State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

JACK and DELAPHINE FEIL, husband and wife; JOHN TONTZ and WANDA TONTZ, husband and wife; and THE RIGHT TO FARM ASSOCIATION OF BAKER FLATS, Petitioners, v. DOUGLAS COUNTY; DOUGLAS COUNTY BOARD OF COUNTY COMMISSIONERS; WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, (WSDOT); WASHINGTON STATE PARKS AND RECREATION COMMISSION; and PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, (PUD), Respondents.	Case No. 08-1-0011 ORDER ON RESPONDENT'S MOTION TO DISMISS; ORDER ON PETITIONERS' MOTION TO SUPPLEMENT THE RECORD AND MOTION TO PRODUCE THE RECORD

I. PROCEDURAL HISTORY

On April 14, 2008, JACK and DELAPHINE FEIL et al., by and through their representative, Jim Klauser, filed a Petition for Review (PFR). With this PFR, Petitioners challenge Douglas County's adoption of Resolution No. TLS 08-09B.

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15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

On April 18, 2008, the Board received Respondent's (County) Motion to Dismiss Petition for Lack of Subject Matter Jurisdiction.

On May 1, 2008, the Board received Respondent's (State's) Washington State Parks and Recreation Commission's (WSP&R) and Washington State Department of Transportation's (WSDOT) Joint Response to Douglas County's Motion to Dismiss.

On May 5, 2008, the Board received Petitioners' Response/Objection to Douglas County's Dismissal Motion; Motion to Supplement the Record; and Declaration of James Klauser in Support of Petitioners' Response/Objection to Douglas County's Dismissal Motion; and Motion to Supplement the Record; Petitioners' Objection and Motion to Strike the "Response" of WSP&R and WSDOT. The Board also received Douglas County's Respondents Memorandum.

On May 6, 2008, the Board received Respondents WSP&R and WSDOT's Joint Response to Petitioner's Motion to Strike.

On May 7, 2008, the Board received Respondent's Index of Record.

On May 8, 2008, the Board received Petitioners' Objection to, Motion to Strike, and Response to WSDOT & WSP&R "Response" to Petitioners' Motion to Strike and Petitioners' Objections to and Motion to Strike the Douglas County May 1, 2008, "Respondent's Memorandum".

On May 13, 2008, the Board held the telephonic Prehearing conference. Present were John Roskelley, Presiding Officer, and Board Members, Dennis Dellwo and Joyce Mulliken. Present for the Petitioners were Robert Rowley and James Klauser. Present for the Respondents were Steve Clem, Douglas County, Steve Klasinski, WSDOT, Jim Swartz, WSP&R, and Matt Kernutt, WSP&R. During the Prehearing conference the Board heard arguments from the parties concerning the Respondents' Motion to Dismiss and Petitioners' Objections and Motion to Strike. The Board provided a briefing schedule for responses to the Respondent's Motion to Dismiss in the prehearing order.

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Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

On May 27, 2008, the Board received Petitioners' Supplemental Response to Douglas County/State Dismissal Motion; Motion to Supplement the Record; and Motion to Produce the Record.

On May 29, 2008, the Board received Respondent's Reply Memorandum on Motion to Dismiss and Controverting Petitioners' Motion to Produce Record and WSP&R and WSDOT's Reply Regarding Subject Matter Jurisdiction.

On June 9, 2008, the Board received Petitioners' Objections to Reply Briefs and Motion to Supplement the Record.

II. FACTS

On March 27, 2006, the Washington State Parks and Recreation Commission (WSP&R) filed a combined Land Development Permit Application for a recreational overlay district and site plan development to construct a public multi-modal trail facility that will be located on a Washington State Department of Transportation (WSDOT) right-of-way and lands owned by the Chelan County PUD. This application was made after the Douglas County Superior Court ordered WSP&R to apply for and obtain land use permits as may be required by the Douglas County Code.

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 expressly authorize or only conditionally allows such activity. No changes were made to the Douglas County Comprehensive Plan or its development regulations.

On November 3, 2006, Douglas County Hearing Examiner, Andrew L. Kottkamp, issued a final decision on the combined application and approved Permit Nos. RO-06-01 and SPD 06-02. The Douglas County Code authorizes the Hearing Examiner to do so. (Chapter 2.13.070).

