, 23201510002, 23201120011, 23201120010, and 23200210008.
- 3.4 The subject property is located within the Greater East Wenatchee Planning Area.
- 3.5 The Comprehensive Plan Designation is Tourist Recreation Commercial, Residential Low, Commercial Agriculture 5 acres, and Commercial Agricultural 10 acres.
- 3.6 The proposal is located in an area designated as Agricultural Resource, Critical Areas and Essential Public Facilities by the Greater East Wenatchee Area Comprehensive Plan.
- 3.7 The subject property is located in the Tourist Recreation Commercial (C-TR), Residential Low (R-L), Commercial Agriculture 5 acres (AC-5), and Commercial Agricultural 10 acres (AC-10) zoning districts. Trail systems are an outright permitted use in the Tourist Recreation Commercial district. Recreational trail systems are allowed in the Residential Low, Commercial Agriculture 5 and Commercial Agriculture 10 districts via a Recreational Overlay District permit.

- 3.8 Chapter 2.13 of the Douglas County Code authorizes the Douglas County Hearing Examiner to review and take action on applications to create a recreational overlay district.
- 3.9 On January 12, 2004 the Douglas County Hearings Examiner approved a shoreline substantial development permit for the proposed Rocky Reach Trail Extension. The shoreline permit decision was appealed to the State Shorelines Hearings Board on January 26, 2004. A separate appeal was filed in Superior Court under the Land Use Petition Act (LUPA) on January 26, 2004. On March 4, 2005, the State Shoreline Hearings Board affirmed the decision by the Douglas County Hearings Examiner. The State Shoreline Hearings Board decision was then appealed to the State Superior Court. On September 13, 2005, the Superior Court affirmed the Shoreline Hearings Board decision and ruled on the LUPA appeal, directing Washington State Parks and Recreation Commission to apply for and obtain land use permits as may be required by the Douglas County Code.
- 3.10 On August 1, 2002, the U.S. Army Corps of Engineers issued a Nationwide Permit 14 for a box culvert crossing at Station 66+60 (River Mile 470.5) on the Rocky Reach Trail.
- 3.11 On January 30, 2003, the Washington State Department of Ecology issued a letter waiving individual water quality certification requirements for the culvert crossing subject to the Corps of Engineers jurisdiction under the Federal Clean Water Act.
- 3.12 On April 18, 2006, the Washington department of Fish and Wildlife issued a Hydraulic Project Approval (HPA) for bridge and culvert installation, native revegetation and site restoration.
- 3.13 In April, 2001 the Washington State Parks and Recreation Commission, in conjunction with the U.S. Department of Transportation Federal Highway Administration and the Washington State Department of Transportation issued a National Environmental Policy Act Environmental Assessment for the proposed trail extension. After review and comment the U.S. Department of Transportation Federal Highway Administration issued a Finding of No Significant Impact in November 2001.
- 3.14 A Biological Assessment was prepared for the proposed trail project in July 2000. Concurrence letters were issued by the U.S. Fish and Wildlife Service on January 17, 2001 and the National Marine Fisheries Service on February 26, 2001. An addendum to the biological Assessment was issued evaluating the project relative to the 2005 re-designation of Critical Habitat, evolutionary significant unit and distinct population segment stock definitions.

- 3.15 The Greater East Wenatchee Area Comprehensive Plan identifies the need and roughly discloses a general alignment of a trail extending from the existing trail at Odabashian Bridge north to Lincoln Rock State Park.
- 3.16 Policies contained within the Greater East Wenatchee Area Plan speak to trail recreation benefits, the provision of a balanced transportation system and a trail system throughout the East Wenatchee area.
- 3.17 By policy, the Greater East Wenatchee Area plan places significant importance on the protection of agricultural lands; establishes that public policies should minimize disruption of agricultural activity; and suggests that innovative techniques be utilized to minimize impacts to agricultural lands of long term commercial significance.
- 3.18 The applicant has proposed a variety of measures within the project design and operation to address agricultural impacts. These include but are not limited to enhanced setbacks, enhanced buffers in areas where enhanced setbacks are not possible, gates at both ends on the agricultural area which will be secured during important agricultural operation periods, additional fencing of agricultural infrastructure (i.e. pump houses), additional security by the applicant to minimize impacts of the trail users on agricultural areas, and a plan to minimize noxious weeds in the trail.
- 3.19 Comments from reviewing agencies have been considered and addressed where appropriate.
- 3.20 The Washington State Parks and Recreation Commission is lead agency, responsible for compliance with the State Environmental Policy Act, (SEPA).
- 3.21 The Washington State Parks and Recreation Commission published a determination of Nonsignificance (DNS) and Adoption of Existing Environmental Document, on November 19, 2001.
- 3.22 Public notice of application for this proposal and notice of the public hearing was provided in conformance with Title 14 Douglas County Code.
- 3.23 Surrounding property owners were given the opportunity to comment on the proposal, can request a copy of the decision, and can appeal the decision subject to the requirements outlined in DCC Title 14.
- 3.24 Proper legal requirements were met and surrounding property owners were given the opportunity to comment on the proposal at a public hearing.

- 3.25 Section 18.46.080(B) authorizes the review authority to reduce the agricultural setback to 60 feet with an enhanced alternative buffering method.
- 3.26 The subject property is located on the shoreline of the Columbia River and contains wetland areas regulated under the provisions of chapter 19.18B Critical Areas-Wetlands.
- 3.27 The trail corridor is not located within wetland boundaries and is located within wetland buffers. Mitigation for impacts to wetland buffers were established at a ratio of 1:1 within the wetland management and mitigation provisions.
- 3.28 Soil mapping from the USDA Natural Resource & Conservation Service indicate the presence of steep and severe building soils on a portion of the subject properties. A Geotechnical Report, from Hong West & Associates, Inc., dated August 26, 1996 and revised December 3, 1997 was submitted by the applicant.
- 3.29 Section 19.18.035 establishes that public trail facilities may be authorized within designated resource lands and critical areas subject to the minimum standards of the Section.
- 3.30 Public and agency comments that were received were considered by the Hearing Examiner in rendering this Decision and forming Conditions of Approval.
- 3.31 The applicant considered alternative routes for a pedestrian/bicycle trail between Odabashian Bridge and Lincoln Rock State Park. One of these alternative routes would have involved acquiring lands in private ownership and would have impacted County designated critical areas. Private property owners on the alternative route were not willing to sell their property or grant an easement for these additional lands required.
- 3.32 The Washington State Parks and Recreation Commission will retain maintenance control over the real property upon which the trail and setback areas are proposed to be located.
- 3.33 A number of people testified alleging incompatibility between orchard activities and the presence of bicyclists and pedestrians. However, the more convincing testimony leaves the Hearing Examiner to find that orchard activities, pedestrians and bicyclists can co-exist in the same proximity, just as they have for over 100 years.
- 3.34 The lands upon which the proposed recreational overlay district and site plan development permit are proposed are lands owned by the public through the Washington State Department of Transportation and through the Chelan PUD.

Opening these public lands for public transportation and recreation activities will benefit the public at large.

- 3.35 There was testimony, both oral and written, as to the potential adverse impacts upon orchard activities. However, the Hearing Examiner finds that these potential impacts can be minimized and mitigated through conditions of approval. Further, the Hearing Examiner finds that agricultural uses can continue in the vicinity of this trail upon implementation of the Conditions of Approval.
- 3.36 At the open record public hearing on September 12, 2006, there was some testimony as to the impacts the trail might have on the presence of beehives used for pollination of fruit trees. As indicated in the September 29, 2006, memorandum from Jonathan Ives to Mark Gillespie, page 3, Mr. Ives indicates that Bill Frazier and Mark Gillespie met with Bruce Smith, a local beekeeper, on September 18, 2006. During this meeting Mr. Smith indicated that bees were kept on site for an average of six weeks roughly between April 1 to May 15 depending on weather conditions. During that period, only the last two weeks were of concern to Mr. Smith. Those two weeks are the time when the beehives are taken from their dispersed orchard locations and reassembled en mass into the makeshift "bee yard" site. During that two-week period the number of assembled hives can number between 4,000 to 5,000 hives. These hives are ultimately reloaded on trucks for shipment to other locations. As a result of this concern, the applicant is willing to enter into a cooperative agreement with Mr. Smith to consider the temporary closure of the affected section of the trail during the peak beehive assembly periods during this last two-week period (14 calendar days). The exact time for this temporary closure would be determined in consultation and in coordination with Mr. Smith. This mitigation measure would be in affect as long as the commercial bee yarding activities were considered a legal use in the underlying zoning district. If and when bee yarding ceased to be a viable or legal activity on that site then the agreement would be void.
- 3.37 There was testimony at the September 12, 2006, public hearing indicating that the existence of this trail would preclude the use of helicopters for aerial spraying. However, the Hearing Examiner finds that Condition of Approval No. 10 for Shoreline Substantial Development Permit No. 87 contained in Decision SP 87 dated January 12, 2004, provides orchardists with a large block of time during the morning hours during a three-month period to conduct aerial spraying and moisture removal on orchards that will remain in the vicinity of the trail.
- 3.38 The proposed trail will, in its entirety, be located on public lands within the WSDOT owned right-of-way, on Chelan PUD lands and on Chelan PUD lands where WSDOT has use rights. Current use of the WSDOT right-of-way and Chelan PUD lands for agricultural is allowed only through year-by-year leases with adjacent landowners and most of these leases have a 30-day termination clause.

- 3.39 Based on the testimony presented at the hearing and other written materials on file it is very clear to the Hearing Examiner that this proposed trail has significant recreation uses, and would also serve as a transportation facility.
- 3.40 There was testimony at the open record public hearing of September 12, 2006, that orchardists may not be able to receive insurance for their orcharding activities. However, no competent evidence was supplied at the hearing to substantiate this allegation.
- 3.41 The Hearing Examiner further finds that should orcharding activities occur on either side of the proposed trail and outside of the buffer areas, that interpretive signs located on the trail would serve an educational purpose for the trail users. The education could include but not be limited to various aspects of farming and orcharding practices, the potential risks associated with those practices and appropriate precautions that trail users should take.
- 3.42 The Hearing Examiner finds that with the effective implementation of the Conditions of Approval, that recreational and transportation uses of the Rocky Reach Trail Extension can safely co-exist with neighboring orchard and farming, and all other agricultural activities.
- 3.43 At the open record public hearing on September 12, 2006, there was some testimony that the trail and proposed vegetated buffers may create frost pockets potentially causing fruit loss.
- 3.44 Approximately 9% of the proposed trail length will require a vegetated buffer. The applicant, through mitigation measures related to trail design, can reduce the likelihood of frost pocket formation along the trail in the vicinity of these vegetated buffers.
- 3.45 Any Conclusion of Law that is more correctly a Finding of Fact is hereby incorporated as such by this reference.

IV. CONCLUSIONS OF LAW

- 4.1 The Hearing Examiner has authority to render this decisions for recreation overlay districts and site plan development permits.
- 4.2 As conditioned, the development will not adversely affect the general public, health, safety and general welfare.

- 4.3 As conditioned, the project meets the goals and policies as set forth in the Greater East Wenatchee Area Comprehensive Plan.
- 4.4 Based upon the letters of concurrence and permit approvals from federal and state agencies this proposal is consistent with applicable federal and state laws and regulations as conditioned.
- 4.5 As conditioned, potential impacts of the project can be mitigated.
- 4.6 The application is consistent with the requirements of DCC 19.18.035, relating to trails and trail related facilities.
- 4.7 Public use and interests will be served by approval of this proposal which utilizes public lands for direct use by the public.
- 4.8 As conditioned, the proposal is consistent with Title 18 "Zoning", Title 19 "Environment", and Title 20 "Development Standards", of the Douglas County Code.
- 4.9 Any Finding of Fact that is more correctly a Conclusion of Law is hereby incorporated as such by this reference.

V. DECISION

Based on the above Findings of Fact and Conclusions of Law, Permit Nos. RO-06-01 and SPD 06-02 are hereby **APPROVED** subject to the following Conditions of Approval.

VI. CONDITIONS OF APPROVAL

All Conditions of Approval shall apply to the applicant, and the applicant's heirs, successors in interest and assigns.

- 6.1 The project shall proceed in substantial conformance with the plans and application materials of file dated March 27, 2006 and July 5, 2006 except as amended by the conditions herein.
- 6.2 The applicant is responsible for compliance with all applicable local, state and federal rules and regulations, and must obtain all appropriate permits and approvals.
- 6.3 The construction of the trail and associated facilities shall proceed in conformance with the Geotechnical Report from Hong West & Associates, dated August 26, 1996 and revised on December 3, 1997.

- 6.4 Prior to construction, the application must contact the East Wenatchee Water District to verify that the trail location does not conflict with the existing water main easement for the regional water main.
- 6.5 The applicant shall include pet waste disposal with the proposed trash receptacles.
- 6.6 The surface of the trail shall provide adequate support for a two axle emergency vehicle weight of 18,000 pounds.
- 6.7 No permanent structures shall be placed within the NESC Safety Zone of the 115kV transmission lines. This zone is located 50 feet from both sides of the middle conductor
- 6.8 The SPD permit shall remain valid after five years after the notice of action was issued, provided that physical improvements consistent with the permit have been commenced within three years of the date of the notice of action.
- 6.9 The applicant shall comply with all Conditions of Approval set forth in Shoreline Permit 87, decision rendered January 12, 2004, except as modified herein.
- 6.10 The applicant may enter into a cooperative agreement with beekeepers to consider the temporary closure of affected sections of the trail during peak beehive assembly periods for a period of up to 14 calendar days. The exact times for these temporary closures would be determined in consultation and coordination with affected beekeepers. This mitigation measure remains in affect as long as commercial bee yarding activities are considered a viable and legal use in the underlying zoning district. If and when bee yarding activities cease to be a viable and/or legal activity on these sites, then this condition shall have no further force or affect. The language of the "cooperative agreement" shall be that which may be mutually agreed to between the applicant and affected beekeepers. However, it should be very clear that this condition is not mandatory on the applicant, but if a "cooperative agreement" under reasonable terms can be reached, then it should be implemented. The applicant shall act in good faith in negotiating and implementing this "cooperative agreement."
- 6.11 Informational signs shall be placed to warn and direct trail users to stay on the trail. Boundary signs shall also be placed at strategic locations along the trail and in response to landowner complaints that can be verified.
- 6.12 The applicant shall design this Rocky Reach Trail Extension with specific attention to creating an environment that will minimize the potential for frost pockets. For the 2,400 feet scheduled for buffer planting, the applicant shall perform an "on the ground" analysis by the Washington State Parks and Recreation Commission, working with a certified horticulturist, orchardists with property adjacent to the

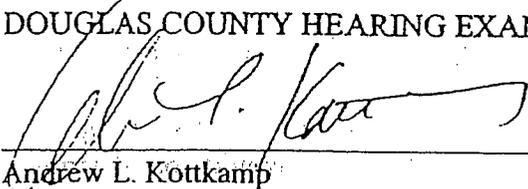
proposed trail and the trail designer to identify the areas (based on topography building locations and other factors) of greatest potential for frost pockets and to take reasonable steps to insure that the buffer is established to avoid the creation of frost pockets while also achieving the buffering requirements set forth in Douglas County Code 18.46.080B.

VII. APPEAL RIGHTS

The decision of the Hearing Examiner is final and conclusive unless an appeal is filed in accordance with Chapter 14.12 of the Douglas County Code. Appeals must be filed in the Douglas County Superior Court and served on all necessary parties within twenty-one (21) days after the above listed date of issuance of this notice of final decision, as determined pursuant to RCW 36.70C.040. Persons that believe they are aggrieved by a decision of the Hearing Examiner are advised to consult their attorney.

Dated this 3rd day of November, 2006.

DOUGLAS COUNTY HEARING EXAMINER



Andrew L. Kottkamp



**Washington State
Department of Transportation**

Douglas B. MacDonald
Secretary of Transportation

Transportation Building
310 Maple Park Avenue S.E.
P.O. Box 47300
Olympia, WA 98504-7300

360-705-7000
TTY: 1-800-833-6388
www.wsdot.wa.gov

March 22, 2006

Mark D. Kulaas
Director of Land Services, Douglas County
140 19th Street NW, Suite A
East Wenatchee, WA 98802

**SUBJECT: Washington State Parks Application for Recreational Overlay
Rocky Reach**

Dear Mr. Kulaas:

This letter will confirm that the Washington State Department of Transportation (WSDOT) is aware of the project proposed by Washington State Parks (Parks) to construct a non-motorized transportation facility that will be partially located on WSDOT property in Douglas County. WSDOT is also aware that Douglas County is requiring that Parks secure approval of a Recreational Overlay (RO) on WSDOT's property as a condition of moving forward with the project.

WSDOT hereby authorizes Parks to submit an application to Douglas County for the RO based upon its understanding of the effects of such RO on WSDOT's property as outlined in the Parks letter of November 22, 2005 and the Douglas County letter of November 29, 2005, enclosed herein as attachments A and B.

Sincerely,

A handwritten signature in cursive script that reads "Gerald L. Gallinger".

Gerald L. Gallinger
Director, Real Estate Services
(360) 705-7305

Attachments

Steven M. Clem
Douglas County Prosecuting Attorney



Eric C. Biggar
Chief Deputy

W. Gordon Edgar
Deputy

Justin Cafferty
Deputy

Nancy Willms
Administrative Assistant

Jenny A. Schlamman
Victim-Witness Coordinator

MEMORANDUM

February 26, 2008

Re: Rocky Reach Trail - Litigation Chronology

To: Board of County Commissioners
From: Steven M. Clem, Prosecuting Attorney *SMC*
Copy: Mark Kulaas, Land Services Director

In response to the Board's request, this Memorandum is a summarized chronology of the litigation involving the Rocky Reach Trail. I have attached to this Memorandum the decisions made by the Hearing Examiner, the Shorelines Hearings Board, the Eastern Washington Growth Management Hearings Board and the Douglas County Superior Court.

