

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 ALVIN ALEXANDERSON, DRAGONSLAYER,
4 INC. and MICHELS DEVELOPMENT LLC.

NO. 04-2-0008

5 Petitioners,

**ORDER ON MOTIONS ON
REMAND**

6 v.

7 CLARK COUNTY

8
9 Respondent.

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12 This Matter comes before the Board upon a mandate issued by the Court of Appeals to the
13 Cowlitz County Superior Court on February 1, 2007 and issued by the Cowlitz County
14 Superior Court to this Board on February 28, 2007.¹ The Board had earlier found that it
15 lacked subject-matter jurisdiction over the petition for review filed in this case because
16 review was sought of a memorandum of understanding (MOU) which was not a
17 comprehensive plan policy, a development regulation or an amendment to either.² The
18 Thurston County Superior Court affirmed the Board. Division II of the Court of Appeals
19 reversed the Board's decision, finding that the MOU constituted a *de facto* comprehensive
20 plan amendment.³ On remand, the parties disagree about the extent of the Court of
21 Appeals ruling. They have agreed that this case can be decided on motions.
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24 **I. ISSUES ON MOTIONS**

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26 1) Does the Board lack subject-matter jurisdiction over the petition for review because
27 the parties to the MOU now agree that Section 9.3 of the MOU has been severed from
28 the MOU?
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31 ¹ Ex Parte Order Remanding Matter to Growth Management Hearings Board, Cowlitz County Superior Court
Cause No. 06-2-00350-I, February 28, 2007.

32 ² Order on Motion to Dismiss, July 20, 2004.

³ *Alexanderson et al. v. WWGMHB et al.*, Docket No. 33750-9, October 17, 2006

1 2) If the Board has jurisdiction over the petition for review, did the County fail to comply
2 with the Growth Management Act in the adoption of the MOU?

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4 **Positions of the Parties**

5 Clark County argues that the Board lacks jurisdiction over the petition for review because
6 the Court of Appeals found only one section of the MOU to be a *de facto* comprehensive
7 plan amendment.⁴ The County argues that the Court of Appeals decision “is premised
8 exclusively upon the inconsistency between MOU Section 9.3 and Plan Goal 6.2.7.”⁵
9 Based on the Court of Appeals’ decision, the Cowlitz Tribe and Clark County have agreed
10 that MOU Section 9.3 has effectively been declared invalid.⁶ Pursuant to Section 17.3 of
11 the MOU, therefore, Clark County maintains that Section 9.3 has been severed from the
12 MOU. Once Section 9.3 has been severed from the rest of the MOU, the County argues,
13 there is no portion of the MOU that is a *de facto* comprehensive plan amendment and the
14 Board lacks jurisdiction over the petition for review.⁷

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17 Petitioners, on the other hand, argue that the Court of Appeals found that the MOU as a
18 whole was a *de facto* comprehensive plan amendment and that the Board has jurisdiction
19 as a result.⁸ Petitioners argue that Section 9.3 of the MOU is just one clear example cited
20 by the Court of Appeals to demonstrate how the MOU directly conflicts with the County’s
21 comprehensive plan, but that all of the obligations assumed by the County under the MOU
22 are “at odds with stated GMA goals.”⁹
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29 ⁴ (Clark County) Motion to Dismiss at 5.
30 ⁵ *Ibid.*
31 ⁶ Clark County points to an exchange of letter between the County and the Cowlitz tribe by which they agreed
32 that Section 9.3 has been severed from the MOU. Exhibits 3 and 4 to the County’s Motion to Dismiss.
⁷ *Ibid* at 5-6.
⁸ Petitioners’ Motion for Summary Judgment at 1-2.
⁹ *Ibid* at 3.

1 **Board Discussion**

2 The County asks the Board to determine that the Court of Appeals' decision first, only
3 pertained to Section 9.3 of the MOU; and second, has the effect of invalidating Section 9.3
4 of the MOU which, under the terms of the MOU, severed the offending section from the rest
5 of the MOU. Without Section 9.3, the County asserts, the MOU no longer conflicts with the
6 County Comprehensive Plan, does not function as a de facto amendment and therefore the
7 Board lacks jurisdiction.

