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

TURTLE ROCK HOMEOWNERS
ASSOCIATION and STEVE and JEANNE
HANSON,

Petitioners,

v.

CHELAN COUNTY,

Respondents,

WENATCHEE ROCK PRODUCTS, LLC,
ROLAND L. CHIPMAN, and PAMP G.
MAIERS,

Intervenors.

Case No. 07-1-0001

FINAL DECISION AND ORDER

I. SYNOPSIS

The Petitioners, Turtle Rock Homeowners Association, et al., filed a petition challenging a decision of the Chelan County Board of County Commissioners (BOCC) to approve an amendment to the Chelan County Comprehensive Plan (CP) to re-designate 55.55 acres of approximately 98 acres of land in unincorporated Chelan County from Residential/Resource 5 (RR-5) to Commercial Mineral (MC). Under the RR-5 designation, "short-term" mineral extraction is a permitted use pursuant to a conditional use permit (CUP). CCC 11.12.040. Under the MC designation, both "short-term" mineral extraction and "long-term" mineral extraction are permitted uses pursuant to a CUP. CCC 11.34.040.

The Petitioners contend Chelan County (County) violated the State Environmental Policy Act (SEPA), RCW Chap. 43.21C in approving the re-designation of the Wenatchee Rock Products (WRP) site (Issue No. 1). The Petitioners also argue the County violated the

1 public participation requirements of the Growth Management Act (GMA) (Issue No. 2),
2 failed to comply with its siting criteria for designation of mineral resource lands (Issue No.
3 3), failed to designate mineral resource lands consistent with the GMA (Issue No. 4), failed
4 to re-designate the property consistent with the GMA (Issue No. 5), and argued the re-
5 designation was barred by the doctrine of *res judicata* (Issue No. 6).

6 The Respondent, Chelan County, and the Intervenors, Wenatchee Rock Products, et
7 al., reject the Petitioners' contentions, and further assert that the Petitioners' SEPA issues
8 are barred by the doctrine of *res judicata*.

9 The Eastern Washington Growth Management Hearings Board (Board) finds the
10 Petitioners' SEPA arguments are barred by *res judicata*. Alternatively, the Board finds the
11 Petitioners failed to carry their burden of proof to show that the County's SEPA
12 determination was clearly erroneous, and any errors in the County's SEPA process or public
13 participation were harmless.

14 The Petitioners have not overcome the presumption of validity with respect to the
15 County's compliance with the GMA requirements for public participation and designation of
16 mineral lands.

17 The County's approval of the re-designation of the WRP site is not barred by the
18 doctrine of *res judicata*. However, to the extent the doctrine of *res judicata* applies, the
19 Petitioners have not carried their burden of establishing the absence of a substantial change
20 in the WRP application.

21 In sum, the Board has determined the Petitioners have failed to carry their burden of
22 proof in Issues No. 1 through No. 6, and find that Chelan County is in compliance with the
23 GMA and the State Environmental Policy Act in adopting Resolution 2006-153.

24 **II. PROCEDURAL HISTORY**

25 On January 18, 2007, TURTLE ROCK HOMEOWNERS ASSOCIATION and STEVE and
26 JEANNE HANSON, by and through their representative, James Carmody, filed a Petition for
Review.

1 On February 20, 2007, the Board held a telephonic Prehearing conference. Present
2 were, Joyce Mulliken, Presiding Officer, and Board Members John Roskelley and Dennis
3 Dellwo. Present for Petitioners was James Carmody. Present for Respondents was Susan
4 Hinkle.

5 On February 27, 2007, the Board issued its Prehearing Order.

6 On March 6, 2007, the Board received a Stipulated Order of Intervention.

7 On March 8, 2007, the Board issued the Stipulated Order of Intervention.

8 On June 8, 2007, the Board held the hearing on the merits. Present were, Joyce
9 Mulliken, Presiding Officer, and Board Members John Roskelley and Dennis Dellwo. Present
10 for Petitioners was James Carmody. Present for Respondents was Susan Hinkle. Present for
11 Intervenors was Michael Murphy.

12 **III. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF 13 REVIEW**

14 Comprehensive plans and development regulations (and amendments thereto)
15 adopted pursuant to Growth Management Act ("GMA" or "Act") are presumed valid upon
16 adoption by the local government. RCW 36.70A.320(1). The burden is on the Petitioners to
17 demonstrate any action taken by the respondent jurisdiction is not in compliance with the
18 Act. RCW 36.70A.320(2).

19 The Hearings Board will grant deference to counties and cities in how they plan
20 under Growth Management Act (GMA). RCW 36.70A.3201. But, as the Court has stated,
21 "local discretion is bounded, however, by the goals and requirements of the GMA." *King*
22 *County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 561,
23 14 P.2d 133 (2000). It has been further recognized, "[c]onsistent with *King County*, and
24 notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly
25 when it foregoes deference to a . . . plan that is not 'consistent with the requirements and
26 goals of the GMA." *Thurston County v. Cooper Point Association*, 108 Wn. App. 429, 444, 31
P.3d 28 (2001).

1 Pursuant to RCW 36.70A.320(3) we “shall find compliance unless [we] determine
2 that the action by [Jefferson County] is clearly erroneous in view of the entire record before
3 the Board and in light of the goals and requirements of [the GMA].” In order to find the
4 County’s action clearly erroneous, we must be “left with the firm and definite conviction that
5 a mistake has been made.” *Department of Ecology v. Public Utility Dist. 1*, 121 Wn.2d 179,
6 201, 849 P.2d 646 (1993).

7 The Hearings Board has jurisdiction over the subject matter of the Petition for
8 Review. RCW 36.70A.280(1)(a).

9 **IV. ISSUES AND DISCUSSION**

10 **Issue No. 1:**

11 Did Chelan County fail to comply with the substantive and procedural requirements
12 of the State Environmental Policy Act (SEPA Chapter 43.21C RCW) in the review and
13 adoption of Resolution No. 2006-153?