January 12, 2004 - Hearing Examiner Don Moos presided over an administrative hearing. December 13, 2003, issued a Decision granting Parks a Substantial Development Permit under the Shorelines Management Act for a multi-modal transportation facility and imposed numerous mitigation conditions on the permit. (See Exhibit 1)

January 2004 - A LUPA Petition filed in the Douglas County Superior Court under *McNeal, et al., vs. Douglas County, et al.*, No. 04-2-00045-6, appealing the Decision of the Hearing Examiner and the SEPA review process.

January 2004 - A Petition for Review was filed with the Shorelines Hearings Board under *McNeal, et al. vs. Douglas County, et al.*, No 04-002, appealing the issuance of the Substantial Development Permit under the Shorelines Management Act and the SEPA review process.

March 4, 2005 - The Shorelines Hearings Board issued 29 pages of Findings of Fact, Conclusions of Law, Order, and Order on Reconsideration after hearing multiple days of testimony and argument in a *de novo* hearing. The Shorelines Hearings Board held that the proposed trail was consistent with the Shoreline Management Act and the County's Shoreline Master Program and that a Substantial Development Permit for the trail was proper. The Shorelines Hearings Board also held that the SEPA review was adequate, complied with law and that further environmental review was required under SEPA. (See Exhibit 2)

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February 26, 2008
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March 2005 - A Petition for Review was filed in the Douglas County Superior Court under *Feil, et al. vs. State of Washington, et al.*, No. 05-2-00121-3, appealing the decision of the Shorelines Hearings Board.

August 2, 2005 - Judge Hotchkiss issued a written opinion on the LUPA appeal outlining a decision that Parks must apply for and obtain a Recreational Overlay or Conditional Use Permit due to the recreational component of the trail. (See Exhibit 3)

September 13, 2005 - Judge John Hotchkiss entered the final Order in the appeal of the Shorelines Hearings Board decision. Judge Hotchkiss affirmed the decision in all respects - that SEPA review was adequate and that no further SEPA review was required, and that the proposed trail was consistent with the Shoreline Management Act and the County's Shoreline Master Program and that a Substantial Development Permit for the trail was proper. (See Exhibit 4)

September 13, 2005 - Simultaneously with entry of the Order in the appeal from the Shorelines Hearings Board decision, Judge Hotchkiss entered his Order Reversing/Remanding Land Use Decision in the LUPA case in accordance with his earlier written decision. Judge Hotchkiss held that no further review is necessary under SEPA unless changes are made to the trail project that would result in significant adverse environmental impacts and further held that the proposed trail will serve both transportation and recreation functions. Judge Hotchkiss reversed the Hearing Examiner's decision that the proposed trail is not subject to permitting under the Douglas County Code because it is a transportation facility. Judge Hotchkiss remanded the case for Parks "to apply for and obtain Permits as may be required by the Douglas County Code." (See Exhibit 5)

October 17, 2005 - A Notice of Appeal was filed under *Feil, et al. vs. State of Washington, et al.*, Case No. 245829-III, Division III of the Court of Appeals, seeking review of Judge Hotchkiss' final Order affirming the Shorelines Hearings Board decision. *The appellants subsequently abandoned this appeal and Judge Hotchkiss' Order is final.*

March 23, 2006 - In compliance with Judge Hotchkiss' LUPA decision, Parks filed an application for a Recreational Overlay designation and Site Plan Development Permit for the trail.

November 3, 2006 - Hearing Examiner Andrew Kottkamp presided over an administrative hearing held September 12, 2006, and issued a Decision granting Parks a Recreational Overlay designation and Site Plan Development Permit for the trail and imposed numerous mitigation conditions on the permit. The Hearing Examiner found that the application was consistent with the Greater East Wenatchee Area

Comprehensive Plan and the Douglas County Code and that the potential impacts of the trail were mitigated by the imposed conditions. (See Exhibit 6)

November 20, 2006 - A LUPA Petition filed in the Douglas County Superior Court under *Feil, et al., vs. Douglas County, et al.*, No. 06-2-00410-5, appealing the Decision of the Hearing Examiner and requesting a Declaratory Judgment that the Hearing Examiner was without jurisdiction to approve a Recreational Overlay.

November 27, 2006 - A Petition for Review was filed with the Growth Management Hearings Board for Eastern Washington under *Feil, et al. vs. Douglas County, et al.*, Case No. 06-1-0012, appealing the Hearing Examiner's decision as a violation of the Growth Management Act.

November 27, 2006 - Jack Feil and others submitted a Request for Action to the Board of County Commissioners requesting that the Board consider the Hearing Examiner's Decision as a recommendation and that the Board review and make a final determination regarding Park's application. The Board subsequently declined to act on the request.

February 16, 2007 - The Growth Management Hearings Board issued its Order on Motion to Dismiss holding that the Recreational Overlay designation was a site specific project permit application and rejecting argument that the designation was a "rezone." The Growth Management Hearings Board held that it did not have jurisdiction over the Hearing Examiner's decision and dismissed the case. (See Exhibit 7)

March 15, 2007 - A Petition for Review was filed in the Douglas County Superior Court under *Feil, et al. vs. Eastern Washington Growth Management Hearings Board, et al.*, No. 07-2-00100-7, appealing the decision of the Growth Management Hearings Board.

July 31, 2007 - Judge John Hotchkiss entered a Decision of the Court in the case involving the Eastern Washington Growth Management Hearings Board decision and affirmed the Board's decision. (See Exhibit 8)

July 31, 2007 - Judge John Hotchkiss entered a Decision of the Court in the case involving the LUPA appeal of the Recreational Overlay designation and the Site Development Permit and the request for a Declaratory Judgment. Judge Hotchkiss held that the Recreational Overlay designation constituted a rezone and that the Hearing Examiner did not have the authority to grant a rezone. Judge Hotchkiss ordered, "As this is a legislative decision, the decision of the Hearing Examiner must be remanded to the County legislative authority for review and decision." Judge Hotchkiss did not make a decision on the merits of the Recreational Overlay designation, although his decision did discuss possible conflicts between agriculture and recreation under the Growth

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Management Act. However, Judge Hotchkiss specifically declined to make a decision involving that conflict. Also, Judge Hotchkiss did not address the Hearing Examiner's issuance of the Site Plan Development permit or the allegations that SEPA review was inadequate. **(See Exhibit 9)**

Douglas County Hearing Examiner

Donald W. Moos, Hearing Examiner
Andrew L. Kottkamp, Deputy Hearing Examiner

NOTICE OF ACTION TAKEN
By The
DOUGLAS COUNTY HEARING EXAMINER
January 12, 2004

RE: SP# 87, a proposed shoreline substantial development permit for a multi-modal non-motorized transportation facility located along the Columbia River in Douglas County as proposed by Washington State Parks and Recreation Commission.

This matter having come before the Douglas County Hearing Examiner on December 18, 2003 is hereby resolved.

- A. PROPOSAL: The applicant has submitted a request for a shoreline substantial development permit to allow for the construction of a multi-modal non-motorized transportation facility within Washington State Department of Transportation right-of-way and property owned by Chelan County Public Utility District Number 1. The proposed Rocky Reach Trail would follow the generally North-South oriented eastern shore of the Columbia River, starting from the Odabashian Bridge and continuing North 5.1 miles to Lincoln Rock State Park. The subject properties are located within the following zoning districts: Tourist Recreation Commercial (C-T), Residential Low (R-L), Commercial Agriculture 5, (AC-5), and the Commercial Agriculture 10 (AC-10) Zoning District.
- B. FINDINGS OF FACT:
1. The proposal is located in an area designated as Agricultural Resource, Identified Critical Areas, Low Residential, Recreation Tourist Commercial and Essential Public Facilities by the Greater East Wenatchee Area Comprehensive Plan.
 2. The proposal is located in the Tourist Recreation Commercial (C-T), Residential Low (R-L), Commercial Agriculture 5, (AC-5), and the Commercial Agriculture 10 (AC-10) zoning districts. Road and trail construction as a public transportation infrastructure improvement may be permitted in all zoning districts as necessary transportation infrastructure envisioned in the comprehensive plan.

3. A portion of the proposal is located within 200 feet of the ordinary high water mark of the Columbia River, a shoreline of statewide significance. The project can proceed only after a Shoreline Management Substantial Development Permit is issued.
4. The Douglas County Shoreline Master Program designates this area as a "Rural" Shoreline environment.
5. Public notice of application for this proposal and notice of the public hearing was provided in conformance with Title 14 Douglas County Code and the provisions of the Douglas County Shoreline Master Program.
6. Public and agency comments were submitted for the subject application.
7. The Washington State Parks and Recreation Commission is lead agency, responsible for compliance with the State Environmental Policy Act, (SEPA). The Washington State Parks and Recreation Commission published a determination of Nonsignificance (DNS) and Adoption of Existing Environmental Document, on November 19, 2001. No appeal of this determination has been filed.
8. The trail extension has been applied for as a multi-modal transportation component of US2/97.
9. The subject property is located on the shoreline of the Columbia River and contains riparian and wetland areas regulated under the provisions of Chapter 19.18B Critical Areas-Wetlands
10. USFWS issued a Section 7 Concurrence on January 17, 2001 with a reaffirmation in January 2003; NOAA Fisheries issued a Section 7 Concurrence on February 26, 2001 with a reaffirmation in February, 2003; the US Army Corps of Engineers issued a NWP-14 Permit on July 31, 2002; and the Washington State Department of Fish and Wildlife issued a HPA Permit on March 21, 2003.
11. The trail corridor is not located within wetland boundaries and is located within wetland buffers. Mitigation for impacts to wetland buffers were established at a ratio of 1:1 within the wetland management and mitigation plan.
12. A geotechnical report was submitted by the applicant for the subject application.
13. The Douglas County Shoreline Design Area Plan designates Cox's Pond and Cottonwood Stands present in the vicinity of the proposed trail corridor as environmentally sensitive areas.

14. The trail corridor location may increase the potential of public entry or impacts to Cox's Pond and the Cottonwood Stands in proximity to the proposed trail corridor.
15. Section 19.18.035 establishes that public trail facilities may be authorized within designated resource lands and critical areas subject to the minimum standards of the Section.
16. The applicant has proposed a variety of measures within project design to address agricultural impacts. These include but are not limited to increased setbacks/buffers, enhanced planted buffers designed in concert with the orchardists and horticulturists to prevent frost pockets, educational signage, fencing, and park ranger patrols and limitation of operation to daylight hours to deter vandalism and fruit theft.
17. The Douglas County Shoreline Design Area Plan proposes an improved pedestrian/non-motorized path extending from Lincoln Rock Park to Rock Island Hydro Park in order to provide linkages between recreational sites, development activities, and individual neighborhoods and communities.
18. The Douglas County Shoreline Design Area Plan notes that trail systems established north of the Odabashian Bridge should occur in a manner that will be compatible with orchard operations. The plan notes further that this may include establishing adequate buffering between these uses through landscaping and fencing.
19. The stormwater, off street parking and loading, and signage standards of DCC Title 20, "Development Standards", apply to the subject application.
20. The Douglas County Engineer has indicated that stormwater control measures listed within the project application address county stormwater concerns for the project. The Department of Ecology has further indicated that a water quality certification for the project is not required.
21. Policies contained within the Douglas County Comprehensive Plan and the Greater East Wenatchee Area Plan speak to trail recreation benefits; a coordinated network of streets and trails with an emphasis on non-motorized transportation; the promotion of linkages to bicycle, equestrian and pedestrian way improvements, emphasizing access to schools, parks, employment and service centers and shorelines; and the reduction of conflicts between different modes of travel through the provision of adequate facilities.
22. The Greater East Wenatchee Area Comprehensive Plan roughly discloses a general alignment of a trail extending from the existing trail at Odabashian Bridge north to the vicinity of Rocky Reach Dam.

23. The Douglas County Shoreline Design Area Plan provides specific policy guidance and design criteria to guide the development of trail facilities.
24. By policy, the Douglas County Comprehensive Plan and Greater East Wenatchee Area plan place significant importance on the protection of agricultural lands; establish that public policies should minimize disruption of agricultural activities, and suggest that innovative techniques be utilized to minimize impacts to agricultural lands from potentially conflicting land uses.
25. Provisions for enhanced setbacks, buffering and resource disclosure statements have been included within County Code to implement comprehensive plan policies for the protection of agricultural lands of long term commercial significance.
26. The project application is subject to the requirements of Sections 19.10.160-170, of Chapter 19.10, Shoreline Access, Douglas County Code.
27. Recreation policy D, within Section XXIII of the Douglas County Shoreline Master Program specifically supports the linkage of shoreline parks and public access points through the use of lineal access such as hiking paths and bike trails.
28. The applicant has requested time limits for project completion that vary from those established by WAC 173-27-090. The applicant has stated that the request is necessary to provide enough time to complete construction plans and specifications, secure adequate funding, and for trail construction.
29. WAC 173-27-150, establishes minimum review criteria for Shoreline Management Substantial Development Permits. This criteria states that a substantial development permit shall be granted only when the development proposed is consistent with the policies and procedures of the Act; the provisions of this regulation; and the applicable master program adopted or approved for the area.
30. In the area of the project site, the application of agricultural sprays is most effective in the calm of the day which is predominately in the morning hours.
31. The critical time for orchard crops in the project area related to spraying and pollinating generally occurs from April thru June 30 of each year.
32. Spraying of orchard crops in the project area generally occurs from April through June 30 and into September of each growing year.

33. This proposed trail will serve both pedestrian and other non motorized traffic and would be part of the statewide multimodal transportation system.
34. Any Conclusion of Law that is more correctly a Finding of Fact is hereby incorporated as such by this reference.

C. CONCLUSIONS OF LAW:

1. Due to the circumstances stated by the applicant for a need for timing flexibility, the applicant's request for revised time frames for project completion is consistent with the provisions of WAC 173-27-090(1), which authorizes a jurisdiction to set a specific time frame for project completion.
2. The public access, circulation and recreation goals of the Douglas County Shoreline Master Program provide a supportive framework for the development of a trail system.
3. As proposed, the subject application is consistent with the requirements found within the transportation and utility sections of Chapter 19.10, Shoreline Access, Douglas County Code.
4. As proposed, the subject application meets the minimum stormwater and off street parking requirements stipulated by Title 20, Development Standards, Douglas County Code.
5. The subject application is consistent with the requirements of DCC 19.18.035, relating to trails and trail-related facilities.
6. Additional measures appear appropriate to discourage unauthorized entry by the public into the Cox's Pond and Cottonwood Stands in proximity to the proposed trail corridor.
7. Mitigation measures and project design and construction management specified by the geotechnical report submitted by the applicant is appropriate to address geologically hazardous issues associated with the proposal.
8. Based upon the letters of concurrence and permit approvals from federal and state agencies and the wetland management and mitigation plan submitted for the subject application, wetland and riparian impacts have adequately been addressed.

9. The proposal, as conditioned, is consistent with the intent and requirements of the Douglas County Shoreline Master Program, the Washington Administrative Code, the Shoreline Management Act, the Douglas County Comprehensive Plan, the Greater East Wenatchee Area Comprehensive Plan, the Douglas County Shoreline Design Area Plan and Douglas County Code.
10. As proposed, revised, and conditioned, potential impacts of the project can be mitigated.
11. Public and agency comments were considered in the attachment of conditions to the proposal.
12. The project is consistent with the review criteria of WAC 173-27-150, in that the project proposed is consistent with the policies and procedures of the Act; the rules for administering shoreline master programs established by WAC 173-27; and the Douglas County Shoreline Master Program.
13. The proposed trail project is part of the statewide multimodal transportation system. RCW 47.06.100.
14. Any Finding of Fact that is more correctly a Conclusion of Law is hereby incorporated as such by this reference

D. ORDER: The Douglas County Hearing Examiner hereby APPROVES application SP #87 submitted by Washington State Parks and Recreation Commission, based on the above findings of fact and conclusions of law and subject to the conditions enumerated below.

E. CONDITIONS OF APPROVAL:

1. Construction shall proceed substantially as shown on the application materials determined to be complete on August 20, 2003 on file with the Douglas County Transportation and Land Services Department, except as modified by conditions below.
2. The conditions of approval apply to the shoreline management substantial development permit of record.
3. The project shall be in compliance with the Shoreline Management Act (RCW 90.58), the Washington Administrative Code, the Douglas County Shoreline Master Program and the Douglas County Code.

4. The applicant shall comply with all applicable local, state and federal regulations and the applicant is responsible for securing any and all state and federal agency permits, as may be required.
5. A fencing plan must be submitted for review and approval to the Douglas County Department of Transportation and Land Services and the Washington State Department of Fish and Wildlife. The fencing plan must address the Cottonwood Stands and Cox's Pond environmentally sensitive areas designated by the Shoreline Design Area Plan. Fence design must be sufficient to discourage the public from entering these areas while still accommodating wildlife movement to these areas.
6. The applicant shall submit a noxious weed management plan for review and approval by the Douglas County Department of Transportation and Land Services prior to site construction commencing. The plan must be based upon recommendations or supporting documentation provided by agencies with expertise, that may include but are not limited to the WSU Agricultural Extension Office or the Natural Resource Conservation Services Department. Douglas County Transportation and Land Services will consult with these agencies in reviewing and approving the noxious weed management plan.
7. Authorization to conduct development activities shall terminate five years after the effective date of the subject shoreline permit application, except as may be approved under the extension provisions of WAC 173-27-090(2)b. Construction of trail facilities must commence and be completed within the 5 year permit window, but is not limited to a requirement for project construction commencement within the initial 2 years of permit issuance.
8. The applicant shall designate and enforce specific times for the opening and closing of the proposed trail. The applicant may designate different opening and closing times for standard time periods and daylight saving time periods.
9. The specific trail opening and closure times shall be posted at all designated access sites in standard time and daylight savings time.
10. From April 1 through June 30 of each year, trail use shall be limited to afternoon hours only and the proposed trail shall be closed during the morning hours. This provision may be altered only with the concurrence of the Washington State Tree Fruit Experiment Station and the Washington State University Agricultural Extension Service.
11. Entrance gates shall be installed and maintained by the applicant at all designated access points to the proposed trail, including but not limited to the Odabashian Bridge access point to the northbound section of the proposed trail and at the Lincoln Rock State Park access point to the proposed trail.

