

NO. 84369-4

SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners/Appellants

v.

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

and

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

Respondents.

Consolidated on Appeal

STATE'S RESPONSE TO AMICUS BRIEF

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I. IDENTITY OF RESPONDENTS

The State of Washington, acting through the Washington State Parks and Recreation Commission (State Parks) and Washington State Department of Transportation (WSDOT), is Respondent at all stages of the proceedings below. The State hereby responds to the Amicus Brief filed by Pacific Legal Foundation, et al. (Amici)

II. ARGUMENTS

A. **The Board Of County Commissioners' (Commissioners) Approval Of The Application For A Recreational Overlay Permit Was A Quasi-judicial Function.**

Amici suggest that the act of approving the application for a Recreational Overlay Permit (RO Permit) was a legislative function. Their position is inconsistent with the specific treatment of the recreational overlay permit process in the Douglas County Code (DCC). An application for a recreation overlay permit is processed pursuant to DCC 18.46. That portion of the code specifically describes that approval process as quasi-judicial.

Applications for the establishment, expansion or amendment of an R-O district shall be processed in accordance with the provisions for **quasi-judicial** review in DCC Section 14.10.040. Approval of an application shall be based on a specific site design authorizing only the specific development proposed, unless amended.

DCC 18.46.030(A) (emphasis added). The DCC defines quasi-judicial review as follows:

Quasi-judicial review shall be used when the development or use proposed under the application requires a public hearing before a hearing body. This type of review shall be used for code interpretation reviews, subdivisions, conditional use permits, planned residential developments, variances, shoreline substantial development permits and other similar applications.

DCC 14.10.040.

The State sought the RO Permit using the quasi-judicial process before a hearing examiner set forth in the code for RO Permits. The hearing examiner approved the permit. AR Vol. 35, 1-6673.

The Appellants appealed the hearing examiner decision to the trial court. The trial court remanded the matter to the county for approval by the Commissioners, based on *Lutz v. City of Longview*, 83 Wn.2d 566, 520 P.2d 1374 (1974). AR Vol. 40, 1-7603-608. The decision in *Lutz* actually involved the review of a planned unit development. At that time, such permits had to be approved by the highest level of local government. The *Lutz* Court did not hold that the approval process was legislative in function, only that such approvals could not be delegated. Today a permit for a planned unit development is expressly described as a project permit under 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 . . . **planned unit developments**, . . .

(Emphasis added).

On remand from the Douglas County Superior Court, the DCC approved the RO Permit unanimously by resolution, not as an ordinance of general applicability.

This project has now been reviewed for two site-specific project permits: a substantial development permit under the County's shoreline master program and the RO Permit at issue here. AR Vol. 35, 1-6671-672. The project has been reviewed by the hearing examiner twice and ultimately approved by the DCC. Elevating this project review to the Commissioners did not change the function of the review from a quasi-judicial review as specified under the zoning code. Issuance of the RO Permit was a quasi-judicial function approved at the highest level of local government.

Despite the specific characterization in the DCC that the RO Permit approval process is quasi-judicial, Amici's assert this review process is a legislative function. To the contrary, a quasi-judicial action involves the application of existing law to particular facts rather than creation of new policy. *Phoenix Dev. V. Woodinville*, 154 Wn. App. 492, 503, 229 P.3d 800 (2009), *Rev Granted* 169 Wn. 2nd 1006, 236 P.3d 206, (2010). The project did not require an amendment to the comprehensive plan or zoning ordinance to process this permit. All the local laws that

were required were already in place. The relevant local laws had already been adopted through the legislative process required by the Growth Management Act (GMA), RCW 36.70A, and the Planning Enabling Act, RCW 36.70. The relevant local laws were not challenged under the process set forth under the GMA. *See* RCW 36.70A.280 through .345. They are presumed valid unless timely challenged. RCW 36.70A.320(1).