14 **The Parties’ Position:**

15 **Petitioners:**

16 The Petitioners contend Chelan County failed to comply with the requirements of the
17 State Environmental Policy Act (SEPA) with respect to review and adoption of the
18 Comprehensive Plan amendment re-designating 55.55 acres of rural land from Rural
19 Residential/Resource-5 – one dwelling unit per five acres (RR-5) to Commercial Mineral
20 (MC). The substantive and procedural failures claimed by the Petitioners included the
21 following: (1) failure to review, adopt or incorporate environmental information or
22 documents from prior applications as required by WAC 197-11-600; (2) environmental
23 review was improperly deferred until time of project review in violation of the requirements
24 of *King County v. Washington State Boundary Review Board*, 122 Wn.2d 648, 860 P.2d
25 1024 (1993); (3) environmental review failed to consider off-site alternatives required for
26 “non-project actions”; and (4) the Environmental Checklist provided incomplete and
insufficient information required with respect to “non-project actions”.

1 The State Environment Policy Act establishes specific procedures for adoption and
2 incorporation of prior environmental review and documents. WAC 197-11-600, -630 and -
3 635. The Petitioner contends Chelan County failed to follow the prescribed process and did
4 not issue or circulate the required adoption notice (WAC 197-11-965). Their referenced
5 documents were neither included in the threshold determination nor reviewed by staff
6 and/or a SEPA Responsible Official. The County also failed to circulate such notice to
7 agencies with authority to comment. The Western Washington Growth Management
8 Hearings Board found that such failure violates the SEPA and impairs public participation.
9 *Ludwig v. San Juan County*, WWGMHB Case No. 05-2-0019c, Final Decision and Order (April
10 19, 2006).

11 Chelan County is claimed to have erroneously deferred environmental review until
12 time of project review. Chelan County issued a Determination of Nonsignificance (DNS) on
13 May 19, 2006. The determination was based upon the following logic and conclusions:

14 It is not anticipated that the adoption of the proposed Comprehensive Plan
15 Amendment will result in unavoidable adverse environmental impacts.

16 Although growth and development will occur as time goes by, most activities
17 that may create impacts to the environment will be required to conduct site
18 specific environmental review when applied for and potential adverse
19 environmental impacts will be addressed and mitigated as required. (CR 3).

20 The Petitioners contend the deferral of such analysis to time of project review violates the
21 SEPA and specific holding by the Supreme Court in *King County v. Washington State*
22 *Boundary Review Board for King County*, 122 Wn.2d 648, 663, 860 P.2d 1024 (1993). The
23 Hearing Boards have adopted the holding in *King County. Whidbey Environmental Action*
24 *Network v. Island County*, WWGMHB Case No. 03-2-0008*27, Final Decision and Order
25 (August 22, 2003); *Eugene Butler, et al. v. Lewis County*, WWGMHB Case No. 99-2-
26 0027c*15, 22, Final Decision and Order (June 30, 2000) ("Major emphasis should be placed
on the quality of SEPA analysis at the front end of the GMA process." The Board also held
that the "phased" approach to an Environmental Impact Study (EIS) is not to be used as a
mechanism for merely postponing, addressing, or determining adverse environmental

1 impacts from different courses of action. To postpone any decisions as to standards or
2 criteria until the permit process is complete is totally antithetical to the requirements of the
3 GMA.); *Seaview Coast Conservation Coalition v. Pacific County*, WWGMHB Case No. 96-2-
4 0010*3, Final Decision and Order (October 22, 1996) (County found not in compliance with
5 the GMA by issuing a DNS because there remained unanswered questions about the
6 environmental impacts of the proposal and WAC 197-11-060 requires environmental
7 consideration of a non-project nature include a "range of probable impacts."); *Hood Canal,*
8 *et al. v. Jefferson County*, WWGMHB Case No. 03-2-0006*10, Compliance Order (October
9 14, 2004) ("The County must analyze potential significant environmental impacts of its non-
10 project actions. The impacts must be measured in terms of the maximum development
11 that might occur as a result of the non-project action."); and *Tracy v. City of Mercer Island,*
12 CPSGPHB Case No. 92-3-0001*14, Final Decision and Order (January 5, 1993) ("SEPA Rules
13 encourage the preparation of the SEPA documents at the earliest possible point in the
14 planning process."). The approval of a comprehensive plan amendment without full and
15 complete environmental review begins a process of government action which can
16 "snowball" and acquire virtually unstoppable administrative inertia. *King County v.*
Washington State Boundary Review Board, 122 Wn.2d at 663, 664.

17 The Petitioners contend a non-project action that proposes a fundamental land use
18 change requires preparation of an Environmental Impact Statement (EIS). A "non-project
19 action" specifically requires consideration of off-site alternatives as well as the no action
20 alternative. WAC 197-11-440(5). The Petitioners assert Chelan County failed to provide
21 any analysis or consideration of either alternative sites or the no action alternative.
22 Environmental documents contain no reference to alternatives, but the record is replete
23 with summaries of potential alternative sites. The County's environmental review is further
24 deficient in that it fails to consider the environmental consequences of the proposed action
25 in terms of the maximum potential development of the property. *Ullock v. Bremerton*, 17
26 Wn. App. 573, 565 P.2d 1179 (1977); *Olympic Environmental Council v. Jefferson County*,
WWGMHB Case No. 03-2-0006, Final Decision and Order (August 15, 2003); and *Kiewet*

1 *Construction Group v. Clark County*, 82 Wn. App. 133, 920 P.2d 1207 (1996). See also,
2 WAC 197-11-060(3)(a).

3 **Respondent and Intervenors:**¹

4 The Respondent/Intervenors argue the Petitioners submitted the SEPA issues to
5 Chelan County Superior Court and cannot raise the same issues before the Board. The
6 Petitioners raised the exact same SEPA issues in their Land Use Petition Action (LUPA), and
7 stipulated that those issues would be heard by superior court. See *Loon Lake Property*
8 *Owners Ass'n v. Stevens County*, EWGMHB No. 01-1-0002c, Order on Motions p.3 (April 23,
9 2001) (petitioner chose to present SEPA issues to the EWGMHB rather than superior court).

