**CENTRAL PUGET SOUND**
**GROWTH MANAGEMENT HEARINGS BOARD**
STATE OF WASHINGTON

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| Elizabeth A. Campbell, | ) | **Case No. 06-3-0031** |
| Petitioner, | ) | ***(Campbell)*** |
| v. | ) | |
| City of Everett, | ) | **ORDER OF DISMISSAL** |
| Respondent. | ) | |

## I. BACKGROUND

On September 13, 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Elizabeth A. Campbell ( **Petitioner** or **Campbell**). The matter was assigned Case No. 06-3-0031, and is hereafter referred to as *Campbell v. City of Everett*. Board member Margaret Pageler is the Presiding Officer (**PO**) for this matter. Petitioner challenges the City of Everett's (**Respondent** or the **City**) adoption of Resolution 2006-1. The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**). Petitioner also submitted a Petition for Certified Standing.

On September 18, 2006, the Board issued its Notice of Hearing, setting the date and location for a prehearing conference and a tentative schedule for the case.

On September 26, 2006, the Board received a Notice of Appearance from Eric S. Laschever and Stoel Rives LLP, on behalf of the City of Everett.

On September 29, 2006, the Board received "Respondent the City of Everett's Motion to Dismiss" (**Motion to Dismiss**), seeking dismissal of the petition on the grounds that the claims are for matters beyond the Board's jurisdiction.

On September 29, 2006, the Board issued "Correction and Clarification of Notice of Hearing," correcting the Board's new address and indicating that the case schedule will be adjusted at the Prehearing Conference in light of the Motion to Dismiss.

On October 16, 2006, the Prehearing Conference was convened in the Board's offices at 10:15 a.m. Presiding Officer Margaret Pageler and Board member Dave Earling attended. Eric Laschever represented the City of Everett. Petitioner Elizabeth Campbell did not appear. Mr. Laschever stated that the PFR should be dismissed because Petitioner had

failed to respond to the City's Motion to Dismiss within 10 days as required by the Board's rules. The PO referred him to the Board's September 29, 2006 Order which stated that the Board, at the PHC, would set a date for Petitioner's response, the City's reply, and the Board's Order on Motions.

In light of Petitioner's failure to appear, the Presiding Officer stated that, if Petitioner's delay is excusable, the Board will issue an order establishing dates for further proceedings; otherwise, the Board will dismiss the PFR for lack of prosecution. The PHC was adjourned at 10:25 a.m. Petitioner's failure to attend was because of illness, as the Board learned in an e-mail posted that day at 8:30 a.m.

On October 17, 2006, the Board issued its Prehearing Order, restating Petitioner's Legal Issues, establishing an expedited calendar for deciding the City's dispositive motion, and requesting specific briefing on *Alexanderson, et al v. Clark County*, Division II Court of Appeals No. 33750-9-II , 2006 Wash.App. LEXIS 2285, (October 17, 2006).

On October 25, 2006, the Board received Petitioner's "Response to Motion to Dismiss, and Supplement to the Record." On October 30, 2006, the Board received Petitioner's "Amended Response to Dismiss and Supplement to the Record" (**Amended Response)**, with format changes.

On November 2, 2006, the Board received "Respondent the City of Everett's Reply to Petitioners' Response to City's Motion to Dismiss" (**City Reply**).

## II. CAMPBELL'S PETITION FOR CERTIFIED STANDING

RCW 36.70A.280(2) provides:

> (2) A petition may be filed only by: (a) The state, or a county or city that plans under this chapter; *(b) a person who has participated orally or in writing before the county or city regarding the matter on which a review is being requested; (c) a person who is certified by the governor within sixty days of filing the request with the board;* or (d) a person qualified pursuant to RCW 34.05.530.

Petitioner Campbell filed a Petition for Certified Standing with her PFR requesting Governor-certified standing under RCW 36.70A.280(2)(c). Petitioner states: "The petition for review raises compelling issues which are of concern across the State of Washington." Petition for Certified Standing, at 1.

