CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

THE CITY OF LAKE STEVENS, Petitioner, v. THE CITY OF SNOHOMISH, Respondent.	**CPSGMHB Case No. 09-3-0008** ***(Lake Stevens)*** **ORDER ON MOTIONS**

SYNOPSIS

On February 3, 2009, the City of Snohomish adopted Resolution No. 1224, which established a North Planning Area (NPA) north of and adjacent to the City of Snohomish Urban Growth Area (UGA). A Petition for Review (PFR) was filed by the City of Lake Stevens alleging the City of Snohomish had, by its action, amended its Comprehensive Plan without following the proper procedure to meet the requirements of the Growth Management Act. After review of submitted briefs and the record, the Board determined Resolution No. 1224 was not an amendment to the City of Snohomish Comprehensive Plan and dismissed the case. [Subject Matter Jurisdiction; De facto Amendment.] A Motion to Supplement the Record was filed by the City of Lake Stevens. Because the Motion to Dismiss was granted, the Board did not address the Motion To Supplement.

I. BACKGROUND

On April 1, 2009, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from the City of Lake Stevens (**Petitioner** or **Lake Stevens**). The matter was assigned Case No. 09-3-0008, and is hereafter referred to as *Lake Stevens v. Snohomish*. Board member David O. Earling is the Presiding Officer (**PO**) for this matter. Petitioner challenges the City of Snohomish's (**Respondent** or **Snohomish**) adoption of Resolution No. 1224. The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**).

On April 7, 2009, the Board issued a "Notice of Hearing" in the above-captioned case.

On May 4, 2009, the Board conducted the Prehearing Conference**.**

On May 11, 2009, the Board issued its "Prehearing Order" that set the final schedule and legal issues to be decided.

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On May 4, 2009, the Board received Snohomish's "Respondent's Document Index" (**Index**).

On June 4, 2009, the Board received the City of Snohomish Motion to Dismiss.

On June 15, 2009, the Board received Petitioner's Response to Respondent's Motion to Dismiss.

On June 18, 2009, the Board received the Snohomish Rebuttal to Motion to Dismiss.

The Board did not hold a hearing on the dispositive motion.

On June 5, 2009, the Board received the City of Lake Stevens Motion to Supplement the Record.

On June 15, 2009, the Board received the City of Snohomish Response to Lake Stevens' Motion to Supplement the Record.

On June 18, 2009, the Board received the City of Lake Stevens Reply In Support of Its Motion to Supplement the Record.

II. THE CHALLENGED ACTION

On February 3, 2009, the City of Snohomish passed Resolution No. 1224, a resolution establishing a "North Planning Area" (NPA) north of and adjacent to the Urban Growth Area (UGA) of the Snohomish City limits. The contested area, in unincorporated Snohomish County, is currently identified as rural. While the County has further indentified the land as a Rural Urban Transition Area (RUTA), it has not been identified as an urban growth area (UGA).

The City of Lake Stevens, through the filing of the Petition for Review (PFR) contends that the City of Snohomish action is a *de facto* amendment to the City's Comprehensive Plan without following the process requirements of the Growth Management Act. The City of Snohomish contends the Resolution directs the staff to prepare for City Council amendments for consideration through the Comprehensive Plan amendment process.

III. MOTION TO DISMISS

Legal Authority

RCW 36.70A.280 Matters subject to board review.

(1) A growth management hearings board shall hear and determine only those petitions alleging either:

(a) ……as it relates to plans, development regulations, or amendments….

RCW 36.70A.290 Petitions to growth management hearings boards---Evidence.

(2) All petitions relating to whether or not an adopted comprehensive plan, development regulation or permanent amendment thereto…..

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WAC 242-02-210 (2)

The Board Rules of Practice and Procedure provide as follows:

Any action may be dismissed by the Board:

(3) Upon motion of the petitioner or respondent prior to the presentation of the respondent's case.

While the Prehearing Order contains six legal issues for the Board to evaluate[1], fundamental to the outcome of the case is Legal Issue No. 1:

> *Amendment to the Snohomish Comprehensive Plan. Does the adoption of Resolution 1224 constitute a de facto amendment to the Snohomish Comprehensive Plan?*

Should the Board find agreement with the Petitioner that the City of Snohomish violated the GMA by passage of Resolution 1224, thus creating a *de facto* amendment to the Snohomish Comprehensive Plan, then Legal Issues 2-6 would need to be adjudicated. Should the Board find Resolution 1224 to not be a *de facto* amendment and dismiss the case, the balance of the legal issues become moot. Should the Board find in favor of Snohomish, Petitioner's Motion to Supplement the Record would also become moot.

Position of the Parties

The City of Snohomish moves the Board to dismiss the PFR in its entirety, contending the Board does not have jurisdiction over the matter, as the action taken by Snohomish is not an amendment to the Comprehensive Plan, *de facto* or otherwise. "Rather, the Resolution necessarily identifies territory that is to be addressed in the amendments it directs staff to prepare. This specific direction to staff ensures proposed amendments are appropriately drafted for Council consideration."[2] Snohomish contends future actions are needed to actually amend the Comprehensive Plan and it is these actions which would be challengeable.