12. The applicant shall take all reasonable actions to ensure, at the time of trail closure, that the trail is vacant of users.
13. The applicant shall close all gates during all times that the trail is closed pursuant to this decision.
14. Signs containing, at a minimum, the warnings set forth in Exhibit 1 to this decision, shall be posted at all designated access points.


Dorit Moos, Hearing Examiner

June 12, 2004
Date

The complete case file on this matter is available for public review during normal business hours at the Permit Center, Douglas County Department of Transportation and Land Services, 470 Ninth Street NE, East Wenatchee, Washington.

Anyone aggrieved by this decision has twenty-one (21) days from the "date of filing" as defined in WAC 461-08-305 and RCW 90.58.140(6) to file a petition for review with the Shorelines Hearings Board as provided for in RCW 90.58.180 and Chapter 461-08 WAC, the rules of practice and procedure of the Shorelines Hearings Board.

Persons that believe they are aggrieved by a decision of the Hearing Examiner are advised to consult their attorney.

Please call the Douglas County Transportation and Land Services Department if you have any questions: (509) 884-7173.

NOTICE TO ROCKY REACH TRAIL USERS

You are entering an Agricultural Use Area.
Activities or elements you might encounter include:

- Farm machinery
- Noise
- Pesticide and Fertilizer Applications
- Honey Bees and Hives

PLEASE remain alert for these activities and stay on the designated trail.

Always consider your own safety, as well as that of the orchard workers.

1 SHORELINES HEARINGS BOARD
2 STATE OF WASHINGTON

3 C.F. and BETTY MCNEAL; BRUCE and
4 SHANNON SMITH; MILTON and TONIA
5 JOHNSON; BRIAN and TERESA STUMPF;
6 MOTT and BETTY LIEK; BOB and KAREN
7 RODGERS; JACK and DELAPHINE FEIL;
8 ROBERT BAIRD and RICHARD BAIRD,
9 d/b/a Baird Brothers; BRUCE and JEAN
10 HAUPT; JOHN and TONIA TONTZ;

11 Petitioners,

12 v.

13 DOUGLAS COUNTY, WASHINGTON
14 DEPARTMENT OF TRANSPORTATION;
15 WASHINGTON PARKS & RECREATION
16 COMMISSION; PUBLIC UTILITY
17 DISTRICT NO. 1 OF CHELAN COUNTY,

18 Respondents.

SHB NO. 04-002

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

And

ORDER ON RECONSIDERATION

19 This case is an appeal by orchardists of the proposed Rocky Reach Trail in Douglas
20 County. The Board held a hearing in the matter on November 22 and 23, 2004, in Lacey,
21 Washington. The Board consisted of Bill Clarke, Presiding, William K. Lynch, Chair, David W.
Danner, Mary Alyce Burleigh, Dan Smalley, and Judy Wilson.

Robert Rowley and James J. Klauser of Rowley & Klauser appeared on behalf of
Petitioners Jack and Delaphine Feil ("Feils"). Sheila Lynch, Assistant Attorney General,
appeared on behalf of Washington Parks and Recreation Commission ("Parks"), and Deborah
Cade, Assistant Attorney General, appeared on behalf of Washington State Department of
Transportation ("WSDOT"). Douglas County Prosecuting Attorney Steven Klem appeared on
behalf of Douglas County. Public Utility District No. 1 of Chelan County ("Chelan PUD") did

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1 not appear at the hearing. Petitioners other than Feils did not formally appear at the hearing,
2 though some testified as witnesses.

3 Kim Otis and Randi Hamilton of Gene Barker and Associates provided Court reporting
4 services. The Board received sworn testimony of witnesses, exhibits, and argument on behalf of
5 the parties. Having fully considered the record, the Board enters the following:

6 **FINDINGS OF FACT**

7 [1]

8 Douglas County approved an application submitted by Parks for a Shoreline Substantial
9 Development Permit for the Rocky Reach Trail. The Rocky Reach Trail would run from south
10 to north along the eastern shore of the Columbia River, starting near the Odabashian Bridge
11 between Wenatchee and East Wenatchee, and going approximately 5 miles (25,000 feet) north to
12 Lincoln Rock State Park, near Chelan PUD's Rocky Reach Dam. Approximately 12,000 feet of
13 the Rocky Reach Trail would be located within 200 feet of the Ordinary High Water Mark of the
14 Columbia River, a Shoreline of Statewide Significance. The trail would provide scenic views of
15 the Columbia River and its shoreline.

16 [2]

17 Estimated construction cost for the trail is \$1.5 million dollars. The location of the
18 proposed Rocky Reach Trail is within the Rural shoreline environment of the Douglas County
19 Shoreline Master Program ("DCSMP"). *Testimony of Bill Fraser; Testimony of Mark*
20 *Gillespie.* The area surrounding the trail is referred to as Baker Flats. Land uses in the area
21 include numerous tree fruit orchards. The trail would mainly be constructed in an existing public
right-of-way held by the Washington Department of Transportation, with a small portion of the

1 trail in a right-of-way owned by Chelan PUD. The right-of-way divides some orchard
2 properties. Since WSDOT acquired the right-of-way, it has leased parts of it to orchardists who
3 have planted fruit trees in the right-of-way.

4 [3]

5 Under the trail proposal, Parks, rather than the orchardists, would lease the land from
6 WSDOT for purposes of constructing and operating the trail. Parks and WSDOT have not
7 entered into any lease agreements for the right-of-way on which the trail would be built. Parks
8 intends to seek a lease term of at least 25 years as this is sufficiently long to justify the expense
9 of the project. The Petitioners in this case are agricultural landowners who believe the trail will
10 impact their orchard operations and that the proposal does not comply with the requirements of
11 the Douglas County SMP and SEPA. *Testimony of Mark Gillespie.*

12 [4]

13 The proposal has been the subject of a number of environmental review and permitting
14 procedures. Parks was the lead agency under the State Environmental Policy Act (SEPA), and
15 used documents prepared under the National Environmental Policy Act (NEPA) to fulfill SEPA
16 requirements. The documents prepared under the SEPA/NEPA process included an
17 Environmental Assessment published in March 2001 (*Ex. P-7*), a Determination of Non-
18 Significance (DNS), Adoption of Existing Environmental Document, and Finding of No
19 Significant Environmental Impact (FONSI) on November 19, 2001. *Ex. P-8*. The U.S. Fish &
20 Wildlife Service issued an Endangered Species Act § 7 concurrence on January 17, 2001 that
21 was reaffirmed in January 2003. (*Ex. R-2 Appendix A*) NOAA Fisheries issued an ESA § 7
concurrence on February 26, 2001 with a reaffirmation in February 2003. (*Ex. R-2 Appendix A*).

1 The US Army Corps of Engineers issued a Nationwide Permit 14 for the proposal on July 31,
2 2002. *Ex. R-2 Appendix C.* The Washington State Department of Fish and Wildlife issued a
3 Hydraulic Project Approval on March 21, 2003. *Ex. R-2 Appendix F.*

4 [5]

5 The purpose and function of the trail has been characterized in a variety of ways over the
6 course of the permitting and environmental review process. In March 2001, Parks'
7 Environmental Assessment ("EA") described the proposed trail as both a "recreational trail" (Ex.
8 P-8, Abstract) and a "multi-modal trail." (Ex. P-8 pg. 1). The section on "Purpose and Need for
9 Proposal" in the 2001 EA describes the purpose of the trail in a number of ways, including:

10 The purpose of the trail is to increase *public access and recreational opportunities*

11 The trail would connect to an existing trail that is used for both *recreation and*
12 *transportation* and would also provide a pedestrian and bicycle corridor

13 State goals and policies concerning trails are found in the Washington State Trails Plan
14 [which states] 'city and county trails are a clear priority, especially those trails and paths
that serve a *dual recreation-transportation function.*'

15 (Emphasis added) *Ex. P-8 at 3.*

16 [6]

17 The Environmental Assessment identified three future actions that would occur: (1) a
18 shoreline substantial development permit, (2) a zoning conditional use permit, and (3) a zoning
19 change to Recreational Zoning Overlay supplemental to the existing Agricultural zoning. *Ex. P-*
20 *8 at Errata Attachment 1-3.* Based on this EA, the FHA issued a FONSI. The FONSI was the
21 existing environmental document adopted by Parks in November 2001 when it issued its DNS
under SEPA.

1 [7]

2 In March 2002, Parks submitted a Master Application to Douglas County for a
3 Conditional Use Permit, Recreational Overlay District, and Shoreline Substantial Development
4 Permit. *Ex. P-9*. Parks' application includes the same descriptions of the purpose and need of
5 the trail including the 2001 EA. *Ex. R-9 at 2*. WSDOT did not sign the 2002 Master
6 Application. Douglas County did not act on this application.

7 [8]

8 During 2003, Parks then stopped referring to the purpose of the trail solely as recreation,
9 and used the phrase "multi-modal transportation facility" for two main reasons. First, the
10 proposed project would be funded with funds available for transportation projects. A September
11 2003 letter to Douglas County from WSDOT references the 18th Amendment to the Washington
12 State Constitution as the source of concern over how the project purpose was identified, as the
13 amendment in Article II, Section 40 relates to use of funds for highway purposes. *Ex. P-16*.
14 Second, because the trail is located in a right-of-way acquired by WSDOT in the 1950's for
15 transportation purposes, WSDOT did not want the zoning in the right-of-way to prevent future
16 use of the right-of-way by WSDOT for transportation purposes. *Testimony of Mark Gillespie,*
17 *Testimony of Mark Kulaas.*

18 [9]

19 After discussions between Parks and WSDOT, Parks revised the applications to be
20 submitted to Douglas County so that the trail reflected transportation purposes. *Testimony of*
21 *Mark Gillespie*. WSDOT then sent Douglas County a letter in June 2003 stating "per this letter,

1 WSDOT authorizes [Parks] to make application for the [shoreline permit] for the project.” (Ex.
2 P-12.) WSDOT signified that the description of project purpose was adequate in a September
3 2003 letter to Douglas County. (Ex P-16). This letter from WSDOT references the 18th
4 Amendment to the Washington State Constitution as the source of concern over how the project
5 purpose was identified, as the amendment in Article II, Section 40 relates to use of funds for
6 highway purposes. A July 2003 letter from Douglas County to WSDOT indicates that the Rocky
7 Reach Trail could “be pursued as a multi-modal transportation component of US 2/97, rather
8 than an unrelated recreational use,” and that such a project purpose would eliminate the need for
9 a recreational zoning overlay as originally envisioned. (Ex. P-12) When Parks eventually
10 submitted its shoreline Joint Aquatic Resources Permit Application (JARPA), the purpose and
11 use of the trail was described as follows:

12 The trail would be used for highway purposes, by materially increasing safety for
13 motorists, bicyclists, and pedestrians (including those using wheelchairs) by providing
14 these users with an alternative transportation corridor to the heavily used State Road 2/97.
15 Once developed and opened for public use, the trail will form a pedestrian link between
16 Lincoln Rock State Park and the existing urban trail system. Bicycle and pedestrian
17 commuter access would be provided to Rocky Reach Dam for employees of the facility .

18 Ex. P-2, Attachment 2, Page 3.

19 [10]

20 With the trail applicant Parks and right-of-way owner WSDOT in agreement on how the
21 project would be identified, Douglas County could act on a shoreline application. Rather than
submitting a Master Application for a Conditional Use Permit, Recreational Overlay District, and
Shoreline Substantial Development Permit, Parks submitted a JARPA for a shoreline permit to
Douglas County in July 2003 (Ex. R-2). The JARPA included previous environmental review

1 that had occurred for the trail project, including federal Biological Assessments and concurrence
2 letters, SEPA DNS and adoption of existing environmental documents, approvals from the
3 Washington Department of Ecology and Department of Fish & Wildlife, and specialized
4 environmental analysis. In response to the shoreline JARPA, Douglas County issued a Notice of
5 Complete Application on August 11, 2003. Ex. R-9. Douglas County did not require a zoning
6 Conditional Use Permit or Recreational Overlay District for the project. *Testimony of Mark*
7 *Kulaas.*

8 [11]

9 Douglas County accepted comments on the shoreline JARPA application. In response to
10 comments received, Parks provided the following response to comments regarding the purpose
11 of the trail:

12
13 **Why was "recreation" deleted from the project, and "transportation uses"**
14 **substituted?"** – Douglas County and WSDOT agreed that a major function of the trail is
15 to provide an alternative transportation route for commuters traveling from in Wenatchee
16 and East Wenatchee to work places in Baker Flats. This purpose is consistent with a
17 primary funding source, a Federal ISTEA Grant, that is designed to promote alternative
18 transportation opportunities. The highway purpose is evident in the significant safety
19 increase for motorists, bicyclists and pedestrians by removing bicyclists and pedestrians
20 from the very busy State Road 2/97 and this use is consistent with the purpose of
21 WSDOT's original land purchase. While the recreational aspects of the trail are an added
benefit to the community, the increased safety for all our citizens, be they young, old, or
disabled, is the primary interest."

Ex. R-19 page 2.

[12]

The Douglas County Department of Transportation and Land Services issued a staff
report on the application to the Douglas County Hearing Examiner in December 2003. The
report recommended issuance of the substantial development permit with a number of

1 conditions. *Ex. R-11.* Douglas County held a public hearing on the shoreline application. The
2 Hearing Examiner approved the issuance of a shoreline substantial development based on
3 findings of fact, conclusions of law, and conditions in January 2004. *Ex. R-12.*

4 [13]

5 The trail will be a 10-foot wide asphalt trail, with a 1-foot gravel shoulder on each side.
6 Trail construction will involve grading and filling of approximately 5,000 cubic yards of
7 materials along the 5.1 mile trail length. Vegetation will be cleared as necessary to construct the
8 trail and maintain buffers from orchard areas. No instream work will occur. Temporary silt
9 fencing and culverts will be used during construction, and open bottom box culverts or bridges
10 will be installed permanently over three seasonal drainages. Specific wetlands and cottonwood
11 stands along the length of the trail are subject to protective measures. Fencing along the trail will
12 be wildlife friendly to allow movement of animals in the area. *Ex. R-12, Ex. R-2.*

13 [14]

14 Douglas County's approval included provisions intended to mitigate possible impacts to
15 agricultural operations near the trail. These included increased buffers and setbacks between the
16 trail and agricultural lands, planted buffer areas to reduce frost pockets that could damage fruit
17 trees, educational signage, fencing, park ranger patrols, and hours of operation limitations to
18 prevent vandalism and theft. In addition, Douglas County required Parks to submit fencing and
19 noxious weed plans; designate, post, and enforce hours of operations that may differ between
20 standard time and daylight savings time periods; close the trail during morning hours from April
21

1 1 – June 30; install gates at trail access points, close trail gates during trail closure times; and
2 post signs warning trail users of nearby agricultural activities. Ex. R-12.

3 [15]

4 Douglas County's findings of fact included a recognition that "the Douglas County
5 Comprehensive Plan and Great East Wenatchee Area Plan place significant importance on the
6 protection of agricultural lands; establish that public policies should minimize disruption of
7 agricultural activities, and suggest that innovative techniques be utilized to minimize impacts to
8 agricultural lands from potentially conflicting land uses," and that the Douglas County code
9 includes "provisions for enhanced setbacks, buffering and resource disclosure statements . . . to
10 implement comprehensive plan policies for the protection of agricultural lands of long term
11 commercial significance." Ex. R-12, page 4 (Douglas County Findings of Fact 24 and 25).

12 [16]

13 Agricultural landowners owning property along the proposed trail appealed Douglas
14 County's decision to the Board. The appeal issues identified in the Board's Pre-Hearing Order
15 were as follows:
16

17 **Issue 1.** Does the SHB have jurisdiction over whether a rezone is required for this
project? If so, is a rezone required?

18 **Issue 2.** Is the project consistent with the County's Shoreline Master Program, the
19 Shoreline Management Act, and other applicable law, regulations, plans, or policies?

20 **Issue 3.** Should the Shoreline Permit be invalidated because the permit application was
incomplete or inaccurate, including but not limited to whether the project should be
21 considered a transportation or recreation use?

Issue 4. Should Douglas County have required Parks to obtain a conditional use permit,
or any other permits, prior to issuance of the Shoreline Permit?

1 Issue 5. Is the proposal for a "transportation" project barred by the Board's decisions in
2 SHB 86-34, 86-36, and 86-39?

3 Issue 6. Should GMA policies and regulations, other than the Shoreline Management
4 Program, be considered "related regulations" that are within the jurisdiction of the SHB?
5 If so, is the project consistent with the County's Comprehensive Plan and any other
6 applicable Growth Management plans or regulations, including but not limited to those
7 designed to protect and conserve agricultural resources?

8 Issue 7. Does the SHB have jurisdiction over SEPA issues relating to the project? If so,
9 if the proposal is for a "transportation" project, is the shoreline development application
10 and assumption of lead agency status of Washington Parks and Recreation Commission
11 ultra vires or violate SEPA?

12 Issue 8. Does the SHB have jurisdiction to determine whether the Shoreline Permit
13 provides adequate mitigation of impacts to abutting agricultural interests? If so, is the
14 mitigation adequate under the Shoreline Management Act, Shoreline Master Program, or
15 other applicable law?

16 Issue 9. Does the SHB have jurisdiction to determine whether the Shoreline Permit
17 provides adequate mitigation for impacts on salmon recovery efforts? If so, is the
18 mitigation in the Shoreline Permit adequate under the Shoreline Management Act,
19 Shoreline Master Program, or other applicable law?