Petitioner also provided evidence of participation in the City's process in connection with the adoption of Resolution 2006-1. PFR Exhibits A, B, C, and D.[1] Petitioners' exhibits indicate that she raised the same issues about the Tribal Settlement Agreement in her

- [1] Exhibit A – July 7, 2006, email letter from Ms. Campbell to City Mayor, Council President and Planning Director, referencing prior discussions with City attorney
- Exhibit B – July 12, 2006, certified letter from Ms. Campbell to City Mayor, Council President, Planning Director and Public Works Director
- Exhibit C – July 25, 2006, letter to Campbell from City Attorney James Iles acknowledging receipt of July 7 email and later certified letter
- Exhibit D – August 22, 2006, letter to Campbell from Iles

prior communications with City officials as she is raising before this Board. The City has not questioned Petitioner's participation standing.

The Board finds and concludes that **Petitioner Campbell has standing** to challenge Resolution 2006-1 pursuant to RCW 36.70A.280(2)(b). Therefore Governor-certified standing pursuant to RCW 36.70A.280(2)(c) is not necessary to preserve Petitioner's issues or right to appeal.

## III. CITY'S MOTION TO DISMISS FOR LACK OF JURISDICTION

### *The Challenged Action and Legislative Context*

Petitioner Campbell challenges Resolution 2006-1, which is captioned "Tulalip and Everett Joint Board for Managing the Construction of the Everett to Tulalip Waterline – City of Everett Contribution to the Joint Board Bank Account." Motion to Dismiss, Ex.A. Resolution 2006-1, adopted July 12, 2006, arose as follows.

On September 16, 2005, the City of Everett entered into an Agreement for Settlement, Water Supply, and Water Delivery System with Tulalip Tribes of Washington. PFR. Ex.E [**Tribal Settlement Agreement**]. The Tribal Settlement Agreement resolved threatened legal action by the Tribe seeking compensation for alleged damages to Tribal fishing rights caused by the construction and operation of the City's water diversion dams on the Sultan River. Ex. E, at 1(1). The Tribal Settlement Agreement also dealt with the parties' respective interests in the relicensing of the Jackson Hydroelectric Project. *Id.* at 2(10). Through the Tribal Settlement Agreement, the City of Everett agreed to supply the Tulalip Tribe with up to 30 million gallons a day (mgd) of water from the City's Sultan Reservoir, to construct and maintain a pipe for delivery of that water, and to pay $5 million toward the cost of the project.[2] *Id.*

The City of Everett's 2005 Comprehensive Plan, adopted July 20, 2005, contains one reference to the Tribal Settlement Agreement or the provision of water service to tribal lands.[3] The Capital Facilities Element of the Plan, at page 11, Table 3, includes in the Water Capital Improvements Program for 2005-2010 an expenditure of $5 million in 2005 for "Tribal Settlement." City Reply, Ex.A.

On June 28, 2006, the City enacted Ordinance No. 2917-06 (published July 5, 2006) which established the "Everett-Tulalip Joint Water Line Fund" to administer the funds pledged by the parties for the construction of the waterline. Motion to Dismiss, Ex.B. On July 12, 2006, the City enacted Resolution 2006-1, which is challenged in Campbell's Petition. Motion to Dismiss, Ex.A. Resolution 2006-1 is an endorsement of the City's contributions to the Joint Board bank account to construct the project.

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[2] The Agreement indicates Everett and the Tribe will each make an initial $5 million payment toward the cost of the pipeline and will seek federal and state grant funds for the remainder of the project. PFR, Ex. E. at 5(D). Other terms of the Agreement require the Tribe to pay for water at the rate set by Everett for its wholesale water customers. *Id.* at 3 (B.2). The Agreement does not include sewer services. City Reply, at 5, fn. 3.

[3] See Amended Response, at 6; City Reply, at 5, Ex.A.

## *Applicable Law*

RCW 36.70A.280(1) provides in pertinent part:

> **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) 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 shoreline 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; or
>
> (b) That the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted.

In *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 178, 4 P.3d 123 (2000) the Supreme Court clarified the jurisdiction of the Boards:

> The GMA … limits the kinds of matters that GMHBs may review: "A growth management hearings board shall hear and determine only those petitions alleging … [t]hat a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter…." RCW 36.70A.280(1)(a). Another provision of the GMA spells out in greater detail the subject matter of each petition: "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 … must be filed within sixty days after publication…." RCW 36.70A.290(2). From the language of these GMA provisions, we conclude that unless a petition alleges that a comprehensive plan or a development regulation or amendments to either are not in compliance with the requirements of the GMA, a GMHB does not have jurisdiction to hear the petition.