In response, Lake Stevens argues that the express language of Resolution 1224 results in a determination that it is a *de facto* amendment. Lake Stevens points to Sections Two, Three, Five and Six of the Resolution as demonstrated evidence supporting that Snohomish has pre-ordained the nature of the land use action.

Both parties argue from different perspectives that *Alexanderson v. Clark County Bd. of Comm'rs, 135 Wn. App. 541, 144 P3rd 1219 (2006)* has bearing on the outcome of the Motion to Dismiss. Snohomish argues that unlike *Alexanderson*, the Snohomish Resolution is a unilateral action and not an enforceable agreement between two parties, as was the case with *Alexanderson* which involved a Memorandum of Understanding (MOU) between the parties.

Lake Stevens contends the *Alexanderson* case does not require the creating of an "enforceable agreement" and, according to Lake Stevens, an MOU does not necessarily create contractual

[1] PFR at 6-7
[2] City Motion to Dismiss at 3

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obligations but merely "understandings" between the parties. Lake Stevens points out that in *Alexanderson*, the Court of Appeals looked at the actual effect of the MOU, from which it concluded an amendment to the Comprehensive Plan had resulted.

Board Discussion

The Board acknowledges Snohomish uses very aggressive "present" language throughout the Resolution. The very title of the Resolution includes…."*Establishing a North Planning Area".* In addition to the title, the THEREFORE section has present action language. Section Two states the City Council "*hereby adopts a North Planning Area (NPA)"* and Section Three states that *"the City shall proceed with comprehensive planning for land within the NPA."* Words used in the Resolution such as *"establish", "adopt"* and *"proceed"* all denote completion of action. Needless to say, the language is aggressive and assertive.[3]

At the same time, language in the Snohomish Resolution appears to recognize the land in question is under Snohomish County's control and not in the City's UGA. The title of the Resolution itself recognizes the land is adjacent to the City's UGA and "*urges"* the Snohomish County Council to incorporate the NPA boundary into the Snohomish County Comprehensive Plan. Similar language is found in Section Five of the THERFORE of the Resolution which "*urges Snohomish County to incorporate the NPA adopted…and to incorporate this boundary [in the County's Comprehensive Plan]."* Words such as *"urges", "adopt"* and *"recognize"* indicate Snohomish acknowledges the process is not completed. This language is clear and does not presume to assert actual control in the area outside the City of Snohomish UGA.

The Board acknowledges the THEREFORE in Section Six can be read two ways. Snohomish argues the Resolution is merely directing staff to prepare amendments related to the NPA for further consideration and future vote under proper GMA procedures. As interpreted by Lake Stevens, the Resolution directs staff to prepare *pro forma* amendments to comply with what Snohomish has already done, in effect a pre-ordained result.

This case differs from *Alexanderson* first, in that no MOU or agreement between two governmental entities is involved and thus there is no enforceable agreement in place. And while a unilateral action may be seen as an amendment, in this case – while the Board views the language in the Resolution as overly aggressive – at the same time, the City of Snohomish acknowledges the land in question is only adjacent to the City UGA and is fully controlled by Snohomish County as a rural area outside the County's UGA.

The second fact distinguishing this matter from *Alexanderson* is that in *Alexanderson*, the County had planning jurisdiction over the land that was subject to the MOU, while in this case, the City of Snohomish does not have planning jurisdiction over the proposed NPA. The proposed NPA is under County planning jurisdiction and cannot even be included in the County's UGA without complying with GMA requirements such as land capacity analysis. There can be no *de facto* amendment by the City of Snohomish.

[3] The Board is aware of the long standing disagreement between Lake Stevens and Snohomish in this matter. The parties would do well to not use language that is incendiary in nature.

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The Board does not view the Resolution as an amendment to the City of Snohomish Comprehensive Plan. Because the Board does not accept the premise of the Resolution as an amendment to the City of Snohomish Comprehensive Plan, and the land in question lies outside the City of Snohomish UGA, but within Snohomish County's control, the Board does not have jurisdiction over the matter.[4] Without jurisdiction in the matter, the City of Snohomish Motion to Dismiss the PFR is **granted.**

When and if the City of Snohomish actually amends its Comprehensive Plan, then the challenges can come.

As noted *supra*, because the Board is dismissing Legal Issue 1, the Board need not and will not, address Legal Issues 2-6 in the Motion to Dismiss. The Board for the same reason will not address the Petitioner's Motion to Supplement.

III. ORDER ON MOTION TO DISMISS

Based upon review of the GMA, Board's Rules of Practice and Procedure, briefing and exhibits submitted by the parties, case law and prior decisions of this Board, and having deliberated on the matter, the Board enters the following ORDER:

1. The City of Snohomish's Motion to Dismiss is **granted.**
2. The Petition for Review in *The City of Lake Stevens v. The City of Snohomish* is **dismissed.**
3. CPSGMHB Case No. 09-3-0008 is **closed.**

This Order of Dismissal should not be construed as a Board determination as to whether Resolution No. 1224 substantively complies with the relevant goals and requirements of the GMA.

So ORDERED this 6th day of July, 2009.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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David O. Earling
Board Member

[4] RCW 36.70A.110(7)
An Urban Area designated in accordance with this section may include within its boundaries urban areas or potential annexation areas designated for specific cities or towns within the county.

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Margaret A. Pageler
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.

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