

**BEFORE THE WESTERN WASHINGTON GROWTH  
MANAGEMENT HEARINGS BOARD**

ALVIN ALEXANDERSON, DRAGONSLAYER, INC.;;  
and MICHELS DEVELOPMENT LLC,

Petitioners,

v.

CLARK COUNTY,

Respondent.

No. 04-2-0008

**ORDER ON  
MOTION TO  
DISMISS**

THIS MATTER comes before the Board on the County's motion to dismiss this case for lack of subject matter jurisdiction over the challenges raised in the Amended Petition for Review. Clark County's Motion To Dismiss. A motions hearing was held on July 1, 2004 in Olympia, Washington. All three board members attended the hearing<sup>1</sup>. Richard Lowry, Chief Civil Deputy Prosecuting Attorney, represented Clark County. Galen Schuler and Greg Overstreet, Perkins Coie, represented the Petitioners.<sup>2</sup>

Several procedural matters regarding the evidence submitted to the Board were addressed at the hearing. The County withdrew its objection to the Petitioners' Motion to Supplement the Record and, at the Board's request, Petitioners submitted Petitioners' Abridged Exhibits Referenced in Opposition to Clark County's Motion to

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<sup>1</sup> Gayle Rothrock was appointed to the Western Washington Growth Management Hearings Board effective July 1, 2004 and she was in attendance at the hearing.

<sup>2</sup> Subsequent to the motions hearing, Petitioners filed a motion for leave to submit supplemental briefing on the applicability of *City of Burien v. CPSGMHB*, 113 Wn. App.375, 53 P.3d 1028, 2002 Wash. App. LEXIS 2218 (Div. II, 2002) to this case. Petitioners' Motion For Leave To File Supplemental Briefing, July 7, 2004. Respondent also filed supplemental briefing on this point. (Clark County's Response to Petitioner's Motion to File Supplemental Brief (July 12, 2004)).

Dismiss after the hearing. These include exhibits offered in the Petitioners' Motion to Supplement the Record. The Index to these exhibits is attached as Appendix A.<sup>3</sup>

## I. SUMMARY

We find that the Board does not have jurisdiction over the memorandum of understanding ("MOU") between the County and the Cowlitz Tribe that will become effective in the event that the tribally owned lands addressed in the memorandum of understanding are placed in trust status. The MOU does not constitute a development regulation, a comprehensive plan provision, or an amendment to either, so the Board lacks jurisdiction to determine its compliance with the Growth Management Act ("the GMA") or the State Environmental Policy Act ("SEPA").

## II. DECISION

### **Background**

After several years of negotiations, the County and the Cowlitz Tribe entered into a Memorandum of Understanding ("MOU") regarding some land owned by the Tribe and located in Clark County that the Tribe is seeking to have placed in trust status by the Bureau of Indian Affairs. On March 2, 2004, the Clark County Commissioners adopted Resolution No. 2004-03-02 approving the MOU. Ex. 423. The MOU states that the County will provide certain services to the Tribe if trust status is accorded to the land, and the Tribe will compensate the County for costs incurred in providing those services. The services addressed in the MOU include law enforcement, prosecution, court and jail services, fire protection and sewer and water. In addition,

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<sup>3</sup> The exhibits offered in the Petitioners' Motion to Supplement the Record are: U.S. Department of Interior, Bureau of Indian Affairs, *Environmental Assessment, Cowlitz Indian Tribe, 151.87 Acre Fee-to-Trust Transfer Project* (March 2004); Century West Engineering Corp. report entitled *Review of Cowlitz Indian Tribe Fee-to-Trust Transfer Environmental Assessment, La Center, Washington* (June 10, 2004); and Kittleson and Associates, Inc. Report entitled *Review of Transportation Element of the Environmental Assessment for the Cowlitz Indian Tribe, 151.87 Acre Fee to Transfer Project* (June 7, 2004).

the Tribe agrees in the MOU to “mitigate traffic, safety, and circulation issues in conformity with Clark County requirements” Ex. 423 (MOU Section 8) and to develop structures and uses on the land in a manner consistent with sections of various titles of the county code: Title 13 – Public Works; Title 14 – Buildings and Structures; Title 15 – Fire Prevention; and Title 40 – the Clark County Unified Development Code. Ex. 423 (MOU, Section 10). However, the MOU does not require the Tribe to abide by the County’s land use policies.