141 Wn.2d at 178.

## *Discussion and Analysis*

*Positions of the Parties*

Ms. Campbell's PFR contends that the City's agreement to provide water service to Tulalip Tribes will make possible significant new development on the Tulalip

reservation.[4] PFR, at 3. Acknowledging that the Tribe is not required to plan under GMA, Petitioner argues that Everett's water service agreement facilitates growth that the City has a duty to plan for under the GMA. *Id.* at 4. Ms. Campbell reasons:

> The net outcome of this arrangement is that the City is effectively engaged in what amounts to "land use laundering," aiding and abetting "off the books" development, providing necessary municipal resources for that development, the same as it would provide to any non-tribal development; except in this case the City is not accounting for that development in its comprehensive and/or other development plans that it is required to maintain, and that the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted to include the population for the Tulalip Reservation.

*Id.* at 4-5.

The City of Everett moved to dismiss the petition on the grounds that Resolution 2006-1 and, indeed, the Settlement Agreement, are not amendments to the City's comprehensive plan or development regulations and therefore are not subject to Board review.[5] Motion to Dismiss, at 2. The City contends that the Board's jurisdiction is generally restricted to review of comprehensive plans and development regulations adopted under the GMA and does not include interlocal agreements. *Id.* citing *Burien v. Growth Management Hearings Board*, 113 Wn.App. 375, 384-5, 53 P.3d 1028 (2002) (claims regarding interlocal agreement not subject to Board's jurisdiction).

The Board's PHO requested both parties to review *Alexanderson, et al v. Clark County*, Division II Court of Appeals No. 33750-9-II (October 17, 2006). The Court of Appeals in *Alexanderson*, reversing a Western Washington Growth Management Hearings Board ruling, held that the Board had jurisdiction to review a Memorandum of Understanding (**MOU**) between Clark County and the Cowlitz Tribe. Under the challenged MOU, Clark County would provide water service to the Tribe to facilitate development of a casino complex on rural land which the Tribe was seeking to have designated as tribal trust land. The *Alexanderson* court characterized the MOU as a *de facto* amendment of Clark County's comprehensive plan, which designated that land and zoned it for low-density use inconsistent with the Tribe's plans. The court concluded that the Western Board should not have dismissed the petition on jurisdictional grounds.

Ms. Campbell reads *Alexanderson* as directly on point:

> According to the *Alexanderson* facts, if the County were to abide by the terms of the MOU, certain rurally zoned, non-tribal property that was going to gain trust status (which would then be exempt from the previous

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[4] Petitioner cites newspaper and internet reports of plans for "a $130 million, 12-story, 363-room resort hotel and conference center;" "a 486-acre master-planned business park designed to support retail, office, light industrial, distribution and warehousing development;" a four-story office building, another hotel tower, recreational-vehicle park, 20-acre amusement park, water park, K-12 Heritage School, and a "high-tech waste treatment plant." *Id.*

[5] A challenge to the Settlement Agreement (adopted September 16, 2005) or to Ordinance 2917-06 (adopted June 28, 2006) would be untimely.

> County land use regulations which governed it) would be converted under the agreement into commercial land, vis-à-vis the County providing it water and sewer services. As a result thereof, land which the County had designated to remain rural would become commercial, only because the County had facilitated that change as a result of its providing the necessary means to do so – the County providing water and sewer services to it. This "change" would have the effect of the County violating its comprehensive plan by facilitating a land use change that was not permissible in its plan.

Amended Response, at 2.

Ms. Campbell acknowledges that the Tulalip reservation is already trust land but hypothesizes that it would be within the City of Everett's planning boundaries if not for its reservation status; therefore the *Alexanderson* reasoning applies. *Id*. Alternatively, Petitioner argues that Everett's Comprehensive Plan states that Everett will provide municipal services within the city boundaries and in other portions of the Everett planning area "as they become annexed or are included within areas to be served by the City through interlocal agreements." *Id*. at 3. Thus, according to Petitioner, the City of Everett has "a planning interest in the reservation land and/or the capital facilities to be applied to that land." *Id*. at 4. Petitioner questions whether the City can provide capital facilities and services appropriately within City boundaries, over the long term, if 30 mgd of water and millions of dollars are committed to the Tulalip project. At a minimum, she contends, the provisions of the Agreement must be accounted for in the Comprehensive Plan. *Id*. at 6. Petitioner states that the single reference to the Tribal Settlement in the CIP for 2005-2010 is not adequate. "The pipeline and the other facilities associated with it account for considerably more than $5 million [and] this reference hardly addresses the much broader planning implications of the Agreement." *Id*. at 6.

