

No. 37252-5-II

COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON

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CLARK COUNTY,

Appellant,

v.

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

Respondents.

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AMICUS CURIAE BRIEF

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## **I. Statement of Interest**

The Cowlitz Tribe of Indians (the "Tribe") is a federally recognized Indian tribe. The Tribe, with Clark County (the "County"), is party to the Memorandum of Understanding (the "MOU") that is the subject of this ongoing litigation. Because the Tribe cannot participate in this action—its status as a sovereign nation would require dismissal if the Tribe were to be joined—it has appeared pursuant to RAP 10.6 requesting amicus curiae status. Its Motion for Leave to File Amicus Brief is attached.

As a preliminary matter, the Tribe feels compelled to file an amicus brief because the County did not raise certain points that the Tribe believes are important. It is particularly unjust not to consider all arguments when the Tribe—the one party most affected by the validity of the MOU—cannot be a party to this action. As an alternative, and to ensure that the Court receives all relevant information, the Tribe provides this amicus brief.

Because the outcome of this litigation will significantly affect the Tribe, it requests that this Court consider the points raised by it in this brief. Of course, the Court has no obligation to consider issues raised only by amicus, but Division II stated last year, "Appellate courts will not

usually decide an issue raised only by amicus, but may choose to do so."<sup>1</sup> Thus, it is well within this Court's discretion to consider the Tribe's arguments. The Tribe respectfully requests that this Court do so because of the unique circumstances presented here.

## **II. The New Comprehensive Growth Plan Makes This Litigation Moot**

As of January 2008 the County began operating under a new comprehensive growth plan, as required by the Growth Management Act ("GMA").<sup>2</sup> Therefore, the rules on what activities, development, and services are allowed in different parts of the County have significantly altered. Under the new comprehensive plan the Tribe's property is now surrounded by the urban growth boundary of La Center. Thus, the activities that are and are not allowed on the Tribe's property have entirely changed. Because the current litigation deals with the legality of urban services extension to the Tribe's property—based upon a comprehensive growth plan that has been replaced—this dispute has become an exercise in theory.

Generally, an appeal is moot and should be dismissed<sup>3</sup> if "it

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<sup>1</sup> *Dragonslayer, Inc. v. Washington State Gambling Comm'n*, 139 Wn. App. 433, 442, 161 P.3d 428 (2007).

<sup>2</sup> Alexanderson et al have noted that as of January 2008 a new comprehensive growth plan replaced and superseded the plan under which this litigation was brought. See Alexanderson reply brief filed in Thurston County Superior Court on December 12, 2007.

<sup>3</sup> *Citizens v. Klickitat County*, 122 Wn.2d 619, 631, 860 P.2d 390, 866 P.2d 1256 (1993).

presents purely academic issues and . . . it is not possible for the court to provide effective relief."<sup>4</sup> Phrased another way, moot cases include those in which only abstract questions remain and those in which issues heard by the trial court no longer exist.<sup>5</sup> Parties need not raise mootness for courts to consider it, because courts can and do determine whether cases are moot of their own volition.<sup>6</sup>

Washington appellate courts have stated that litigation based on a growth management plan becomes moot when a new growth management plan is adopted.<sup>7</sup> Division II noted, when faced with an appellant's challenge of designated densities under a subsequently replaced plan: "The Board invalidated these densities because they promoted urban growth outside designated urban growth areas. Manke appealed that ruling to this court. Before we reached the merits of that appeal, the issue became moot because the County repealed the 1996 Plan in its entirety and replaced it with the 1998 Plan."<sup>8</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> *Chudy v. Bequette*, 139 Wn. App. 1078, \_\_ P.3d \_\_ (2007).

<sup>6</sup> "Even though mootness was not raised and argued by the parties, we must consider the question because the facts suggest that this is a dispute about abstract rights, not a controversy that will make a difference to the litigants. We will normally not accept jurisdiction to decide such a moot question." *Mauzy v. Gibbs*, 44 Wn. App. 625, 629, 723 P.2d 458 (1986) (citation omitted).

<sup>7</sup> *Manke Lumber Co. v. Cent. Puget Sound Growth Mgmt. Hearings Board*, 113 Wn. App. 615, 53 P.3d 1011 (2002).

<sup>8</sup> *Id.* at 621 n. 5.

Division I applied a similar approach to that of the *Manke* court when faced with a challenge to Whatcom County's interim ordinances, adopted under the GMA. During the course of litigation, the interim ordinances were replaced by Whatcom County's new plan and regulations, which contained many of the same provisions found in the interim ordinances. Whatcom County then filed a motion for rescission of the determination that its interim ordinances were invalid. In response to this, the Court of Appeals determined that Whatcom County could not bring the motion and stated, "The new plan and regulations supercede [sic] the interim ordinances, [and] thus a new petition challenging the plan is necessary to obtain review by the Board."<sup>9</sup> The *Wells* court effectively dismissed litigation occurring under a plan that was no longer in effect.