Petitioners have closely followed the negotiations in this case because they are landowners and businesspeople who live and work in areas in proximity to the property that the Tribe is seeking to place in trust status. Petition for Review. In December 2002, the Petitioners urged the County to negotiate an agreement with the Tribe before the land was placed into trust status. Ex. 201. In September 2003, Petitioners submitted comment letters to the Washington State Department of Community, Trade and Economic Development (“CTED”) (Ex. 293) and to the county commissioners (Ex. 294) concerning the draft MOU and urging that the MOU should comply with the Growth Management Act (“GMA”) and the State Environmental Policy Act (“SEPA”).

The board of county commissioners approved the MOU by Resolution 2004-03-02 on March 2, 2004. Ex. 423. In approving the MOU, however, the board of county commissioners made it plain that they were not intending to support the Tribe’s trust application:

The Board has concerns that the trust application, if federally-approved, would permit uses on this rural and resource land which otherwise would not be allowed under the County’s comprehensive land use plan, would permit gaming, which is otherwise prohibited in unincorporated Clark County, and could potentially adversely affect existing business.

Resolution 2004-03-02, Section 2. Disclaimer. (Ex. 423)

**Issue: Does the Growth Management Hearings Board have jurisdiction over the Memorandum of Understanding between the County and the Tribe?**

Petitioners argue that the Board has jurisdiction to determine the compliance of the MOU with the GMA and SEPA because the MOU is a development regulation and a *de facto* amendment to the County's comprehensive plan. Petitioners' Opposition to Clark County's Motion to Dismiss at 10-16. The County argues that the Board has no jurisdiction because the MOU is not a comprehensive plan provision, development regulation, or an amendment to either. Clark County Motion to Dismiss at 1.

The Board's jurisdiction is limited by statute to comprehensive plans, development regulations and amendments thereto:

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

(a) That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shorelines master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW.

RCW 36.70A.280 (1)(a)<sup>4</sup>

And:

All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter or chapter 90.58 or 43.21C RCW must be filed within sixty days after publication by the legislative bodies of the county or city.

RCW 36.70A.290(2).

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<sup>4</sup> The Board also has jurisdiction to determine that the 20-year growth management planning population projections adopted by the office of financial management should be adjusted but that is not at issue here. RCW 36.70A.280(1)(b)

**A. Is the MOU a development regulation?**

Petitioners first argue that the MOU is a development regulation as that term is defined in the GMA. Petitioners' Opposition to Clark County's Motion to Dismiss at 10. In the GMA, the term "development regulation" is defined:

"Development regulation" 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 RCW36.70B.020, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city.

RCW 36.70A.030(7)

Petitioners urge that the MOU adopts "official controls" on the development of the subject property. *Ibid* at 11. However, a development regulation entails controls placed *by the county* on development or land use activities. The MOU was adopted to address use of the property once it is no longer in the County's jurisdiction by virtue of its trust status. It will not apply unless and until the County has no jurisdiction over the property:

This MOU is being executed as of the date shown hereon, but it is specifically agreed that this MOU shall not become effective and enforceable until the date on which the United States Secretary of the Interior accepts the Clark County Site in trust for the Cowlitz Indian Tribe. The acceptance of the Clark County Site into trust for the Tribe is an express condition precedent to this MOU's becoming final.

Ex. 423, Section 16.0

The MOU contains an agreement by the Tribe to adopt certain of the County's land use regulations; it does not contain a waiver of sovereignty to allow the County to regulate land use activity on the Tribe's property (assuming it is granted trust status):

In this MOU, the Tribe agrees that it will act in a manner consistent with certain applicable state laws and Clark County ordinances and requirements/regulations. Nothing in this agreement shall be construed as constituting tribal consent to state and local jurisdiction beyond the specific provisions hereof.