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10 The Board begins its analysis with the directive from the Court of Appeals:

11 We reverse the Board's decision that it lacked subject matter jurisdiction and remand
12 to the Board for further proceedings.¹⁰

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14 The Board originally found it lacked subject matter jurisdiction over the petition for review.
15 This decision was reversed by the Court of Appeals. Now, the County asks the Board to
16 ignore the plain directive from the Court of Appeals.

17
18 The first prong of the County's argument is that the Court of Appeals rested its decision
19 exclusively on Section 9.3 of the MOU. It is true that the Court of Appeals' analysis uses
20 Section 9.3 of the MOU as the basis for its determination that "what was previously
21 forbidden is now allowed".¹¹ However, the Court did not parse the MOU and specify that
22 only certain provisions of it were a *de facto* comprehensive plan amendment. It refers to the
23 MOU in its entirety:

24
25 Because **the MOU** has the legal effect of amending the plan, just as if the words of
26 the plan itself had been changed to mirror **the MOU**, **the MOU** was a de facto
27 amendment and the Board has jurisdiction.¹²

28 (emphasis added)

29 Thus, the Court of Appeals clearly was considering the MOU as a whole.

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31 ¹⁰ *Alexanderson et al. v. WWGMHB et al.*, 135 Wn. App. 541, 551, 144 P.3d 1219, 2006 Wash. App. LEXIS
2285 (Division II, 2006).

32 ¹¹ *Ibid* at 550.

¹² *Ibid.*

1 The second prong of the County's argument is that the Court of Appeals decision itself
2 deprived the Board of subject matter jurisdiction. The County argues that Section 9.3 of the
3 MOU is now "severed" because the Court of Appeals' decision "effectively" invalidated it.
4 While the County has not altered the agreement itself, the County and the Tribe have
5 agreed that Section 9.3 has been declared invalid by the Court of Appeals and so that
6 provision has been severed from the rest of the MOU.¹³ If this result was an automatic
7 consequence of the Court of Appeals' decision, then it should have been part of the
8 argument presented to the Court of Appeals as to why there would be no Board jurisdiction.
9 Under the County's theory, any determination that the MOU violated the comprehensive
10 plan would result in invalidation, severance and a lack of subject matter jurisdiction. This
11 argument was not raised before the Board the first time a motion concerning jurisdiction was
12 brought; and it was not raised to the Court of Appeals. Since the argument could have been
13 raised in the first appeal, it cannot be brought now. Even in cases raising constitutional
14 violations, the Washington courts have found that issues that could have been (but were
15 not) raised in the first appeal may not be the basis for a second appeal.¹⁴ The Board,
16 therefore, will not second-guess the Court of Appeals on an issue that could have been
17 raised to that court in the first appeal.
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21 Petitioners argue that the Board could review the other sections of the MOU and determine
22 that those also effectively amend the comprehensive plan. Petitioners argue that
23 transportation, water, police, fire and other obligations of the County under the MOU
24 "constitute amendments to the County's comprehensive plan – to the same extent and for
25 the same reasons as Section 9.3's water provision."¹⁵ However, the Court of Appeals has
26 already found that the MOU constitutes a *de facto* comprehensive plan amendment. The
27 Court did not separate out particular provisions of the MOU from the MOU as a whole and
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31 ¹³ AR 576 and 577.

32 ¹⁴ *State v. Sauve*, 100 Wn.2d 84, 668n P.2d 894 (1983); *State v. Barberio*, 66 Wn.2d 902, 833 P.2d 459 (Div. I, 1992)

¹⁵ Petitioners' Motion for Summary Judgment at 12.

1 we see no reason to do so now. The appellate court determination that the Board has
2 subject matter jurisdiction is conclusive on the issue of Board jurisdiction.