10 The Intervenors contend that because the superior court ruled on the SEPA issues
11 and upheld the County's SEPA threshold determination, the Petitioners' attempt to raise the
12 same issues before the Board is barred by *res judicata*. *Res judicata* occurs when a prior
13 judgment has a concurrence of identity in four respects with a subsequent action. There
14 must be identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4)
15 the quality of the persons for or against whom the claim is made. *Rains v. State*, 100
16 Wn.2d 660, 663, 674 P.2d 165 (1983); *Skagit County Growthwatch v. Skagit County*,
17 WWGMHB No. 04-2-0004, Order on Motions to Dismiss, p.6 (June 2, 2004). The parties,
18 subject matter and claims in the LUPA action are exactly the same as this case. *Res*
19 *judicata* precludes the Board from hearing these SEPA issues.

20 In the alternative, the Intervenors believe the SEPA determination was not clearly
21 erroneous and must be upheld. The SEPA review was not improperly deferred to the
22 project stage. Unlike *King County v. Boundary Review Board*, 122 Wn.2d 648, 860 P.2d
23 1024 (1994), upon which the Petitioners rely, there was only a minor change in permitted
24 uses and the environmental impacts of the intended use were extensively studied.

25 ¹ Respondent Chelan County concurred in the analysis and arguments of Intervenors on all
26 issues.

1 The County was not required to consider alternative sites. The authorities cited by
2 the Petitioners, including WAC 197-11-440(5)(d), only apply where an EIS is required. The
3 County properly considered environmental information from prior applications.

4 Contrary to the Petitioners' arguments, the Intervenors argue WRP did not submit
5 substantial new information at the planning commission hearing, but used environmental
6 materials and studies that pre-dated the DNS and which were already in the County's files
7 and available to the public and the Petitioners. The County was not required to formally
8 adopt or incorporate prior "environmental documents" or environmental studies in the DNS.
9 Under WAC 197-11-600 et seq., adoption and incorporation by reference are optional. It
10 was not necessary to incorporate any existing environmental documents by reference into
11 the DNS because no mitigation requirements or other provisions in the earlier documents
actually became part of the DNS.

12 WRP submitted a complete SEPA checklist. The questions were adequately
13 answered, and the checklist specifically identified the County's prior SEPA determinations
14 and the voluminous studies that had already been done.

15 Finally, any procedural errors in the SEPA process were harmless. There is no
16 evidence the Petitioners or any other persons were harmed or their ability to participate
17 impaired in any way. All of the materials and studies in this case were in the County's files
18 for the site and were specifically referenced in connection with the application. The
19 Petitioners and their counsel were active participants in the prior proceedings and the same
materials were submitted and considered.

20 **Board Analysis:**

21 The Board agrees with the parties that the doctrine of *res judicata* may be applied in
22 proceedings before the Growth Management Hearings Boards. See *Grant County v.*
23 *EWGMHB and James Whitaker, et al*, Case No. 04-2-01395-6, Grant County Superior Court,
24 Order on Petitioners Motion for Summary Judgment, December 28, 2006. In the case
25 before the Board, the subject matter of the SEPA claims is exactly the same as the SEPA
26 claims in the superior court. The Petitioners point out the superior court matter was a

1 zoning case, and this case before the Board is a GMA comprehensive plan case, but the
2 exact same SEPA determination was contested in both cases. The parties, subject matter
3 and claims in the LUPA are exactly the same as this case. The quality of the persons for or
4 against whom the claim is made is the same. *Res judicata* precludes the Board from hearing
5 these SEPA issues. The Petitioners had the choice to present the SEPA issues to the
6 superior court or to this Board, and they chose to have the SEPA issues decided in the
7 superior court. The same burden of proof is used in both cases. The superior court has
8 determined the SEPA threshold determination was not clearly erroneous.

9 Alternatively, if the Board did have jurisdiction and found *res judicata* did not apply,
10 the Board would reach the same conclusion as the superior court. The SEPA threshold
11 determination was not clearly erroneous, and the record the County used in that
12 determination was proper under the SEPA and under the GMA.

13 **Conclusion:**

14 The Petitioners' SEPA arguments are barred by *res judicata*. Alternatively, the
15 Petitioners have not carried their burden of proof to show that the SEPA determination was
16 clearly erroneous.

17 **Issue No. 2:**

18 Did Chelan County violate public participation requirements of the Growth
19 Management Act (GMA) by failing to require a complete application and supporting
20 materials prior to public hearing; limiting and restricting the scope of comment by the public
21 and interested parties at the hearing; denying the public full and reasonable opportunity to
22 comment upon the application; and failing to consider public comment in the decision-
23 making process?

24 **The Parties' Position:**

25 **Petitioners:**

26 The Petitioners contend Chelan County violated public participation requirements of
the Growth Management Act by failing to require a complete application and supporting
materials prior to the public hearing; by limiting and restricting the scope of comment from

1 the public and interested parties at the hearing; by denying the public full and reasonable
2 opportunity to comment upon the application; and failing to consider public comment in the
3 decision making process.

4 "Public participation" is the heart of the Growth Management Act (GMA). *Wilma v.*
5 *Stevens County*, EWGMHB Case No. 06-1-0009c*6, Final Decision and Order (March 12,
6 2007); and *Citizens for Good Governance v. Walla Walla County*, EWGMHB Case No. 05-1-
7 0013*5, Final Decision and Order (June 15, 2006). The Petitioners contend Chelan County
8 failed to require a complete application and supporting material prior to issuance of its
9 threshold determination and commencement of the public hearing process. The County's
10 planning staff noted the deficiencies and concluded that the applicant ". . . has not provided
11 the documentation/data to support the statements." (CR 2, p. 17). Similar deficiencies
12 were noted during the public hearing before the Chelan County Planning Commission. (PC
13 Transcript 10/30/06, pp. 3-5). According to the Petitioners, the applicant further failed to
14 provide information regarding criteria for designation of mineral resource lands as required
15 by WAC 365-190-070. Materials were submitted at time of public hearing, but neither the
16 public nor the staff had an opportunity to review such materials. The planning staff noted
17 ". . . [i]t's almost impossible to do (i.e., review) in the time frames between hearings."
18 (BOCC Transcript 11/14/06, p.7). The Petitioners argue that despite the lack of complete
19 application and materials, Chelan County proceeded with decision making in the absence of
20 adequate opportunity for staff and public comments.

