IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BRITT DUDEK and BRUCE BAGULEY, Appellants, v. THE EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD; DOUGLAS COUNTY; a Washington Municipal Corporation; CITY OF EAST WENATCHEE, a Washington Municipal Corporation; PANGBORN MEMORIAL AIRPORT; THE PORT OF CHELAN COUNTY; and THE PORT OF DOUGLAS COUNTY, Respondents.	No. 38577-5-II ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR RECONSIDERATION AND AMENDING UNPUBLISHED OPINION, AND DENYING MOTION TO PUBLISH

Appellants Britt Dudek and Bruce Baguley (Dudek) filed motions to reconsider and to publish our unpublished decision filed August 24, 2010. We grant in part and deny in part the motion to reconsider and deny the motion to publish.

We grant Dudek's motion for reconsideration, in part, by making the following changes to our unpublished opinion filed August 24, 2010:

(1) On page 1, first paragraph, we delete "failed to carry their burden of demonstrating standing" from the end of the third sentence and delete "They have also" from the beginning of the fourth

sentence, so that the third and fourth sentences now combined read:

> Dudek and Baguley, however, have ~~failed to carry their burden of demonstrating standing. They have also~~ failed to provide enough specific facts to demonstrate harm, relying instead, on generalities.

(2) On pages 6-7, we delete from the last sentence on page 6:

> demonstrate even a basic threshold of harm, a necessary prerequisite for challenging the Resolution before the Board. *Nelson,* 160 Wn.2d at 186;[7] *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 27 P.3d 1149 (2001).[8]

In place of this deleted portion, we insert "meet their burden under RCW 34.05.570" so that this sentence now reads:

> ~~demonstrate even a basic threshold of harm, a necessary prerequisite for challenging the Resolution before the Board~~ meet their burden under RCW 34.05.570. ~~*Nelson,* 160 Wn.2d at 186[7]; *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 27 P.3d 1149 (2001).[8]~~ *Yakima Police Patrolmen's Ass'n v. City of Yakima*, 153 Wn. App. 541, 564-65, 222 P.3d 1217 (2009).

On page 7, we also delete footnotes 7 and 8.

(3) On page 8, the first partial paragraph, we delete "standing or" from the second full sentence, we delete "standing and" from the third full sentence, and we delete "because appellants fail to establish the threshold requirement of standing" from the fourth and final sentence, so that this part of the paragraph now reads:

> But nowhere in their brief do Dudek and Baguley address ~~standing or~~ any actual harm flowing from the Resolution to the land at issue. Nor do they provide any reason why the Board and the superior court should have reached their procedural challenges in the absence of ~~standing and~~ specific examples of how the Resolution, or how even the County's Airport Overlay District, improperly or detrimentally regulates their land uses. Similarly, therefore, we do not reach their numerous procedural complaints about the County's enactment of the Resolution ~~because appellants fail to establish the threshold requirement of standing~~.

(4) Also on page 8, we insert the following new paragraph immediately after the first partial

paragraph, above, and directly before the "ATTORNEY FEES" heading:

> Additionally, Dudek has failed to establish that a justiciable controversy exists, as required by the Uniform Declaratory Judgment Act (UDJA). *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) (citation omitted). Accordingly, Dudek is not entitled to declaratory relief.

(5) Judge Quinn-Brintnall also makes the following changes in her dissent filed with the opinion on August 24, 2010. On page 12 she deletes the following language from the first sentence of the first paragraph, "had standing to challenge Douglas County's resolution and," so that this sentence now reads:

> I concur with the majority that Britt Dudek and Bruce Baguley failed to demonstrate both that they ~~had standing to challenge Douglas County's resolution and~~ had suffered specific harm, precluding us from addressing their substantive procedural arguments.

From the first sentence of the last paragraph on page 12, she adds "s" to "amount" and deletes the following language, so that this sentence now reads:

> Here, rather than engaging in the proper analysis for determination of whether Dudek and Baguley's claims are frivolous, the majority holds that ~~the combination of~~ Dudek and Baguley's ~~lack of standing and~~ failure to demonstrate specific harm amounts to a frivolous appeal under RAP 18.9.

She also changes the second sentence in the last paragraph on page 12 as follows: She deletes the second word "standing" and the comma after that word; she also substitutes "two" for "three" in the phrase "three separate issues," so that this sentence now reads:

> But ~~standing,~~ failure to establish grounds for relief and whether a claim is frivolous are ~~three~~ two separate issues—each entitled to this court's attention on appeal. Without the appropriate analysis, I cannot agree with the majority that Dudek and Baguley's underlying claims are completely devoid of merit—and, therefore, frivolous under RAP 18.9—simply because Dudek and Baguley's arguments may be deficient under other issues of law.