3
4 The next question is whether there is any dispute that the adoption of the MOU as a *de*
5 *facto* comprehensive plan amendment fails to comply with the GMA as alleged in the
6 petition for review. The County concedes that, if the Board has jurisdiction over the petition
7 for review, “a remand is necessary in order to achieve compliance with GMA requirements
8 related to public participation and internal comprehensive plan consistency.”¹⁶ The County
9 references Issue Nos. 1, 7, 9, 14 and 17 from the Order Setting Schedule on Remand as
10 the issues on which noncompliance is conceded (assuming Board jurisdiction).¹⁷
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13 Although the County concedes some of the consistency challenges in the Joint
14 Supplemental Filing, the most important concession from the point of view of the Board is
15 that the County has failed to meet the public participation requirements of the GMA. Where
16 the Board has found a public participation violation, it has been a common practice for the
17 Board to remand for compliance with the public participation requirements without first
18 addressing the other allegations. The Board has stated that the reason for this is that the
19 public participation issue disposes of the case and addressing the other issues would
20 violate RCW 36.70A.290(1) concerning advisory opinions.¹⁸ While there may be occasions
21 where the Board would decide other issues after finding a public participation violation¹⁹,
22 those ordinarily occur because the local jurisdiction’s position on the other issue(s) is
23 settled. This is not one of those circumstances. The County clearly did not realize that
24 entering into the MOU would constitute a comprehensive plan amendment and it may, upon
25 remand and public participation, change parts of the MOU or its comprehensive plan. It
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30 ¹⁶ Joint Supplemental Filing, June 6, 2007, at 2.

31 ¹⁷ *Ibid.*

32 ¹⁸ FOOSC v. Skagit County, WWGMHB Case NO. 98-2-0006 (Final Decision and Order, July 23, 1998)

¹⁹ See, e.g., *Vinatieri et al. v. Lewis County*, WWGMHB Case No. 03-2-0020c (Compliance Order – 2005)
where the Board found a public participation violation and also found a failure to consult with cities on criteria
for siting major industrial developments as is required by RCW 36.70A.367.

1 would be premature for this Board to review the MOU for compliance with the GMA and
2 SEPA until the County has had the opportunity to do its own review.

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4 Based on the stipulation of the parties, therefore, the Board finds that Clark County did not
5 provide for early and continuous public participation in the adoption of the MOU in violation
6 of RCW 36.70A.020(11), RCW 36.70A.035, and RCW 36.70A.140 and Clark County Code
7 Ch. 40.560.
8

9 II. INVALIDITY

10 Petitioners further request the Board to find that the MOU substantially interferes with Goal
11 2 (sprawl reduction), Goal 5 (economic development), Goal 8 (natural resource industries),
12 Goal 9 (open space and recreation), Goal 10 (environment), and Goal 11 (citizen
13 participation and coordination) of the GMA.²⁰ At this juncture, however, the Board has not
14 made a finding of noncompliance with any of the GMA requirements except the public
15 participation and comprehensive plan amendment process requirements. RCW
16 36.70A.020(11), 36.70A.035, 36.70A.140; and 36.70A.130. Therefore, the Board finds it
17 premature to enter a determination of substantial interference with Goals 2, 5, 8, 9 and 10.
18 The Board will, however, consider whether the continuing validity of the MOU substantially
19 interferes with Goal 11, the citizen participation goal of the GMA.
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23 A finding of invalidity may be entered when a board makes a finding of noncompliance and
24 further includes a “determination, supported by findings of fact and conclusions of law that
25 the continued validity of part or parts of the plan or regulation would substantially interfere
26 with the fulfillment of the goals of this chapter.” RCW 36.70A.302(1) (in pertinent part).
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28
29 We have held that invalidity should be imposed if continued validity of the noncompliant
30 comprehensive plan provisions or development regulations would substantially interfere with
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²⁰ Petitioners' Motion for Summary Judgment at 14.
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1 the local jurisdiction's ability to engage in GMA-compliant planning. See *Butler v. Lewis*
2 *County*, WWGMHB Case No. 99-2-0027c (Order Finding Noncompliance and Imposing
3 Invalidation, February 13, 2004) and *1000 Friends of Washington v. Thurston County*,
4 WWGMHB Case No. 05-2-0002 (Final Decision and Order, July 30, 2005).