21 The Petitioners contend the BOCC limited public comment to three minutes and
22 argue this limitation denied the public a reasonable opportunity to present its comments
23 and issues with respect to the application. The Petitioners claim no time limitation was
24 placed upon the applicant. The public hearing before the BOCC represented the first and
25 only opportunity for the public to comment upon substantial application materials that were
26 first presented in the prior proceeding before the Planning Commission. The Petitioners
argue that many issues involved expert testimony as well as substantive evidence on critical
components of the application. They further contend the hearing process deprived the

1 public of a reasonable opportunity to comment and fundamentally violated the GMA's public
2 participation requirements.

3 The Petitioners submitted evidence at the time of hearing before the BOCC, including
4 expert reports and videotape evidence of prior operations. The BOCC limited testimony
5 with respect to such materials and did not review or watch videotaped evidence. Rather,
6 the BOCC relied upon their own cursory observations and reached unsubstantiated
7 conclusions that they have not individually ". . . witnessed any of the impacts that the
8 people have brought forth." (Transcript 11/14/06 at 32-33). The Petitioners contend a
9 simple review of a videotape presented at the hearing would have disclosed the significant
10 problems associated with short term crushing and processing operations.

10 **Respondent and Intervenors:**

11 The Respondent/Intervenors point out there is no allegation here that public notice
12 was inadequate. They contend the record clearly demonstrates more than adequate public
13 notice of every step in this process was given.

14 As a threshold matter, the Petitioners cannot challenge the decision on grounds the
15 public participation process adopted by the County was defective. The Petitioners failed to
16 challenge the County's public participation provisions at the time of their adoption, and are
17 thus time barred. RCW 36.70A.290(2); *Kittitas County Conservation v. Kittitas County*,
18 EWGMHB No. 06-1-0011, Final Decision and Order at 13-14 (April 27, 2007). The only
19 issue that can now be reviewed is whether the County followed its public participation
20 program. According to the Intervenors, there is no allegation or evidence the County did
21 not comply with its public participation program.

22 The Intervenors contend the Petitioners' argument that the County failed to require a
23 complete application prior to the hearing is a repeat of the Petitioners' failed SEPA
24 arguments. Only a couple of minor points were clarified immediately prior to the hearing:
25 depth of overburden and confirmation of the quality of materials. The Intervenors argue
26 these issues had been previously addressed in the staff report and other reports, and the
Petitioners and the public had adequate notice of these issues. All studies, reports, and

1 other material issues had been thoroughly considered and subjected to challenge and
2 review through the prior Conditional Use Permit (CUP) process; and all relevant materials
3 were in the County files and available to the project opponents for many months. As with
4 the SEPA issues, the Petitioners assert another complete set of studies, reports, mitigation
5 agreements, agency comments and approvals, and CUP decisions should have been
6 submitted at some unspecified point in time. However, the Petitioners presented no
7 evidence any individual, expert, consultant or attorney was deprived of their ability to
8 review any relevant materials in advance of the BOCC hearing, or were prevented from
9 submitting opposing testimony.

10 The Intervenors argue that, like the Petitioners, the applicant (WRP) was also subject
11 to a time limitation on their testimony. The Petitioners show no authority to support their
12 arguments regarding time limitations. The Intervenors contend neither the GMA nor the
13 applicable WAC Regulations preclude either the Planning Commission or the BOCC from
14 controlling their own docket and procedures. The Petitioners claim there was insufficient
15 time to respond to new material allegedly submitted at the Planning Commission hearing,
16 but, according to the Intervenors, the claim that substantial new material was submitted is
17 false.

18 The Intervenors argue the Petitioners cite no authority for their claim the BOCC failed
19 to consider public comment in the decision-making process, and fail to explain the standard
20 by which this claim can be judged. The Petitioners factual arguments extrapolate from the
21 time limit imposed on testimony and an alleged failure to review some videotapes. These
22 claims are insufficient to meet the burden of showing the BOCC decision was clearly
23 erroneous based on the record as a whole.

24 **Board Analysis:**

25 The County adopted its Public Participation Plan and the time to challenge it has
26 passed. The question before the Board is whether the County followed its public
participation plan. *Citizens for good Governance, Futurewise, Intervenors, v. Walla Walla
County Respondent, Pennbrook Homes, Intervenors, City of Walla Walla Intervenors,*

1 *EWGMHB*, Case No. 05-1-0013. The Petitioners' arguments did not overcome the threshold
2 of deference the Board must give to the County. While the Board recognizes the County
3 may have committed minor procedural errors, which the Board does not find substantive,
4 overall the County complied with its own public participation plan and the goals of the GMA.

5 **Conclusion:**

6 The Petitioners have not overcome the presumption of validity of the County's
7 actions with respect to Issue No. 2.

8 **Issues Nos. 3 - 5:**

9 Did Chelan County fail to comply with the siting criteria for Commercial Mineral Lands
10 in WAC 365-190-070 and Chelan County's Comprehensive Plan in adoption of Resolution
11 No. 2006-153? (Issue No. 3)

12 Were the County's procedures used to designate mineral resource lands inconsistent
13 with the State's Growth Management Act? (Issue No. 4)

14 Is Chelan County Resolution No. 2006-153 inconsistent with purpose and locational
15 guidelines, goals, and policies established by Chelan County Comprehensive Plan? (Issue
16 No. 5)

17 **The Parties' Position:**

18 **Petitioners:**

19 The Petitioners contend Chelan County failed to follow the prescribed plan and
20 statutory procedures with respect to designation of mineral resource lands in the following
21 respects: (1) the individual and ad hoc processing of individual site applications violates the
22 GMA requirements for inventory and comprehensive planning with respect to resource
23 designations; and (2) the re-designation of property is inconsistent with siting and locational
24 guidelines established by WAC 365-190-070 and Chelan County's Comprehensive Plan.

