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COURT OF APPEALS  
DIVISION II

08 OCT 17 PM 12:26

No. 37252-5-11

STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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**CLARK COUNTY,**

**Appellant,**

**v.**

**WESTERN WASHINGTON GROWTH  
MANAGEMENT HEARINGS BOARD, ALVIN  
ALEXANDERSON, DRAGONSLAYER, INC., and  
MICHELS DEVELOPMENT, LLC,**

**Respondent.**

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**ALEXANDERSON'S RESPONSE BRIEF**

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**ORIGINAL**

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## I. INTRODUCTION

Clark County's ("County") appeal improperly asks this Court to reconsider an issue that it has already resolved. In 2004, Respondents Alexanderson et al. ("Alexanderson") filed with the Growth Management Hearings Board ("Growth Board") an appeal of a memorandum of understanding ("MOU") between Clark County and the Cowlitz Indian Tribe. The appeal asserted that the MOU—though styled a mere contract—was, in fact, a *de facto* amendment of the County's comprehensive plan and a development regulation that violated the goals and policies of the Growth Management Act ("GMA"). Clark County moved to dismiss the appeal for lack of subject matter jurisdiction, and in 2004 the Growth Board granted the motion:

We find that the Board does not have jurisdiction over the memorandum of understanding ("MOU") . . . . The MOU does not constitute a development regulation, a comprehensive plan provision, or an amendment of either, so the Board lacks jurisdiction to determine its compliance with the Growth Management Act ("the GMA") or the State Environmental Policy Act ("SEPA").

On appeal, this Court reversed. In a unanimous, published opinion, this Court unambiguously answered the question whether the Growth Board had jurisdiction over Alexanderson's challenge to the MOU:

Since the MOU acts as a de facto amendment to the County's comprehensive plan, we hold that the Board had jurisdiction to hear the petition. We reverse and remand to the Board.

*Alexanderson v. Board of Clark County Commissioners*, 135 Wn. App. 541, 543, 144 P.3d 1219 (2006) (*Alexanderson*). To remove all doubt, this Court concluded its decision by holding, "We reverse the Board's decision that it lacked subject matter jurisdiction and remand to the Board for further proceedings." *Id.* at 551.

Yet when the case was remanded to the Growth Board, the County *again* moved to dismiss for lack of subject matter jurisdiction. The Board was plainly bewildered by the County's demand that the Board disregard this Court's clear mandate. The Board noted that, in 2004, it had "originally found that it lacked subject matter jurisdiction over the petition for review," but that decision "was reversed by the Court of Appeals." "Now the County asks the Board to ignore the plain directive from the Court of Appeals." The Board declined to do so, and this appeal followed.

In appealing, the County hopes this Court will revisit the previously decided jurisdictional ruling. In its Opening Brief, the County stated the issue before this Court: the "issue in this APA appeal is the scope of the Western Washington Growth Management Hearings Board ("Hearings Board") subject matter jurisdiction over a County/Tribal

MOU.” County’s Opening Br. at 1. The County’s appeal does not challenge the *substantive* merits of the Board’s decision and presents no new issues.<sup>1</sup> The County merely continues to question the correctness of this Court’s two-year-old decision and seeks to rehash settled law. The County’s appeal accomplishes precisely what the law of the case doctrine was designed to prevent: the endless of relitigation of settled issues, wasting scarce judicial resources and undermining the finality of this Court’s decisions.

The parties have now devoted nearly five years of litigation to the single question of whether the Growth Board had jurisdiction to hear Alexanderson’s petition. Even after this Court resolved the issue, the County continues to insist that this Court erred.<sup>2</sup> The County’s appeal should be denied.

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<sup>1</sup> On April 30, 2008, Alexanderson filed a motion on the merits seeking summary affirmance of the Growth Board’s exercise of its jurisdiction. In response, the County raised a number of issues that suggested the County’s appeal was challenging the substantive merits of the Growth Board’s decision, issues that the County had not raised either at the Growth Board or at the Superior Court and that were therefore not properly before this Court. Nevertheless, the commissioner denied Alexanderson’s motion on the merits, ruling without explanation that “Clark County’s appeal is not clearly without merit.”

<sup>2</sup> Nor has the County used the opportunity of the past year to provide a GMA-compliant public process. As the Growth Board found in its February 20, 2008 Order Finding Continuing Non-Compliance, “The County has not taken any action to comply with the requirements for public participation in the adoption of its *de facto* comprehensive plan amendment in the MOU. It therefore continues to be in non-compliance with” the GMA. *See* Appendix A at 6:9-12. Though the Order (Appendix A) is not part of the certified administrative record, it is a further order of the Growth Board in this matter and is appropriately before this Court. Alexanderson moves

## II. STATEMENT OF THE CASE

Alexanderson relies on and incorporates by reference this Court's statement of the factual and procedural background that appears in *Alexanderson*, 135 Wn. App. at 543-547. The statement of facts below is intended merely to provide an update of the procedural developments in the case since *Alexanderson* was decided.

This Court held in 2006 that the MOU constituted a *de facto* amendment of the County's comprehensive plan within the jurisdiction of the Growth Board and remanded the matter to the Growth Board to exercise its jurisdiction. *Id.* at 551. With the case remanded to the Growth Board, the County again moved to dismiss for lack of subject matter jurisdiction. AR 25. The County contended that this Court held that *only* MOU Section 9.3 (in which the County agreed to provide municipal water to the casino development) constituted a *de facto* amendment to the County's comprehensive plan. *Id.* The County further argued that the effect of this Court's ruling was to invalidate MOU Section 9.3, thereby eliminating the sole basis for the Growth Board's jurisdiction. *Id.* Alexanderson moved for summary judgment, asking the Board to exercise its jurisdiction as directed by this Court. AR 803.

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pursuant to RAP 9.10 to supplement the record with the Growth Board's February 20, 2008 Order.

The Growth Board exercised its jurisdiction, found the MOU to be GMA-noncompliant, and declared it invalid. CP 459-70. In rejecting the County's jurisdictional arguments, the Growth Board noted that this Court had already found that the Board had jurisdiction to hear the case:

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

CP 461 (emphasis added). The Growth Board chose not to ignore this Court's mandate.

On a petition for review to the Thurston County Superior Court, the County again assigned error to the Growth Board's exercise of jurisdiction over the MOU. CP 32-47. The County argued that this Court's *Alexanderson* decision was limited to MOU Section 9.3, which (they argued) was severed from the agreement, thereby depriving the Growth Board of the very jurisdiction found by the Court. *Id.* The superior court denied the County's petition and affirmed the decision of the Growth Board. CP 511-12.