We otherwise deny Dudek's motion for reconsideration, and we deny his motion for publication.

IT IS SO ORDERED.

DATED this _________________ day of_____________________, 2010.

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Hunt, J.

We concur:

____
Armstrong, PJ.

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Quinn-Brintnall, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BRITT DUDEK and BRUCE BAGULEY, Appellants, v. THE EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD; DOUGLAS COUNTY; a Washington Municipal Corporation; CITY OF EAST WENATCHEE, a Washington Municipal Corporation; PANGBORN MEMORIAL AIRPORT; THE PORT OF CHELAN COUNTY; and THE PORT OF DOUGLAS COUNTY, Respondents.	No. 38577-5-II UNPUBLISHED OPINION

Hunt, J. — Britt Dudek and Bruce Baguley, owners of land adjacent to Pangborn Airport, challenge Douglas County's adoption of a Resolution amending portions of the county code affecting the airport's overlay district. They argue that the Resolution interferes with their agricultural practices and that the County failed to follow procedural requirements under the Growth Management Act (GMA) and other statutes before adopting the Resolution. Dudek and Baguley, however, have failed to carry their burden of demonstrating standing. They have also failed to provide enough specific facts to demonstrate harm, relying instead, on generalities. In so

doing, they preclude our addressing their substantive procedural arguments. Accordingly, we affirm the decisions of the Board and the superior court, and we award attorney fees on appeal to the County and to the City of East Wenatchee.

FACTS

Central to the dispute here is Resolution No. TLS 07-09B (Resolution), which Douglas County adopted in response to the following concerns: (1) "[A]irports within the state and across the nation have faced increasing problems with the encroachment of incompatible development," CP at 138, on adjacent land; and (2) correspondingly, "[a]ir space hazards may endanger the lives and property of users of the airport and of occupants of land in its vicinity." CP at 139. The County recognized these problems and sought "[t]o ensure that the function and value of [Pangborn] is maintained for future generations," CP at 138, by amending portions of the Douglas County Code (DCC) concerning the Airport Overlay District, DCC 18.65, and adopting Resolution No. TLS 07-09B.

Douglas County's Airport Overlay District,

> protect[s] the viability of the Pangborn Memorial Airport as a significant resource to the community by encouraging compatible land uses, densities and reducing hazards that may endanger the lives and property of the public and aviation users.

CP at 142 (DCC 18.65.010). The code exempts from this district "[n]onresidential agricultural uses, structures and/or buildings, provided that the use will not penetrate the airspace within the [Airport Overlay District] district safety zones."[1] CP at 143 (DCC 18.65.040(E)).

[1] The Resolution that Dudek and Baguley challenge in this appeal did not affect this exemption.

The Resolution seeks to protect both the safety of residents and aviation interests by (1) restricting the per-person density per acre on land adjoining Pangborn,[2] and (2) prohibiting erection of nursing homes and large day care centers adjacent to Pangborn, consistent with previous similar restrictions on hospitals and schools near the airport.[3]

Dudek and Baguley own property adjacent to the airport and within the Airport Overlay District. They filed a petition for review with the Eastern Washington Growth Management Hearings Board (Board), challenging the County's procedures in enacting the Resolution. As their basis for asserting harm, they claimed that the Resolution impacted Dudek's orchard and that Baguley wants the "opportunity" to operate an orchard on his land in the future. Administrative Record (AR) at 4. They noted generally that orchard operations "cast spray and smoke into the air" and "require densities likely to be prohibited by the vague" Resolution, which eliminates their "currently permitted" "[u]ses, practices and rights." AR at 4. Despite these assertions, Dudek

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[2] The lands surrounding the airport are divided into safety "zones," with the following restrictions:

Zones 1-2: 0-5 people per acre
Zone 3: [must be no more than] 25 people per acre
Zone 4: [no restriction]
Zone 5: [no more than] 50 people per acre
Zone 6: [no restriction]

CP at 144 (DCC 18.65.050(M)). Although the record is not entirely clear, it appears that there was no restriction for Zones 1, 2, 3 and 5 before the County adopted the Resolution. Zone 4 was previously restricted to no more than 40 people per acre. And Zone 6 was previously restricted to no more than 100 people per acre. Dudek and Baguley do not specify in which zone their lands rest.