25 The GMA and implementing regulations require the county to designate, identify,
26 classify and protect mineral resource lands. RCW 36.70A.050, -.060, and -.070. See also,
WAC 365-190-070. The Petitioners argue Chelan County has allowed for the ad hoc and
individual site application review process rather than conducting review in the context of

1 overall county-wide planning processes. According to the Petitioners, Chelan County has
2 "no systematic process to identify and establish new (or newly identified) mineral resource
3 lands." The application of resource guidelines set forth in WAC 365-190-070 is further
4 impaired and limited by not implementing a systematic review process.

5 WAC 365-190-070 sets forth specific guidelines and recognizes ". . . areas shall be
6 classified as mineral resource lands based on geologic, environmental, and economic
7 factors, existing land uses, and land ownership." The Petitioners contend that Wenatchee
8 Rock Products failed to provide required information in order to review classification
9 guidelines and Chelan County failed to fully and completely consider and apply such
10 guidelines as it related to existing land use and impacts upon developed residential areas.
11 Turtle Rock Estates is an established LAMIRD and represents pre-existing urban level
12 development. The area is in direct proximity of the proposed resource land usage and
13 includes a number of sensitive populations, including the elderly, children and individuals
14 with health considerations. The Petitioners argue evidentiary materials also recognized the
15 topography and location of the proposed operation is not conducive to effective
16 disbursement of air contaminants and is an area with inversion potentials. Chelan County
17 failed to specifically review, evaluate and determine compliance with guideline directives.

18 Finally, Chelan County's Comprehensive Plan recognizes not all sites containing
19 mineral resources are appropriate for long term commercial mining activities. Locational
20 guidelines prohibit the designation of mineral resource lands where: (1) they are in direct
21 proximity to established population areas; and (2) areas of more intense uses of lands. The
22 County's Comprehensive Plan specifically provides that mineral resource lands ". . .should
23 not be adjacent to incompatible urban or rural development." The Petitioners argue the
24 designation of the WRP's site is in direct conflict with the Comprehensive Plan directions
25 and guidelines.

26 **Respondent and Intervenors:**

The Respondent/Intervenors assert the County properly applied the siting criteria for
designation of mineral resource lands. The GMA requires each jurisdiction to designate

1 "Mineral resource lands that are not already characterized by urban growth and that have
2 long-term significance for the extraction of minerals." RCW 36.70A.170(1)(c). In addition,
3 jurisdictions are required to adopt regulations to ensure mineral resource lands are
4 conserved. RCW 36.70A.060(1). The GMA places a high-priority on the conservation and
5 protection of resource lands because such lands are non-renewable resources. *Spokane*
6 *Rock Products, Inc. v. Spokane County*, EWGMHB No. 02-1-0003, FDO at 5 (July 19, 2002).
7 The conservation and protection of known mineral resource lands is a primary objective of
8 the GMA. *Id.* The legislature directed the Department of Community Trade and Economic
9 Development (CTED) to adopt guidelines for classification of mineral resource lands. WAC
10 365-190-010. The Intervenors contend the BOCC applied the CTED criteria and the
11 County's planning policies, and determined the re-designation of the WRP site as mineral
12 resource lands was appropriate. That decision was not clearly erroneous in light of the
entire record before the Board.

13 According to the Intervenors, the County was not required to undertake an inventory
14 or consider alternative sites before re-designating the WRP site. The GMA does not require
15 the County to undertake such an analysis in deciding whether to re-designate a single
16 parcel as mineral resource lands. The Petitioners have not challenged the County's original
17 designation of mineral resource lands under RCW 36.70A.170(1)(c). The Intervenors
18 contend any challenge to the County's existing designations of mineral resource lands is
19 untimely and cannot be considered by the Board. RCW 36.70A.290(2). Furthermore, in
20 *Save Our Butte Save Our Basin Society v. Chelan County*, EWGMHB No. 94-1-0015s,
21 Compliance Hearing Order at 9 (January 30, 1995), the Board specifically held Chelan
22 County was in compliance with the requirements of the GMA to assure the conservation of
23 mineral resource lands. The Board has already held that the method for achieving
24 compliance with the GMA rests with the local government. *Save Our Butte*, at 5. The
25 choice of methods used "need not require the use of consultants and outside experts, the
26 local people and their government officials know their area." *Save Our Butte*, at 6. The full
inventory and comparative analysis approach advocated by the Petitioners would make the

1 designation of mineral resource lands a nearly impossible task. The Intervenor's argue that
2 the approach advocated by the Petitioners is inconsistent with other provisions of the GMA,
3 which recognizes the distinction between site specific actions and more general planning
4 documents. See RCW 36.70A.470(1).

5 *Spokane Rock Products, supra*, does not support the Petitioner's argument that the
6 County must consider all other sites in order to uniformly apply the siting criteria. The
7 Intervenor's argue, although it might be desirable for the County to engage in a broader
8 analysis of mineral resource sites throughout the County when it adopts or reviews its
9 Comprehensive Plan, there is no requirement the County conduct an inventory of its mineral
10 resource lands or do a "comparative analysis" of various potential sites in order to designate
11 a single site.

12 Unlike *Spokane Rock Products, supra*, the Petitioners have not produced any
13 evidence of non-uniform application of the siting criteria, and do not identify any other sites
14 that would demonstrate non-uniform application of the criteria. The burden of proof is on
15 the Petitioners who have failed to carry that burden.

16 According to the Intervenor's, the BOCC's application of the siting criteria was not
17 clearly erroneous. The inventory of resource lands enacted as part of the County's 2000
18 Comprehensive Plan was not an exhaustive list. The fact that the WRP site was not
19 previously designated as mineral resource lands is irrelevant to the question of whether the
20 site should be designated now.

21 Intervenor's further contend the WRP application provided detailed information on
22 both the County and CTED siting criteria, as well as compliance with other Comprehensive
23 Plan policies. The referenced documents included a complete range of studies and
24 supporting data.