The amicus brief claims, at page 5, that the State admits that this was a legislative function based on a statement in the State's Brief. That statement is taken out of context and misapplied by Amici. The purpose of the statement referenced by Amici was to show this court that, although this project must be reviewed under the exclusive methods set forth in the Land Use Petition Act (LUPA), RCW 36.70C, the Court need not be concerned that this case presents the potential problem identified in *Woods v. Kittitas Cy.*, 162 Wn.2d 597, 614, 174 P.3d 25 (2007). In *Woods*, this Court acknowledged that there may be a potential problem in a LUPA challenge when the land use action is evaluated under a comprehensive plan or local zoning ordinance that is not in compliance with the GMA, but which is deemed valid because it was not challenged within the 60-day appeal period in RCW 36.70A.290(2). The challenged RO Permit application does not present such a case.

This permit is authorized by a comprehensive plan and a zoning ordinance. The comprehensive plan includes many policies adopted pursuant to the GMA to balance four different goals set forth in the GMA: the agriculture resource goal, recreation goal, transportation goal, and the shoreline management goal. The policies in the comprehensive plan are discussed at length in the County's response brief. County Resp. Br. at 20-29. The recreational overlay zoning ordinance implements the comprehensive plan policies. It may be too late to challenge the comprehensive plan and RO Permit zoning ordinance, but the record in this case demonstrates that the comprehensive plan and RO Permit ordinance would nevertheless be in compliance with the GMA. Amici's untimely attempt to reopen the policy decisions in the comprehensive plan and RO Permit ordinance should be rejected. No second look is warranted or available under either the GMA or LUPA.

Perhaps the State could have more artfully made this argument in its brief, but it does not change the legal conclusion that consideration and approval of the RO Permit remains a quasi-judicial function under the local code. At issue in this case is an application for a site-specific project permit. The county reviews the application for compliance with the comprehensive plan and implementing development regulations adopted by Douglas County. The county's determination that the application

complies with the governing comprehensive plan provisions and development regulations is a quasi-judicial determination, DCC 18.46.030(A), which constitutes a land-use decision reviewable only under LUPA. RCW 36.70C.030. *See Woods*, 162 Wn.2d at 610. Both the trial court and the Court of Appeals correctly affirmed the Commissioners' decision to approve the RO Permit under the standards set forth in the LUPA. This Court also should affirm.

B. Amici's Policy Arguments Regarding The Conservation Of Agricultural Lands Under GMA Do Not Justify Setting Aside The Statutory Review Provisions In The GMA and LUPA.

Amici argue that landowners must be able to challenge public projects like the recreational trail in Douglas County to ensure the protection of agricultural lands. The State agrees that a significant part of the GMA's enforcement is through litigation by citizens alleging a county or city has failed to comply with the GMA requirements, but the Legislature places two important constraints on the ability of citizens to bring actions alleging noncompliance with the GMA.

First, such challenges must be timely filed – within 60 days of the date of publication of a comprehensive plan, development regulation, or amendment thereto. RCW 36.70A.290(2). The comprehensive plan at issue here was adopted in March 2006. The overlay ordinance under which this permit application was filed was adopted in 1997

(TLS 97-10-71B). The present action was filed in April 2008, well after the deadline established in the GMA.

Second, the GMA does not authorize challenges to site-specific land-use decisions; such decisions are not comprehensive plans or development regulations. *Woods*, 162 Wn.2d at 610. Rather, LUPA grants the superior court exclusive jurisdiction to review site-specific land-use decisions. *Id.* A county's review of a proposed land use project, such as the RO Permit here, is reviewed for consistency with the applicable development regulations and/or comprehensive plan, not for compliance with the GMA. *Id.* at 613. "Because the GMA does not provide for it, we hold that a site-specific rezone cannot be challenged for compliance with the GMA." *Id.* at 614.

Amici seek to have the permit application at issue here reviewed for compliance with the GMA, in direct contradiction to the applicable statutes and to this Court's holding in *Woods*. Their attempt should be rejected.