20 [17]

21 The parties filed cross-motions for summary judgment on all appeal issues. The Board
issued a summary judgment order on November 17, 2004. In the summary judgment order, the
Board found it lacked jurisdiction to determine Issue 1 (whether a rezone is required), Issue 6
(whether the project is consistent with the County's comprehensive plan), Issue 9 (whether the
shoreline Permit provides adequate mitigation for impacts on salmon recovery efforts), and part
of Issue 4 (whether a zoning conditional use permit was required. The Board granted summary
judgment in favor of Parks and WSDOT on Issue 4 (whether a shoreline conditional use permit
was required for the project), Issue 5 (whether prior Board decisions SHB 86-34, 86-36, and 86-
39 act to bar the trail proposal, and part of Issue 7 (whether Parks was an appropriate lead agency
under SEPA. The Board held over for the hearing on the merits, Issue 2 (is the project consistent

1 with the County's Shoreline Master Program, the Shoreline Management Act, and other
2 application law), Issue 3 (whether the shoreline application was accurate, including whether the
3 trail should be considered a transportation or recreation use), parts of Issue 7 (requirement for
4 additional SEPA review and SEPA checklist), and parts of Issues 6 and 8 (adequacy of
5 mitigation to abutting agricultural interests based on the mitigation requirements or policies of
6 the Shoreline Master Program or Shoreline Management Act).

7 [18]

8 Prior to the hearing, Petitioners filed a Motion for Reconsideration on the Board's
9 summary judgment decision on Issue 4 (whether project required a shoreline conditional use
10 permit for the project was required). Petitioners' initial Motion for Reconsideration on this issue
11 was filed in response to a letter opinion issued by the Board, prior to being able to review the full
12 summary judgment decision. Consequently, the Board established a briefing schedule for the
13 Motion for Reconsideration of Issue 4, allowing Petitioners to refile a Motion for
14 Reconsideration after the hearing and after review of the Board's summary judgment order, and
15 allowed a response brief to the Motion for Reconsideration from Parks and WSDOT.
16

17 [19]

18 The evidence presented by Petitioners generally concerned potential impacts to
19 agricultural operations from the use of the trail. Orchards rely on pollination by bees to produce
20 tree fruit. Bees are brought by truck into orchards during the spring. Bee yards require remote
21 locations, = truck access to an area flat enough for unloading hives, and access to water. Tree
fruit orchards require one or two beehives per acre, with 15,000 - 20,000 bees in a hive. The

1 location of the trail includes areas used for bee storage. There could be conflicts between bees
2 and trail users, or bee storage may be relocated to other areas to avoid such conflicts that would
3 increase costs to orchardists. Based on the proposed trail location, bees may be stored within 50-
4 100 feet of the trail. Many of bees will be stored West of the trail and thus will have direct
5 access to the water of the Columbia River without crossing the trail. *Testimony of Bruce Smith;*
6 *Testimony of Mott Like; Testimony of Mark Gillespie.*

7 [20]

8 Tree fruits grown in Baker Flats orchards include apricots, peaches, cherries, pears, and
9 apples. These fruits require spraying of insects from late March until the end of September. The
10 type of spraying that occurs during a particular time of the year depends on the insects present
11 and stage of fruit development. Spraying generally occurs during morning hours. The most
12 active spraying season is from April 1 to June 30. The proposed trail would be closed during
13 morning hours from April 1 to June 30. The two most common methods for spraying insecticide
14 are an air blast sprayer in which a fan and blower are used from the ground to spray trees, or
15 aerial application from helicopters. Air blast sprayers tend to cause more drift of insecticide,
16 while helicopter spraying applies a more concentrated insecticide mix. Pesticide application
17 involves a number of safety precautions, including clothing such as a hood, goggles, and
18 respirator. Orchardists also use flaggers on roads near orchards to control access during
19 spraying, or warn sprayers that people are present, and may use flaggers along the proposed trail
20 if access restrictions are not sufficient. Orchardists find it easier to stop spraying than to stop
21 traffic. No final design for access gates on the trail or access restriction enforcement protocols

1 have been developed for the trail and orchardists have concerns that access restrictions will not
2 be followed. The wildlife friendly fencing may not be sufficient to restrict human access.

3 *Testimony of Herb Teas; Testimony of Rob Missal; Testimony of Shannon Huehn; Testimony of*
4 *Mott Like; Testimony of Milt Johnson; Ex. R-12.*

5 [21]

6 Restrictions on re-entry into orchards sprayed with pesticide last from 24-48 hours to up
7 to 14 days for some pesticides. Pesticide spray drift is minimized by not spraying during times
8 of no wind or high wind. The optimum condition for pesticide spraying is with a wind of 1-3
9 miles per hour. Pesticide labels provide the required distance between the sprayed area and
10 surface water bodies. *Testimony of Herb Teas; Testimony of Rob Missal.*

11 [22]

12 One method used to minimize pesticide spray drift is the use of trees, shrubs, or other
13 types of screening. This method reduces the flow of air that could carry pesticides. One result of
14 such spray drift buffers is frost pockets can be produced by the still air. Because the movement
15 of air is reduced, cold air can pool up. The frost pockets can damage fruit. Frost pockets can be
16 prevented or minimized by using fans to move air, spraying water, and using propane heaters in
17 the orchards. *Testimony of Herb Teas.*

18 [23]

19 South of the Odabashian Bridge, where the proposed Rocky Reach Trail connects to an
20 existing trail, a number of small orchards are in operation. In these orchards, pesticides are
21

sprayed mainly using blast sprayers. These orchards are near residential areas. This area used to

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1 be sprayed by helicopters. It is possible that if the proposed Rocky Reach Trail were
2 constructed, helicopter spraying would not occur in the area due to safety concerns. *Testimony*
3 *of Herb Teas; Testimony of Rob Missal.* Orchardists are concerned about how changing
4 spraying practices would affect salability of fruit as presence of insect larvae can result in
5 limitations on sale or export. *Testimony of Brian Stumpf.*

6 [24]

7 The WSDOT right-of-way leased by orchardists would no longer be part of the orchards
8 if the proposed Rocky Reach Trail is constructed and this would cause an economic loss to
9 orchardists. Birds and wildlife inhabit the right-of-way area, and certain birds like hawks and
10 eagles will keep out nuisance birds that can damage fruit. Theft of orchard fruit and equipment
11 has been a problem when people follow the WSDOT right-of-way into orchards or access
12 orchards by boat from the Columbia River. Orchardists are concerned about liability impacts if
13 pesticide spraying affects trail users. *Testimony of Mott Like; Testimony of Milt Johnson;*
14 *Testimony of Jack Feil.*

15 [25]

16 Chelan PUD holds rights to properties along the Columbia River in the form of a flood
17 easement. In some locations, the precise extent and meaning of that flood easement is unclear.
18 In cases where ownership or use rights were in conflict, Parks located the proposed trail on the
19 WSDOT right of way so that ownership and use issues between Chelan PUD and property
20 owners would not be implicated. *Testimony of Bill Fraser.*

1
2 [26]

3 Agricultural buffers from the trail are mainly 100 feet in width, based on the Douglas
4 County Code. For approximately 2,400 feet of the 25,000 foot trail, an enhanced buffer 60 feet
5 wide is proposed. Douglas County has approved a noxious weed plan for the trail proposal. The
6 access gates for the trail have not been designed yet, but will be designed to exclude both
7 vehicular and pedestrian traffic. There are no access restrictions in the trail area right now, so
8 people have unrestricted access to the WSDOT right-of-way. Park rangers from Lincoln Rock
9 State Park will provide increased patrols of the trail area. The concerns about the trail raised by
10 orchardists during the permitting process were analyzed in the NEPA FONSI and by Douglas
11 County. *Testimony of Mark Gillespie; Testimony of Jonathan Ives; Ex. R-7.*

12 [27]

13
14 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

15 FROM THE ABOVE FINDINGS OF FACT, THE BOARD MAKES THESE

16 CONCLUSIONS OF LAW

17 [1]

18 The Board has jurisdiction over the subject matter and the parties. RCW 90.58.180. As
19 the appealing party, Petitioners bear the burden of proof. RCW 90.58.140(7). The Board's
20 review of shoreline decisions is de novo, without deference to the decision of the local
21 government. WAC 461-08-500(1). *McArthur v. City of Long Beach*, SHB Case No. 03-017
(2003), see also *Buechel v. Ecology*, 125 Wn.2d 196, 203 (1994).

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ADEQUACY OF SEPA REVIEW

[2]

Petitioners assert additional SEPA review of the project was required based on the modification in project purpose from recreation to transportation, and change in permitting requirements from Douglas County. Under WAC 197-11-610, an agency may adopt any environmental analysis prepared under the National Environmental Policy Act (NEPA) by following certain procedures. Parks chose to use the NEPA FONSI as an existing environmental document when it issued its SEPA DNS. This procedure was proper under SEPA. Under SEPA, additional environmental review is required when there are:

- (i) Substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts (or lack of significant adverse impacts, if a DS is being withdrawn); or
- (ii) New information indicating a proposal's probable significant adverse environmental impacts. (This includes discovery of misrepresentation or lack of material disclosure.) A new threshold determination or SEIS is not required if probable significant adverse environmental impacts are covered by the range of alternatives and impacts analyzed in the existing environmental documents.

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

In this case, the change in the project related not to environmental impacts, but to the description of its purpose and the permit requirements before Douglas County. Initially, local approvals required of Parks were going to include a zoning Conditional Use Permit and a Recreational Zoning Overlay. Ultimately, only a shoreline substantial development permit was required. None of the attributes relating to environmental impacts from construction or use of the trail have changed. Thus, no further environmental review was required. As the Board

1 determined on summary judgment, the question of whether a zoning Conditional Use Permit or
2 Recreational Zoning Overlay is required for this project is beyond the jurisdiction of this Board.

3
4 COMPLETENESS/ACCURACY OF SHORELINE PERMIT APPLICATION

5 [3]

6 This appeal issue (Issue 3) was framed as "Should the shoreline permit be invalidated
7 because the permit application was incomplete or inaccurate, including but not limited to
8 whether the project should be considered a transportation or recreation use." In its summary
9 judgment order, the Board found disputed issues of material fact and held the matter over for the
10 hearing. The Board's Order noted

11 "the requirements for a shoreline permit application are contained at WAC 173-27.180.
12 Application requirements are also in the Douglas County Code at 19.08.090 . . . the
13 Board has previously used a harmless error standard to evaluate claims based on accuracy
of a shoreline permit application." See Sahlin et al. University Place and Day Island
Yacht Harbor Inc., SHB No. 03-024 (2005). Order on Summary Judgment at 6-7.

14 Petitioners provided no argument or evidence on the completeness of the application or
15 the requirements of WAC 173-27-080 or Douglas County Code § 19.08.090. The description of
16 the project in the shoreline JARPA application to Douglas County stated the following:

17 The trail would be used for highway purposes, by materially increasing safety for
18 motorists, bicyclists, and pedestrians (including those using wheelchairs) by providing
19 these users with an alternative transportation corridor to the heavily used State Road 2/97.
20 Once developed and opened for public use, the trail will form a pedestrian link between
Lincoln Rock State Park and the existing urban trail system. Bicycle and pedestrian
commuter access would be provided to Rocky Reach Dam for employees of the facility.

1 This project description is consistent with the testimony provided at the hearing regarding
2 the purpose and use of the trail. The shoreline permit application submitted by Parks to Douglas
3 County was complete and accurate. Petitioners allege the change in the description of project
4 purpose was an agreement made between Parks, WSDOT, and Douglas County done in order to
5 avoid environmental review of the project. The Board disagrees. The exhibits and testimony in
6 the appeal demonstrate that Parks and WSDOT needed to reach agreement on how the project
7 would be characterized due to the respective statutory authorities applicable of each agency. On
8 summary judgment, the Board determined it did not have jurisdiction to determine the statutory
9 authority of either Parks or WSDOT to participate in the project.

10
11 **DECISION ON RECONSIDERATION – SHORELINE CONDITIONAL USE PERMIT**

12 [4]

13 Petitioners seek reconsideration of the Board's decision on summary judgment decision
14 that the project does not require a shoreline conditional use permit. On this issue, the Board
15 determined that regardless of whether the project is characterized as a transportation or
16 recreation project, it is a permitted use. Douglas County SMP § 25 states "conditional uses are
17 those that are not allowed outright to locate in the particular shoreline area." Petitioners argue it
18 was improper for the Board to rule on summary judgment that no shoreline conditional use
19 permit was required using an "either or" analysis since the Board reserved for hearing issue 3,
20 regarding whether the shoreline application was accurate in how the project was identified. On
21 reconsideration, the Board denies Petitioners' request for reconsideration on issue 4 that a
shoreline conditional use permit is required.

1 [5]

2 Section XX of the Douglas County SMP deals with Road and Railroad Construction and
3 Design. Under Douglas County SMP § 20.30, road and railroads are specifically permitted uses
4 in the Rural Environment. Both Parks and WSDOT agreed that the Rocky Reach Trail would be
5 pursued as a transportation component of State Highway 2/97. The descriptions of the project in
6 the application and supporting materials established it would have transportation purposes. The
7 conclusion that the proposed Rocky Reach Trail would provide transportation purposes is
8 consistent with the Douglas County SMP, which makes an explicit connection among roads,
9 pedestrian safety, and non-motorized travel within the Rural Environment: "Scenic corridors
10 with public roadways should have provisions for safe pedestrian and other non-motorized
11 travel." Douglas County SMP § XX.C. Petitioners also argued that the Douglas County SMP
12 policies require the trail to be located away from shorelines if possible. In contrast, however,
13 there is an exception for roads "serving port and recreational facilities." Further, relocating the
14 trail away from shoreline areas would reduce or eliminate the shoreline access and views that are
15 part of the intended purpose of the trail.

16 [6]

17 Section XXIII of the Douglas County SMP covers Recreation. Under Douglas County
18 SMP § 23.30, recreational activities are specifically permitted uses in the Rural Environment.
19 The evidence in this case shows that the Rocky Reach Trail will have recreational uses. The
20 conclusion that the proposed Rocky Reach Trail would provide recreational purposes is
21 consistent with the Douglas County SMP, which makes a clear connection between recreation
and motorized and non-motorized transportation: "The linkage of shoreline parks and public

1 access points through the use of linear access should be encouraged, such as hiking paths,
2 bicycle trails, and/or scenic drives.”

3 [7]

4 Petitioners appear to be arguing the proposed Rocky Reach Trail can only be either a
5 transportation or recreation purpose, or that if it is both types of use, that a shoreline conditional
6 use permit is required because a dual transportation/recreation use is not an outright permitted
7 use in the Rural Environment. This is an incorrect reading of the purpose for shoreline
8 conditional use permits. In the context of shoreline conditional use permits, if a project has two
9 purposes, both of which are outright permitted uses, no shoreline conditional use permit is
10 required. For example, if a shoreline environment allowed both “residential development” and
11 “commercial development” as outright uses, a project that proposed both uses would not require
12 a shoreline conditional use permit. Such is the case here, where a project proposed as a
13 transportation component of a road project (an outright permitted use) also involves recreational
14 uses (another outright permitted use). In this case, the transportation purpose of the proposed
15 Rocky Reach Trail and its attendant recreational uses, fit within the uses identified as specifically
16 permitted uses within the Rural Environment of the Douglas County SMP.

17
18 IMPACTS TO AGRICULTURE

19 [8]

20 The scope of the Board’s review is whether the substantial development permit issued by
21 Douglas County complies with the Douglas County Shoreline Master Program, the Shoreline
Management Act, and regulations implementing the SMA. The Board’s jurisdiction is limited to

1 whether the permit complies with these statutes and regulations. Concerns by agricultural
2 landowners that the proposed trail will impact orchard operations provide a basis for the Board to
3 deny or condition the permit only if such impacts are prohibited or must be mitigated under the
4 Douglas County SMP, SMA, SMA regulations, or SEPA.

5 [9]

6 Petitioners argue the proposed trail is inconsistent with the definition of Rural
7 Environment in the Douglas County SMP. Rural Environment is defined as “those areas, which
8 because of their physical characteristics and present uses, are suitable for agricultural uses, are
9 [sic] recreational uses compatible with the agricultural uses. It is intended to serve as a buffer
10 zone between urban areas and protect these areas from intensive shoreline expansion.”¹ This
11 definition asks the question whether the recreational aspects of the trail are compatible with the
12 agricultural uses in the Rural Environment. The Board concludes the trail is compatible with
13 agricultural uses. The conditions on trail use proposed by Parks, and the additional conditions
14 added by Douglas County are sufficient to ensure compatibility. The Board acknowledges that
15 the proposed trail may require orchardists to modify certain practices at times, just as the
16 presence of the orchards results in conditions modifying the allowed uses of the trail at times.
17 Overall, the uses are compatible, there was no evidence suggesting that the trail and the orchards
18 cannot co-exist.

19 [10]

20 The Douglas County SMP establishes goals for public access, recreation, and
21 transportation, among other things. Petitioners also argue the proposed trail violates every single

¹ Based on the phrasing of this definition, the Board concludes the word “are” before “recreational uses” should have been “and.”

1 applicable goal of the Douglas County SMP. Section IV of the Douglas County SMP includes
2 the following:

- 3 2. **Public Access Element Goal.** To provide for public access to the shorelines of
4 Douglas County by upgrading existing public access and by providing additional
5 access consistent with the natural features; to assure that access is as safe as possible,
6 will not have a detrimental effect on other shoreline uses or on the waters themselves,
7 or infringe upon private property rights.
- 8 3. **Circulation Element Goal.** To create and maintain a comprehensive circulation
9 system which provides for the safe, convenient, economic, and diversified movement
10 of people, with minimum disruption to the shoreline area and environment.
- 11 4. **Recreation Element Goal.** To encourage development of diverse, convenient and
12 adequate recreational facilities along the shorelines of Douglas County, for the
13 primary purpose of Douglas County residents. Also, to encourage the development of
14 recreational facilities to attract and accommodate visitors, thus aiding economic
15 growth.