25 Contrary to the Petitioner's arguments, the guidelines do not prohibit siting mineral
26 resources adjacent to incompatible rural residential development. This Board has held that
"physical proximity of resource lands to populated areas 'in and of itself, does not preclude
designation.'" *Spokane Rock Prods.*, FDO at 7 (quoting Ridge, at 5). The "GMA calls for the

1 protection of natural resources from urban development, not the other way around.”
2 *Spokane Rock Prods.*, FDO at 7. “RCW 36.70A.060 requires that resource lands be
3 protected or ‘buffered’ from the influence of adjacent property...” *Id.*

4 By requiring notice to owners within 500 feet of resource lands, the County’s
5 Comprehensive Plan recognizes such lands may be within 500 feet of residences. The
6 Petitioners’ residences are much further away from WRP operations than 500 feet, and are
7 separated from WRP by a major highway, an earth berm, and a change in elevation.

8 Mineral resource lands may be designated near residential areas as long as the effect
9 on incompatible uses can be mitigated. *Spokane Rock Prods.*, FDO at 7. The County’s
10 guidelines establish that mineral resource lands should not be adjacent to *incompatible*
11 urban or rural development. Adjacent residential uses are not incompatible if the impacts
12 can be mitigated. The Intervenors contend the Petitioners have not shown the impacts of
13 mineral extraction cannot be mitigated. The BOCC specifically found existing operations on
14 the WRP site have been successfully mitigated. That finding is supported by the record and
15 is not clearly erroneous.

16 The Intervenors further argue the Petitioners’ factual arguments regarding the
17 quality of materials on the WRP site and the availability of such materials at other locations
18 are not supported by the record. The Petitioners have not carried their burden of proof to
19 establish the BOCC’s application of the siting criteria to the WRP site was clearly erroneous
20 in light of the entire record.

21 **Board Analysis:**

22 Under the GMA, counties and cities are directed to find, identify and conserve
23 agricultural, forest, and mineral resource lands designated under RCW 36.70A.040, .060
24 and .170. RCW 36.70A.170 requires all counties and cities to designate and conserve the
25 natural resources by designating all forest lands, mineral resource lands, and agricultural
26 lands that have long-term commercial significance. The legislature directed counties to do
this as quickly as possible because many new rural developments were starting to take land

1 away from farm, timber, and mining ventures. It was important for the legislature and the
2 state of Washington to conserve these resources for future generations.

3 The legislature not only made it a primary objective to conserve and protect resource
4 lands, they also directed the CTED to adopt guidelines to help counties carry out this
5 directive. The guidelines are very clear in WAC 365-190-070, which states: "Counties and
6 cities shall identify and classify aggregate and mineral resource lands from which the
7 extraction of minerals occurs or can be anticipated. Other proposed land uses within these
8 areas may require special attention to ensure future supply of aggregate and mineral
9 resource material, while maintaining a balance of land uses."

10 The County has a current inventory of resource lands. The County identified the
11 mineral resource lands when it first began the process of adopting its Comprehensive Plan.
12 But the lands in that early inventory were mostly operating mines, operating farms, and
13 operating forest land. Because mineral resource lands are more difficult to identify (than
14 timber and farming operations), and it would not be prudent or possible for the County to
15 drill holes to determine what other lands should be designated for mineral (aggregate)
16 operations, the County waited for those lands to be developed as needed and as people
17 were willing to change the designation of their property. This process is very difficult
18 because newly identified mineral resource lands are often near areas where people are
19 building their homes.

20 In some cases, mineral extraction operations might not be as compatible with
21 existing uses. RCW36.70A.060(b) "Counties and cities shall require that all plats, short
22 plats, development permits, and building permits issued for development activities on, or
23 within 500 feet of, lands designated as ... mineral resource lands, contain a notice that the
24 subject property is within or near designated ... mineral resource lands on which a variety of
25 commercial activities may occur that are not compatible with residential development for
26 certain periods of limited duration. The notice for mineral resource lands shall also inform
that an application might be made for mining-related activities, including mining, extraction,
washing, crushing, stockpiling, blasting, transporting, and recycling of minerals."

1 The Chelan County's process anticipates mineral resources may be designated in
2 areas zoned RR-5, RR-10 and RR-20. Those are the zones in which mineral extraction is
3 allowed. The County anticipates land owners in these zones may apply for designations of
4 mineral resource lands. The County is required to conserve resources such as mineral land,
5 agricultural land, and timber land, and is doing so in this particular case.

6 The County had sufficient information to make an informed decision in this case
7 based on the record and history of past operations that had taken place at the WRP site.
8 There was written information in the record indicating the applicant has had problems in
9 the past which were mitigated at that time, but overall, WRP has been performing as they
10 said they would do so under the CUP. The County's actions complied with the criteria in
11 WAC 365-190-070 and the County's own Comprehensive Plan. The Petitioners have not
12 shown the County's application of the designation criteria was clearly erroneous.

Conclusion:

13 The Petitioners have not overcome the presumption of validity of the County's
14 actions and have not carried their burden of proof on these issues.

Issue No. 6:

15 Was Chelan County barred from processing the comprehensive plan amendment
16 application by the legal doctrine of *res judicata*?

The Parties' Position:

Petitioners:

19 The Petitioners contend that in 2004, Wenatchee Rock Products (WRP) submitted a
20 contemporaneous application for a Comprehensive Plan amendment and rezone of 55.55
21 acres of a 98 acre parcel of land. (CPA 2004-03 and ZC 2004-03). The application was
22 literally identical to the present application. After considering all evidence, testimony and
23 argument, the BOCC denied both the Comprehensive Plan re-designation and the rezone of
24 the property. (CR 17, Ex. A). The denial was upheld on appeal to the Eastern Washington
25 Growth Management Hearings Board. *Chipman v. Chelan County*, EWGMHB Case No. 05-1-
26 0002, Order of Dismissal (January 31, 2005) (CR 17, Ex. A). The subject matter, properties

1 and parties were identical to the present application. No material changes were made to
2 the application.