5
6 Petitioners argue that the MOU assists in the "inappropriate conversion of undeveloped
7 land", harming local businesses, creating uses that are incompatible with agriculture in the
8 area, and leading to degradation of the environment and open space.²¹ All of this,
9 Petitioners urge, was done without citizen participation and input.²²

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12 The County responds that a determination of invalidity is unnecessary in this case. If the
13 Board has jurisdiction, it should, the County urges, remand the MOU to the County to clarify
14 or eliminate any conflicting provisions²³.

15
16 Ordinarily, the Board would have no authority to invalidate an agreement. However, in this
17 case, the Court of Appeals has decided that the MOU is a comprehensive plan amendment.
18 Therefore, the Board's authority to determine substantial interference with GMA goals
19 extends to the MOU.²⁴ Further, the Board must consider the MOU as it would an adopted
20 comprehensive plan amendment for purposes of determining whether its continuing validity
21 substantially interferes with fulfillment of Goal 11, the citizen participation and coordination
22 goal of the GMA.

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24
25 Had the County adopted a comprehensive plan amendment to extend services to the Tribe
26 as set out in the MOU without complying with its public participation plan, the continuing
27 validity of that amendment would substantially interfere with Goal 11 because the decisions
28 themselves would remain in effect. Since the Court of Appeals has directed us to consider
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31 ²¹ *Ibid.*

²² *Ibid.*

²³ Argument of counsel for the County at the motions hearing, May 30, 2007.

²⁴ RCW 36.70A.302

1 the MOU as a comprehensive plan amendment, the Board must likewise view the impact of
2 the continuing validity of the MOU. Having the County's obligations continue in effect
3 despite the fact that there has been no citizen input in them belies the significance of public
4 participation in assuming the obligations in the first place. Petitioners assert that the MOU is
5 being used to support the Tribe's application to put the lands in trust status and as a central
6 consideration in the environmental review of the trust acquisition and casino project.²⁵ If the
7 MOU continues in effect, the ability of the public to have input into the County's decisions
8 may be nullified, because the trust application process will proceed in reliance upon the
9 MOU without public participation.
10

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12 For these reasons, the Board finds that the continuing validity of the MOU substantially
13 interferes with the fulfillment of Goal 11 of the GMA and therefore the MOU is invalid.
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15 III. FINDINGS OF FACT

- 16 1. Clark County is a county located west of the crest of the Cascade Mountains that is
17 required to plan pursuant to RCW 36.70A.040.
- 18 2. Petitioner Alexanderson submitted written comments concerning the draft MOU and
19 oral testimony to the Clark County commissioners concerning the MOU prior to its
20 adoption. Petitioners Dragonslayer and Michels submitted written comments on the draft
21 MOU prior to its adoption.
- 22 3. After several years of negotiations, the County and the Cowlitz Tribe entered into a
23 Memorandum of Understanding ("MOU") regarding some land owned by the Tribe and
24 located in Clark County that the Tribe is seeking to have placed in trust status by the
25 Bureau of Indian Affairs. On March 2, 2004, the Clark County Commissioners adopted
26 Resolution No. 2004-03-02 approving the MOU. Ex. 423.
- 27 4. Petitioners filed a petition for review based on the County's adoption of the MOU on
28 May 3, 2004.
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²⁵ AR 580.
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1 5. By order dated July 20, 2004, this Board had dismissed the petition for review in this
2 case for lack of subject-matter jurisdiction.²⁶

3 6. The Thurston County Superior Court affirmed the Board's decision.