### III. SUMMARY OF ARGUMENT

For nearly five years, the parties have litigated one issue in this case: whether the Growth Board had jurisdiction to consider Alexanderson's petition for review challenging the MOU between the

County and the Cowlitz Indian Tribe. The County has repeatedly conceded that it did not comply with the GMA, and so the scope of the Growth Board's subject matter jurisdiction has been the case's sole subject of dispute. In 2006, that dispute resulted in a decision of this Court, which held "that the MOU is a *de facto* amendment to the comprehensive plan within the Board's jurisdiction and not a development agreement outside the Board's jurisdiction. . . . We reverse the Board's decision that it lacked subject matter jurisdiction and remand to the Board for further proceedings." *Alexanderson*, 135 Wn. App. at 551.

In spite of the clarity of that decision, the County has spent an additional two years arguing that this Court either reached the wrong result or was so inartful in drafting its decision that it intended to reach a different result. And so the County has forced another full round of briefing and argument at the Growth Board, at the Thurston County Superior Court, and now at this Court.

The law of the case doctrine was designed to prevent the never-ending relitigation and agitation of settled issues, the waste of judicial resources, the squandering of the parties' time and money that this case has come to represent. This Court should affirm its own decision in this very case and deny the County's appeal.

#### IV. ARGUMENT

There can be no question that this Court's 2006 decision remanded the matter to the Growth Board and directed it to exercise its jurisdiction over Alexanderson's petition for review. *Alexanderson*, 135 Wn. App. at 549 (holding that "because the MOU has the legal effect of amending the plan . . . the MOU was a de facto amendment and the Board has jurisdiction"); 551 ("We reverse the Board's decision that it lacked subject matter jurisdiction and remand to the Board for further proceedings."). In spite of the clarity of this Court's holding and remand order, the County hopes to persuade this Court that its unmistakably broad ruling was careless and that this Court should have written a much narrower opinion.

In order to avoid this Court's clear jurisdictional ruling, the County makes two arguments. The first is that, although this Court held that the Growth Board had jurisdiction to hear Alexanderson's petition challenging the entire MOU, the Court intended to limit its holding to one single provision of the MOU, Section 9.3, in which the County committed to deliver an urban level of water to a casino development to be located in a rural area. The County's argument hinges on the assumption that this Court was imprecise and that the Growth Board was obligated to disregard this Court's actual holding in favor of this Court's intended holding. The County's second argument is that, by finding MOU Section 9.3 to

constitute a *de facto* comprehensive plan amendment, this Court “effectively invalidated” that provision, thereby severing it from the MOU and depriving the Growth Board of the jurisdiction found by the Court of Appeals. This second argument assumes that this Court not only carelessly drafted its decision but that it did so in a way that unwittingly nullified its remand order and deprived the Growth Board of jurisdiction. Neither argument has merit.<sup>3</sup>

**A. Standard of Review**

Judicial review of a decision by the Growth Board is governed by the Administrative Procedure Act (“APA”), RCW ch. 34.05. RCW 36.70A.300(5); *City of Burien v. Central Puget Sound Growth Management Hearings Board*, 113 Wn. App. 375, 382, 53 P.2d 1028 (2002) (citing *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (1994)). RCW 34.05.570(3) sets forth the criteria for review. Of the nine possible grounds for relief from an agency decision, the County relies on two here:

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<sup>3</sup> The Growth Board accurately summarized the County’s arguments this way:

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

CP 461 at 3:2-8.

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(d) The agency has erroneously interpreted or applied the law.

RCW 34.05.570(3)(b), (d).

Legal determinations of the Growth Board are reviewed de novo. *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998); *City of Burien*, 113 Wn. App. at 382. Under the APA, the burden of demonstrating the invalidity of the agency action is on the party asserting the invalidity.

RCW 34.05.570(1)(a).

The County cannot meet its burden of showing the Growth Board acted without jurisdiction or misapplied the law. After all, the Growth Board exercised its statutory subject matter jurisdiction over Alexanderson's petition, exactly as it was ordered to do by this Court.

**B. The Scope of the Hearings Board's Jurisdiction over the MOU is Settled Law and Further Review is Precluded under the Law of the Case Doctrine.**

This Court's 2006 ruling that the Growth "Board had jurisdiction to hear [Alexanderson's] petition" conclusively established the subject matter jurisdiction of the Growth Board and remains controlling under the law of the case doctrine. Clark County's appeal improperly asks this Court to revisit and narrow its earlier ruling. This Court should reject the

County's effort to indefinitely prolong this case by relitigating settled issues.

The law of the case doctrine "is employed to express the principle that an appellate court will generally not make a redetermination of the rules of law which it has announced in a prior determination in the same case or which were necessarily implicit in such prior determination."

*Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992) (quoting 15 L. Orland & K. Tegland, Wash. Prac., *Judgments* § 380 at 55 (4th ed. 1986)). The Washington Supreme Court has stated that the purpose of the law of the case doctrine is to promote "the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" *State v. Harrison*, 148 Wn.2d 550, 562, 829 P.3d 1004 (2003) (quoting *Christianson v. Cold Indus. Operating Corp.*, 486 U.S. 800 (1988)). Courts apply the doctrine "to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts.'" *Harrison*, 148 Wn.2d at 562 (quoting 5 Am. Jur. 2d, *Appellate Review* § 605 (2d ed. 1995)).

Here, the County argues that by hearing Alexanderson's petition challenging the entire MOU, and not just Section 9.3, the Growth Board

exceeded its jurisdiction. But the issue of whether the Growth Board had jurisdiction to hear Alexander's petition for review challenging the County's compliance with the GMA in executing the entire MOU was squarely addressed by this Court. This Court ruled unambiguously: "We reverse the Board's decision that it lacked subject matter jurisdiction and remand to the Board for further proceedings." *Alexanderson*, 135 Wn. App. at 551. Repeatedly, this Court held that, "[s]ince the MOU acts as a de facto amendment to the comprehensive plan we hold that the Board had jurisdiction to hear the petition." *Id.* at 543.

The law of the case doctrine promotes the finality of this Court's determination and the efficiency of the judicial process. Consistent with that doctrine, the County's continued challenge to the subject matter jurisdiction of the Growth Board should be denied.

**C. There Can Be No Question That This Court's Jurisdictional Holding Was Broadly Inclusive of the Entire MOU.**

The County seeks to avoid the necessary result of this Court's earlier ruling by arguing that this Court's jurisdictional holding was limited to one provision of the MOU: Section 9.3. For at least the following four reasons, the County is wrong.