Further, the Washington Supreme Court has addressed a similar legal issue, except involving the Solid Waste Management Act ("SWMA") regulatory scheme. *Citizens v. Klickitat County* concerned the validity of Klickitat County's SWMA plan.<sup>10</sup> Klickitat County argued that because it had since passed an addendum to its Solid Waste Management Plan, the issues—which were brought under the unaltered plan—had become moot. The Court disagreed, but its apparent reasons for doing so are instructive:

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<sup>9</sup> *Wells v. W. Wash. Growth Mgmt. Hearings Bd*, 100 Wn. App. 657, 670, 997 P.2d 405 (2000).

<sup>10</sup> 122 Wn. 2d 619.

"The 1992 addendum is not a completely new update or plan standing alone . . . The addendum merely changes one aspect of the 1990 Plan Update; it is not a substitute for the entire Plan."<sup>11</sup> The Court seemed to make its decision on the fact that the litigated plan remained in force: the original plan was not replaced or substituted by the new plan. Based on the Court's language, it appears that the issues would have been dismissed as moot if the plan had been entirely replaced instead of only subject to an addendum.

In sum, the case law supports the proposition that adoption of a new comprehensive plan moots issues being litigated that rely on an old plan. Here, all parties agree that as of January 2008 the County began operating under a new comprehensive plan. The challenges raised by Alexanderson regard the legality of urban services extension to the Tribe's property when the property was not within the confines of an urban area. Now, however, the property is within an urban growth area—the urban growth area of La Center. Because the Tribe's property is now within an urban area, the critical underlying issue being litigated has become moot.

### **III. The Hearings Board Exceeded Its Power When It Purported to Invalidate the Entire MOU**

Growth hearings boards were formed to serve a limited purpose.

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<sup>11</sup> *Id.* at 631.

That purpose is expressly designated in RCW 36.70A.280(1):

(1) A growth management hearings board shall hear and determine only those petitions alleging . . . :

(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.

Therefore, the hearings boards have subject matter jurisdiction only over matters stemming from alleged violation of the GMA by comprehensive plans, development regulations, or amendments thereto.<sup>12</sup> Under the plain language of the statute, hearings boards may not consider matters that are not GMA violations.

In deciding *Alexanderson v. Board of Commissioners*, Division II recognized the hearings boards' limitations on subject matter jurisdiction.<sup>13</sup> Understanding these limitations, the *Alexanderson* court discussed one provision of the MOU—Section 9.3, which involved extension of public water service. The MOU is made up of 18 parts with multiple subparts, yet the Court did not mention any other part of the MOU. What the Court

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<sup>12</sup> *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 178, 4 P.3d 123 (2000).

<sup>13</sup> 135 Wn. App. 541, 542, 144 P.3d 1219 (2006).

held deserves repeating: "Here, Section 9.3 of the MOU directly conflicts with the comprehensive plan and will override Goal 6.2.7 of the comprehensive plan if the Tribe's trust application is approved . . . We hold that the MOU is a de facto amendment to the comprehensive plan within the Board's jurisdiction . . ." <sup>14</sup> As it reads, the Court's holding in *Alexanderson* is very narrow: the Court explicitly recognized the subject matter limitations of hearings boards and did not propose or endorse a broader construction of hearings boards' jurisdictional scope.

Neither the statute nor the Court of Appeals gave the Western Washington Growth Management Hearings Board (the "Hearings Board") authority to invalidate the entire MOU between the County and the Tribe. In fact, the Court of Appeals expressly endorsed the statutory limitations of the Hearings Board's authority. It is unclear why the Hearings Board now believes it can invalidate the entire MOU, when it previously could not. <sup>15</sup> The Hearings Board stated that the Court of Appeals decision "clearly was considering the MOU as a whole." <sup>16</sup> As can be seen from the language quoted above, the Hearings Board's construction contradicts a plain reading of the Court of Appeals' opinion. Neither is it a

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<sup>14</sup> *Id.* at 550.

<sup>15</sup> *Alexanderson v. Clark County*, No. 04-2-0008, Order on Motions on Remand (WWGMHB June 19, 2007).

<sup>16</sup> *Id.* at 3.

commonsense interpretation of the opinion, since the Court of Appeals would not try to take an action that it does not have the power to take: namely, expand the subject matter jurisdiction of the Hearings Board in direct contravention of state statute.