16 Specifically, Petitioners argue the proposed trail will violate the policy for public access
17 which states that access to shorelines not "infringe upon private property rights." While
18 Petitioners' witnesses testified to concerns about impacts to agricultural operations, these
19 concerns do not restrict the orchardists' private property rights. The proposed trail is on state-
20 owned or PUD lands. The impacts to orchardists are similar to impacts that exist because of
21 public roads near the orchards. The proposed trail is consistent with the circulation element goal
of providing "safe, convenient, economic and diversified movement of people, with minimum
disruption to the shorelines area and environment." Douglas County SMP § IV.3. Petitioners
argue the recreation element is violated because there are no findings to support the goal and that
recreational use is inconsistent with other goals. In contrast, the application materials and
environmental review documents all discuss the recreational uses that would be provided by the
trail. No evidence was provided that the trail would not provide recreational uses or that the trail
is somehow inconsistent with the recreational goals of the SMP.

1 [11]

2 The policies and regulations in the Douglas County SMP relating to agriculture relate not
3 to protection of agriculture from shoreline transportation or recreation uses, but rather, to the
4 protection of the shoreline from agricultural activities. For example, Douglas County SMP
5 Section 5 provides policies such as buffer zones between agriculture land and shorelines, erosion
6 control measures, and pesticide use. Douglas County SMP regulations regarding agriculture in
7 the rural environment relate to proper use of pesticides, regulations for livestock feedlots, and
8 regulations for fertilizer use. The regulations protect shorelines from agricultural activities, not
9 the other way around. *Douglas County SMP § 5.30.*

10 [12]

11 The policies for transportation and recreation in the Douglas County SMP similarly do
12 not provide protections for agriculture. *Douglas County SMP Section XX. (Transportation) and*
13 *XXIII. (Recreation).* The evidence provided by Petitioners relate to a variety of impacts to
14 orchard operations, including: (1) theft of fruit and equipment by people using the trail and
15 adequacy of trail closures, (2) impacts on orchardists' pesticide use, (3) health and safety impacts
16 to trail users who fail to abide by trail closures or warning flaggers, (4) impacts on storage of
17 bees and safety impacts to trail users who come into contact with bees, (5) economic impacts
18 caused by loss of fruit trees in WSDOT right of way, and (6) loss of fruit from frost pockets
19 caused by trail buffers. These stated concerns relate to appeal issue 8, which states:

20 Does the SHB have jurisdiction to determine whether the Shoreline Permit provides
21 adequate mitigation of impacts to abutting agricultural interests? If so, is the mitigation
adequate under the Shoreline Management Act, Shoreline Master Program, or other
applicable law?

1 The Board concludes it has jurisdiction on this issue only if the Douglas County SMP,
2 SMA, or SMA regulations require adequate mitigation of impacts to abutting agricultural
3 interests, and further concludes that no specific agricultural mitigation requirements exist. The
4 provision in the Douglas County SMP defining Rural Environment to include "recreational uses
5 compatible with the agricultural uses" is the lone Douglas County SMP provision regarding
6 protection of agriculture. As the Board has discussed, the uses of the trail are compatible with
7 agricultural operations. The Board recognizes the designations of agricultural lands under the
8 Growth Management Act and Douglas County Code provisions regarding agricultural buffers.
9 To the extent Petitioners seek to raise arguments regarding protection of agricultural under these
10 other statutes or ordinances, they must do so in another forum.
11

12 **COMPLIANCE WITH SHORELINE MANAGEMENT ACT**

13 [13]

14 Petitioners argue the proposed Rocky Reach Trail is inconsistent with RCW 90.58.020,
15 the section of the SMA establishing policies for the use of shorelines. Petitioners have argued
16 that the Board's denial of a shoreline permit for a state highway in the same WSDOT right-of-
17 way in SHB No. 86-34, 86-36, and 86-39 acted to bar the proposed trail. On summary judgment,
18 the Board disagreed, concluding that the prior shoreline case dealt with a significantly different
19 proposal, that of a state highway. However, the Board's decision in that opinion is significant in
20 some respects, as evidenced by the following conclusion of law:

21 The proposed shoreline highway and the fence along its margin would constitute a
serpentine barrier that would separate the residents of a populous community from the

1 shoreline at their doorstep. The sum total of a pedestrian path here and a bicycle path
2 there cannot make up for this.

3 *Washington Environmental Council et al. v. Douglas County et al.*, SHB Nos. 86-34, 86-36, and
4 86-39, Conclusion of Law XI.

5 Clearly, the Board in the prior decision considered pedestrian and bicycle paths as
6 mitigating for impacts to the shoreline and reduction in shoreline access that would be caused by
7 the highway proposal.

8 [14]

9 Petitioners argue Douglas County failed to properly apply the policies preferences RCW
10 90.58.020. Douglas County's decision did consider the shoreline policies of RCW 90.58.020.

11 *Ex. R-11*. These policies are as follows:

- 12 (1) Recognize and protect the statewide interest over local interest;
- 13 (2) Preserve the natural character of the shoreline;
- 14 (3) Result in long term over short term benefit;
- 15 (4) Protect the resources and ecology of the shoreline;
- 16 (5) Increase public access to publicly owned areas of the shorelines;
- 17 (6) Increase recreational opportunities for the public in the shoreline;
- 18 (7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or
19 necessary.

20 Petitioners contend that of these policies, the trail proposal "is supported, if at all, almost
21 exclusively by the sixth ranked 'recreational use' preference. Petitioners then argue that even the
recreational preference in the SMA is dubious, because Parks changed the purpose of project
from recreation to transportation. The Douglas County staff report includes consideration of the
policies of RCW 90.58.020. *Ex. R-11*. These policy preferences in the SMA relate to policies
for the protection and use of shorelines. In contrast, the evidence and argument put forth by
Petitioners relates mainly to protection of agricultural activities. Petitioner put forth no evidence

1 relating to impacts to the natural character of the shoreline (policy 2), shoreline resources and
2 ecology (policy 4), public access (policy 5).

3 [15]

4 Petitioner argues that the project fails to meet policy 3, long term over short term benefit
5 because there are no leases for the project and thus a project of indeterminate length cannot
6 protect the long term interest. The Board disagrees. The fact that leases have not been signed
7 for the property does not relate to the shoreline policies of RCW 90.58.020(3). The policy
8 preferences in RCW 90.58.020 relate to policies for protection and uses of shorelines, not
9 protection and uses of agricultural lands. Petitioners did not provide any evidence relating to
10 long or short-term impacts to the shoreline from the project.

11

12 COMPLIANCE WITH RCW 90.58.360

13

[16]

14 Petitioners argue "it is the Board's ruling [on summary judgment] that Superior Court,
15 not the SHB, has exclusive jurisdiction to determine whether or not Douglas County and/or
16 applicant complied with RCW 90.58.360." *Feil's Written Summation and Renewed Motion to*
17 *Reconsider*, at 2. RCW 90.58.360 states "Nothing in this chapter shall obviate any requirement
18 to obtain any permit, certificate, license, or approval from any state agency or local government."
19 This provision of the SMA is not a substantive permit requirement, but is a savings clause stating
20 that the requirements of the SMA do not affect any other permit requirement that may apply to a
21 project. The Board concludes that Parks has met the requirements for a shoreline permit under

1 the Shoreline Management Act, Douglas County SMP, and shoreline regulations. If Petitioners
2 believe that other permit approvals are required, that is a matter for another forum.

3 [17]

4 Petitioners also argued "the only way to authorize a recreational use is by rezoning to a
5 'Recreational Overlay District'" (see DCC 18.46.010-080 at Ex. P-5. Petitioners' Written
6 Summation at 15. The permitting process originally envisioned by Parks and Douglas County
7 included seeking a Recreational Overlay District for the trail area, but this was ultimately not
8 sought. The Board's jurisdiction is limited to whether the permit complies with the Douglas
9 County SMP, the SMA, and SMA regulations. The Board does not have jurisdiction to
10 determine whether other non-shoreline permitting procedures were required or properly
11 followed. This is the same conclusion the Board reached in its summary judgment decision in
12 this case. See *McNeal et al. v. Douglas County et al.*, SHB No. 04-002, Order on Summary
13 Judgment paragraphs 6, 7 & 8.

14 [18]

15 Petitioners also argued that impacts of the proposed trail result in violations of
16 requirements in the Growth Management Act to designate and protect agricultural lands of long-
17 term commercial significance. On summary judgment, the Board stated as follows:

18 As it relates to the this case, the status of the agricultural land under the Douglas County
19 Comprehensive Plan is relevant to the Board's review of the shoreline permit. However,
20 just as we stated in the *Preserve Our Islands* decision, the issue "to be decided after the
21 hearing, of whether the proposed use complies with the substantive policies and
provisions of the SMA relating to use and protection of the shorelines, is a matter
independent of GMA." Evidence relating to the GMA comprehensive plan may be
relevant, but this Board does not determine compliance with GMA or other land use laws
not part of the local master program and SMA. *Maple Valley Citizens v. City of Maple
Valley*, SHB NO. 03-014 (2004).

1 Order on Summary Judgment, paragraph 21.

2 If the project required a shoreline conditional use permit (which the Board has
3 determined it does not), the review of the shoreline conditional use permit would trigger
4 consideration of WAC 173-27-160(1)(c) which requires "that the proposed use of the site and
5 design of the project is compatible with other authorized uses within the area and with uses
6 planned for the area under the comprehensive plan and shoreline master program." Even though
7 the "compatible with GMA" analysis in WAC 173-27-160(1)(c) does not apply here because no
8 shoreline conditional use permit is required, the Board engaged in a similar analysis anyway.
9 This is because the Rural Environment designation in the Douglas County SMP allows
10 "recreational uses compatible with the agricultural uses." The Board has concluded that the
11 proposed Rocky Reach Trail is compatible with agricultural land uses in the area and consistent
12 with the Douglas County SMP, SMA, and SMA regulations. Whether the proposed Rocky
13 Reach Trail "complies with" substantive or procedural provisions of the GMA is beyond the
14 reach of this Board.

15 [19]

16 The Board agrees with the statement in Petitioners' closing brief that its witnesses were
17 "consistent, credible, and undeniably and justifiably concerned about the conflicts of this
18 proposed trail with their orchard operations ..." The thrust of the concerns raised by the
19 agricultural landowners, however, relate to operation of orchards, not to impacts to shorelines
20 from the proposed Rocky Reach Trail.

21 [20]

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

FILED

AUG 2 2005

JUANITA S. KOCH
DOUGLAS COUNTY CLERK
WATERVILLE, WASH.

BY _____ DEPUTY

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF DOUGLAS

C.F. MCNEAL and BETTY MCNEAL,)	
Husband and wife, et. al.,)	No. 04-2-00045-6
Plaintiffs,)	
)	
vs.)	
)	
DOUGLAS COUNTY; WASHINGTON)	COURT'S DECISION
STATE DEPARATMENT OF)	ON LUPA APPEAL
TRANSPORTATION, et. al.,)	
Defendants.)	
)	

On or about January 12, 2004, the Douglas County Hearing Examiner, Don Moos, entered a notice of action taken by the Douglas County Hearing Examiner concerning what is referred to as the "Rocky Reach Trail." The decision allowed the applicant, Washington State Parks and Recreation Commission, to construct a trail that runs from the Odabashian Bridge north for approximately 5.1 miles to Lincoln Rock State Park. The trail is to be constructed within a right-of-way owned by the Washington State Department of Transportation and the Chelan County Public Utility District. The trail will run through four different zoning districts in Douglas County, a Tourist Recreation Commercial Zone, a Residential Low Zone, a Commercial Agricultural Five Zone, and a Commercial Agricultural Ten Zone. The

COPY

EXHIBIT 3

1 Hearing Examiner issued no permit for the construction of the trail, other than a Shoreline
2 Substantial Development Permit. The Petitioners in this action have appealed the decision of
3 Mr. Moos, arguing, primarily, that in addition to a Shoreline Substantial Development Permit,
4 the applicant needs a Recreational Overlay or Conditional Use Permit prior to proceeding
5 with the project. The Court heard argument on this LUPA appeal on July 14, 2005 and took
6 the matter under advisement.

7 The question is whether or not the Hearing Examiner's decision is a violation of one of
8 the six standards set forth in RCW 36.70C.130. The Petitioners suggest that the County was
9 somehow attempting to avoid the requirements of its own comprehensive plan by initially
10 stating that a Recreational Overlay would be required and now suggesting that as the project
11 is a transportation project, no permit is required. This Court does not know nor engage in the
12 process of considering whether or not the County is attempting to avoid obligations that it
13 may believe genuinely exist or not. The project was either lawfully approved by the Hearing
14 Examiner as presented or it was not. What the County's intent was in presenting the
15 application without a Recreational Overlay is, this Court believes, irrelevant to the process.
16

17 The Court believes that all of the parties participating recognize that the Rocky Reach
18 Trail has significant recreational uses. Nonetheless, this Court believes that the record
19 supports the position that the trail is also a transportation facility. Clearly the record reflects
20 that it is the goal of the comprehensive plan to connect recreational facilities such as Lincoln
21 Park and the Apple Capital Trail and Hydro Park. All three facilities, and areas that can be
22 accessed by those facilities, create significant recreational opportunities, but also
23
24

1 transportation necessarily occurs when one goes from one facility to the other by use of the
2 trail. Candidly, the Court believes that any trail serves both functions. The Court finds
3 nothing in this record, other than speculation, to establish transportation use versus
4 recreational use.

5 The position of the Washington State Department of Transportation and Washington
6 State Parks and Recreation Commission (hereinafter "State") is that as a multi-modal
7 transportation facility, additional permits or compliance with the County's comprehensive
8 plan is not required. And, if so, the County's comprehensive plan has been complied with.
9 It's clear that the State believes it must comply with the Shoreline Management Act and the
10 associated County ordinances that apply to the shorelines, and also the State Environmental
11 Policy Act and associated environmental concerns of the County. If so, why wouldn't the
12 State have to comply with the GMA and the Douglas County Code? This Court does not see
13 that the State is anymore exempt from complying with the GMA than it is with the Shorelines
14 Management Act and/or the State Environmental Policy Act.

15 RCW 47.06.100 does provide, "That the State-interest component of the statewide
16 multi-modal transportation plan shall include a bicycle transportation and pedestrian
17 walkways plan . . ." On the other hand, RCW 47.06.040(2) provides, among other things, that
18 "Plans developed under each component must be consistent with . . . local comprehensive
19 plans prepared under Chapter 36.70A RCW. . .," which this Court believes includes
20 interaction between the zoning districts.
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1 The State argues that the trail is placed on the Washington State Department of
2 Transportation right-of-way that was always, pre-GMA, transportation property. As a
3 significant portion of the trail is not within the shoreline, the shoreline permit does not apply
4 to all areas and all zones and as the trail is also on Chelan County PUD property, the existence
5 of DOT property prior to the GMA does not cure the application. The Court does not believe
6 it would have anyway.

7 The State, and for that matter the County, wish to ignore the fact that this trail will
8 potentially expose significant numbers of individuals into an area designated as agricultural
9 lands of long-term commercial significance, pursuant to RCW 36.70A.170(1)(a). These
10 individuals using this transportation facility will not be moving through the orchard at a rate
11 of 60 miles per hour, but moving at a rate of a walker, jogger, or bicyclist. It seems to this
12 Court that the reason for the safeguards of the GMA and DCC 18.04.020, as cited by the
13 State, is to study the relationships and provide a workable relationship between land uses, the
14 transportation system, and the environment. Although the applicant itself has suggested, and
15 the Hearing Examiner approved, certain measures that attempt to eliminate and/or lessen the
16 impact between the trail users and the agricultural lands, if this is an outright use, this would
17 be left solely to the good graces of the applicant. Lands designated by the County as
18 agricultural lands of long-term commercial significance are obviously a significant part of the
19 GMA. A comprehensive plan that does not protect these designated agricultural lands from
20 inconsistent uses would violate the GMA. *King County v. Growth Mgt. Hearings Board*, 142
21 Wn.2d 543 (2000). Accessory uses of agricultural lands is so significant that the State
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1 Legislature addressed the manner in which innovative zoning techniques can be used in these
2 areas. RCW 36.70A.177. The Court recognizes that whether or not the provisions of Douglas
3 County comprehensive plan violates the GMA is a decision of the Growth Management
4 Hearings Board, but this Court should not interpret Douglas County's Code in a manner that
5 would violate the GMA. And I do not believe this Court needs to.

6 The County's position is that the County's comprehensive plan has been complied with
7 as the trail is a permissible use in all zones. For this proposition the County cites the Douglas
8 County Code 19.18:035, which provides that, "Construction of public and private trails and
9 trail-related facilities . . . may be authorized within designated resource lands and critical
10 areas . . ." This Court believes that that is true, so far as it goes. The provisions of Title 19 of
11 the Douglas County Code have to do, primarily, with the environmental concerns. Douglas
12 County 19.18A.010 provides that, "Governing standards and criteria addressing uses and
13 activities as well as bulk, height and dimensional standards within agricultural resource zones
14 are found in Title 18 of DCC." As such, in determining whether or not a use is allowed under
15 the Douglas County Code, the Court must refer to Title 18. Of the four zoning districts that
16 this trail will cross, only one, the Tourist Recreation Commercial (C-T), specifically provides
17 for trails as a permitted use. None of the other three zones provide for trails as a permitted
18 use or an accessory use. The Court must try to ascertain the intent of the legislative body.
19
20 *Wiggars v. Skagit County*, 23 Wn. App. 207 (1979). If a trail is a permissible use in all
21 zoning districts, why would it be specifically identified in one zone, but not the others?
22
23
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1 This Court believes that the County planning staff was correct in its initial thought
2 process that this trail could be authorized from the Odabashian Bridge to Lincoln Rock Park,
3 but would have to be done through the process of a Recreational Overlay. This Court does
4 not believe that this trail can be constructed simply as a transportation project initiated by the
5 Washington State Parks Department for the purpose of connecting the park system, which has
6 existed for years, without the Recreational Overlay. The Court is convinced that the State
7 could not build a park within these zones without a Recreational Overlay, at the very least. If
8 the applicant could not construct a park within these zones without a Recreational Overlay or
9 a Conditional Use Permit, how can the individuals using these parks be allowed to move back
10 and forth between the parks without the same zoning considerations?