On November 20, 2006, the Petitioners filed a Land Use Petition Act (LUPA), RCW 36.70C, petition in Douglas County Superior Court appealing the decision of the Hearing Examiner and requesting a Declaratory Judgment that the Hearing Examiner was without

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Yakima, WA 98902
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Fax: 509-574-6964

jurisdiction to approve a recreational overlay.[1] Seven days later, the Petitioners filed a Petition for Review (PFR) with the Eastern Washington Growth Management Hearings Board (Board), which the Board dismissed on February 16, 2007, holding that the recreational overlay was a site specific project permit application and the Board did not have jurisdiction over the Hearing Examiner's decision.[2] The Board's decision was affirmed by the Douglas County Superior Court on July 31, 2007.[3]

Also on July 31, 2007, the Douglas County Superior Court entered an order in the LUPA case holding that the recreational overlay granted for the Rocky Reach Trail constituted a rezone and that the Hearing Examiner did not have the authority to grant a rezone.

On March 25, 2008, in response to the Court's decision, the Douglas County Board of County Commissioners adopted Resolution No. TLS 08-09B and approved the application of WSP&R and affirmed the Hearing Examiner's decision with two additional Conditions of Approval.

III. DISCUSSION

Preliminary Matters:

At the Pre-hearing conference on May 13, 2008, the following objections and motions were discussed by the parties and Board, and action was taken during the Pre-hearing conference or will be addressed in this Order:

(1) The Petitioners' May 5, 2008, Response/Objection to Douglas County's Dismissal Motion was discussed and noted. The Petitioners' Motion to Supplement the Record was GRANTED and attachments reviewed by the Board pursuant to WAC 242-02-650.

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[1] *Feil, et al., v. Douglas County, et al.,* Douglas Co. Cause No. 06-2-00410-5, July 31, 2007.

[2] Feil, et al., v. Douglas County, et al., EWGMHB Case No. 06-1-0012, Order on Motion to Dismiss (Feb. 16, 2007).

[3] *Feil, et al. v. EWGMHB, et al*., Cause No. 07-2-00100-7.

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(2) The Petitioners' May 8, 2008, Objections to (and Motion to Strike) the Douglas County May 1, 2008 "Respondent's Memorandum" were noted, and the Petitioners' Motion to Strike portion DENIED pursuant to WAC 242-02-030(3) and WAC 242-02-522.

(3) Petitioners' May 8, 2008, Objection to, Motion to Strike, and Response to Washington Department of Transportation and State Parks and Recreation Commission "Response" to Petitioners' Motion to Strike was noted, and Petitioners' Motion to Strike portion DENIED pursuant to WAC 242-02-030(3) and WAC 242-02-522.

Motions and Supplement Briefs Filed Subsequent to Pre-hearing Order:

On June 9, 2008, the Petitioners filed their Objection to "Reply" Briefs. With this objection, the Petitioners move to strike the County and the State's reply briefs as being unresponsive to arguments asserted by the Petitioners' in their Supplemental Response brief. The Board notes this objection, but finds it is the duty and responsibility of the Board to weigh the arguments presented by the parties and determine whether or not the party carrying the burden of proof has adequately presented its case. The Board gives every brief and every argument the weight it is entitled to. In that regard, the Petitioners' objection is noted.

Included with the Objection to Reply Briefs was a Motion to Supplement the Record, Declaration of James Klauser, and attachments, with the stated purpose being to refute statements made by the County in its reply brief. The Board finds that this declaration and its attachments are not necessary or of substantial assistance to the Board in making its determination. Therefore, pursuant to WAC 242-02-540, the Petitioners' June 9, 2008 Motion to Supplement is DENIED.

Current Matters:

Motion to Supplement the Record (May 29, 2008):

The Respondents[4] did not reply to this motion. The Petitioners' [5]move to supplement the Record with four documents: (1) Attachment A is a copy of an e-mail exchange

[4] Douglas County, WSDOT, WSP&R Commission, and Public Utility District No. 1 of Chelan County.

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between the Board and the Petitioners; (2) Attachment B is a copy of the Index to the Record for Case No. 06-1-0012; (3) Attachment C is the Greater East Wenatchee Zoning Map; and (4) Attachment D is excerpts from the Greater East Wenatchee Comprehensive Plan. The Board, pursuant to WAC 242-02-660, shall take official notice of Attachments C and D, as these are legislative enactments of the County. As for Attachments A and B, the Board, pursuant to WAC 242-02-540, does not find these to be necessary or of substantial assistance to the Board in reaching its decision. Therefore, the Board GRANTS, in part, and DENIES, in part, the Petitioners' Motion to Supplement. Attachment C and D shall become part of the Record of this proceeding.