Petitioner concludes:

> The resolution and ordinance act as what the court in *Alexanderson* called "de facto amendments" to the City of Everett's comprehensive plan, because they require the City "to act inconsistently with planning policies [its comprehensive plan]" by providing water, capital facilities improvements, and sewer services (and even the City's credit which is a violation of the Washington State constitution) to the Tulalip Tribes' reservation.

*Id.* at 7.

In reply, the City of Everett distinguishes *Alexanderson* on its facts.[6] Everett argues that its comprehensive plan "does not restrict the City from providing water services in rural areas in the way that the Clark County plan restricted such service." City Reply, at 4. Further, the land at issue in the Clark County case was non-tribal land and therefore was subject to county land use designation, whereas here, the Tulalip land to be served with Everett's water line is tribal trust land and exempt from city regulation. *Id*. at 5. The Tulalip land is outside the City boundary and not in the City's planning area; thus, the City asserts, "the fact that the lands being served are outside the bounds of the

[6] The City also argues that Division II decisions are not binding on this Board. Reply, at 2.

Comprehensive Plan makes it impossible to find that the Settlement somehow amends the City's Comprehensive Plan." *Id*.

*Board Discussion*

The Growth Management Hearings Boards have jurisdiction to review comprehensive plans and development regulations and amendments thereto. *Wenatchee Sportsmen Ass'n, supra*, 141 Wn.2d at 169. This Board has long recognized that its jurisdiction is narrow.[7] In *Burien v. Growth Management Hearings Board, supra*, 113 Wn.App. at 384-5, the Division II Court of Appeals upheld this Board's determination that it lacked jurisdiction to review an interlocal agreement between the City of Seatac and the Port of Seattle, except to the extent the terms of that agreement were enacted as comprehensive plan or development regulations or amendments.

Is Resolution 2006-1 an amendment to Everett's Comprehensive Plan or development regulations? On its face, it is not.

In *Alexanderson*, the Division II Court of Appeals required the Western Board to look beyond the face of a similar tribal settlement agreement and to analyze the effect of the agreement. Because the MOU in that case was directly counter to an express provision of the County's comprehensive plan, the Court ruled that it was a "de facto" amendment to the comprehensive plan and therefore, the challenge should have been reviewed by the Western Board.

In light of the *Alexanderson* opinion, is Resolution 2006-1 a *de facto* amendment to the City of Everett's Comprehensive Plan? The Board concludes that it is not.

The present case differs from *Alexanderson* in several significant ways. First, *Alexanderson* involved proposed water service extension to non-tribal land which was within the planning and zoning authority of Clark County. While the Cowlitz Tribe anticipated that the property would be granted trust status, at the time of the MOU the land was within the County's authority. *Alexanderson*, 2006 Wash.App. Lexis 2285, at 4.

Here, by contrast, the lands proposed to be served pursuant to the Tulalip Tribal Settlement are tribal trust lands which are <u>not</u> within the City of Everett nor within its extended planning area. In fact, the reservation is not within Snohomish County's planning jurisdiction for unincorporated areas and is simply not subject to GMA planning. Trust lands, the *Alexanderson* court reminds us, "enjoy sovereign immunity from state regulations." *Id.* at 2.

Second, in *Alexanderson*, Clark County's comprehensive plan permitted water service extensions to rural and resource lands "… *only if* service is provided at a level that will accommodate *only the type of land use* and development density called for in the [comprehensive plan]." *Id.* at 4 (emphasis in original). The MOU water service extension to serve Cowlitz Tribal development was directly contrary to this Clark County plan

[7] See, e.g., *Anderson Creek v. City of Bremerton*, CPSGMHB Case No. 95-3-0053c, Order on Dispositive Motions (Oct. 18, 1995) (no jurisdiction over surplusing and sale of city property); *Harless, et al v. Kitsap County*, CPSGMHB Case No. 02-3-0018c, Order on Motions (Jan 23, 2003) (Memorandum of Agreement and ULID neither amended the plan nor development regulations; board lacked subject matter jurisdiction).