11 This Court is not convinced that the final outcome will change. Nonetheless, this
12 Court does believe that the issue is more than form over substance. This Court believes that if
13 this trail is to exist in its present location, that it must do so pursuant to Douglas County Code
14 as a Recreational Overlay or Conditional Use. Plaintiffs will draft and present the appropriate
15 orders.
16

17 The matter will be remanded.

18 DATED this 2nd day of August 2005.

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21 JOHN HOTCHKISS
22 JUDGE OF THE SUPERIOR COURT
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FILED
SEP 13 2005
FILM NO. _____
JUANITA S. KOCH
DOUGLAS COUNTY CLERK
WATERVILLE, WASH.
BY _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR
THE COUNTY OF DOUGLAS

JACK FEIL AND DELAPHINE FEIL,
HUSBAND AND WIFE; MOTT LIEK
AND BETTY LIEK, HUSBAND AND
WIFE; BRUCE SMITH AND
SHANON SMITH, HUSBAND AND
WIFE; MILTON JOHNSON AND
TONIA JOHNSON, HUSBAND AND
WIFE; BRIAN STUMPF AND
TERESA STUMPF, HUSBAND AND
WIFE; BOB ROGERS AND KAREN
ROGERS, HUSBAND AND WIFE;
ROBERT BAIRD AND ROLAND
BAIRD, d/b/A BAIRD BROTHERS,
AND JOHN TONTZ AND WANDA
TONTA, HUSBAND AND WIFE,,

Plaintiffs,

v.

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

Defendants.

NO. 05-2-00121-3

ORDER ~~(Proposed)~~

ORDER (Proposed)

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100

EXHIBIT 4

1 This case is an appeal of a decision by the Shoreline Hearings Board ("Board")
2 affirming the issuance of a Shoreline Substantial Development Permit to the Washington State
3 Parks and Recreation Commission ("Parks") for construction of a non-motorized
4 transportation facility parallel to the Columbia River near Wenatchee. In granting summary
5 judgment on specific issues in the case, the Board ruled that determining whether the
6 proposed facility complies with Douglas County's Growth Management Act plans and
7 regulations was outside the scope of its review under RCW 90.58.180. In its decision
8 following hearing, the Board ruled that Parks' Determination of Nonsignificance ("DNS")
9 under the State Environmental Policy Act ("SEPA") was not clearly erroneous, and that the
10 proposed facility was consistent with the Shoreline Management Act and Douglas County's
11 Shoreline Master Program. SHB No. 04-002, Findings of Fact, Conclusions of Law, and
12 Order, and Order on Reconsideration (March 4, 2005). This court hereby affirms the Board's
13 decision.

14 The court considered the record of the Board proceedings, the briefing submitted by
15 the parties, and arguments presented at hearing on July 14, 2005. Appellants Jack and
16 Delaphine Feil and Mott Liek appeared by their attorneys, Robert Rowley, James Klauser, and
17 Robert Dodge. Pctitioners Smith, Johnson, Rogers, Stumpf, Tontz and Baird joined in the
18 Petition, appeared pro se, and did not participate in the proceedings or submit briefing. Parks
19 appeared by its attorney, Sheila Lynch. Douglas County appeared by its attorney, Steven
20 Clem. The Washington State Department of Transportation appeared by its attorney, Stephen
21 Klasinski. The court now enters the following conclusions and order.

22 CONCLUSIONS OF LAW

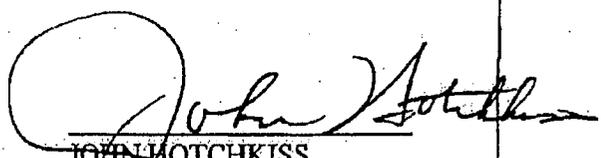
- 23 1. The Board's decision to limit the scope of its inquiry to whether SEPA review was
24 adequate, and whether the proposed facility is consistent with the Shoreline
25 Management Act and the County's Shoreline Master Program, is consistent with its
26 statutory authority described in RCW 90.58.180.
2. The Board's conclusion that there was no change in the proposal following the issuance
of the SEPA DNS that related to environmental impacts is supported by substantial

- 1 evidence in the record. Therefore, the Board's decision that no further environmental
 2 review was required is correct, under RCW Chapter 43.21C and WAC Chapter 197-11.
- 3 3. The Board's conclusion that the proposed facility is consistent with the Shoreline
 4 Management Act and the Douglas County Shoreline Master Program is supported by
 5 substantial evidence in the record and is correct as a matter of law.
- 6 4. The Board's conclusion that the proposed facility is permitted outright by Douglas
 7 County's Shoreline Master Program and that no shoreline conditional use permit was
 8 required is supported by substantial evidence in the record and is correct as a matter of
 9 law.
- 10 5. The Board's conclusion that RCW 90.58.360 does not require the Shorelines Hearing
 11 Board to expressly condition its Order upon Parks obtaining all necessary state and
 12 local permits is correct as a matter of law.

9 **ORDER**

10 Based on the foregoing, this court hereby affirms the Board's Findings of Fact,
 11 Conclusions of Law, and Order, and Order on Reconsideration.

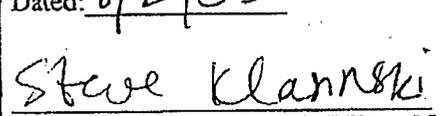
12 DATED this 13th day of ~~August~~ ^{Sept.}, 2005.

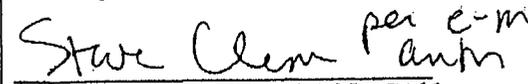
13 
 14 JOHN HOTCHKISS
 15 Judge

16 **Presented by:**

17 
 18 SHEILA LYNCH, WSBA No. 26343
 19 Of Attorneys for Respondent
 20 Washington State Parks and Recreation Commission

21 Dated: 8/25/05

22  *per e-mail auth.*
 23 STEPHEN R. KLASINSKI, WSBA No. 11419
 24 Assistant Attorney General
 25 Washington State Department of Transportation and Public Construction

26  *per e-mail auth.*
STEVEN M. CLEM, WSBA No. 7466
 Douglas County Prosecutor

FILED

SEP 13 2005

FILM NO. JUANITA S. KOCH
DOUGLAS COUNTY CLERK
WATERVILLE, WASH.
BY _____ DEPUTY

The Honorable John Hotchkiss
Hearing Date: September 13, 2005
Hearing Time: 9:00 am

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF DOUGLAS

C.F. MCNEAL and BETTY MCNEAL,
husband and wife, et al., et ux.,

Petitioners,

v.

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

Respondents.

No. 04-2-00045-6

ORDER
REVERSING/REMANDING
LAND USE DECISION

NATURE OF THE CASE AND LEGAL RULINGS

A. This case is an appeal brought by the Petitioners pursuant to the Land Use Petition Act (LUPA), RCW Chapter 36.70C, and challenging land use decisions made by Douglas County, Washington. The decision appealed from was entered by Douglas County Hearing Examiner Don Moos on January 12, 2004. The LUPA appeal was timely filed. The Petitioners have standing under LUPA.

ORDER
REVERSING/REMANDING
LAND USE DECISION
No. 04-2-00045-6

EXHIBIT 5

- 1 B. The Hearing Examiner issued a Shoreline Substantial Development permit to the
2 Washington State Parks and Recreation Commission (Parks) for construction of a
3 multi-modal transportation facility near the Columbia River in Douglas County.
4 Petitioners complained that construction of the proposed facility could not proceed
5 without additional land use approvals. Specifically, the Petitioners complained that
6 Parks must obtain a Recreational Overlay District and a Conditional Use Permit prior to
7 building the proposed facility.
- 8 C. The undersigned judge heard argument in this case on July 14, 2005. The Court
9 reviewed the record submitted by Douglas County, the declarations and briefs of the
10 parties, and oral argument from legal counsel for the represented parties. Pro se parties
11 attended the hearing but did not present argument.
- 12
- 13 D. The proposed facility would traverse a length of approximately 5.1 miles across Baker
14 Flats, from the Odabashian Bridge at the south to Lincoln Rock State Park at the north,
15 connecting to and extending the existing "Apple Capital Loop Trail." Most of the
16 facility would be located within Washington State Department of Transportation
17 (WSDOT) right of way. The remaining portion would be located within Chelan Public
18 Utility District (Chelan PUD) lands. Approximately one-third of the proposed facility
19 is located within the 200-foot shoreline area.
- 20 E. The proposed facility would cross four different zoning districts in Douglas County: a
21 Tourist Recreation Commercial Zone, a Residential Low Zone, a Commercial
22 Agricultural Five Zone, and a Commercial Agricultural Ten Zone.
- 23
- 24 F. The Respondents argued that the proposed ~~transportation~~ ^{QA} facility is not subject to
25 Douglas County's zoning regulations because it is a transportation facility, and the
26 Douglas County Code does not provide for permitting of transportation facilities as

1 land uses. The record demonstrates that the facility will serve both transportation and
2 recreation functions.

3 G. The Douglas County Code permits recreation trails outright only in the Tourist
4 Recreation Commercial zone.

5
6 H. In addition to the Shorelines Substantial Development Permit already obtained by
7 Parks, Parks must apply for and obtain a ~~Recreational Overlay and/or a Conditional Use~~
8 Permits may be required by the Douglas County Code.

9 I. Consistent with this court's decision in the companion appeal of the Shoreline Hearings
10 Board's decision upholding issuance of the Shoreline Substantial Development Permit,
11 no further review is necessary under the State Environmental Policy Act unless there
12 are changes to the proposed project that would result in probable significant adverse
13 environmental impacts.

14
15 J. Douglas County was ordered to prepare and certify the record before the Hearing
16 Examiner. The record prepared and certified by Douglas County consisted of
17 approximately 1,560 pages of documents. These documents were identified by
18 Douglas County as exhibits that the Hearing Examiner considered in the proceeding
19 before him. Petitioner Feil paid \$318.15 for the production of that record pursuant to
20 RCW 36.70C.110(3). In addition, Douglas County submitted a tape recording of the
21 Hearing Examiner's December 18, 2003 public hearing. Petitioner Feil paid \$ 1,022.00
22 to have that tape recording transcribed and certified as a verbatim transcript, pursuant to
23 RCW 36.70C.110(1), which was also filed with the Court. There was no attempt by
24 any party to shorten the record pursuant to RCW 36.70C.110(2).

25 Reimbursement for the cost of the certified record ^{and hearing transcripts} shall be paid by the State Parks and
26 Recreation Commission and the Washington State Department of Transportation to Petitioner

Total costs are \$1,340.15. *JS*

1 Feil. ~~The cost for the transcript of the Hearing Examiner's public hearing shall not be~~
2 ~~reimbursed. This transcript was not necessary to the resolution of the legal question of whether~~
3 ~~the Douglas County Code requires permits in addition to the Shoreline Substantial~~
4 ~~Development Permit for the proposed facility. Petitioners made no effort to limit their costs~~
5 ~~with respect to the transcript, in light of the issues they raised in this case.~~

6 From the foregoing; now, therefore,

7 FINAL ORDER

8 IT IS HEREBY ORDERED:

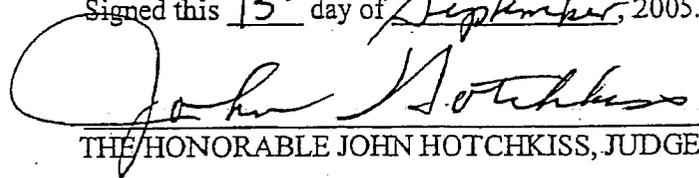
9 A. The Hearing Examiner's decision that because Park's proposed bicycle/pedestrian trail
10 is a transportation facility; it is permitted in all zoning districts and not subject to permitting
11 under the Douglas County Code, is reversed. This matter is remanded for Parks to apply for
12 and obtain ~~a Recreational Overlay and/or a Conditional Use Permit~~ *CA* as may be required by the
13 Douglas County Code.

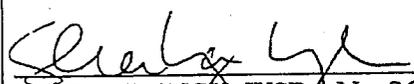
14 B. Petitioner Feil is granted judgment against the State of Washington Parks and
15 Recreation Commission for ~~\$318.15~~ *\$1340.15 JS*

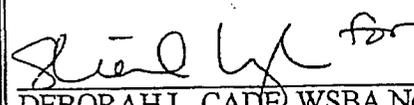
17 C. Other than the costs awarded to reimburse Petitioner Feil for costs of producing the
18 record, no costs or attorney fees are awarded.

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Signed this 13th day of September, 2005.


THE HONORABLE JOHN HOTCHKISS, JUDGE


SHEILA LYNCH, WSBA No. 26343
Of Attorneys for Respondent
Washington State Parks and Recreation Commission

 for
DEBORAH L. CADE, WSBA No. 18329 per e-mail auth.
Assistant Attorney General
Washington State Department of Transportation and Public Construction

STEVEN M. CLEM, WSBA No. 7466
Douglas County Prosecutor

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Douglas County Hearing Examiner
Andrew L. Kottkamp, Hearing Examiner

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IN THE MATTER OF)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
RO-06-01 and SPD 06-02)	DECISION AND
Rocky Reach Trail Extension)	CONDITIONS OF APPROVAL

ROWLEY & KLAUSER, LLP
557 Roy St., #160
Seattle, WA 98109

THIS MATTER having come on for hearing in front of the Douglas County Hearing Examiner on September 12, 2006, the Hearing Examiner having taken evidence hereby submits the following Findings of Fact, Conclusions of Law, Decision and Conditions of Approval as follows:

I. INTRODUCTION / PROCEDURAL DEVELOPMENTS

- 1.1 This is an application submitted by the Washington State Parks and Recreation Commission for the construction a public, multi-modal trail facility that will follow generally north-south oriented eastern shore of the Columbia River starting from the Odabashian Bridge and continuing approximately 5.1 miles north to Lincoln Rock State Park within Washington State Department of Transportation right-of-way and property owned by the Chelan County Public Utility District Number 1.
- 1.2 On January 12, 2004, the Douglas County Hearing Examiner approved a shoreline substantial development permit for this proposed Rocky Reach Trail Extension. The approval identified that the proposed project was consistent with the Shoreline Management Act, the Douglas County Shoreline Master Program and the Shoreline Design Area Plan.
- 1.3 This decision was appealed to the State Shoreline Hearings Board on January 26, 2004. Additionally, a separate appeal was filed in Douglas County Superior Court under the Land Use Petition Act on January 26, 2004.
- 1.4 On March 4, 2005, the State Shoreline Hearings Board affirmed the decision of the Douglas County Hearing Examiner.
- 1.5 The State Shoreline Hearings Board decision was then appealed to the Douglas County Superior Court.

EXHIBIT 6

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Rocky Reach Trail Extension
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- 1.6 On September 13, 2005, Douglas County Superior Court affirmed the Shoreline Hearings Board decision and ruled on the Land Use Petition Action appeal, directing the Washington State Parks and Recreation Commission to apply for and obtain land use permits as may be required by the Douglas County Code.
- 1.7 On or about March 23, 2006, the Washington State Parks and Recreation Commission filed a land development permit application for a recreational overlay designation for property covered by the Rocky Reach Trail Extension.
- 1.8 An open record public hearing on this application was held on September 12, 2006. At this hearing, the Hearing Examiner took testimony and admitted exhibits into the record.
- 1.9 In lieu of direct cross-examination by Mr. Jack Feil's attorney against the applicant and Douglas County Transportation and Land Services personnel, Mr. Feil's attorney agreed to submit written questions to the applicant and to Douglas County Transportation and Land Services personnel on or before September 20, 2006.
- 1.10 The Hearing Examiner ordered that the responses to those questions must be provided by September 29, 2006.
- 1.11 The Hearing Examiner believes that he made it very clear that no additional public comment or testimony would be admitted during this interim period.
- 1.12 The Hearing Examiner further ordered that his decision would be made by October 13, 2006.
- 1.13 Unfortunately, additional public comments were received in violation of this order apparently due to confusion in interpretation of the Hearing Examiner's oral ruling at the September 12, 2006, hearing.
- 1.14 In order to clarify the record and to admit into the record these public comments that were submitted after September 12, 2006, but before September 29, 2006, the Hearing Examiner issued an order dated October 11, 2006.
- 1.15 In that order, the Hearing Examiner is very clear that no public comment from Mr. Feil or any other member of the public submitted after September 29, 2006, would be admitted into the record. The Hearing Examiner opened the public record from September 29, 2006, through October 20, 2006, for the sole purpose of allowing the applicant to provide any additional rebuttal evidence that they may wish to submit.

- 1.16 The Hearing Examiner further ordered that at 5:00 p.m. on October 20, 2006, the public record in this matter would close.
- 1.17 The Hearing Examiner made it very clear and ordered that all documents submitted by Mr. Feil, by members of the public and by attorneys in this matter up to September 29, 2006, would be included as a part of the record.
- 1.18 The Hearing Examiner further ordered, and made it very clear, that the reopening of the record from September 29, 2006, through October 20, 2006, was for the sole and limited purpose of allowing the applicant to provide rebuttal evidence, should they so desire. The record was not reopened for additional public comment, or argument.
- 1.19 Finally, the Hearing Examiner ordered that his decision would be made on or before November 3, 2006.