**1. This Court's holding was unambiguously broad.**

This Court in *Alexanderson* broadly held that "[b]ecause the MOU has the legal effect of amending the plan, just as if the words of the plan

itself had been changed to mirror the MOU, the MOU was a de facto amendment and the Board has jurisdiction.” 135 Wn. App. at 549. While this Court cited to MOU Section 9.3 to illustrate the MOU’s conflict with the comprehensive plan, it did not limit its jurisdictional ruling to Section 9.3. To the contrary, it held that “the MOU” is a comprehensive plan amendment within the jurisdiction of the Growth Board. The County may not assume that this Court inadvertently or carelessly used expansive language when it ordered the Growth Board to exercise its jurisdiction.

As the Growth Board correctly reasoned:

It is true that the Court of Appeals’ analysis uses Section 9.3 of the MOU as the basis for its determination that “what was previously forbidden is now allowed.” However, the Court did not parse the MOU and specify that only certain provisions of it were a *de facto* comprehensive plan amendment. It refers to the MOU in its entirety. . . . Thus, the Court of Appeals clearly was considering the MOU as a whole.”

CP 461 at 3:19-28.

Not only did this Court refer in every instance to the Growth Board’s jurisdiction over the MOU (and not just to one provision of the MOU), this Court also remanded the matter to the Growth Board to exercise its jurisdiction over Alexanderson’s petition for review. *Alexanderson*, 135 Wn. App. at 549 (Appellants “argue that the board had jurisdiction to hear [the] petition. We agree.”). Alexanderson’s petition

asserted 16 different ways that the MOU as a whole violated both the GMA and the State Environmental Policy Act (“SEPA”), Chapter 43.21C RCW. The County’s cramped reading of *Alexanderson*—as applying to only one provision of the MOU—makes nonsense of the Court’s remand for exercise of jurisdiction over the entire petition for review.

**2. This Court rejected the County’s motion for reconsideration, which argued that the holding was overly broad.**

Even the County plainly acknowledged the broad scope of this Court’s ruling in *Alexanderson* when it filed a motion for reconsideration that asked this Court to limit the scope of its decision. The County immediately asked this Court to reconsider its broad holding:

The County does not contest the finding of conflict [between MOU Section 9.3 and the comprehensive plan]; instead, it is asserted that ***this Court erred in concluding that such conflict rendered the MOU a de facto comprehensive plan amendment*** affording the [Growth Board] review jurisdiction.

*Alexanderson*, County Motion for Reconsideration (Nov. 1, 2006)

(emphasis added). Specifically, the County argued that this Court should reconsider its broad ruling because the alleged effect of the ruling was to substantially expand the jurisdiction of the Growth Board: “The decision grossly expands Hearings Board jurisdiction beyond that intended by the legislature.” *Id.* at 4. The County clearly considered, as did this Court,

that this Court's decision found Growth Board jurisdiction over the entire MOU.

This Court denied the County's motion for reconsideration, and the County did not petition the Supreme Court for further review. Having complained on reconsideration that this Court erred in writing an overly broad decision that "grossly expands" Growth Board jurisdiction, it is highly disingenuous for the County now to argue that this Court actually intended to issue a narrower ruling limited to MOU Section 9.3. Indeed, the County now says that it "does not contest" the finding of conflict as to MOU Section 9.3. The County would not have moved for reconsideration to contest the Court's broad ruling if the County agreed with the Court's supposedly narrow decision.

**3. Section 9.3 was only one example of many showing a direct conflict between the MOU and the County's comprehensive plan.**

In finding that the MOU conflicted with (and effectively amended) the Clark County comprehensive plan, this Court used one provision of the MOU to illustrate the point: "Although the language of Section 9.3 does not explicitly amend Goal 6.2.7 of the County's comprehensive plan, it has the actual effect of doing so." *Alexanderson*, 135 Wn. App. at 549. Like this Court, *Alexanderson* had referred in briefing to the many provisions of the MOU that directly conflict with the comprehensive plan,

and this Court could have pointed to any of them to illustrate the conflict. *See, e.g., Alexanderson*, Appellant's Opening Br. at 26 (“[T]he MOU has the *effect* of a plan amendment regardless of Clark County's understanding or intent. The MOU provision concerning the extension of water service to the commercial and urban development of the Site *illustrates this point.*”) (second emphasis added). In fact, *Alexanderson* noted that all of the County's commitments to provide services and facilities to the tribal development similarly ran afoul of the comprehensive plan:

Under RCW 36.70A.110(4), Clark County should not agree to any extension of urban governmental services in rural areas. *Accord* CP at 946 (CCCP Policy 6.1.2); *see also Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 57 P.3d 1156 (2002) (extension of sewer line into rural area violates RCW 36.70A.110(4)). The GMA defines “urban governmental services” to include “public services” and “public facilities” such as sanitary sewer systems, water systems, fire and police protection, and transportation infrastructure. RCW 36.70A.030(12), (13), (19). Under the MOU, Clark County agrees to the extension of water service adequate for the commercial development of the trust land. CP 649 (MOU § 9.3). Clark County also agrees to provide public safety services. CP at 646-48 (MOU §§ 3-6). This violates the GMA and the County's own CCCP policy barring the extension of urban services into rural areas.

*Alexanderson*, Appellants' Opening Br. at 27 n. 4. In fact, each of the County's commitments in the MOU requires the County to extend its services and facilities to a rural area at urban levels in precisely the same way as MOU Section 9.3. Each of these commitments directly conflicts with the comprehensive plan and each could have been used by this Court to illustrate the conflict.

The comprehensive plan makes the limitation on the County's extension of services crystal clear. It states that if services are provided to rural areas, they may only be provided "at levels appropriate to serve rural development." Policy 1.1(c). Fire, police, and other services may be provided in rural areas, but the "level of service provided in such cases should remain rural in nature." Policy 6.6.5. Policy 6.2.7 discourages premature development by restricting the amount of municipal water that may be delivered to rural areas: Clark Public Utilities "may construct extensions of existing services in the rural area only if service is provided at a level that will accommodate only the type of land use and development density called for in the 20-year plan." Likewise, the County is prohibited from making "transportation improvements [including road construction] . . . that would trigger premature development or development that is inconsistent with applicable 20-year plans and zoning and supporting infrastructure." Policy 3.2.2. The comprehensive plan has

as an overarching goal the discouragement of urbanization of rural areas and seeks to accomplish this goal by prohibiting the County from providing municipal services to rural areas at urban levels. Policy 6.10.13.

Nevertheless, in the MOU, the County agreed to provide sewer, water, police, fire, and other emergency services, and to permit road construction and other transportation improvements. CP 51-82 (MOU §§ 3, 4, 5, 6, 8, 9). All of these obligations require the County to act in ways that conflict with the County's obligations under the comprehensive plan. Moreover, even the tribal commitments in the MOU require County extension of services. For example, MOU Sections 7 and 10 require the Tribe to develop the site in accordance with County health and construction codes, and those codes in turn require the County to conduct inspections and to issue permits. CP 54-55.