Ex. 423, Section 17.5

The Petitioners refer the Board to the case of *Servais v. City Bellingham*, 2000 WL 1277014 (West. Wash. Growth Mgmt. Hearings Board), WWGMHB Case No. 00-2-0020 (Order on Dispositive Motion, August 31, 2000) in support of their argument that the MOU is a development regulation. In that case, the Board found that a memorandum of agreement between Western Washington University (“WWU”) and the City of Bellingham was a development regulation:

By its own terms the agreement defines the standards upon which WWU will submit specific projects to the City and under which currently-existing development regulations the City will approve or disapprove those interim projects.

*Servais v. City Bellingham*, WWGMHB Case No. 00-2-0020 (Order on Dispositive Motion, August 31, 2000)

That case differs fundamentally from this one in that the City had regulatory authority over the WWU property. WWU would have to bring its projects to the City for approval. Here, the County will have no regulatory authority over the trust lands under the MOU and the Tribe will have no obligation to submit any projects to the County for approval.

**Conclusion:** To the extent that the MOU provides for controls on development or land use activities, those would be imposed by the Tribe, not the County. Therefore, the MOU does not entail the County’s placement of official controls on tribal trust lands and is not a development regulation within the meaning of the GMA.

**B. Is the MOU a *de facto* comprehensive plan amendment?**

Petitioners also argue that the MOU is a *de facto* amendment of the County's comprehensive plan. Petitioners' Opposition to Clark County's Motion to Dismiss at 14. Petitioners argue that the MOU "modified the County's planning policies and it foreclosed the County's planning options." *Ibid* at 16. This is because the subject property is designated as both an agricultural resource land and an industrial reserve area under the Clark County comprehensive plan. *Ibid* at 14. If and when the property is placed in trust status, it may be used in many ways that are inconsistent with the County's comprehensive plan. *Ibid* at 15.

The problem with Petitioners' argument is that the MOU is not what would modify the County's planning policies. Placement of the subject property in trust status and outside the jurisdiction of the County is what will allow the property to be used in ways that may not be consistent with the County's planning policies, or, indeed, the GMA and SEPA. However, the County does not have authority to place or not place property into trust status. The "acquisition of land in trust status" is a matter in the authority of the federal government. 25 CFR 151.3.

Once the property is placed in trust status, the County may not impose land use regulations on it. The County cites several cases that articulate the principle that Indian lands are not subject to local land use regulation. Clark County Motion to Dismiss at 2; *see, e.g., Gobin v. Snohomish County*, 304 F.3d 909 (9<sup>th</sup> Circuit, 2002). Petitioners do not dispute this principle but argue that the MOU facilitates the placement of the subject property into trust status. Petitioners' Opposition to Clark County's Motion to Dismiss at 18.

Whether or not the federal government relies upon this MOU to make its determination on trust status, it does not transform the MOU into a comprehensive plan amendment.

“Comprehensive plan” is also a defined term in the GMA:

“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.

RCW 36.70A.030(4)

The MOU that is challenged here does not itself change the comprehensive plan. It is an agreement about what the Tribe and the County will do if and when the subject property is placed into trust status.

It is true that a change in status of the subject property would require the County to take action to amend its comprehensive plan because it would remove some land from the County’s jurisdiction; this would necessarily mean a change to the County’s land use maps, and would probably lead the County to revisit its designations and development regulations applicable in the vicinity of the trust lands. Petitioners argue that the County has a duty to adjust its comprehensive plan and development regulations in conjunction with the MOU. Petitioners’ Opposition to Clark County’s Motion to Dismiss at 19. If the subject property is placed in trust status, then such a duty may well arise. But, as the County points out, the County could hardly begin to do a comprehensive plan review until it knows what is going to happen with the subject property.

The case of *City of Burien v. CPSGMHB*, 113 Wn. App. 375, 53 P.3d 1028 (Div. II, 2002) involved a similar situation. The City of Sea-Tac and the Port of Seattle negotiated and adopted an interlocal agreement that provided that certain amendments

to the City's zoning maps and land use maps would be made. Thereafter, the City of Sea-Tac did amend its plan, zoning code, and maps. *Ibid* at 381. The Central Board held that it did not have jurisdiction over the negotiation and execution of the interlocal agreement but it did have jurisdiction over the amendments that were adopted pursuant to the interlocal agreement. *Ibid* at 384. The Court of Appeals affirmed.