II. ITEMS IN THE RECORD

- 2.1 At the open record public hearing on September 12, 2006, the Hearing Examiner admitted the entire Planning Staff file for this matter into the record as it existed up to September 12, 2006.
 - 2.1.1 To be very clear, Douglas County Transportation and Land Services compiled a list of public comments received since September 6, 2006, which were compiled by memorandum dated September 6, 2006, and a second memorandum dated September 12, 2006, all of the items listed within both memorandums are included in the public record.
- 2.2 Additionally, the Hearing Examiner heard testimony from the following individuals:
 - 2.2.1 Mark Gillespie, of the Washington State Parks
 - 2.2.2 Bill Frazier, Eastern Region Park Manager and Project Coordinator
 - 2.2.3 Jon Ives, of Jones & Stokes, identified as the authorized agent in application materials and the environmental consultant
 - 2.2.4 Nina Villalobos, of Wenatchee
 - 2.2.5 David Zamora, of Wenatchee
 - 2.2.6 Dr. Walter Newman, of Wenatchee
 - 2.2.7 Karen Russell, of East Wenatchee
 - 2.2.8 Robert Parlette, of Wenatchee
 - 2.2.9 Andy Dappen, of Wenatchee
 - 2.2.10 Allison Haug, of Wenatchee
 - 2.2.11 Doug Pauley, of Wenatchee
 - 2.2.12 David Steipe, of Wenatchee
 - 2.2.13 Mary Cook, of Wenatchee
 - 2.2.14 Steve Godfrey, of Cashmere
 - 2.2.15 Mike Zanol, of East Wenatchee

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Rocky Reach Trail Extension
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- 2.2.16 Brittney Moline, of Wenatchee
 - 2.2.17 Jon Tontz, of East Wenatchee
 - 2.2.18 Blane Smith, of Monitor
 - 2.2.19 Bruce Smith, of Wenatchee
 - 2.2.20 Britt Dudek, of East Wenatchee
 - 2.2.21 Bob Strutzel, of Monitor
 - 2.2.22 Larry Letts, of East Wenatchee
 - 2.2.23 Shannon Huehn, of East Wenatchee
 - 2.2.24 Jack Feil, of East Wenatchee
 - 2.2.25 Dick Feil, of East Wenatchee
- 2.3 Additionally, after the September 12, 2006, meeting, during the period where the public record was kept open, the following additional comments were received:
- 2.3.1 Letter from attorneys Robert Rowley and James Klauser, co-counsel for Jack and Delaphini Feil, which contained questions directed to Curtis Lillquist of Douglas County Transportation and Land Services and questions directed to Mark Gillespie of Washington Parks and Recreation Commission
 - 2.3.2 Letter from James Klauser dated September 21, 2006, with enclosures which are now included into the public record
 - 2.3.3 September 29, 2006, letter from attorney James Klauser to the Hearing Examiner with attachments including a letter signed by 34 individuals
 - 2.3.4 Email from Jim Klauser to Andrew Kottkamp dated September 29, 2006
 - 2.3.5 Letter dated September 29, 2006, from Mark Gillespie to Mark Kulaas
 - 2.3.6 September 29, 2006, letter from Mark Gillespie to Robert Rowley and James Klauser with attachments. All attachments to that letter are admitted into the record which include Washington Parks and Recreation Commission responses to questions directed to Mark Gillespie by Mr. Feil's attorneys
 - 2.3.7 September 29, 2006, letter with attachments from Mark Gillespie to Andrew Kottkamp, Douglas County Hearing Examiner. Those attachments include a September 29, 2006, memorandum from Jonathan Ives of Jones & Stokes to Mark Gillespie (15 pages) with attachments including a color photograph with zoning districts overlaid, attachment 1 which includes transcript of proceedings of hearing before the Shoreline Hearings Board on SHB Cause No. 04-002, transcript of proceedings of September 12, 2006, open record public hearing on permit RO-06-01 which is the subject of this decision., and under attachment 3 miscellaneous land leases and "rental agreements," under attachment 4, Rocky Reach Hydroelectric Project FERC No. 2145-060 settlement agreement
 - 2.3.8 September 29, 2006, letter from Glen DeVries to Andrew Kottkamp with attachments:
 - (a) September 29, 2006, letter from Mark Gillespie to Robert Rowley and James Klauser with attachment

- (b) September 20, 2006, fax from Robert Rowley and James Klauser with questions from Jack Feil to Curtis Lillquist and Mark Gillespie
 - (c) September 20, 2006, letter from Jack Feil to Andrew Kottkamp
 - (d) Article, "State parks consider corporate sponsors"
 - (e) September 18, 2006, letter from Freeman Keller to Curtis Lillquist
 - (f) September 22, 2006, fax from James Klauser to Curtis Lillquist and Andrew Kottkamp with September 21, 2006, letter with attachments
 - (g) September 21, 2006, letter from James Klauser to Andrew Kottkamp with attachments
 - (h) September 25, 2006, letter from Bruce Smith to Andrew Kottkamp
 - (i) September 27, 2006, emails from Chip and Paige Balling to Curtis Lillquist, Glen DeVries and Stephen Neuenschwander
 - (j) September 22, 2006, letter from Mark Gillespie to Mark Kulaas with attachments
 - (k) November 23, 2004, Transcript of Proceedings, Day Two, SHB No. 04-002, filed May 20, 2005
 - (l) November 22, 2004, Transcript of Proceedings, Day One, SHB No. 04-002, filed May 20, 2005
 - (m) September 28, 2006, email from Susan Frieberg to Stephen Neuenschwander with attached September 28, 2006, letter to Andrew Kottkamp via email to Curtis Lillquist
 - (n) September 27, 2006, email from Drew and Cathy Gaylord to Curtis Lillquist
 - (o) September 27, 2006, email from Chip and Paige Balling to Curtis Lillquist
 - (p) September 21, 2006, email from Vicky Cibicki to Curtis Lillquist
 - (q) September 20, 2006, email from Andrew Kahn to Curtis Lillquist
 - (r) September 19, 2006, email from Eliot Tina to Curtis Lillquist
 - (s) Draft "Rocky Reach Trail Orchard Impacts"
 - (t) Draft "Lease Agreement" between Washington State Parks and Recreation Commission and Washington State Department of Transportation
 - (u) Draft "Trail Lease" between Washington State Parks and Recreation Commission and Washington State Department of Transportation
- 2.3.9 September 29, 2006, letter from Glen DeVries to Andrew Kottkamp
- 2.3.10 October 6, 2006, letter from AAG Carolyn Klohe to Andrew Kottkamp
- 2.3.11 October 18, 2006, letter from Mark Gillespie to Andrew Kottkamp

2.4 The following items were received after September 29, 2006, and are not part of the record:

2.4.1 October 3, 2006, letter from attorneys Rowley and Klauser.

2.4.2 October 19, 2006, letter from attorneys Rowley and Klauser to the Hearing Examiner, Mark Gillespie and Mark Kulaas.

III. FINDINGS OF FACT

- 3.1 The applicant is the Washington State Parks and Recreation Commission. Property owners signing the application are the Washington State Department of Transportation and Chelan County Public Utility District #1.
- 3.2 General Description: An application submitted by the Washington State Parks and Recreation Commission for the construction of a public, multi-modal trail facility that serves both transportation and recreation functions and will follow generally north-south oriented eastern shore of the Columbia River starting from the Odabashian Bridge and continuing north 5.1 miles to Lincoln Rock State Park within Washington State Department of Transportation right-of-way and property owned by Chelan County Public Utility District Number 1.
- 3.3 The property is located in a portion of Section 22, 15, 11, 10, and 2 within Township 23 North, Range 20 East, W.M., as well as Section 35 of Township 24 N., Range 20 East, W.M., Douglas County. The proposed Rocky Reach Trail would follow the generally North-South oriented eastern shore of the Columbia River, starting from the Odabashian Bridge and continuing North 5.1 miles to Lincoln Rock State Park. Douglas County Assessor Numbers for the subject property are 4040000001, 23201510002, 23201120011, 23201120010, and 23200210008.
- 3.4 The subject property is located within the Greater East Wenatchee Planning Area.
- 3.5 The Comprehensive Plan Designation is Tourist Recreation Commercial, Residential Low, Commercial Agriculture 5 acres, and Commercial Agricultural 10 acres.
- 3.6 The proposal is located in an area designated as Agricultural Resource, Critical Areas and Essential Public Facilities by the Greater East Wenatchee Area Comprehensive Plan.
- 3.7 The subject property is located in the Tourist Recreation Commercial (C-TR), Residential Low (R-L), Commercial Agriculture 5 acres (AC-5), and Commercial Agricultural 10 acres (AC-10) zoning districts. Trail systems are an outright permitted use in the Tourist Recreation Commercial district. Recreational trail systems are allowed in the Residential Low, Commercial Agriculture 5 and Commercial Agriculture 10 districts via a Recreational Overlay District permit.

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- 3.8 Chapter 2.13 of the Douglas County Code authorizes the Douglas County Hearing Examiner to review and take action on applications to create a recreational overlay district.
- 3.9 On January 12, 2004 the Douglas County Hearings Examiner approved a shoreline substantial development permit for the proposed Rocky Reach Trail Extension. The shoreline permit decision was appealed to the State Shorelines Hearings Board on January 26, 2004. A separate appeal was filed in Superior Court under the Land Use Petition Act (LUPA) on January 26, 2004. On March 4, 2005, the State Shoreline Hearings Board affirmed the decision by the Douglas County Hearings Examiner. The State Shoreline Hearings Board decision was then appealed to the State Superior Court. On September 13, 2005, the Superior Court affirmed the Shoreline Hearings Board decision and ruled on the LUPA appeal, directing Washington State Parks and Recreation Commission to apply for and obtain land use permits as may be required by the Douglas County Code.
- 3.10 On August 1, 2002, the U.S. Army Corps of Engineers issued a Nationwide Permit 14 for a box culvert crossing at Station 66+60 (River Mile 470.5) on the Rocky Reach Trail.
- 3.11 On January 30, 2003, the Washington State Department of Ecology issued a letter waiving individual water quality certification requirements for the culvert crossing subject to the Corps of Engineers jurisdiction under the Federal Clean Water Act.
- 3.12 On April 18, 2006, the Washington department of Fish and Wildlife issued a Hydraulic Project Approval (HPA) for bridge and culvert installation, native revegetation and site restoration.
- 3.13 In April, 2001 the Washington State Parks and Recreation Commission, in conjunction with the U.S. Department of Transportation Federal Highway Administration and the Washington State Department of Transportation issued a National Environmental Policy Act Environmental Assessment for the proposed trail extension. After review and comment the U.S. Department of Transportation Federal Highway Administration issued a Finding of No Significant Impact in November 2001.
- 3.14 A Biological Assessment was prepared for the proposed trail project in July 2000. Concurrence letter were issued by the U.S. Fish and Wildlife Service on January 17, 2001 and the National Marine Fisheries Service on February 26, 2001. An addendum to the biological Assessment was issued evaluating the project relative to the 2005 re-designation of Critical Habitat, evolutionary significant unit and distinct population segment stock definitions.

- 3.15 The Greater East Wenatchee Area Comprehensive Plan identifies the need and roughly discloses a general alignment of a trail extending from the existing trail at Odabashian Bridge north to Lincoln Rock State Park.
- 3.16 Policies contained within the Greater East Wenatchee Area Plan speak to trail recreation benefits, the provision of a balanced transportation system and a trail system throughout the East Wenatchee area.
- 3.17 By policy, the Greater East Wenatchee Area plan places significant importance on the protection of agricultural lands; establishes that public policies should minimize disruption of agricultural activity; and suggests that innovative techniques be utilized to minimize impacts to agricultural lands of long term commercial significance.
- 3.18 The applicant has proposed a variety of measures within the project design and operation to address agricultural impacts. These include but are not limited to enhanced setbacks, enhanced buffers in areas where enhanced setbacks are not possible, gates at both ends on the agricultural area which will be secured during important agricultural operation periods, additional fencing of agricultural infrastructure (i.e. pump houses), additional security by the applicant to minimize impacts of the trail users on agricultural areas, and a plan to minimize noxious weeds in the trail.
- 3.19 Comments from reviewing agencies have been considered and addressed where appropriate.
- 3.20 The Washington State Parks and Recreation Commission is lead agency, responsible for compliance with the State Environmental Policy Act, (SEPA).
- 3.21 The Washington State Parks and Recreation Commission published a determination of Nonsignificance (DNS) and Adoption of Existing Environmental Document, on November 19, 2001.
- 3.22 Public notice of application for this proposal and notice of the public hearing was provided in conformance with Title 14 Douglas County Code.
- 3.23 Surrounding property owners were given the opportunity to comment on the proposal, can request a copy of the decision, and can appeal the decision subject to the requirements outlined in DCC Title 14.
- 3.24 Proper legal requirements were met and surrounding property owners were given the opportunity to comment on the proposal at a public hearing.

- 3.25 Section 18.46.080(B) authorizes the review authority to reduce the agricultural setback to 60 feet with an enhanced alternative buffering method.
- 3.26 The subject property is located on the shoreline of the Columbia River and contains wetland areas regulated under the provisions of chapter 19.18B Critical Areas-Wetlands.
- 3.27 The trail corridor is not located within wetland boundaries and is located within wetland buffers. Mitigation for impacts to wetland buffers were established at a ratio of 1:1 within the wetland management and mitigation provisions.
- 3.28 Soil mapping from the USDA Natural Resource & Conservation Service indicate the presence of steep and severe building soils on a portion of the subject properties. A Geotechnical Report, from Hong West & Associates, Inc., dated August 26, 1996 and revised December 3, 1997 was submitted by the applicant.
- 3.29 Section 19.18.035 establishes that public trail facilities may be authorized within designated resource lands and critical areas subject to the minimum standards of the Section.
- 3.30 Public and agency comments that were received were considered by the Hearing Examiner in rendering this Decision and forming Conditions of Approval.
- 3.31 The applicant considered alternative routes for a pedestrian/bicycle trail between Odabashian Bridge and Lincoln Rock State Park. One of these alternative routes would have involved acquiring lands in private ownership and would have impacted County designated critical areas. Private property owners on the alternative route were not willing to sell their property or grant an easement for these additional lands required.
- 3.32 The Washington State Parks and Recreation Commission will retain maintenance control over the real property upon which the trail and setback areas are proposed to be located.
- 3.33 A number of people testified alleging incompatibility between orchard activities and the presence of bicyclists and pedestrians. However, the more convincing testimony leaves the Hearing Examiner to find that orchard activities, pedestrians and bicyclists can co-exist in the same proximity, just as they have for over 100 years.
- 3.34 The lands upon which the proposed recreational overlay district and site plan development permit are proposed are lands owned by the public through the Washington State Department of Transportation and through the Chelan PUD.

Opening these public lands for public transportation and recreation activities will benefit the public at large.

- 3.35 There was testimony, both oral and written, as to the potential adverse impacts upon orchard activities. However, the Hearing Examiner finds that these potential impacts can be minimized and mitigated through conditions of approval. Further, the Hearing Examiner finds that agricultural uses can continue in the vicinity of this trail upon implementation of the Conditions of Approval.
- 3.36 At the open record public hearing on September 12, 2006, there was some testimony as to the impacts the trail might have on the presence of beehives used for pollination of fruit trees. As indicated in the September 29, 2006, memorandum from Jonathan Ives to Mark Gillespie, page 3, Mr. Ives indicates that Bill Frazier and Mark Gillespie met with Bruce Smith, a local beekeeper, on September 18, 2006. During this meeting Mr. Smith indicated that bees were kept on site for an average of six weeks roughly between April 1 to May 15 depending on weather conditions. During that period, only the last two weeks were of concern to Mr. Smith. Those two weeks are the time when the beehives are taken from their dispersed orchard locations and reassembled en masse into the makeshift "bee yard" site. During that two-week period the number of assembled hives can number between 4,000 to 5,000 hives. These hives are ultimately reloaded on trucks for shipment to other locations. As a result of this concern, the applicant is willing to enter into a cooperative agreement with Mr. Smith to consider the temporary closure of the affected section of the trail during the peak beehive assembly periods during this last two-week period (14 calendar days). The exact time for this temporary closure would be determined in consultation and in coordination with Mr. Smith. This mitigation measure would be in effect as long as the commercial bee yarding activities were considered a legal use in the underlying zoning district. If and when bee yarding ceased to be a viable or legal activity on that site then the agreement would be void.
- 3.37 There was testimony at the September 12, 2006, public hearing indicating that the existence of this trail would preclude the use of helicopters for aerial spraying. However, the Hearing Examiner finds that Condition of Approval No. 10 for Shoreline Substantial Development Permit No. 87 contained in Decision SP 87 dated January 12, 2004, provides orchardists with a large block of time during the morning hours during a three-month period to conduct aerial spraying and moisture removal on orchards that will remain in the vicinity of the trail.
- 3.38 The proposed trail will, in its entirety, be located on public lands within the WSDOT owned right-of-way, on Chelan PUD lands and on Chelan PUD lands where WSDOT has use rights. Current use of the WSDOT right-of-way and Chelan PUD lands for agricultural is allowed only through year-by-year leases with adjacent landowners and most of these leases have a 30-day termination clause.

- 3.39 Based on the testimony presented at the hearing and other written materials on file it is very clear to the Hearing Examiner that this proposed trail has significant recreation uses, and would also serve as a transportation facility.
- 3.40 There was testimony at the open record public hearing of September 12, 2006, that orchardists may not be able to receive insurance for their orcharding activities. However, no competent evidence was supplied at the hearing to substantiate this allegation.
- 3.41 The Hearing Examiner further finds that should orcharding activities occur on either side of the proposed trail and outside of the buffer areas, that interpretive signs located on the trail would serve an educational purpose for the trail users. The education could include but not be limited to various aspects of farming and orcharding practices, the potential risks associated with those practices and appropriate precautions that trail users should take.
- 3.42 The Hearing Examiner finds that with the effective implementation of the Conditions of Approval, that recreational and transportation uses of the Rocky Reach Trail Extension can safely co-exist with neighboring orchard and farming, and all other agricultural activities.
- 3.43 At the open record public hearing on September 12, 2006, there was some testimony that the trail and proposed vegetated buffers may create frost pockets potentially causing fruit loss.
- 3.44 Approximately 9% of the proposed trail length will require a vegetated buffer. The applicant, through mitigation measures related to trail design, can reduce the likelihood of frost pocket formation along the trail in the vicinity of these vegetated buffers.
- 3.45 Any Conclusion of Law that is more correctly a Finding of Fact is hereby incorporated as such by this reference.

IV. CONCLUSIONS OF LAW

- 4.1 The Hearing Examiner has authority to render this decisions for recreation overlay districts and site plan development permits.
- 4.2 As conditioned, the development will not adversely affect the general public, health, safety and general welfare.