Motion to Produce a Legible/Audible Record (May 29, 2008):

Position of the Parties:

Petitioners:

According to the Petitioners, RCW 36.70A.290(4) requires the Board to base its decision on the record by the County. The Petitioners claim the Record provided to the Board has not been provided to the Petitioners and requests that no further action should be taken in this case until a legible/audible copy has been provided. The Petitioners move the Board to: (1) order the County to provide the Petitioners with a legible/audible copy of the CD/DVD provided to the Board and other parties; or (2) for the Board to copy its own legible/audible copy and provide it to the Petitioners.[6]

Respondents Douglas County:

The County contends it has no affirmative obligation to provide a copy of the entire record to the Petitioners. The County has a duty to make the record available to the Petitioners for inspection. The County notes, if Petitioners request copies of the record and/or portions of the record and pay for such copies, the County will provide these

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[5] Jack and Delaphine Feil, John and WandaTontz, and The Right To Farm Association of Baker Flats.

[6] Petitioners' Supplemental Response to Douglas County/State Dismissal Motion at 3.

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documents. The County served the Index of Record on the Petitioners and mailed copies of the Record and audio recordings to the Board and counsel of record in digital format (DVD) as a courtesy. The County further contends it has no affirmative obligation to provide a copy of the entire Record to the Petitioners, but rather it has a duty to make the Record available to the Petitioners for inspection and will provide copies at the Petitioners expense. The County claims it has not received any communication from the Petitioners regarding any problems with the courtesy copies and learned of the problem through an e-mail authored by the Presiding Officer.

Board Discussion:

WAC 242-02-520 requires the County to file with the Board and serve a copy on the parties an *index of all material* used in taking the action which is the subject of the petition for review within thirty days of service of the petition. The written or tape-recorded record of the legislative proceedings where action was taken shall also be *available to the parties for inspection*.

The County sent legible/audible recordings in CD/DVD format to the Board and a courtesy copy to the parties of record. The County has made the record available to the parties for inspection as required by WAC 242-02-520. Therefore, the Petitioners' motion is DENIED.

Motion to Dismiss:

Position of the Parties:

Respondent Douglas County:

With its Motion to Dismiss, the County claims: (1) the Board does not have subject matter jurisdiction because the decision challenged by the Petitioners constitutes a site-specific development permit or, in the alternative, a site-specific rezone, and is not within the jurisdiction conferred by RCW 36.70A.280(1); and (2) the Board lacks subject matter jurisdiction pursuant to RCW 36.70A.280(1) under principles of *res judicata* and collateral

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estoppel based upon the Board's prior decision in *Feil, et al. v. Douglas County, et al.*[7] The County listed numerous facts supporting its argument, including Douglas County Resolution No. TLS-08-09B; the Superior Court LUPA decision in *Feil, et al. v. Douglas County*;[8] and the Board's decision in *Feil, et al. v. Douglas County, et al.*, Case No. 06-1-00012.[9]

The County's request for dismissal of the Petition for lack of subject matter jurisdiction is pursuant to the following authorities: (1) RCW 36.70A.280(1), RCW 36.70A.030(7), and RCW 36.70B.020(4); (2) WAC 242-02-020(2); (3) *Wenatchee Sportsmen Assoc. v. Chelan County*[10]; (4) *Feil, et al. v. Douglas County, et al.*[11]; (5) *Chipman v. Chelan County*[12]; and (6) *Wilma, et al. v. City of Colville*[13].

Washington State Parks and Recreation Commission and Washington State Department of Transportation's (State) Joint Response:

The State, which includes both the WSP&R and WSDOT, concurs with and joins in the County's motion to dismiss and contends a LUPA action in Superior Court is the proper forum to challenge the issuance of this site-specific permit. According to the State, the Board granted the State of Washington's motion to dismiss a similar challenge in *Feil, et al., v. Douglas County, et al.*[14], holding that the Recreational Overlay (R/O) permit at issue was a project permit application as defined in RCW 36.70B.020. In a subsequent action by the Douglas County Superior Court, the Court held that the R/O permit constituted a rezone which required legislative approval and only the Board of County Commissioners (BOCC)

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[7] Feil, et al., v. Douglas County, et al., EWGMHB Case No. 06-1-0012, Order on Motion to Dismiss (Feb. 16, 2007).

