

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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3 ALVIN ALEXANDERSON; DRAGONSLAYER,  
4 INC.; and MICHELS DEVELOPMENT L.L.C.,

Case No. 04-2-0008

5 Petitioners,

**ORDER FINDING COMPLIANCE**

6 v.

7  
8 CLARK COUNTY,

9 Respondent.  
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12 THIS Matter came before the Board on October 6, 2009 following the submittal of Clark  
13 County's Status Report and Notice of Compliance (Compliance Report).<sup>1</sup> The Board held a  
14 telephonic compliance hearing that day attended by Board members James McNamara,  
15 Nina Carter and William Roehl with Mr. Roehl presiding. Clark County (County) was  
16 represented by Curt Wyrick. Eric Merrifield represented the Petitioners.  
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19 **I. BURDEN OF PROOF**

20 After a board has entered a finding of non-compliance, the local jurisdiction is given a period  
21 of time to adopt legislation to achieve compliance. RCW 36.70A.300(3)(b).  
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23 After the period for compliance has expired, the board is required to hold a hearing to  
24 determine whether the local jurisdiction has achieved compliance. RCW 36.70A.330(1) and  
25 (2). For purposes of board review of the comprehensive plans and development regulations  
26 adopted by local governments in response to a non-compliance finding, the presumption of  
27 validity applies and the burden is on the challenger to establish that the new adoption is  
28 clearly erroneous. RCW 36.70A.320(1), (2) and (3). If a finding of invalidity has been  
29 entered, the burden is on the local jurisdiction to demonstrate that the ordinance or  
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1 <sup>1</sup> Status Report and Notice of Compliance filed July 31, 2009.

1 resolution it has enacted in response to the finding of invalidity no longer substantially  
2 interferes with the goals of the GMA. RCW 36.70A.320(4).

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4 In order to find the County's action clearly erroneous, the Board must be "left with the firm  
5 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,  
6 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

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8 Within the framework of state goals and requirements, the boards must grant deference to  
9 local governments in how they plan for growth:

10       In recognition of the broad range of discretion that may be exercised by counties  
11       and cities in how they plan for growth, consistent with the requirements and goals  
12       of this chapter, the legislature intends for the boards to grant deference to the  
13       counties and cities in how they plan for growth, consistent with the requirements  
14       and goals of this chapter. Local comprehensive plans and development  
15       regulations require counties and cities to balance priorities and options for action  
16       in full consideration of local circumstances. The legislature finds that while this  
17       chapter requires local planning to take place within a framework of state goals  
18       and requirements, the ultimate burden and responsibility for planning,  
19       harmonizing the planning goals of this chapter, and implementing a county's or  
20       city's future rests with that community. RCW 36.70A.3201 (in part).

21 In sum, the burden is on the Petitioners to overcome the presumption of validity and  
22 demonstrate that any action taken by the County is clearly erroneous in light of the goals  
23 and requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).  
24 Where not clearly erroneous and thus within the framework of state goals and requirements,  
25 the planning choices of the local government must be granted deference.

26 Only if a finding of invalidity has been entered is the burden on the local jurisdiction to  
27 demonstrate that the ordinance or resolution adopted in response to the finding of invalidity  
28 no longer substantially interferes with the goals of the GMA. RCW 36.70A.320(4).

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30 In this case, the Board found that a County Memorandum of Understanding (MOU) with the  
31 Cowlitz Tribe substantially interfered with GMA public participation Goal 11 and imposed  
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1 invalidity. The County thus bears the burden of demonstrating that the MOU no longer  
2 substantially interferes with that GMA goal.

## 3 4 **II. ISSUE TO BE DISCUSSED**

5 Whether Clark County has achieved compliance with regard to the area found to be out of  
6 compliance with the Growth Management Act (GMA) in the Board's Order on Motions On  
7 Remand, and subsequent Compliance Orders<sup>2</sup>?

## 8 9 **III. DISCUSSION**

10 The County states in its Compliance Report that it rescinded the MOU with the Cowlitz Tribe  
11 on April 7, 2009.<sup>3</sup> The Rescission Agreement was signed by the Tribe and the County and  
12 specifically states: "Now, therefore, the parties mutually agree that the Memorandum of  
13 Understanding made and entered into on March 2, 2004, between the Tribe and the County  
14 regarding such property (approximately 151.87 acres located in Clark County), is rescinded  
15 as of the date this agreement is signed by both parties."<sup>4</sup>

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18 The Petitioners stated in their Response<sup>5</sup> that they do not oppose entry of a finding of  
19 compliance and reiterated that statement during the Compliance Hearing.

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21 In the Board's earlier Orders, two methods for achieving compliance were suggested:  
22 adoption of the MOU with appropriate public participation or repeal.<sup>6</sup> The County has now  
23 acted by following the avenue of repeal.  
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29 <sup>2</sup> Order on Motions On Remand, June 15, 2007; Order Finding Continuing Noncompliance, Feb. 20, 2008;  
30 Order Finding Continuing Noncompliance, Jan. 6, 2009.

31 <sup>3</sup> Rescission Agreement, EX. 4 to Compliance Report.

32 <sup>4</sup> Id.

<sup>5</sup> Petitioners' Response To Status Report and Notice of Compliance, filed Sept. 1, 2009.

<sup>6</sup> Orders Finding Continuing Noncompliance, Feb. 20, 2008 and Jan. 6, 2009.

1 **IV. ORDER**

2 The Board finds that Clark County has achieved compliance by its action. Therefore, the  
3 Board enters a finding of compliance and this case is closed.<sup>7</sup>

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5 Dated this 8th day of October, 2009.

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9 William Roehl, Board Member

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12 James McNamara, Board Member

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15 Nina Carter, Board Member

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

18 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the date  
19 of mailing of this Order to file a petition for reconsideration. The original and three  
20 copies of a motion for reconsideration, together with any argument in support  
21 thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the  
22 original and three copies of the motion for reconsideration directly to the Board, with  
23 a copy served on all other parties of record. **Filing means actual receipt of the**  
24 **document at the Board office.** RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-  
25 330. The filing of a motion for reconsideration is not a prerequisite for filing a petition  
for judicial review.

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

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32 <sup>7</sup> Compliance having been achieved, the basis for the determination of invalidity no longer exists.

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 or by mail, but  
3 service on the Board means actual receipt of the document at the Board office within  
4 thirty days after service of the final order. A petition for judicial review may not be  
5 served on the Board by fax or by electronic mail.

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