provision; it would have accommodated more intense development than the uses allowed in the Clark County plan. *Id.*

In the present case, by contrast, Everett's Comprehensive Plan states that Everett will provide municipal services "within areas to be served by the City through interlocal agreements with other service providers in Snohomish County." [8] Amended Response, at 3. The new waterline project was added to the Capital Facilities Element of the Everett Plan in 2005 as a line item in the Water Capital Improvements Program for 2005-2010 – "Tribal Settlement - $5 Million – 2005." The commitment of funds implemented in Resolution 2006-1 is thus consistent with the Everett Comprehensive Plan. The Tulalip Settlement Agreement and implementing Resolutions are therefore not *de facto* amendments of the Everett Comprehensive Plan over which the Board would have jurisdiction.[9]

The Board finds and concludes that the challenged resolution – Resolution 2006-1 – is not (1) a comprehensive plan or development regulation or amendment thereto, nor (2) a *de facto* amendment to the City of Everett Comprehensive Plan. The Board therefore has no jurisdiction to hear the matter.

### *Conclusion*

The Board finds and concludes that it lacks subject matter jurisdiction to review Resolution 2006-1. The City's Motion to Dismiss is **granted**.

## IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board finds:

1. Petitioner Campbell participated orally and in writing before the City of Everett concerning the Tribal Settlement Agreement and Resolution 2006-1, through discussions with City staff and a letter to the Mayor and Council President. PFR, Ex. A-D.
2. Resolution 2006-1 provides funding to build a water service extension to Tulalip tribal lands pursuant to a Settlement Agreement between the City of Everett and the Tulalip Tribe. PFR, Ex. E; Motion to Dismiss, Ex.A.
3. Under the Tribal Settlement Agreement, the land to be served by the water service extension is tribal trust land. Amended Response, at 2, City Reply, at 6.
4. The Tulalip tribal trust land is not subject to GMA planning requirements. See *Alexanderson, supra,* at 2.
5. The Tulalip tribal trust land is not within the City of Everett or its planning area. City Reply, at 5.

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[8] The Board takes official notice that Everett provides wholesale water supply to a number of other entities, some of which may be GMA planning entities (cities or towns) and others not (water districts or PUDs). *See generally* Everett Comprehensive Plan Update, Capital Facilities Element.4.b and Table 4.

[9] Regardless of consistency with the Everett Comprehensive Plan language, an interlocal agreement proposing to extend Everett's water service to unincorporated rural or resource lands of Snohomish County would be subject to Board jurisdiction and review under RCW 36.70A.110(4). See, *Thurston County v. Cooper Point Association*, 148 Wn.2d 1, 57 P.3d 1156 (2002); *Pilchuck VI v. Snohomish County*, CPSGMHB Case No. 06-3-0015c, Final Decision and Order (Sept. 15, 2006), at 45-53.

6. Resolution 2006-1 authorizes the City to deposit certain funds to a joint account established in Ordinance No. 2917-06, which implements certain provisions of the Tribal Settlement Agreement. Challenges to the Tribal Settlement Agreement, to Ordinance No. 2917-06, or to provisions of the 2005 Everett Comprehensive Plan Update are now time-barred.
7. The commitment of $5 million which is implemented in Resolution 2006-1 is consistent with the Capital Facilities Element of the Everett Comprehensive Plan. City Reply, Ex. A.

The Board concludes:

8. Petitioner has standing to challenge Resolution 2006-1 pursuant to RCW 36.70A.280(2)(b).
9. Resolution 2006-1 is not an amendment to Everett's Comprehensive Plan or development regulations.
10. Resolution 2006-1 is not a *de facto* amendment of the Everett Comprehensive Plan.
11. The Board lacks subject-matter jurisdiction to review Resolution 2006-1.

## V. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the GMA, prior Board Orders and case law, and having deliberated on the matter the Board ORDERS:

1. The City of Everett's Motion to Dismiss is **granted.**

2. The matter of *Elizabeth A. Campbell v. City of Everett*, CPSGMHB Case No. 06-3-0031, is **dismissed with prejudice.**

3. All further proceedings in this matter are **cancelled** and the matter is **closed**.

So ORDERED this 9th day of November, 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____
David O. Earling
Board Member

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Edward G. McGuire, AICP
Board Member

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.[10]

[10] Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior Court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior Court according to the 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 parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

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