3 The Boards have recognized the application of the doctrine of *res judicata* and
4 adopted the four-part test articulated by the courts of this state. *Loon Lake Property*
5 *Owners v. Stevens County*, EWGMHB Case No. 01-1-0002c*9, Amended Final Decision and
6 Order (October 21, 2001); and *Skagit County Growth-Watch*, WWGMHB Case No. 04-2-
7 0004* 3-4, Order on Motion to Dismiss (June 2, 2004). The court requires the identity of
8 four items: (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the
9 quality of the persons for or against whom the claim is made. *Hilltop Terrace Homeowners*
10 *Association v. Island County*, 126 Wn.2d 22, 31, 891 P.2d 29 (1995). Each of the four
11 elements is present in this proceeding. The Petitioners argue that the application is barred
12 by the doctrine of *res judicata*.

12 **Respondent and Intervenors:**

13 The Respondent/Intervenors agree the doctrine of *res judicata* is applicable in GMA
14 proceedings. However, although the doctrine of *res judicata* is generally applicable in GMA
15 cases, *res judicata* does preclude the BOCC Decision in this case for two reasons. First, the
16 requirement of a "substantial change" set forth in *Hilltop Terrace Homeowners Ass'n v.*
17 *Island County*, 126 Wn.2d 22, 891 P.2d 29 (1995), does not apply to GMA actions. Second,
18 even if a substantial change were required, the Petitioners have not shown the absence of
19 such a change.

20 According to the Intervenors, *Hilltop Terrace* and the other cases cited by the
21 Petitioners involve judicial review of land use permit decisions. No case holds that the
22 *Hilltop Terrace* rule applies to the unique framework of the GMA. The *Hilltop Terrace* court
23 adopted the standard four-part test for *res judicata*: "identity of (1) subject matter; (2)
24 cause of action; (3) persons and parties; and (4) the quality of the persons for or against
25 whom the claim is made." In the context of successive applications, the first element —
26 identity of subject matter — is critical. *Hilltop Terrace* held that a successive application for
a land use permit is not the same subject matter for purposes of *res judicata* if there is a

1 "substantial change" in either (i) circumstances or conditions relevant to the application or
2 (ii) the application itself.

3 However, the *Hilltop Terrace* court also held the requirement of substantial change
4 may be modified by legislative enactment, and that "local legislative bodies are free to
5 calibrate the flexibility of their land use decision-making by expressly specifying the *res*
6 *judicata* effect of particular proceedings..." *Hilltop Terrace*, 126 Wn.2d at 32-33.

7 The GMA replaces the common law rule set forth in *Hilltop Terrace* with the statutory
8 requirement of docketing. See RCW 36.70A.130; -.470. Pursuant to these requirements,
9 the County has adopted a docketing procedure under which applications for map
10 amendments may be considered once each year. CCC 14.14.020; -.050(c). Nothing in the
11 Chelan County Code precludes a party from applying for the same amendment more than
12 once. These requirements represent a legislative replacement of the common law rule in
13 *Hilltop Terrace* as applied to matters that are subject to the GMA. There is no claim here
14 the County's amendment or docketing procedures violate the Act.

15 The GMA docketing scheme, which replaces common law *res judicata* rules, is
16 predicated on the fundamental notion comprehensive plans are not static. The GMA
17 recognizes the need to continually review and revise comprehensive plans and development
18 regulations to meet the needs of society, which outweighs the need for finality.

19 Furthermore, the Petitioners' application of *res judicata* conflicts with the primary
20 objective of the GMA to protect mineral resource lands. The broader GMA policy of
21 identifying and protecting such lands supersedes the desires for finality by neighboring
22 property owners. In sum, the common law requirement of "substantial change" for
23 successive permit applications has no role in the GMA decision-making.

24 In the alternative, if a substantial change is necessary, the Petitioners have the
25 burden, under RCW 36.70A.280(2), to establish the absence of a substantial change. The
26 Petitioners cannot carry their burden of proof. The record supports a determination that
the circumstances surrounding the WRP application had substantially changed in February,
2006, when WRP applied for the re-designation. In 2004, there was no demonstrated track

1 record of successful and mitigated operations on the Wenatchee Rock Products site. At that
2 time, a CUP had not been granted under the RR-5 zone.

3 The BOCC specifically found that the mitigation issues had been addressed by the
4 time WRP submitted its 2006 application. The BOCC correctly and specifically found
5 changed circumstances that justified granting the second WRP application. The Petitioners
6 have not shown the decision was clearly erroneous.

7 **Board Analysis:**

8 As stated in Issue No. 1, the Board agrees with the parties the doctrine of *res*
9 *judicata* may be applied in proceedings before the Growth Management Hearings Boards.
10 The Board also agrees with the Respondents and Intervenors the GMA requirement of
11 docketing, which establishes regular times for review of amendments to comprehensive
12 plans and development regulations, obviates the requirement of a "substantial change"
13 under the *Hilltop Terrace* case. By establishing regular times for GMA review, the County
14 has moved itself away from what the *Hilltop Terrace* case required. In GMA cases, annual
15 review provides for and allows the applicant in this case to continue to make this particular
16 application. There is no prohibition for the reapplication if applications are received as they
17 are in this County on an annual or five year basis. Changes might occur according to the
18 needs of the County in accepting certain applications, or as in this case, some temporary
19 aggregate mining may have occurred that demonstrated such a permanent change might
20 be more appropriate.

21 Alternatively, if the Board concluded a substantial change was required in order to
22 allow the County's consideration of this application, the Board finds there has been a
23 substantial change. Between the WRP applications there have been periods of time where
24 the land was used as temporary gravel and aggregate mining. During that period of time,
25 the County had the opportunity to examine whether or not there were problems, what the
26 problems were, and how they could be addressed in mitigation.

1 **Conclusion:**

2 The County's approval of the re-designation of the WRP site is not barred by the
3 doctrine of *res judicata*.

4 **Issue No. 7:**

5 Does Resolution No. 2006-153 substantially interfere with the fulfillment of the goals
6 and policies of the Growth Management Act and should be declared invalid?