[8] *Feil, et al., v. Douglas County, et al.*, Douglas Co. Cause No. 06-2-00410-5, July 31, 2007.

[9] *Feil, et al.*, footnote 2.

[10] *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000).

[11] *Feil, et al.*, footnote 2.

[12] *Chipman v. Chelan County*, EWGMHB Case No. 05-1-0002, Order of Dismissal (Jan. 31, 2006).

[13] Wilma v. City of Colville, EWGMHB Case No. 02-1-0007, FDO on Amended Petition for Review (Dec. 5, 2002).

[14] *Feil,et al*., footnote 2.

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Yakima, WA 98902
Phone: 509-574-6960
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had the power to approve such an application. The BOCC unanimously approved the project permit.

The State contends an administrative agency, such as the Board, has only that authority expressly granted or necessarily implied by RCW 36.70A.280(1). As such, the Board does not have the jurisdiction to decide challenges to site-specific land use decisions because site-specific land use decisions do not qualify as CP's or development regulations. Citing *Woods*[15], the State argues such a challenge must be brought under LUPA in Superior Court.

The State argues the R/O permit issued by the County is a site-specific land use decision and claims the Superior Court has already ruled this application is a site-specific proposal.[16] According to the State, the number of acres involved, which total 29 acres, is not relevant as argued by the Petitioners because the courts and the Board have found much larger projects to be site-specific land use decisions.[17]

The State claims the Petitioners cannot create subject matter jurisdiction by alleging violations of the GMA by implication. The County's resolution, according to the State, is not an amendment adopted under the GMA process. The State contends RCW 36.70A.280(1) does not convey jurisdiction over implied amendments, but over adopted amendments to the CP or development regulations.

The State also claims the Petitioners failed to challenge the CP and development regulations in a timely manner, which is 60 days after publication of the ordinance that adopts the CP or development regulations or amendments thereto. The time has passed to appeal the CP or development regulations.

Petitioners:

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[15] *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007) at 612 (citing *Wenatchee Sportsmen*).

[16] *Feil, et al.*, footnote 1.

[17] WSP&R, et al. Joint Response to Douglas County's Motion to Dismiss at 4.

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As requested by the Board's Pre-hearing Order, the Petitioners filed a timely response brief to the Respondents Motion to Dismiss. In their May 27, Response, the Petitioners: (1) rely upon their previously submitted April 30, 2008, Response and the declaration of James J. Klauser, together with their May 6, 2008, objections to the Douglas County brief and the State brief; (2) ask that the documents they rely upon be admitted as "supplements to the record" in accordance with RCW 36.70A.290(4) in a Motion to Supplement the Record; (3) move the Board for alternative relief relative to the "record" in a Motion to Produce a Legible/Audible Record; and (4) respond to the County's argument for dismissal.[18]

With their response, the Petitioners argue the following: (1) the burden of proof is on the moving party, Douglas County[19]; (2) the doctrines of collateral estoppel and *res judicata* do not apply[20]; and (3) *Wenatchee Sportsmen Association v. Chelan County*[21] and *Woods v. Kittitas County*[22] do not support the motions to dismiss.

Under sub-section (1) above, the Petitioners claim the petition facially complies with the requirements of RCW 36.70A.280 and RCW 36.70A.290. According to the Petitioners, the moving parties (County and State) have the burden to establish lack of jurisdiction and contend the County and State have failed to do so.[23]

Under sub-section (2) above, the Petitioners contend the County fails to provide briefing to support collateral estoppel or *res judicata*. According to the Petitioners, the County fails to provide legal authority to support its claim an earlier ruling of the Board, where the Board found it lacked jurisdiction to review a hearing examiner decision,

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[18] Petitioners' Supplemental at 2-8.

[19] Petitioners' Supplemental at 3.

[20] Ibid at 3-4.

[21] *Wenatchee Sportsmen Association*, footnote 10.

[22] *Woods v Kittitas County*, 162 Wn.2d 597, 610, 174 P.3d 25 (2007).

[23] Petitioners' Supplemental Response to Douglas County/State Dismissal Motion at 3.