These issues were all briefed to this Court in the *Alexanderson* case decided in 2006. After reading the briefing and hearing the arguments of counsel, this Court ruled that *the MOU* conflicts with the comprehensive plan and is therefore subject to the jurisdiction of the Growth Board. While MOU Section 9.3's water provision provides a useful illustration of the conflict between the MOU and comprehensive plan, this Court might likewise have enlisted any of the direct conflicts pointed out in briefing. Furthermore, setting aside the many direct and

irreconcilable conflicts between the MOU and the comprehensive plan, perhaps more important is that the purpose of the MOU *as a whole* is to facilitate the urbanization and commercial development of rural, agricultural resource lands in a manner that undermines the County's ability to meet its obligations under its comprehensive plan. The County's request for a line-by-line parsing of the MOU misses the point that this Court understood in writing its 2006 opinion: that the County's collective commitments in the MOU cannot be squared with the County's planning obligations under the GMA. There is therefore no reason to believe that this Court inadvertently and carelessly drafted an expansive holding.

**4. If the Court's holding had been limited to Section 9.3, this Court would necessarily have resolved Alexanderson's second assignment of error.**

Finally, if this Court had intended to limit its holding to one single provision of the MOU, it would have been necessary for the Court to resolve Alexanderson's second assignment of error: that the Growth Board erred in ruling that the MOU does not constitute a "development regulation"—as that term is used in the GMA—within the Board's jurisdiction. This Court, however, found it unnecessary to reach this issue:

Alexanderson, et al. assert that the MOU is an official control over the Tribe's development and a development regulation. Because we hold that the MOU is a *de facto* amendment to the comprehensive plan, we

need not reach this issue and therefore decline to address whether the MOU is a development regulation or amendment.

*Alexanderson*, 135 Wn. App. at 550. This Court's conclusion that it was unnecessary to determine whether the MOU was a development regulation demonstrates that it was not limiting its holding to MOU Section 9.3. Under the County's reasoning, this Court inexplicably left unresolved the scope of the Growth Board's subject matter jurisdiction over the remainder of the MOU.

**D. The County's Arguments in Response to Motion on the Merits Introduced New Issues First Raised on Appeal.**

This Court's decision in *Alexanderson* and the history of this case make plain that this Court's ruling and remand order recognized the Growth Board's jurisdiction over Alexander's petition challenging the entire MOU. Accordingly, the County's current appeal revisits the one question that was fully answered by *Alexanderson* and is therefore improper under the law of the case doctrine. *See* County's Opening Br. at 1 (summarizing the sole issue as "the scope of the [Growth Board's] subject matter jurisdiction over a County/Tribal MOU"). *Alexanderson* filed a motion on the merits on April 30, 2008, arguing that the County's appeal constituted an improper and untimely effort to obtain reconsideration of this Court's 2006 decision. In response, Clark County suggested that (apart from the jurisdictional issue) the County's appeal

challenged the *substantive* merits of the Growth Board's decision.

Because Alexanderson reasonably anticipates that the County will raise these arguments in its Reply Brief, it is necessary to address them here.

The County's response to Alexanderson's motion on the merits asserted two substantive challenges to the Growth Board's decision invalidating the MOU. Neither argument is properly before this Court and neither has merit.

**1. The County argues that the Growth Board did not correctly evaluate the GMA's public participation requirement.**

First, the County argued that the Growth Board failed to "analyze whether Clark County's non-GMA public participation outreach was sufficient to comply with the spirit of the program." Resp. to Motion on Merits at 9. The County contended that, under Washington law, "exact compliance" with the GMA's public participation requirements is not necessary, so long as "the spirit of the program and procedures is observed." *Id.* (citing *Burien v. Growth Management Hearings Board*, 113 Wn. App. 375, 387, 553 P.3d 1028 (2002)). The County thus faulted the Board for failing to evaluate whether the public review process for the MOU satisfied the spirit (if not the exact letter) of the GMA.

This argument is not properly before this Court. The County did not raise the argument before the Growth Board or the superior court; in

fact, the County never made this argument until its response to Alexanderson's motion on the merits. This Court has often stated the rule that it "will not review issues raised for the first time on appeal." *See, e.g., State v. Trout*, 125 Wn. App. 313, 317, 103 P.3d 1278 (2005).

Even if this argument were properly before this Court, there is a very good reason that the Growth Board did not closely evaluate the adequacy of the County's public participation process: the County itself *stipulated* that "a remand is necessary in order to achieve compliance with GMA requirements related to public participation and internal comprehensive plan consistency." CP 463 (Growth Board Order quoting Joint Supplemental Filing).<sup>4</sup> At every stage of this litigation, the County has stipulated on the record that, in executing and adopting the MOU, the County did not comply with the GMA or SEPA. Rich Lowry, counsel for Clark County, made this admission: "if the Board finds jurisdiction over the MOU . . . we would confess error, that we did not go through . . . the public information process that's required procedurally for the GMA enactment, nor do I think I can come up with clever arguments that what we did is consistent with the GMA." Transcript of May 27, 2004 Growth

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<sup>4</sup> The Growth Board reiterated the County's stipulation in its 2008 Order Finding Continuing Non-Compliance. *See* Appendix A at 5:24 to 6:2 ("The Board's Order on Motions on Remand found that the County had failed to comply with [the public participation requirements of the GMA and the County Code] when it adopted the MOU. *This finding was based on the County's stipulation that it had not followed its GMA processes in approving the MOU. . . .*").

Board Hearing at 20. The county has made similar statements throughout this litigation. *See, e.g.*, Statement of R. Lowry, Transcript of July 1, 2004 Growth Board Hearing at 8:10-15 (“There is no question but that we did not purport to or in fact comply with either the procedural or substantive mandates of the Growth Management Act or the comprehensive plan and development regulations in entering into the MOU.”).

After repeatedly stipulating—in argument and in formal Growth Board filings—that the County had not provided a GMA-compliant public participation process prior to execution of the MOU, it is astonishing that the County would now fault the Growth Board for not further analyzing whether GMA-compliant public involvement had been provided.

**2. The County argues that invalidation of the MOU was not an appropriate remedy.**

The County’s second brand new argument—raised for the first time in opposition to the motion on the merits—is that “invalidation of an interlocal agreement as a remedy was specifically rejected” by this Court in *Burien*. Resp. to Motion on Merits (Aug. 7, 2008) at 7. The County has never before raised this challenge to the invalidation remedy, and so it is not properly before the Court.