[3] Before adoption of the Resolution, two other subsections of DCC 18.65 prohibited any use of land adjacent to Pangborn that would "foster an increase in bird population," CP at 143 (DCC 18.65.050(C)), and any use that would "emit emissions of fly ash, dust, vapor, gases or other forms of emissions that may conflict with any planned operations of the airport." CP at 143 (DCC 18.65.050(B)).

and Baguley neither specifically alleged nor presented evidence that the Resolution had caused or would cause any actual harm to or infringement of their use of their lands. The Board ruled that "the [Resolution] is in compliance with the Growth Management Act" and that Dudek and Baguley had failed to carry their burden on all issues.[4] CP at 48.

On January 11, 2008 Dudek and Baguley filed a petition for review of the Board's decision in Thurston County Superior Court (Cause No. 08-2-0074-2) and a request for declaratory judgment that DCC 18.65.040(E),[5] a preexisting section unchanged by the Resolution, is unconstitutionally vague because it "includ[es] an unconstitutional delegation of legislative power to unspecified administrative officials." CP at 11. Dudek and Baguley named other defendants, including the City of East Wenatchee,[6] which had previously joined Douglas County in "adopt[ing] the Greater East Wenatchee Area Comprehensive Plan." CP at 135.

Ruling that Dudek and Baguley had failed to meet their burden of proof under the Administrative Procedure Act (APA), RCW 34.05.570, the superior court affirmed the Board's

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[4] The Board did not address standing.

[5] DCC 18.65.040 provides:

> The following structures, uses or other activities are exempt from the provisions of the AP-O district when permitted in the underlying zoning district:
> . . . .
> E. Agricultural Uses. Nonresidential agricultural uses, structures and/or buildings, provided that the use will not penetrate the airspace within the AP-O district safety zones, the FAR Part 77 surfaces or otherwise create a safety impact as determined by the review official.

CP at 142-43.

[6] The City of East Wenatchee was the only defendant, other than the County, to file a brief on appeal.

final decision and order and dismissed their petition for review. The superior court also denied Dudek and Baguley's request for a declaratory judgment because they failed to establish that (1) they were within a "zone of interest"; (2) they had "suffered an injury in fact, economic or otherwise," CP at 154 (*citing Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 157 P.3d 847 (2007)), CP at 167; or (3) the matter concerns "interests that are direct and substantial, rather than potential, theoretical, abstract or academic," as required to establish standing. CP at 154, 167 (*see Bercier v. Kiga*, 127 Wn. App. 809, 822, 103 P.3d 232 (2004), *review denied,* 155 Wn.2d 1015 (2005)). Dudek and Baguley appeal.

ANALYSIS

Without explaining specifically in what ways the Resolution actually causes harm, Dudek and Baguley broadly assert on appeal:

> Multiple problems exist, especially for [Dudek and Baguley], whose properties lie at the south end of the main runway in the flight path, and are thus significantly impacted by [the Resolution].
>
> Fruit attracts wild birds, a prohibited act under [the Resolution]. Growing fruit requires spraying. Aerial spraying will violate the airspace zones and is prohibited. Blast spraying thrusts chemicals skyward, another prohibited act. Obscure "density" requirements included in [the Resolution] limit the numbers and location of farm workers, who must be spread out so as not to violate those [Resolution] restrictions.

Br. of Appellant (amended and revised) at 15. They fail to establish grounds for relief.

Sitting in the same position as the superior court, we review the Board's decisions by applying the standards of the APA directly to the record before the Board. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000). As the party asserting that the Board erroneously interpreted or applied the law, or that the Board's decision is not supported by substantial evidence, Dudek and Baguley carry the burden of demonstrating the decision's invalidity. *King County*, 142 Wn.2d at 553; *The Cooper Point Ass'n v. Thurston County*, 108 Wn. App. 429, 435-36, 31 P.3d 28 (2001), *aff'd*, *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 57 P.3d 1156 (2002); RCW 34.05.570(1)(a). In this they have failed.

In their petition for review to the superior court, Dudek and Baguley asserted:

> Dudek owns land . . . [and] he operates an orchard in the areas impacted and restricted by [the Resolution].
>
> . . . .
>
> [Baguley] currently does not operate an orchard on his property but wants the opportunity to do so.
>
> Orchard operations do attract birds. Orchard operations do cast spray and smoke into the air. Such operations do require densities likely to be prohibited by the vague [Resolution], in its application and enforcement. Uses, practices and rights currently permitted to [Dudek and Baguley] are eliminated by the [Resolution].