C. Profiting From State Land Is Not An Entitlement.

Amici indicate that this state-owned land has contributed substantial income to the Appellants over the years. The State recognizes that the Appellants may have come to rely on this income, but the right to farm this state-owned land was never an entitlement. Their use of this

state-owned land is granted by contract, not by the GMA or by any county ordinance adopted under the GMA. The property was condemned by the state in the 1950s for transportation purposes. The adjacent farmers have been permitted to farm this corridor only as an interim use, under a year-to-year lease, until an appropriate transportation use was developed. AR 1-000006809-6810. The proposed trail is an appropriate use designed in part to provide a safer route for pedestrian/bike traffic to Lincoln State Park.

Potentially 24 acres of orchard may be removed from production when the trail is built. AR Vol. 35 1-6701. This loss is associated with the buffers surrounding the trail. The trail itself is only 10 feet wide. AR Vol. 35, 1-6692 -701. The Appellants are concerned about this loss of revenue. The DCC did not turn a deaf ear to such concerns. The Commissioners specifically added a condition to the permit under Attachment B to address their concern. Attachment B reads as follows:

1. A buffer less than that proposed in the application is acceptable without an alternative vegetative buffer in those instances where there is agreement between WSDOT as lessor, WA State Parks as lessee; and an adjacent orchardists 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.

The record reflects that the trail that currently exists south of the Odabashian Bridge has existed for sometime without conflict with the adjacent agricultural use in that area. AR Vol. 40A, 0-7705 (VT 2-25-08 at 56). As to the proposed trail north of the bridge, the Commissioners left open to these Appellants the possibility of reducing the impact to their continued use of the WSDOT corridor if they, in fact, determine that the maximum buffers are not required to prevent conflicts. In essence, the Commissioners have allowed Appellants a measure of control over their ability to continue to profit from this state-owned land.

A consultant for State Parks analyzed the compatibility of the project with adjacent agricultural use. AR Vol. 35, 1-6701. The consultant acknowledged that pedestrian/bike trails were discouraged in areas designated as agricultural lands. The consultant then analyzed the actual impact. With buffers, fencing, and controls on opening and closing times, the impact could be lessened. AR Vol. 35, 1-6702. A major source of concern by Appellants was liability associated with pedestrian use of the trail. AR Vol. 32, 0-6077 (Jack Feil by letter dated 2-24-08). The impact of bee activity was thoroughly discussed and addressed through trail closures. AR Vol. 36, 1-6802-804. Impacts on helicopter spraying were discussed and addressed through temporary trail closures. AR Vol. 36, 1-6806. Appellants have in place the necessary protections

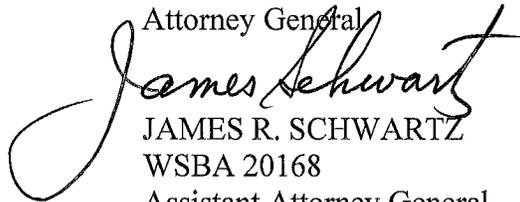
and flexibility to limit the impact of this trail on their harvest. The GMA does not require a different result.

III. CONCLUSION

All of the issues raised by Amici were considered and correctly addressed by the Court of Appeals in its decision. The Appellants and Amici have failed to establish any legal basis for evaluating the RO Permit application for compliance with the GMA, instead of assessing their compliance with the valid comprehensive plan and zoning ordinance that long have been in effect in the County. The Court of Appeals decision should be affirmed.

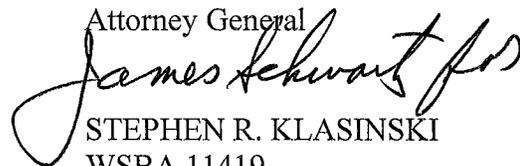
RESPECTFULLY SUBMITTED this 16th day of February 2011.

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