Moreover, there is a good reason the County has not raised the issue prior to the County’s response to the motion on the merits: the

argument relies on a misreading of *Burien* (a case fully briefed to this Court in *Alexanderson*). In *Burien*, this Court did not rule that invalidation is not an appropriate remedy for GMA-noncompliant agreements or other actions. In that case, this Court ruled that the Growth Board lacked jurisdiction over the interlocal agreement in the first instance because the agreement itself (unlike the MOU in the present case) did not amend the local comprehensive plan. 113 Wn. App. at 380-81. Instead, the agreement merely required the City of Burien to “consider an amendment to its GMA Comprehensive Plan” and to “consider adoption of updates” to local planning documents. *Id.* This Court affirmed the Growth Board’s determination that “the negotiation and execution of the [interlocal agreement] itself was a non-GMA action and, thus, was not subject to the Board’s jurisdiction.” *Id.* at 384.

In other words, *Burien* lacked the one fundamental fact present in this case: an agreement that effectively amended the comprehensive plan and conferred subject matter jurisdiction on the Growth Board. The County’s untimely efforts to raise new issues are unavailing and demonstrate clearly the value of enlisting the law of the case doctrine to prevent the endless re-litigation of settled issues.

**E. The County's Second Argument Regarding Supposed Severance of MOU § 9.3 Has No Merit.**

The second part of the County's two-step argument contends that, by finding that MOU Section 9.3 conflicted with the County's comprehensive plan, the Court of Appeals "effectively invalidated" that section, severing it from the MOU by operation of the MOU's severance provision. As the County argues it, by severing the one term of the MOU that provided a basis for jurisdiction, the Court of Appeals also deprived the Growth Board of jurisdiction. The Growth Board summarized the argument this way:

The second prong of the County's argument is that the Court of Appeals decision itself deprived the Board of subject matter jurisdiction. The County argues that Section 9.3 of the MOU is now "severed" because the Court of Appeals' decision "effectively" invalidated it.

CP 462 at 4:1-3. This argument must also be rejected as pure gamesmanship.

The argument makes a mockery of the Court of Appeals' order directing the Growth Board to exercise its jurisdiction and determine the legal validity of the MOU. The County suggests that the Court of Appeals simultaneously recognized the Growth Board's jurisdiction *and* unintentionally canceled out its own ruling by eliminating the sole basis for jurisdiction.

Even if the County's argument were not legally absurd, moreover, it is factually incorrect. The Court of Appeals addressed one issue: "[W]e hold that the Board had jurisdiction to hear the petition." *Alexanderson*, 135 Wn. App. at 543. Because the Court addressed only the Growth Board's jurisdiction, it did not reach the merits of whether the County complied with the GMA when it executed the MOU. The County is therefore incorrect to state that "the Court of Appeals' decision 'effectively' declared the MOU Section 9.3 void." County's Opening Br. at 19. The Court did not "effectively" do anything: it found that the Growth Board had jurisdiction and nothing else. The Growth Board declared the entire MOU to be invalid because the Growth Board was the first tribunal to reach the merits of Alexanderson's claims. The Court of Appeals, however, did not reach the merits of these claims, and the County's argument that "the parties to the MOU agreed that Section 9.3 . . . . had been severed from the MOU pursuant to the severability provisions of Section 17.3" is wholly irrelevant. *Id.* at 19-20. The MOU's severance term is triggered when "any provision of this MOU is declared invalid by a court of competent jurisdiction." CP 60 (MOU § 17.3). The Court of Appeals did not declare any provision of the MOU to be invalid, and the Court's remand to the Growth Board for full exercise of its

statutory jurisdiction would have served no purpose if the Court of Appeals had already ruled on the validity of the MOU.

The County has not met its burden of showing that the Growth Board has interpreted or applied the law erroneously. The decision of the Growth Board should therefore be affirmed.

**F. If This Court Were to Conclude that Its Earlier Decision Was Limited to Section 9.3, the Court Should Now Determine Whether the MOU Constitutes a Development Regulation.**

In its 2006 ruling that the MOU constitutes a *de facto* comprehensive plan amendment within the review jurisdiction of the Growth Board, this Court found it unnecessary to decide whether the MOU is *also* a development regulation that confers jurisdiction. If this Court now holds that the Court's prior jurisdictional ruling applied only to MOU Section 9.3, Respondents respectfully request that the Court resolve this question left unanswered by *Alexanderson*.

The plain language of the GMA shows that the MOU, in addition to being a *de facto* comprehensive plan amendment, is a development regulation. Under the GMA:

"Development regulations" 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.

RCW 36.70A.030(7) (emphasis added).

The MOU clearly includes official controls that Clark County has placed on development and land development activities with the consent of the Tribe. CP 51 (§ 1.4, 1.5), 55 (§ 10), 60 (§ 17.5) and 79 (Ex. C). While such an agreement requires the consent of the Tribe, once that consent is granted, the County has full authority to enforce the requirements of its land development code.

The Growth Board has previously ruled that a memorandum of agreement ("MOA") regulating development through selective application of and exemption from existing development regulations is, itself, a development regulation that is reviewable by the Growth Board. In *Servais v. City of Bellingham*, No. 00-2-0020, 2000 WL 1277014 (2000), the Growth Board reviewed an MOA between the City of Bellingham and Western Washington University ("WWU"). The MOA defined the standards and procedures for development by WWU. Like the Clark County MOU, the Bellingham MOA provided for a selective application of existing development regulations:

The MOA specifically references various Bellingham Municipal Code (BMC) provisions relating to criteria for approval of

building projects. In addition to specifically adopting some parts of the current BMC, the MOA exempts WWU from certain requirements contained in other BMC sections.

*Id.* at \*2. As such, the Growth Board explained: "It is hard to envision how the MOA does not fit within the definition contained in RCW 36.70A.030(7): 'development regulations' . . . ." *Id.* at \*3. The Growth Board therefore concluded: "We specifically find that the MOA is a development regulation and that *we have jurisdiction* to review the claims . . . ." *Id.* (emphasis added). Just as in *Servais*, Clark County's MOU is an amendment to the County's development regulations and is within the subject matter jurisdiction of the Growth Board. It places official controls on the Tribe's development of the Site.

The Growth Board rejected Alexanderson's reliance on *Servais*, holding that case to "differ fundamentally from this one" because "[h]ere, the County will have no regulatory authority over the trust lands under the MOU." CP 443. The Board's attempt to distinguish *Servais* is unpersuasive because, as noted above, the MOU *requires* the Tribe to comply with selected provisions of the land development code and grants Clark County enforcement authority in the event of noncompliance.

A development regulation is defined to include "controls placed on development or land use activities by a county or city."

RCW 36.70A.030(7). Like the MOA in *Servais*, the MOU executed by Clark County is a negotiated agreement that incorporates various select "provisions relating to criteria for approval of building projects."