As in the *City of Burien* case, the MOU that is challenged here did not itself amend the comprehensive plan or development code of the County. Unlike the *City of Burien* case, the County will not adopt comprehensive plan amendments or development regulations pursuant to the MOU because the MOU will come into effect only if the subject property is placed in trust status and *beyond* the jurisdiction of the County.

**Conclusion:** The MOU simply represents an agreement as to how the Tribe will work with the County on a variety of issues if the land is placed in trust status. It is not a comprehensive plan amendment, *de facto* or otherwise.

### **C. The Impact of Placing the Lands in Trust**

We are limited in this decision to determining whether the Board has jurisdiction over the challenged MOU and we determine that we do not. In so doing, however, we do not minimize the significance on county planning of placing lands in trust status. Both the County and the Petitioners have expressed serious concerns about the impact of future development on trust lands that may not be consistent with either the County's planning policies or the GMA.

The Petitioners' position that the MOU should reflect consistency with existing County planning policies and the GMA is clearly a good idea. The problem is that neither this Board nor the County has the ability to compel a sovereign nation to

accept state and local planning policies. Moreover, the decision whether the lands at issue will be placed in trust status is up to the federal government, not the County.

### **III. FINDINGS OF FACT**

1. Clark County is a county located west of the crest of the Cascade Mountains that is required to plan pursuant to RCW 36.70A.040.
2. Petitioner Alexanderson submitted written comments concerning the draft MOU and oral testimony to the Clark County commissioners concerning the MOU prior to its adoption. Petitioners Dragonslayer and Michels submitted written comments on the draft MOU prior to its adoption.
3. After several years of negotiations, the County and the Cowlitz Tribe entered into a Memorandum of Understanding (“MOU”) regarding some land owned by the Tribe and located in Clark County that the Tribe is seeking to have placed in trust status by the Bureau of Indian Affairs. On March 2, 2004, the Clark County commissioners adopted Resolution No. 2004-03-02 approving the MOU. Ex. 423.
4. The MOU does not require the Tribe to abide by the County’s land use policies.
5. In approving the MOU, the board of county commissioners made it plain that they were not intending to support the Tribe’s trust application.
6. The Board’s jurisdiction is limited by statute to comprehensive plans, development regulations and amendments thereto.
7. The MOU was adopted to address use of the property once it is no longer in the County’s jurisdiction by virtue of its trust status. It will not apply unless and until the County has no jurisdiction over the property.
8. The MOU contains an agreement by the Tribe to adopt certain of the County’s land use regulations; it does not contain a waiver of sovereignty to allow the

County to regulate land use activity on the Tribe's property (assuming it is granted trust status).

9. The MOU does not entail the County's placement of official controls on tribal trust lands and is not a development regulation within the meaning of the GMA.
10. The MOU that is challenged here does not itself change the comprehensive plan. It is an agreement about what the Tribe and the County will do if and when the subject property is placed into trust status.
11. The County will not adopt comprehensive plan amendments or development regulations pursuant to the MOU because the MOU will come into effect only if the subject property is placed in trust status and *beyond* the jurisdiction of the County.
12. The MOU simply represents an agreement as to how the Tribe will work with the County on a variety of issues if the land is placed in trust status. It is not a comprehensive plan amendment.
13. The decision whether the lands at issue will be placed in trust status is up to the federal government, not the County.

#### **IV. CONCLUSIONS OF LAW**

- A. This Board has jurisdiction over the parties to this action.
- B. The Petitioners have standing pursuant to bring this petition for review.
- C. The Board lacks subject-matter jurisdiction over the challenge to the Memorandum of Understanding adopted by Clark County Resolution 2004-03-02 because it is not a development regulation, a comprehensive plan provision or an amendment of either.

#### **V. ORDER**

Based on the foregoing, the Petition for Review filed in this case (as amended) is hereby **DISMISSED**.

This is a final decision for purposes of appeal pursuant to RCW 36.70A.300(5).

DATED this 23<sup>rd</sup> day of July, 2004.

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Holly Gadbow, Board Member

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Margery Hite, Board Member

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Gayle Rothrock, Board Member