- 4.3 As conditioned, the project meets the goals and policies as set forth in the Greater East Wenatchee Area Comprehensive Plan.
- 4.4 Based upon the letters of concurrence and permit approvals from federal and state agencies this proposal is consistent with applicable federal and state laws and regulations as conditioned.
- 4.5 As conditioned, potential impacts of the project can be mitigated.
- 4.6 The application is consistent with the requirements of DCC 19.18.035, relating to trails and trail related facilities.
- 4.7 Public use and interests will be served by approval of this proposal which utilizes public lands for direct use by the public.
- 4.8 As conditioned, the proposal is consistent with Title 18 "Zoning", Title 19 "Environment", and Title 20 "Development Standards", of the Douglas County Code.
- 4.9 Any Finding of Fact that is more correctly a Conclusion of Law is hereby incorporated as such by this reference.

V. DECISION

Based on the above Findings of Fact and Conclusions of Law, Permit Nos. RO-06-01 and SPD 06-02 are hereby **APPROVED** subject to the following Conditions of Approval.

VI. CONDITIONS OF APPROVAL

All Conditions of Approval shall apply to the applicant, and the applicant's heirs, successors in interest and assigns.

- 6.1 The project shall proceed in substantial conformance with the plans and application materials of file dated March 27, 2006 and July 5, 2006 except as amended by the conditions herein.
- 6.2 The applicant is responsible for compliance with all applicable local, state and federal rules and regulations, and must obtain all appropriate permits and approvals.
- 6.3 The construction of the trail and associated facilities shall proceed in conformance with the Geotechnical Report from Hong West & Associates, dated August 26, 1996 and revised on December 3, 1997.

RO-06-01 and SPD 06-02
Rocky Reach Trail Extension
Page 12 of 14

- 6.4 Prior to construction, the application must contact the East Wenatchee Water District to verify that the trail location does not conflict with the existing water main easement for the regional water main.
- 6.5 The applicant shall include pet waste disposal with the proposed trash receptacles.
- 6.6 The surface of the trail shall provide adequate support for a two axle emergency vehicle weight of 18,000 pounds.
- 6.7 No permanent structures shall be placed within the NESC Safety Zone of the 115kV transmission lines. This zone is located 50 feet from both sides of the middle conductor
- 6.8 The SPD permit shall remain valid after five years after the notice of action was issued, provided that physical improvements consistent with the permit have been commenced within three years of the date of the notice of action.
- 6.9 The applicant shall comply with all Conditions of Approval set forth in Shoreline Permit 87, decision rendered January 12, 2004, except as modified herein.
- 6.10 The applicant may enter into a cooperative agreement with beekeepers to consider the temporary closure of affected sections of the trail during peak beehive assembly periods for a period of up to 14 calendar days. The exact times for these temporary closures would be determined in consultation and coordination with affected beekeepers. This mitigation measure remains in affect as long as commercial bee yarding activities are considered a viable and legal use in the underlying zoning district. If and when bee yarding activities cease to be a viable and/or legal activity on these sites, then this condition shall have no further force or affect. The language of the "cooperative agreement" shall be that which may be mutually agreed to between the applicant and affected beekeepers. However, it should be very clear that this condition is not mandatory on the applicant, but if a "cooperative agreement" under reasonable terms can be reached, then it should be implemented. The applicant shall act in good faith in negotiating and implementing this "cooperative agreement."
- 6.11 Informational signs shall be placed to warn and direct trail users to stay on the trail. Boundary signs shall also be placed at strategic locations along the trail and in response to landowner complaints that can be verified.
- 6.12 The applicant shall design this Rocky Reach Trail Extension with specific attention to creating an environment that will minimize the potential for frost pockets. For the 2,400 feet scheduled for buffer planting, the applicant shall perform an "on the ground" analysis by the Washington State Parks and Recreation Commission, working with a certified horticulturist, orchardists with property adjacent to the

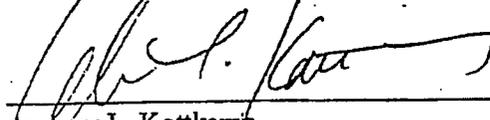
proposed trail and the trail designer to identify the areas (based on topography, building locations and other factors) of greatest potential for frost pockets and to take reasonable steps to insure that the buffer is established to avoid the creation of frost pockets while also achieving the buffering requirements set forth in Douglas County Code 18.46.080B.

VII. APPEAL RIGHTS

The decision of the Hearing Examiner is final and conclusive unless an appeal is filed in accordance with Chapter 14.12 of the Douglas County Code. Appeals must be filed in the Douglas County Superior Court and served on all necessary parties within twenty-one (21) days after the above listed date of issuance of this notice of final decision, as determined pursuant to RCW 36.70C.040. Persons that believe they are aggrieved by a decision of the Hearing Examiner are advised to consult their attorney.

Dated this 3rd day of November, 2006.

DOUGLAS COUNTY HEARING EXAMINER



Andrew L. Kottkamp

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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

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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.

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).

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

IV. ORDER

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

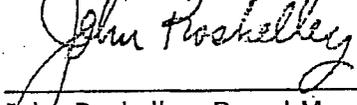
The Board finds that the Eastern Washington Growth Management Hearings Board does not have jurisdiction over the subject matter of this Petition and Orders the Petition dismissed.

SO ORDERED this 16th day of February 2007.

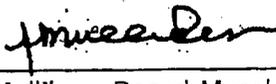
EASTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD



Dennis Dellwo, Board Member



John Roskelley, Board Member



Joyce Mulliken, Board Member

FILED

JUL 31 2007

JUANITA S. KOCH
DOUGLAS COUNTY CLERK
WATERVILLE, WASH.

BY _____ DEPUTY

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF DOUGLAS

JACK FEIL and DELAPHINE FEIL,
husband and wife, et. al.,
Plaintiffs,

No. 07-2-00100-7

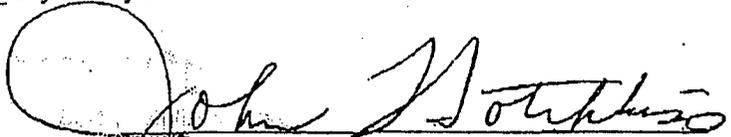
vs.

THE EASTERN WASHINGTON
GROWTH MANAGEMENT HEARINGS
BOARD, et. al.,
Defendants.

DECISION OF THE COURT

As a result of the Court's decision in Douglas County cause no. 06-2-00410-5, the
decision of the Eastern Washington Growth Management Hearings Board is hereby affirmed.

DATED this 31st day of July 2007.


JOHN HOTCHKISS
JUDGE OF THE SUPERIOR COURT

Superior Court of the State of Washington
For Douglas County

DECISION OF THE COURT.

EXHIBIT 8

FILED

JUL 31 2007

JUANITA B. KOCH
DOUGLAS COUNTY CLERK
WATSONVILLE, WASH.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF DOUGLAS

JACK FEIL and DELAPHINE FEIL,)
husband and wife, et. al.,)
Plaintiffs,)

No. 06-2-00410-5

vs.)

DOUGLAS COUNTY; WASHINGTON)
STATE DEPARTMENT OF)
TRANSPORTATION, et. al.,)
Defendants.)

DECISION OF THE COURT

Washington State Parks and Recreation Commission submitted an application for a recreational overlay on property from the Odabashion Bridge just outside of the city limits of East Wenatchee to Lincoln Rock Park, a distance of approximately five miles. The purpose of the recreational overlay is to create a trail that links an existing trail from as far south as Hydro Park in Douglas County to the Odabashion Bridge, with Lincoln Rock State Park. The proposed trail will be located on property owned by the Department of Transportation and the Chelan County Public Utility District, which is adjacent to the Columbia River. The trail from Odabashion Bridge to Lincoln Rock Park would run through property zoned by Douglas

Superior Court of the State of Washington
For Douglas County

DECISION OF THE COURT
Page 1

EXHIBIT 9

County as tourist recreational, low residential, commercial agricultural 5 and commercial agricultural 10.

This LUPA appeal is from the decision of a Douglas County Hearing Examiner approving the recreational overlay. The Petitioners consist of individuals residing in the agricultural 5 and agricultural 10 zone, areas of agricultural resource lands of long-term commercial significance, as designated by Douglas County. The appeal raises several issues, the first of which is whether or not the recreational overlay is a rezone or is more akin to a permit. If the recreational overlay is a rezone, the decision must be made by the County Commission as opposed to a Hearing Examiner.

Although it is clear that Douglas County has delegated the authority to impose a recreational overlay to a Hearing Examiner, the question is whether or not Douglas County has the authority to delegate this decision. The Petitioners argue that a recreational overlay is like the planned unit development "floating zone," which was found to be a rezone in *Lutz v. Longview*, 83 Wn.2d 566 (1974). If the creation of a recreational overlay is a rezone, the *Lutz* Court held that the County Commission does not have authority to delegate the decision to rezone to a Hearing Examiner. The Respondents suggest that *Lutz* does not control as the recreational overlay is more akin to a permit than it is to a floating zone. As support, the Respondents rely on *Heithaus v. Planning & Zoning Commission of the Town of Greenwich*, 779 A.2nd 750 (2001).

The recreational overlay is designated as a zoning district by the Douglas County Code, DCC 18.12.020. The recreational overlay district is found in DCC Chapter 18.46. The

1 chapter provides that, "The recreational overlay district is permitted within all districts
2 enumerated within this title, except where specifically prohibited within the code." A
3 recreational overlay is not specifically prohibited in a commercial agriculture 5 district, DCC
4 18.34, or a commercial agriculture 10 district, DCC 18.36.

5 Uses permitted within the recreational overlay district are enumerated in DCC
6 18.46.040, which include water dependent facilities, public and private parks outside of an
7 urban growth area, golf courses, ball fields and courts, shooting ranges, recreational vehicle
8 parks and campgrounds, outdoor commercial facilities and activities charging an admission
9 fee for participants or spectators, such as motorized vehicle racetracks or horse racing,
10 outdoor music festival, outdoor events or festivals or group camps, sports rallies and club
11 organizations, recreational trail systems and other similar uses. DCC 18.46.070 and DCC
12 18.46.080 provide for development standards and performance standards for the recreational
13 overlay district.
14

15 This Court does not believe that the legal parameters of this matter are limited to the
16 creation of a trail on public property for the use and benefit of the general public. Should this
17 Court determine that the Hearing Examiner can not only conduct the hearing, but also make
18 the decision to create the recreational overlay in this case, the Court must also determine that
19 the Hearing Examiner is authorized to conduct a hearing and allow each of these landowners
20 to change the use of their agricultural land to such things as golf courses, campgrounds and
21 the like, all without the review and specific approval of the Douglas County Commission, or
22 review of the Growth Management Hearings Board. Although this trail will be located on
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DECISION OF THE COURT
Page 3

Superior Court of the State of Washington
For Douglas County
John Hotchkiss, Judge
P.O. Box 488
Waterville, WA 98158-0488
(509) 743-9063 884-9430

1 public property, it is public property that has been zoned commercial agricultural 5 and
2 commercial agricultural 10 by Douglas County.

3 The Court in *Lutz v. Longview, supra*, defined a planned unit development as a zoning
4 instrument that achieves flexibility by permitting specific modifications of the customary
5 zoning standards as applied to a particular parcel. The Court indicated that the planned unit
6 development is a flexible device often referred to as a floating zone. It hovers over the entire
7 municipality until subsequent action causes it to embrace an identified area. The Court
8 further held that the change in permitted uses in that case was obvious. The Court held that
9 the authorities are clear that such a change in permitted uses is a rezone or amendment of the
10 zoning ordinance. The Washington State Supreme Court relied on a decision of the
11 Connecticut Court in *Sheridan v. Planning Board of Stamford*, 266 A.2d 396 (1969) for this
12 position, along with a California case.

13
14 The Respondents suggest that a recreational overlay is different than the planned unit
15 development discussed in *Lutz*. The Respondents suggest that the *Sheridan* case relied on by
16 *Lutz* was distinguished by the Connecticut Supreme Court in *Heithaus v. Planning & Zoning*
17 *Commission of the Town of Greenwich, supra*, and this Court should follow that lead. In
18 *Heithaus* the landowner had requested an historic overlay, which was allowed by the zoning
19 code of the Town of Greenwich. The Supreme Court of Connecticut held that the
20 determination of the zoning commission was made in an administrative capacity, which was
21 appropriate. The Trial Court had reached its conclusion by comparing an historic overlay
22 zone to both a special permit and a floating zone. The Trial Court concluded that the historic
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DECISION OF THE COURT
Page 4

Superior Court of the State of Washington
For Douglas County
John Hotchkiss, Judge
P.O. Box 488
Waterville, WA 98538-0488
(509) 745-9063 884-9430

overlay zone was more like a special permit than a floating zone. At footnote 7 the Trial

1 Court held that:

2 "If a landowner meets the conditions set forth for a special
3 exception, the [zoning commission] is bound to grant one, but in
4 the case of a floating zone, discretion is maintained and additional
5 limitations may be imposed. . . because [the zoning commission] is
6 acting legislatively."

7 In this particular case, the Court does not find that the Hearing Examiner is bound to
8 grant a recreational overlay if the conditions in the recreational overlay district are met. The
9 conditions are too vague, and particularly with the language that trails are to be discouraged in
10 the agricultural zones. The Court in *Hetthaus* further indicated that an application for a
11 special permit seeks permission to vary the use of a particular piece of property from that for
12 which it is zoned, without offending the uses permitted as of right in the particular zoning
13 district and area.

14 The AC 5 zone and AC 10 zone zoning districts in the Douglas County code indicate
15 that trail systems should be discouraged. It is difficult for this Court to see how this
16 recreational overlay that allows a trail system to run through the AC 5 and AC 10 district for
17 recreational purposes is not an application for a use that would offend the uses permitted as of
18 right. The Court believes that *King County v. Central Puget Sound Growth Mgt. Hearings*
19 *Board*, 142 Wn.2d 543 (2000) and *Lewis County v. Central Puget Sound Growth Mgt.*
20 *Hearings Board*, 157 Wn.2d 488 (2006) specifically hold that these recreational uses offend
21 AC 5 and AC 10 zones, which are agricultural resource areas of long-term commercial
22 significance.
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DECISION OF THE COURT
Page 5

Superior Court of the State of Washington
For Douglas County
John Hotchkiss, Judge
P.O. Box 488
Waterville, WA 98358-0488
(509) 745-9063 884-9430

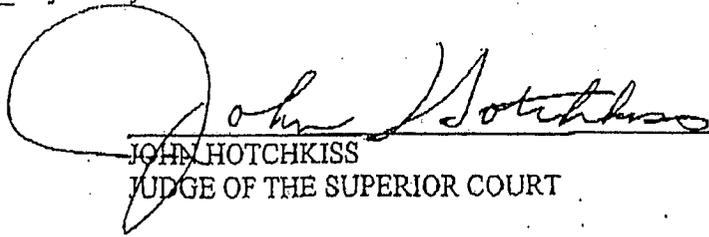
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In addition, the Courts have held that actions of a city council are rezones when there are specific parties requesting a classification change for a specific tract. *Raynes v. Leavenworth*, 118 Wn.2d 237 (1992); *Cathcart v. Snohomish County*, 96 Wn.2d 201 (1981). The recreational overlay is clearly a specific party requesting that a specific piece of real property be treated in a particular manner.

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. The legislative authority of Douglas County may decide to review the zoning for the entire area. After all, if those who have made a determination that recreational use and agricultural use are compatible are wrong, the farmers are still subject to the restrictions of the agriculture zone. This Court is not suggesting this, or even indicating that a change is legally permissible; this Court is only suggesting that it is the County Commission that has this power, if anyone. Do not read into this that this Court has made a decision as to whether or not the rezone is appropriate because it has not. Under the circumstances, that issue is not before the Court.

As this is a legislative decision, the decision of the Hearing Examiner must be remanded to the County legislative authority for review and decision.

DATED this 31st day of July 2007.


JOHN HOTCHKISS
JUDGE OF THE SUPERIOR COURT

FILED

SEP 13 2007

JUANITA S. KOCH
DOUGLAS COUNTY CLERK
WATERVILLE, WASH.

BY _____ DEPUTY

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF DOUGLAS

JACK FEIL and DELAPHINE FEIL,)
husband and wife, et. al.,)
Plaintiffs,)

No. 06-2-00410-5

vs.)

DOUGLAS COUNTY; WASHINGTON)
STATE DEPARTMENT OF)
TRANSPORTATION, et. al.,)
Defendants.)

DECISION ON RECONSIDERATION

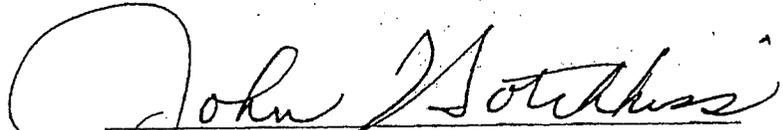
Respondents have moved the Court for reconsideration of the Court's decision of July 31, 2007. The Court has reviewed State Respondent's motion for reconsideration and/or clarification of decision; Petitioners' response to Parks' motion for reconsideration and objection to Klohe declaration, and reply to Petitioners' response to State's motion for reconsideration and/or clarification.

The first question is whether or not the declaration of Karolyn R. Klohe should be stricken. The Court believes that it should, although the Court did not find the substance of the declaration to be of much significance. Nonetheless, the declaration will be stricken.

1 The Court is also beginning to understand that putting anything more on paper than is
2 absolutely required allows both parties to suggest that the Court has made findings and
3 decisions that it has not. As such, the Court will simply state that the motion for
4 reconsideration is denied.

5 Respondents have also requested that the Court clarify its decision. The Court does
6 not believe that clarification is necessary. The Court has found the recreational overlay to be
7 a rezone. The Court has found no more than that concerning the Hearing Examiner's decision
8 or position within Douglas County. As a rezone it should be processed as such.

9 DATED this 13th day of September 2007.

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12 JOHN HOTCHKISS
13 JUDGE OF THE SUPERIOR COURT
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