In its Order dismissing Alexanderson's appeal, the Growth Board wrongly concluded that the "MOU does not entail the County's placement of official controls on tribal trust lands and is not a development regulation." CP 443. The County itself acknowledges that the effect of the MOU is to control tribal development of the lands. County's Opening Br. at 18 (describing the Tribe's commitment in the MOU as one "to develop its property consistent with county development regulations").

The County will have direct regulatory authority over the trust lands under the MOU because the MOU *grants* the County regulatory authority by (1) creating a binding obligation for the Tribe to comply with provisions of the County code and (2) waiving the Tribe's sovereign immunity to suits brought to enforce compliance with the code. CP 60 (MOU § 17.5) ("the Tribe agrees that it will act in a manner consistent with certain applicable state law and Clark County ordinances and requirements/regulations"); CP 58 (MOU § 13.0) ("The Tribe agrees to waive its sovereign immunity in favor of the County as to any dispute which arises out of this MOU or the activities undertaken by the Tribe pursuant to the terms set forth herein for enforcement."); CP 79-80

(identifying dozens of sections of the Clark County Code that will apply to the Tribe, including sewer, building, fire prevention, landscaping, street and road standards, and other provisions).

A simple review of the documents reveals that the County has regulatory authority over the Tribe's development by virtue of the MOU.<sup>5</sup> As a development regulation, the MOU is within the jurisdiction of the Growth Board. Of course, this Court need not address this issue. The Court has already declined Alexanderson's request to resolve this issue based on its holding that the MOU constitutes a *de facto* comprehensive plan amendment. It is neither necessary nor appropriate for the County to ask this Court to revisit the Court's 2006 ruling in *Alexanderson*. However, if it does revisit that earlier ruling, this Court should also find that the MOU is a development regulation within the Growth Board's jurisdiction.

---

<sup>5</sup> The County has argued in the past that the MOU is not currently a development regulation because the agreement does not become effective unless and until the tribal land is taken into trust (and therefore removed from County enforcement jurisdiction). This argument fails, however, to recognize that one (or both) of the parties to the agreement views the MOU as a currently valid and binding agreement. *See* Order (Appendix A) at 4 (quoting letter from Cowlitz Tribe, which stated that "It is the continuing position of the Tribe that our government-to-government relationship memorialized in the MOU remains a valid and binding contract between the County and the Tribe."). Moreover, even after the land is taken into trust, the MOU makes clear that the Tribe has waived its sovereign immunity to the County's lawsuits to enforce compliance with the County's development code. CP 58.

**V. CONCLUSION**

For the foregoing reasons, Respondents Alexanderson et al. respectfully ask this Court to affirm the decision of the Western Washington Growth Management Hearings Board.

DATED: October 17, 2008

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# APPENDIX A

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 FINDING CONTINUING  
NON-COMPLIANCE**

6 v.

7 CLARK COUNTY

8  
9 Respondent.

10  
11  
12 This Matter comes before the Board upon a compliance hearing held telephonically on  
13 February 7, 2008. Richard Lowry, Chief Civil Deputy Prosecuting Attorney, appeared for  
14 Clark County. Eric Merrifield and Patrick Ryan appeared for Petitioners. All three Board  
15 members attended, Margery Hite presiding.  
16

17 **SYNOPSIS**

18 In this order, the Board finds that Clark County continues to be in non-compliance with  
19 respect to the Memorandum of Understanding with the Cowlitz Indian Tribe (MOU) that the  
20 County has adopted, as a *de facto* comprehensive plan amendment. Although this Board  
21 had originally found that the MOU was not subject to Board jurisdiction, the Court of  
22 Appeals, Division II, found that the MOU constitutes a *de facto* comprehensive plan  
23 amendment and the Board has thereafter required compliance of the MOU with the GMA as  
24 a comprehensive plan amendment. County Resolution No. 2008-01-18 does not cure the  
25 non-compliance since it neither repeals the MOU nor does it adopt it in accordance with the  
26 public participation requirements of the Growth Management Act (GMA), Ch.36.70A. RCW.  
27  
28

29 **PROCEDURAL HISTORY**

30 The Petition for Review in this case was filed on May 3, 2004 and challenged the adoption  
31 of Clark County Resolution No. 2004-03-02. That resolution approved the Memorandum of  
32

1 Understanding (the MOU) between the County and the Cowlitz Indian Tribe concerning  
2 certain property that the Tribe seeks to have placed into trust status. The MOU was adopted  
3 to address use of the property once it is no longer in the County's jurisdiction by virtue of its  
4 trust status. On July 23, 2004, this Board entered an order dismissing the petition based  
5 on lack of subject-matter jurisdiction.<sup>1</sup> The Board's order was appealed to the Thurston  
6 County Superior Court. The Superior Court affirmed the Board.<sup>2</sup> Petitioners then appealed  
7 to the Court of Appeals, Division II. The Court of Appeals reversed the Board's  
8 determination that it lacked subject-matter jurisdiction on the basis that the MOU constitutes  
9 a *de facto* comprehensive plan amendment.<sup>3</sup> The case was remanded to the Board and on  
10 June 15, 2007, this Board found, among other things, that "Clark County did not provide for  
11 early and continuous public participation in the adoption of the MOU in violation of RCW  
12 36.70A.020(11), RCW 36.70A.035, and RCW 36.70A.140 and Clark County Code  
13 Ch. 40.560."<sup>4</sup>  
14

15  
16  
17 This latest decision of the Board was also appealed by the County. The Thurston County  
18 Superior Court has again affirmed the Board<sup>5</sup> and appeal is pending before the Court of  
19 Appeals.<sup>6</sup>  
20

21 On January 29, 2007, the Clark County Board of Commissioners adopted Resolution No.  
22 2008-01-18.<sup>7</sup> It provides:

23 Unless the Hearing Board's June 19, 2007 Order on Motion on Remand is overturned  
24 on further appellate court review, Clark County will not seek to implement or enforce  
25 its provisions.<sup>8</sup>  
26

27 <sup>1</sup> Order on Motion for Dismissal, July 23, 2004.

28 <sup>2</sup> Alvin Alexanderson; Dragonslayer, Inc.; and Michels Development, LLC v. the Board of Clark County  
29 Commissioners and the Western Washington Growth Management Hearings Board, Thurston No. 04-2-  
01723-5(July 1, 2005)

30 <sup>3</sup> *Alexanderson v. Board of County Commissioners*, 135 Wn. App. 541 (2006)

31 <sup>4</sup> Order on Motions on Remand, June 15, 2007 at 5.

32 <sup>5</sup> Order Affirming Decision of the Growth Management Hearings Board, Thurston County Superior Court  
Cause No. 07-2-01398-6, December 14, 2007.

