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

3 **BOARD DISCUSSION**

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

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

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

5 **IV. ORDER**

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

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

11 **SO ORDERED** this 16<sup>th</sup> day of February 2007.

12 EASTERN WASHINGTON GROWTH MANAGEMENT  
13 HEARINGS BOARD

14 \_\_\_\_\_  
Dennis Dellwo, Board Member

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16 John Roskelley, Board Member

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18 Joyce Mulliken, Board Member