AR at 4. They made only these vague general assertions. They failed to show how the Resolution harms them, or others, through regulating their land use or how it detrimentally affects the long term commercial agricultural use of the land in question. Thus, by asserting mere speculative generalities, they fail to demonstrate even a basic threshold of harm, a necessary

prerequisite for challenging the Resolution before the Board. *Nelson,* 160 Wn.2d at 186;[7] *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 27 P.3d 1149 (2001).[8]

Dudek and Baguley failed to articulate specific facts to demonstrate harm when the County challenged their standing before the Board[9] and in superior court.[10] Similarly, they fail to

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[7] "To have standing a party must (1) be within the zone of interest protected by statute and (2) suffered an injury in fact, economic or otherwise." *Nelson*, 160 Wn.2d at 186.

[8] We define a "justiciable controversy" as "(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive." *To-Ro Trade Shows*, 144 Wn.2d at 411 (citation omitted).

[9] The County argued to the Board:

> Now, in terms of the amendments that were adopted that are currently before this Board, frankly, I am here now making my argument at the final hearing and I still don't know what sections of those amendments are being objected to by the Petitioners. . . . [W]e just have these general, broad statements that are made with respect to things that were in the airport overlay district.
>
> . . . .
>
> And I'm just trying to emphasize the fact that we don't know, as of right now at 11:45 into the final hearing, what [Petitioners'] specific objections are to these amendments.

Transcript of Proceedings (VTP) (Nov. 19, 2007) at 78-80. Nevertheless, Dudek and Baguley never responded by articulating specific facts to establish standing. *See also* VTP (Nov. 19, 2007) at 88, 92, 117-18.

[10] The County replied to Dudek and Baguley's argument: "Well, Your Honor there's been no showing of any unresolved resource conflicts." Verbatim Report of Proceedings (VRP) (Aug. 1, 2008) at 29. "*There's no evidence submitted of any injury. There's no evidence submitted of any zone of interest.*" VRP (Aug. 1, 2008) at 31 (emphasis added.)

Dudek and Baguley began rebuttal by stating, "I think our reply brief covers pretty much everything he just responded, Your Honor, so I'm not going to beat a dead horse. I'll refer to our reply brief, which covers just about everything he just argued." VRP (Aug. 1, 2008) at 34. They later noted:

> [The County is] arguing today that our duty was to produce a record to show you how what they did impacted us. Well, we did make reference to what's

address this deficiency on appeal. In their Brief of Appellant they vaguely assert procedural faults with the County's actions and assign error generally to the Board's and the superior court's refusal to sanction the County. But nowhere in their brief do Dudek and Baguley address standing or any actual harm flowing from the Resolution to the land at issue. Nor do they provide any reason why the Board and the superior court should have reached their procedural challenges in the absence of standing and specific examples of how the Resolution, or how even the County's Airport Overlay District, improperly or detrimentally regulates their land uses. Similarly, therefore, we do not reach their numerous procedural complaints about the County's enactment of the Resolution because appellants fail to establish the threshold requirement of standing.

ATTORNEY FEES

The County requests attorney fees on appeal under RCW 4.84.370(1) providing:

> Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of *a decision by a county,* city, or town *to issue, condition, or deny a development permit* involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, *or similar land use approval or decision.* The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if: . . . the county, city, or town['s] . . . decision is upheld at

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> specifically in the airport overlay. You can't do blast spraying. You can't do anything up in the air. You can't attract birds. I mean, we're talking about trees that bear fruit. And if you've ever been over there, birds are part of the program. But you're not supposed to do anything, according to their regs, don't do anything to attract birds on your land.
>
> . . . .
>
> But we didn't—our duty was not to produce a record, bring in experts and say, yes, I've looked at this, and you obviously are going to have an impact on your farming. . . . Government has the duty to produce a record and they simply didn't do it.

VRP (Aug. 1, 2008) at 37-38.

superior court and on appeal.

(emphasis added). Dudek and Baguley argue that that the County is not entitled to fees and costs because RCW 4.84.370 applies only to "land use decisions." Reply Br. of Appellant at 20. We agree.