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precludes the Board from reviewing the most recent decision by the Douglas County BOCC. The Petitioners claim the County cannot now provide the legal authority in a reply brief that it was required to provide in its opening brief. The Petitioners argue the County might have appealed the adverse decision from the Superior Court in the Court's July 31, 2007 decision in *Feil, et al., v. Douglas County, et al.*,[24] but chose to comply with the Court's decision.[25]

Under sub-section (3) above, the Petitioners argue the Court was applying a legislatively created jurisdictional rule in the *Wenatchee Sportsmen* and the *Woods* cases, not as the County would wish the Board to believe that the Court was enunciating a judicial common law principal. The Petitioners claim, in both cases cited above, the courts found express authorization in the CP for the site-specific rezones involved in those cases, but "[S]uch is not so in this case."[26]

The Petitioners contend the County's action constitutes an amendment by the County to its development regulations that are required to enhance, preserve and protect the agricultural lands of long-term commercial significance. The Petitioners cite *King County v. Central Puget Sound Growth Management Hearings Board*[27] which the Supreme Court made it clear all other uses in protected agricultural lands "must take a back seat" and that "recreational projects, whether on public land or not, cannot be authorized."[28]

The Petitioners claim the CP must authorize a site-specific rezone to a recreational overlay zone, if this action is to be treated as a development permit rather than an amendment to development regulations. The Petitioners argue that nowhere in the County's CP is there a mention of a Recreational Overlay Zone and nowhere is there an expression of any authority to rezone.[29]

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[24] *Feil, et al., v. Douglas County, et al.*, Douglas Co. Cause No. 06-2-00410-5, July 31, 2007.

[25] Petitioners' Supplemental at 4.

[26] Ibid at 6.

[27] *King Co. v. CPSGMHB*, 142 Wn.2d 543, 560, 14 P.3d 133, 142 (2000).

[28] Petitioners' Supplemental at 7.

[29] Ibid.

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The Petitioners do agree that the Greater East Wenatchee Area CP identifies a project, but is silent about zoning or rezoning. According to the Petitioners, the CP does not authorize any site-specific rezones as required for a decision to qualify as a development permit.

Respondent Douglas County's Reply:

Douglas County claims: (1) it has no affirmative obligation to provide a copy of the record to the Petitioners, but it did mail courtesy copies of the Index of Record and audio recordings to the parties[30] (decided above); (2) it filed and served its Motion to Dismiss in compliance with WAC 242-02-570(2)[31]; (3) the action taken by Douglas County is a "project permit application" as referenced in RCW 36.70A.030(7) and defined at RCW 36.70B.020(4) that *Wenatchee Sportsmen* and *Woods* support the County's and States' position when important language is not omitted[32]; and (4) these same issues were considered by this Board in *Feil et al., v. Douglas County*.[33]

Washington State Parks and Recreation Commission and Washington State Department of Transportation's Reply:

The State claims the project meets the definition of a site-specific project under RCW 36.70B.020 and both *Woods v. Kittitas County*[34] and *Wenatchee Sportsmen Assoc*.[35] held the rezones involved in those cases need only be consistent with the CP to meet the definition of a project permit. Citing *Woods*, the State argues once a CP and zoning regulations are approved, subsequent site-specific land use decisions by a local jurisdiction must be generally consistent with the CP.

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[30] Respondent's Reply Memorandum on Motion to Dismiss, etc. at 2.

[31] Ibid at 3.

[32] Ibid at 4-7

[33] *Feil, et. al., v. Douglas County,* EWGMHB Case No. 06-1-0012, Order on Motion to Dismiss (Feb. 16, 2007).

[34] *Woods,* footnote 22.

[35] *Wenatchee Sportsmen Association,* footnote 10.

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The State contends, absent an express provision in the zoning ordinances that would require specific compliance with a CP, as was the case in *Woods*, a CP legally sets out only the generalized coordinated policy statements of the governing body. According to the State, a site-specific application of existing zoning laws, as is the case here, would qualify as a site-specific rezone authorized by the CP, if the action is consistent with the general policies of the CP. Contrary to the Petitioners' claim, neither the *Woods* Court or the *Wenatchee Sportsmen* Court found express authorization in the CP's for the specific actions at issue in those cases. According to the State, the Courts focused on whether the action was approved pursuant to existing zoning laws, which placed the action within the exclusive jurisdiction of the Superior Court under LUPA.