4 7. Division II of the Court of Appeals reversed the decision of the Board, finding that the
5 Board did have jurisdiction over the challenged action as a *de facto* comprehensive plan
6 amendment.
7

8 8. The Court of Appeals found: "Because the MOU has the legal effect of amending
9 the plan, just as if the words of the plan itself had been changed to mirror the MOU, the
10 MOU was a *de facto* amendment and the Board has jurisdiction."

11 9. The County and the Tribe have agreed that Section 9.3 of the MOU has been
12 declared invalid by the Court of Appeals and so that provision has been severed from
13 the rest of the MOU.
14

15 10. The County has taken no legislative action to amend or rescind the MOU.

16 11. The County concedes that the MOU was adopted without compliance with the GMA
17 requirements for public participation or with the County's process for adoption of
18 comprehensive plan amendments.

19 12. The County clearly did not realize that entering into the MOU would constitute a
20 comprehensive plan amendment and it may, upon remand and public participation,
21 change parts of the MOU or its comprehensive plan.
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23 **IV. FINDINGS OF FACT RELATED TO INVALIDITY**

24 13. The MOU is being used to support the Tribe's application to put the lands in trust
25 status and as a central consideration in the environmental review of the trust acquisition
26 and casino project.
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28 14. If the MOU continues in effect, the ability of the public to have input into the County's
29 decisions may be nullified, because the trust application process will proceed in reliance
30 upon the existing MOU which was adopted without public participation.
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²⁶ Order on Motion to Dismiss.
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1 15. Any finding of fact that is determined to be a conclusion of law is hereby adopted as
2 such.

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4 **IV. CONCLUSIONS OF LAW**

- 5 A. The Board has jurisdiction over the parties and subject matter of the petition for
6 review.
7
8 B. The petition for review was timely filed.
9
10 C. Petitioners have standing to file the petition for review.
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12 D. The adoption of the MOU failed to comply with the GMA and Clark County
13 requirements for public participation in the adoption of comprehensive plan
14 amendments. RCW 36.70A.020(11), 36.70A.035, 36.70A.140 and Clark County
15 Code Ch. 40.560.
16
17 E. The continuing validity of the MOU substantially interferes with fulfillment of Goal 11
18 of the GMA. RCW 36.70A.020(11). The MOU is therefore invalid pursuant to RCW
19 36.70A.302.
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21 F. Any conclusion of law that is determined to be a finding of fact is hereby adopted as
22 such.

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24 **V. ORDER**

25 Based on the foregoing, the County is ordered to achieve compliance with the GMA in
26 accordance with this decision no later than **December 14, 2007**. The following schedule
27 shall apply:

28 Compliance Due	December 14, 2007
29 Compliance Report and Index Due (County to file)	December 21, 2007
30 Written Objections to a Finding of Compliance Due (if any)	January 11, 2008
31 County Response Due	February 1, 2008
32 Compliance Hearing (time and location to be established by subsequent order)	February 7, 2008

1 Any requests for an extension of the period for compliance must substantiate that
2 compliance could not reasonably be achieved within the time period set herein and must be
3 filed with the Board no later than **December 7, 2007**.

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5 DATED this 19th day of June 2007.
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10 Margery Hite, Board Member

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12 _____
13 Holly Gadbow, Board Member

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15 _____
16 James McNamara, Board Member
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18 Pursuant to RCW 36.70A.300 this is a final order of the Board.
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20 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the
21 mailing of this Order to file a petition for reconsideration. Petitions for
22 reconsideration shall follow the format set out in WAC 242-02-832. The original and
23 three copies of the petition for reconsideration, together with any argument in
24 support thereof, should be filed by mailing, faxing or delivering the document directly
25 to the Board, with a copy to all other parties of record and their representatives.
26 **Filing means actual receipt of the document at the Board office.** RCW 34.05.010(6),
27 WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for
28 filing a petition for judicial review.

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

Enforcement. 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

1 parties within thirty days after service of the final order, as provided in RCW
2 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,
3 but service on the Board means actual receipt of the document at the Board office
4 within thirty days after service of the final order.

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

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