The plain language of RCW 4.84.370 applies only to local government decisions issuing, conditioning, or denying a site-specific development permit.[11] The appeal here does not involve any such County land use action because Dudek and Baguley did not apply for any type of permit and they were not seeking County approval or issuance of a permit for a specific project or development. Rather, they challenged the County's Resolution amending the comprehensive plan. As they note in their reply brief, RCW 36.70B.020(4) expressly excludes comprehensive plan amendments from the definition of "project permit" or "project permit application." Reply Br. of Appellant at 20-21. Reading this definitional statute together with RCW 4.84.370's lists of land use decisions for which a prevailing party on appeal can receive attorney fees, there is no provision for attorney fees to the prevailing party in an appeal from an amendment to a comprehensive plan. Therefore, the County is not entitled to attorney fees on appeal under RCW 4.84.370. *See Tugwell v Kittitas County*, 90 Wn. App. 1, 951 P.2d 272 (1997).

We do, however, award the County fees and costs under RAP 18.9(a) for having to defend against a frivolous appeal. RAP 18.9(a) authorizes an award of compensatory damages against a party who files a frivolous appeal. *See e.g., Kearney v. Kearney*, 95 Wn. App. 405, 417,

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[11] *See also* RCW 36.70C.020, which defines "land use decision," and RCW 36.70B.020(4), which defines "project permit." Both statutes point to site-specific development or permit applications.

974 P.2d 872 (1999), *review denied,* 138 Wn.2d 1022 (1999). An appeal is frivolous when there are no debatable issues over which reasonable minds could differ, *Kearney*, 95 Wn. App. at 417 (citations omitted), and the appeal is so devoid of merit that there is no reasonable possibility of reversal. *Matheson v. Gregoire*, 139 Wn. App. 624, 639, 161 P.3d 486 (2007). We hold that Dudek and Baguley's appeal is frivolous because, as we have already noted, they failed to demonstrate harm and standing below; and they have failed to remedy these dispositive deficiencies on appeal.

The City of East Wenatchee also requests attorney fees and costs for defending against this frivolous appeal, citing RCW 4.84.185, which provides that the "prevailing party . . . receive expenses for opposing frivolous action or defense."[12] The City argues that Dudek and Baguley's appeal is "frivolous and advanced without reasonable cause." Br. of Resp't at 4. Again, we agree. Accordingly we award attorney fees to both the County and the City for having to defend against this frivolous appeal.

[12] Dudek and Baguley argue that RCW 4.84.185 applies only in the trial court, not in the appellate court. Even assuming without deciding that this is so, we can award attorney fees for a frivolous appeal under RAP 18.9(a). *In re Settlement/Guardianship of AGM*, 154 Wn. App. 58, 83, 223 P.3d 1276 (2010).

We affirm the decisions of the Board and the superior court, and we award attorney fees on appeal to the County and to the City of East Wenatchee upon compliance with RAP 18.1.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J

I concur:

Bridgewater, P.J.

Quinn-Brintnall, J. (concurring in part, and dissenting in part) — I concur with the majority that Britt Dudek and Bruce Baguley failed to demonstrate both that they had standing to challenge Douglas County's resolution and had suffered specific harm, precluding us from addressing their substantive procedural arguments. In addition, I concur with the majority that because the resolution is not a land use decision issuing, conditioning, or denying site specific development permits, the County is not entitled to attorney fees under RCW 4.84.370. I write separately, however, because I do not agree that Dudek and Baguley's underlying claims are frivolous or wholly lacking in merit.

Whether an appeal is frivolous depends on considerations established in *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187, *review denied*, 94 Wn.2d 1014 (1980):

> (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

Where an appeal presents at least one arguably meritorious issue, the appeal will not be considered frivolous. *Rhinehart v. Seattle Times*, 59 Wn. App. 332, 342, 798 P.2d 1155 (1990).

Here, rather than engaging in the proper analysis for determination of whether Dudek and Baguley's claims are frivolous, the majority holds that the combination of Dudek and Baguley's lack of standing and failure to demonstrate specific harm amount to a frivolous appeal under RAP 18.9. But standing, failure to establish grounds for relief, and whether a claim is frivolous are three separate issues—each entitled to this court's attention on appeal. Without the appropriate

analysis, I cannot agree with the majority that Dudek and Baguley's underlying claims are completely devoid of merit—and, therefore, frivolous under RAP 18.9—simply because Dudek and Baguley's arguments may be deficient under other issues of law.

Accordingly, I respectfully dissent from that portion of the majority opinion awarding Douglas County and the City of East Wenatchee attorney fees for having to defend the appeal.

QUINN-BRINTNALL, J.