Board Discussion:

This petition is strikingly similar to *Feil, et al. v. Douglas County*, Case No. 06-1-0012, where the Board dismissed the Petitioners' petition because it determined it did not have jurisdiction.

Again, as in Case No. 06-1-0012, the Board must look to the Growth Management Act (GMA) to determine if it has subject matter jurisdiction to hear this petition. RCW 36.70A.280(1) authorizes the Board to hear and determine only those petitions alleging either:

> 1)(a) That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter,..., or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 ...

In other words, the Board has jurisdiction to decide challenges to comprehensive plans, development regulations or amendments thereto. RCW 36.70A.030(4) defines comprehensive land use plan as:

> (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.

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Fax: 509-574-6964

RCW 36.70A.030(7) defines development regulations as:

> (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.

This definition is specific in that the Board's jurisdiction does not include project permit applications as defined under RCW 36.70B.020 which provides:

> (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.

According to the County and State agencies, this appeal challenges a "site-specific land development permit for a Recreational Overlay District (R/O permit) issued by Douglas County to State Parks for a public, multi-modal transportation facility."[36] The County and State have consistently maintained that whether the action taken by the County is a permit, binding site plan or rezone is immaterial, as all three are included within the definition of a "project permit application."[37]

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[36] WSP&R, et al. Joint Response at 2.

[37] RCW 36.70B.020.

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This Board held in *Feil, et al. v. Douglas County, et al.,*[38] that "[T]he application for a R/O permit is a project permit application as defined in RCW 36.70B.020." The Board's decision was affirmed by the Douglas County Superior Court on July 31, 2007, in *Feil, et al. v. EWGMHB, et al*.[39] In a parallel case, the Douglas County Superior Court held that the R/O permit constituted a rezone that required legislative approval. The Court's order read, in part:

> This recreational overlay is clearly a specific party requesting that a specific piece of real property be treated in a particular manner.[40]

The parties in this case disagree whether the R/O permit is a site-specific rezone, as alleged by the County and State, or an amendment to the County's development regulations, as alleged by the Petitioners. The parties do agree the Board does 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 under the Board's authority authorized by RCW 36.70A.280.[41] A challenge to a site-specific land use decision must be brought under LUPA in Superior Court.[42]

Under *Woods v. Kittitas County* and *Wenatchee Sportsmen Assoc. v. Chelan County*, a site-specific rezone not subject to the Board's jurisdiction must be authorized by a jurisdiction's comprehensive plan. The CP is a guiding document or blueprint, not subject to the specifics the Petitioners' seem to suggest by their comment, "express authorization in the Comprehensive Plan."[43] In this case, the Rocky Reach permit application is authorized by the Greater East Wenatchee Area Comprehensive Plan in the Plan's goals and policies.

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[38] Feil, et al., v. Douglas County, et al., EWGMHB Case No. 06-1-0012, Order on Motion to Dismiss (Feb. 16, 2007).

[39] *Feil, et al., v. Douglas County, et al.*, Douglas Co. Cause No. 06-2-00410-5, July 31, 2007.

[40] *Feil, et al. v. EWGMHB, et al*., Cause No. 07-2-00100-7.

[41] *Woods*, footnote 22.

[42] *Woods*, footnote 22, citing *Wenatchee Sportsmen Assoc*., 141 Wn.2d 169, 179, 4 P.3d 123 (2000).

[43] Petitioners' Supplemental at 6.

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The Greater East Wenatchee Area Comprehensive Plan is a sub-area plan adopted by Douglas County. [44]

The CP encourages and addresses the County's intent to develop trail systems to provide for multi-modal transportation routes, as well as recreational opportunities.[45] The proposal is located in an area designated as Agricultural Resource, Critical Areas and Essential Public Facilities by the Greater East Wenatchee Area CP. The subject property is located in the Tourist Recreation Commercial (C-TR), Residential Low (R-L), Commercial Agriculture 5 acres (AC-5), and Commercial Agriculture 10 acres (AC-10) zoning districts. Importantly, trail systems are an outright permitted use in the Tourist Recreation Commercial district, while recreational trail systems are allowed in the other three zones mentioned above by the issuance of a Recreational Overlay District permit.[46]

The Petitioners' time to challenge the CP and development regulations concerning recreational overlays was within 60 days of publication of these documents. The Board does not have jurisdiction to review the CP, its regulations or actions performed pursuant to these documents unless they are challenged within 60 days of the publication of their adoption. That time has long since passed as required by RCW 36.70A.290(2).