7 **The Parties' Position:**

8 **Petitioners:**

9 The Petitioners contend Chelan County Resolution No. 2006-153 substantially
10 interferes with the fulfillment of the goals and policies of the Growth Management Act and
11 should be declared invalid. RCW 36.70A.302 authorizes the Board to invalidate legislative
12 actions under three circumstances. A potential would exist for vesting of the application and
13 result in land development in a manner consistent with the directives of the GMA. *Orton*
14 *Farms, LLC v. Pierce County*, CPSGMHB No. 04-3-0007c, Final Decision and Order (August
15 2, 2004). Invalidation is proper in this proceeding where there has been a failure to comply
16 with public participation, environmental review and mineral resource siting criteria.

17 **Respondent and Intervenors:**

18 The County is not out of compliance with the GMA, so there is no basis for a finding
19 of invalidity.

20 **Conclusion:**

21 The Board has not found the County out of compliance. There is no basis for a
22 finding of invalidity.

23 **V. FINDINGS OF FACT**

- 24 1. Chelan County is a county located East of the crest of the Cascade
25 Mountains and is required to plan pursuant to RCW 36.70A.040.
- 26 2. The Petitioners are citizens of Chelan County that participated in the
adoption of Resolution 2006-153, in writing and through testimony.

- 1 3. The BOCC adopted Resolution 2006-153 dated November 21, 2006,
2 approving an amendment to the Chelan County Comprehensive Plan to
3 re-designate approximately 55 acres of land in unincorporated Chelan
4 County from RR-5 to MC. Under the RR-5 designation, "short-term"
5 mineral extraction is a permitted use pursuant to a conditional use
6 permit (CUP). CCC 11.12.040. Under the MC designation, both "short-
7 term" mineral extraction and "long-term" mineral extraction are
8 permitted uses pursuant to a CUP. CCC 11.34.040.
- 9 4. On February 28, 2006, WRP submitted the current application for a
10 Comprehensive Plan amendment and rezone to MC. The application
11 included the application form, SEPA checklist and other required
12 information. The SEPA checklist specifically identified the County's
13 previous SEPA determinations, SEPA checklists, and mitigation
14 agreements for the 2003 and 2004 CUP applications, as well as the
15 mitigation requirements and conditions of approval for the 2004 CUP.
16 The SEPA checklist also identified more than 50 existing studies,
17 determinations and reports relating to the applicant's property that
18 were already in the County's files and available to the public.
- 19 5. On May 15, 2006, the County issued a DNS.
- 20 6. The Chelan County Planning Commission held a public hearing on the
21 application on October 30, 2006. After hearing comments and
22 testimony from the County, WRP, the Petitioners and other project
23 opponents, the Planning Commission voted unanimously to recommend
24 approval of the application.
- 25 7. The Planning Commission does not issue SEPA determinations, or hear
26 administrative appeals from such determinations. Chelan County does
 not provide an administrative appeal of its SEPA threshold
 determinations. CC 14.11.030(d).
8. After a public hearing on November 14, 2006, the BOCC approved the
 re-designation and rezone to MC. The BOCC issued its written decision
 in Resolution 2006-153 dated November 21, 2006, which includes the
 BOCC's Findings of Fact and Conclusions of Law.
9. The Petitioners challenged Resolution 2006-153 under the Land Use
 Petition Act, RCW Chapter 36.70C ("LUPA") in the Douglas County
 Superior Court.

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10. The Petitioners also filed a Petition for Review to this Board on or about January 12, 2007. Both the LUPA action and the Petition alleged the County violated SEPA. The Petitioners' opening brief in the LUPA action argued, inter alia, that: (i) the County failed to review, adopt or incorporate environmental information from prior applications in its SEPA determination, (ii) the County improperly deferred environmental review to the application stage, and (iii) the County failed to include an analysis of alternative sites in its SEPA review.
11. On April 16, 2007, the Court entered a stipulated order in which the parties agreed the SEPA issues would be heard by the superior court in the LUPA action before and separately from the other issues raised in the Petition.
12. The Petitioners filed their Hearing on the Merits Brief in this case on May 11, 2007. They raised the exact same SEPA issues that were raised in the LUPA action.
13. At a hearing on May 15, 2007, the superior court heard arguments on the SEPA issues, and upheld the County's DNS. The Court ruled that the County's SEPA threshold determination was not clearly erroneous, and any procedural errors in the issuance of the DNS were harmless.

VI. CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties to this action.
2. This Board has jurisdiction over the subject matter of this action.
3. The Petitioners have standing to raise the issues listed in the Prehearing Order.
4. The Petition for Review in this case was timely filed.
5. The Petitioners' SEPA arguments are barred by *res judicata*.
6. The County's approval of the re-designation of the WRP site is not barred by the doctrine of *res judicata*.

1 WAC 242-02-330. The filing of a petition for reconsideration is not a
2 prerequisite for filing a petition for judicial review.

3 **Judicial Review:**

4 Any party aggrieved by a final decision of the Board may appeal the decision to
5 superior court as provided by RCW 36.70A.300(5). Proceedings for judicial
6 review may be instituted by filing a petition in superior court according to the
7 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil.

8 **Enforcement:**

9 The petition for judicial review of this Order shall be filed with the appropriate
10 court and served on the Board, the Office of the Attorney General, and all parties
11 within thirty days after service of the final order, as provided in RCW 34.05.542.

12 Service on the Board may be accomplished in person or by mail. Service on the
13 Board means actual receipt of the document at the Board office within thirty
14 days after service of the final order.

15 **Service:**

16 This Order was served on you the day it was deposited in the United States mail.

17 RCW 34.05.010(19)

18 SO ORDERED this 17th day of July 2007.

19 EASTERN WASHINGTON GROWTH MANAGEMENT
20 HEARINGS BOARD

21 _____
22 Joyce Mulliken, Board Member

23 _____
24 John Roskelley, Board Member

25 _____
26 Dennis Dellwo, Board Member