<sup>6</sup> Clark County Compliance Hearing Memorandum at 1 and Exhibit 3.

<sup>7</sup> Exhibit 4 to Clark County Compliance Hearing Memorandum.

1 Based on the adoption of Resolution No. 2008-01-18, the County seeks a finding of  
2 compliance.<sup>9</sup>

### 4 ISSUE PRESENTED

5 Issue No. 1: Does the adoption of Clark County Resolution No. 2008-01-18 effectively  
6 repeal the *de facto* comprehensive plan amendment adopted through the MOU?

7  
8 Issue No. 2: Did the County provide for early and continuous public participation in the  
9 adoption of the MOU in compliance with RCW 36.70A.020(11), RCW 36.70A.035, and RCW  
10 36.70A.140 and Clark County Code Ch. 40.560 through the adoption of Clark County  
11 Resolution No. 2008-01-18?

### 13 DISCUSSION

14  
15 ***Issue No. 1: Does the adoption of Clark County Resolution No. 2008-01-18 effectively***  
16 ***repeal the de facto comprehensive plan amendment adopted through the MOU?***

#### 17 **Positions of the Parties**

18 The County argues that Resolution No. 2008-01-18 “makes it clear that the County will not  
19 effectuate the MOU unless the Hearings Board Order is overturned.”<sup>10</sup> This commitment,  
20 the County urges, “goes well beyond the effects of the determination of invalidity entered by  
21 the Hearings Board which, under RCW 36.70A.302, focuses upon vesting of development  
22 applications.”<sup>11</sup>

23  
24  
25 Petitioners argue that the County has failed to repeal the MOU.<sup>12</sup> The County could not  
26 implement and enforce the MOU anyway, Petitioners claim, since the Board has declared it  
27  
28  
29

30 <sup>8</sup> Resolution 2008-01-18, Section 1.

31 <sup>9</sup> *Ibid* at Section 2.

32 <sup>10</sup> Clark County Compliance Hearing Memorandum at 3.

<sup>11</sup> *Ibid*.

<sup>12</sup> Petitioners' Response to Clark County's Hearing Memorandum at 2.

1 to be invalid.<sup>13</sup> Further, the issue is not the enforceability of the contract, Petitioners argue,  
2 but the compliance of the land use action taken in it.<sup>14</sup>  
3

#### 4 **Board Discussion**

5 Based on the direction from the Court of Appeals that the MOU constitutes a *de facto*  
6 comprehensive plan amendment, this Board found that the MOU fails to comply with the  
7 public participation requirements of the GMA.<sup>15</sup> The County's promise not to implement or  
8 enforce the provisions of the MOU does not constitute a repeal of the comprehensive plan  
9 amendment. The MOU remains in effect and the County's agreement not to enforce it does  
10 not alter its effectiveness. In fact, the Cowlitz Tribe has made it clear that it will enforce the  
11 provisions of the MOU:  
12

13           It is the continuing position of the Tribe that our government-to-government  
14           relationship memorialized in the MOU remains a valid and binding contract between  
15           the County and the Tribe.<sup>16</sup>

16 The Resolution itself does not preclude the County from changing its mind with respect to  
17 the MOU, and anticipates that it will do so if the decision of the Board is "judicially  
18 overturned." If the Board were to find that the Resolution achieved compliance, there would  
19 be no basis for Board jurisdiction if the County were to change its mind and decide to  
20 enforce its provisions. Also, a finding of compliance would at least arguably moot the  
21 existing judicial appeal.  
22

23  
24 Had the County requested it, the Board might accept a commitment such as is found in the  
25 Resolution as a basis for rescinding a determination of invalidity. If the County agrees not  
26 to accept applications, thereby precluding them from vesting, the County can accomplish  
27 the same thing as a determination of invalidity and prevent inconsistent development  
28

29  
30 <sup>13</sup> *Ibid* at 3.

31 <sup>14</sup> *Ibid*.

32 <sup>15</sup> Order on Motions on Remand,

<sup>16</sup> Letter from Cowlitz Indian Tribe to Clark County, dated January 8, 2008; Exhibit 2 to Clark County  
Compliance Hearing Memorandum

1 applications from vesting during the period of compliance remand. Here, however, the  
2 County expressly stated that only a finding of compliance would meet its needs, since it  
3 wishes to be eligible for state grants.<sup>17</sup>  
4

5 **Conclusion:** The commitment made in Resolution 2008-01-18 not to implement or enforce  
6 the provisions of the MOU does not constitute a repeal of the *de facto* comprehensive plan  
7 amendment embodied in the MOU.  
8

9 **Issue No. 2: Did the County provide for early and continuous public participation in**  
10 **the adoption of the MOU in compliance with RCW 36.70A.020(11), RCW 36.70A.035,**  
11 **and RCW 36.70A.140 and Clark County Code Ch. 40.560 through the adoption of Clark**  
12 **County Resolution No. 2008-01-18?**

### 13 **Positions of the Parties**

14 The County does not assert that it adopted Resolution No. 2008-01-18 in accordance with  
15 its own public participation plan for comprehensive plan amendments or RCW  
16 36.70A.020(11), RCW 36.70A.035, and RCW 36.70A.140.  
17

18 Petitioners argue that the County has held no public hearings and solicited no public  
19 comment on the MOU.<sup>18</sup> They note that the County could have incorporated the MOU into  
20 its pending comprehensive plan revision process but failed to do so.<sup>19</sup>  
21

### 22 **Board Discussion**

23 The Board's Order on Motions on Remand found that the County had failed to comply with  
24 RCW 36.70A.020(11), RCW 36.70A.035, and RCW 36.70A.140 and Clark County Code  
25 Ch. 40.560 when it adopted the MOU. This finding was based on the County's stipulation  
26  
27  
28  
29  
30

31 <sup>17</sup> Oral argument, February 7, 2008.

32 <sup>18</sup> Petitioners' Response to Clark County's Hearing Memorandum at 1.

<sup>19</sup> *Ibid.*

1 that it had not followed its GMA processes in approving the MOU, since the County did not  
2 believe it was amending its comprehensive plan.<sup>20</sup>

3  
4 Since the County has not repealed the MOU, the *de facto* comprehensive plan amendment  
5 continues to fail to comply with the public participation requirements for adoption of such a  
6 legislative land use action under the GMA. Resolution No. 2008-01-18 was not adopted in  
7 conformity with the County's public participation plan either.<sup>21</sup>

8  
9 **Conclusion:** The County has not taken any action to comply with the requirements for  
10 public participation in the adoption of its *de facto* comprehensive plan amendment in the  
11 MOU. It therefore continues to be in non-compliance with RCW 36.70A.020(11), RCW  
12 36.70A.035, and RCW 36.70A.140 and Clark County Code Ch. 40.560.