The Petitioners argue that in *King County v. CPSGMHB*, the Supreme Court "made it abundantly clear that, within such protected areas (agricultural land of long-term commercial significance), all other uses must take a back seat to agricultural uses, and that recreational projects, whether on public land or not, cannot be authorized."[47] The Court in *King County* decided this case based on development regulations adopted pursuant to RCW

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[44] Respondent's Memorandum at 9.

[45] Douglas County Regional Policy Plan, Policy E and E-1; Douglas County Countywide CP, 3.4.1 (G-14), 6.1 Transportation, 6.1.1 (T-7, T-8, T-10 through T-13); GEWACP Goals and Policies 8-8, 8-9, 5-3, 5-4; SMP goals and policies; Douglas County development regulations, DCC 14.98.861, DCC 19.18.035.

[46] Douglas County Hearing Examiner's Findings of Fact, Conclusions of Law, Decision and Conditions of Approval, Nov. 3, 2006; Findings of Fact Nos. 3.6 – 3.7.

[47] Petitioners' Supplemental at 7.

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15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
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Fax: 509-574-6964

36.70A.177, specifically "innovative techniques", not on whether a site-specific rezone, such as an recreational overlay zone, is allowed in designated agricultural lands of long-term commercial significance. This argument is not relative to this case.

Conclusion:

The Board agrees with the County and State agencies that "neither the *Woods* Court nor the *Wenatchee Sportsmen* Court found express authorization in the comprehensive plans for the specific actions at issue in those cases."[48] In order to qualify as a site-specific rezone, not subject to the Board's jurisdiction, the rezone must be authorized by the CP. The County and State agencies have shown that both the zoning laws and CP authorized this action, placing it squarely in the exclusive jurisdiction of the Superior Court.

The application for a R/O 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 this petition. The County's Motion to Dismiss this matter is GRANTED.

III. ORDER

Based upon the Board's review of the GMA, prior decisions of the Boards, the Pre-hearing Motion to Dismiss discussion, and briefings of the Parties, and having discussed and deliberated on the matter, the Board finds:

1. The Board does not have jurisdiction over the subject matter of this petition and, therefore, the County's Motion to Dismiss is GRANTED. The Board enters an Order of Dismissal for Case No. 08-1-0011. RCW 36.70A.280.
2. The Petitioners' May 5, 2008, Objection to Douglas County's Dismissal Motion was discussed and noted at the Pre-hearing conference and Motion to Supplement the Record was GRANTED and attachments reviewed by the Board. WAC 242-02-540.

[48] WSP&R Reply at 3.

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3. The Petitioners' May 8, 2008, Objections to and Motion to Strike the Douglas County May 1, 2008, "Respondent's Memorandum" were noted. The Motion to Strike "Respondent's Memorandum" is DENIED.

4. The Petitioners' Objection to, Motion to Strike, And Response To States' "Response" to Petitioners' Motion to Strike is noted and Motion to Strike the States' Response is DENIED. WAC 242-02-522.

5. The Petitioners' May 29, 2008, Motion to Supplement the Record is GRANTED in part, DENIED in part. The Board will take official notice of Attachments C and D to the Declaration; supplementation of the Record with Attachments A and B will not be permitted. WAC 242-02-660. The Petitioners' Motion to Produce the Record is DENIED. WAC 242-02-520.

6. The Petitioners' June 9, 2008, Objection to "Reply" Briefs is noted, but the correlating Motion to Strike is DENIED. The Petitioners' Motion to Supplement the Record is DENIED. WAC 242-02-522 and WAC 242-02-540.

Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration:

Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this Order to file a petition for reconsideration. Petitions for reconsideration shall follow the format set out in WAC 242-02-832. The original and four (4) copies of the petition for reconsideration, together with any argument in support thereof, should be filed by mailing, faxing or delivering the document directly to the Board, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review:

Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial

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review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil.

<u>Enforcement</u>:

The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail. Service on the Board means <u>actual receipt of the document at the Board office</u> within thirty days after service of the final order.

<u>Service</u>:

This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

SO ORDERED this 17th day of June 2008.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

_____
John Roskelley, Board Member

_____
Dennis Dellwo, Board Member

_____
Joyce Mulliken, Board Member

Eastern Washington
Growth Management Hearings Board

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Yakima, WA 98902
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Fax: 509-574-6964