#### 13 14 15 **FINDINGS OF FACT**

- 16 1. Clark County is located west of the crest of the Cascade mountains and is required to  
17 plan pursuant to RCW 36.70A.040.
- 18 2. Petitioners are the original petitioners in this case.
- 19 3. The Petition for Review in this case was filed on May 3, 2004 and challenged the  
20 adoption of Clark County Resolution No. 2004-03-02.
- 21 4. On July 23, 2004, this Board entered an order dismissing the petition based on lack  
22 of subject-matter jurisdiction.
- 23 5. The Court of Appeals reversed the Board's determination that it lacked subject-matter  
24 jurisdiction on the basis that the MOU constitutes a *de facto* comprehensive plan  
25 amendment in *Alexanderson v. Board of County Commissioners*, 135 Wn. App. 541  
26 (Division II -2006).
- 27 6. On remand, on June 15, 2007, this Board found, among other things, that "Clark  
28 County did not provide for early and continuous public participation in the adoption of  
29  
30  
31

32 <sup>20</sup> Order on Motions on Remand.

<sup>21</sup> County response to Board questions at oral argument.

1 the MOU in violation of RCW 36.70A.020(11), RCW 36.70A.035, and RCW  
2 36.70A.140 and Clark County Code Ch. 40.560.”

3 7. On January 29, 2007, the Clark County Board of Commissioners adopted Resolution  
4 No. 2008-01-18, providing:

5 “Unless the Hearing Board’s June 19, 2007 Order on Motion on Remand is  
6 overturned on further appellate court review, Clark County will not seek to implement  
7 or enforce its provisions.”

8 8. The County seeks a finding of compliance based upon the adoption of Resolution  
9 No. 2008-01-18.

10 9. Any finding of fact later determined to be a conclusion of law is adopted as such.

11  
12 **CONCLUSIONS OF LAW**

13 A. The Board has jurisdiction over the parties and subject-matter of this compliance  
14 case.

15 B. Resolution No. 2008-01-18 did not repeal the *de facto* comprehensive plan  
16 amendment embodied in the MOU.

17 C. Resolution No. 2008-01-18 did not comply with RCW 36.70A.020(11), RCW  
18 36.70A.035, and RCW 36.70A.140 and Clark County Code Ch. 40.560 in providing  
19 early and continuous public participation in the adoption of the *de facto*  
20 comprehensive plan amendment embodied in the MOU.

21 D. The MOU continues to fail to comply with RCW 36.70A.020(11), RCW 36.70A.035,  
22 and RCW 36.70A.140 and Clark County Code Ch. 40.560.

23 E. Any conclusion of law later determined to be a finding of fact is adopted as such.  
24  
25

26  
27 **ORDER**

28 The County is ordered to achieve compliance with the GMA and this order within 180 days  
29 of the date of this order. The following schedule shall apply:  
30  
31  
32

1	Compliance Due	August 15, 2008
2	Compliance Report and Index to the Record Due	August 22, 2008
3	(County to file and serve on all parties)	
4	Any Objections to a Finding of Compliance Due	September 12, 2008
5	County's Response Due	October 3, 2008
6	Compliance Hearing (location to be determined)	October 9, 2008

8 DATED this 20<sup>th</sup> day of February 2008.

9 *Margery Hite*

10  
11 Margery Hite, Board Member

12 *Holly Gadbow*

13  
14 Holly Gadbow, Board Member

15 *James J. McNamara*

16  
17 James McNamara, Board Member

18  
19 Pursuant to RCW 36.70A.300 this is a final order of the Board.

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

30 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the  
31 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for  
32 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

1 **Enforcement.** The petition for judicial review of this Order shall be filed with the  
2 appropriate court and served on the Board, the Office of the Attorney General, and all  
3 parties within thirty days after service of the final order, as provided in RCW  
4 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,  
5 but service on the Board means actual receipt of the document at the Board office  
6 within thirty days after service of the final order.

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

1 **WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD**

2 Case No.: 04-2-0008

3 Alexanderson, et al v. Clark County

4 **DECLARATION OF SERVICE**

5 I, PAULETTE YORKE, under penalty of perjury under the laws of the State of  
6 Washington, declare as follows:

7  
8 I am the Executive Assistant for the Western Washington Growth Management  
9 Hearings Board. On the date indicated below a copy of an ORDER FINDING CONTINUING  
10 NON-COMPLIANCE in the above-entitled case was sent to the following through the United  
11 States postal mail service:

12 Alvin Alexanderson  
13 4219 NW 328<sup>th</sup> Street  
14 Ridgefield, WA 98642

15 George Teeney, President  
16 Dragonslayer, Inc.  
17 P.O. Box 1990  
18 LaCenter, WA 98624

19 Clark County Auditor  
1200 Franklin Street  
20 PO Box 5000  
21 Vancouver WA 98666-5000

22 Perkins Coie LLP  
23 1201 Third Ave, Suite 4800  
24 Seattle, WA 98101-3099

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25 Dated this 20<sup>th</sup> day of February, 2008.

26 

Paulette Yorke, Executive Assistant

FILED  
COURT OF APPEALS  
DIVISION II

08 OCT 17 PM 12:26

STATE OF WASHINGTON  
BY

DEPUTY

No. 37252-5-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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**CLARK COUNTY,**

**Appellant,**

**v.**

**WESTERN WASHINGTON GROWTH  
MANAGEMENT HEARINGS BOARD, ALVIN  
ALEXANDERSON, DRAGONSLAYER, INC., and  
MICHELS DEVELOPMENT, LLC,**

**Respondent.**

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**CERTIFICATE OF SERVICE**

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Patrick W. Ryan, WSBA #25499  
Eric S. Merrifield, WSBA #32949  
**PERKINS COIE LLP**  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
(206) 359-8000

Jessica Hottell certifies and states:

I am a citizen of the United States of America and a resident of the State of Washington; I am over the age of eighteen years; I am not a party to this action; and I am competent to be a witness herein. On October 17, 2008, I caused to be served, a true and correct copy of the following:

1. Alexanderson's Response Brief; and
2. Certificate of Service.

upon the following at the address as stated below by the method of service indicated:

**VIA U.S. MAIL & EMAIL**

Curt Wyrick  
Chief Civil Deputy Prosecuting Attorney  
Clark County Courthouse  
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Vancouver, WA 98666-5000  
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**VIA U.S. MAIL & EMAIL**

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Email: marthall@atg.wa.gov

DATED at Seattle, Washington this 17<sup>th</sup> day of October, 2008.



\_\_\_\_\_  
Jessica Hottell