Many, if not most, of the MOU's provisions are not in conflict with the GMA. This is true for two reasons. First, multiple provisions simply fall outside the scope of matters addressed by the GMA. MOU subject matters range from the applicability of state health regulations on tribal land (Section 7.0) to taxes that the Tribe would pay the County (Section 11.0). The MOU provided for the creation of an education and arts fund by the Tribe (Section 12.0) while also discussing the delegation of law enforcement responsibilities on the land (Section 3.0). Second, provisions that may have conflicted with the GMA under the County's old comprehensive plan do not conflict under the new plan. The Hearings Board has jurisdiction over the agreement only to the extent that it conflicts with the County's comprehensive plan. Because it has jurisdiction only over conflicts, or de facto amendments, it did not have the power to invalidate the MOU provisions not in conflict with the comprehensive plan.

When the County argued its appeal at the Superior Court in December 2007, the judge did not seem to recognize the fact that the

Hearings Board does not have jurisdiction over portions of the MOU that do not implicate the GMA.<sup>17</sup> This distinction—that there are parts of the MOU which clearly implicate the GMA and parts which clearly do not—appears to have gone unrecognized by the Superior Court judge hearing the appeal. The Hearings Board simply does not have jurisdiction over those aspects of the MOU that are unrelated to the GMA.

**IV. The Hearings Board Committed Procedural Error In Issuing The Invalidation Order.**

Following the Division II *Alexanderson* opinion, the Tribe acknowledged that one provision of the MOU conflicted with the County's comprehensive growth plan. In response the Tribe and the County recognized that as a matter of law the provision was severed from the agreement.<sup>18</sup> By acknowledging severance without dispute, the Tribe showed its willingness to make the MOU GMA-compatible. The Hearings Board did not take note of this action, opting instead to issue an order of invalidity as to the whole MOU.

The MOU is a part of the Tribe's proposal to have the federal government take its land into trust. Issuing an order of invalidity severely prejudiced the Tribe because it threatened the Tribe's trust application and

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<sup>17</sup> Clark County v. Western Washington Growth Management, et al., Verbatim Report of Proceedings of December 14, 2007.

<sup>18</sup> Remand Record at 25, Ex. 3, 4.

caused questioning of the Tribe's authority as a sovereign nation.

The purpose of a determination of invalidity is clear from the GMA's legislative history—it is to stop development permits from vesting. Orders of invalidity were added to the GMA in 1995 to resolve questions whether a plan or regulation found GMA-noncompliant remained valid for purposes of granting project permits while the municipality's compliance action was on remand.<sup>19</sup> Following the recommendation of the Governor's Task Force on Regulatory Reform, the legislature decided that local regulations found not to comply with the GMA would still have legal effect during the remand process unless the relevant regulations (or parts thereof) were found to substantially interfere with the goals of the GMA.<sup>20</sup> The Hearings Board is to decide whether there is a "reasonable risk" that development will occur during the remand period that would make it difficult for the local jurisdiction to plan in accordance with the

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<sup>19</sup> RCW 36.70A.302. The provisions were added on the recommendation of the Governor's Task Force on Regulatory Reform, which had found that members of local governments had questions whether a noncompliant plan or regulation remains in effect during the period of remand. *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 561, 958 P.2d 962 (1998). The Task Force recommended that even though a local plan or regulation that violates state law is technically invalid, it should remain in effect unless the Hearings Board makes certain findings in an invalidity order. *Id.*

<sup>20</sup> RCW 36.70A.302(1)(b); RCW 36.70A.300(4) ("Unless the board makes a determination of invalidity as provided in RCW 36.70A.302, a finding of noncompliance and an order of remand shall not affect the validity of comprehensive plans and development regulations during the period of remand.").

requirements of the GMA.<sup>21</sup> The legislative history shows that the purpose of an invalidity determination is to control the vesting of development permits.

Here, the contested MOU involved two parties: the County and the Tribe. The MOU did not create a regulatory scheme under which other parties could obtain development permits. In fact, the MOU did not contemplate other parties, period—it merely defined the rights, roles, and responsibilities as between the County and the Tribe if the Tribe's land is eventually taken into trust. Thus, the only party that could obtain development rights under the MOU was the Tribe.

Had the Hearings Board weighed the risk of development, the following would have become evident: until the land is taken into trust, there is no possibility that the Tribe will develop while the MOU is made GMA-compatible. Before the land is granted trust status, the Tribe cannot undertake the MOU's contemplated development. If the land were taken into trust while the MOU was on remand, which may be the Hearings Board's concern, the invalidity order would serve only to allow the Tribe unbridled discretion in its development, free of any obligation to the County. Once the land is taken into trust, the Tribe is not bound by the

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<sup>21</sup> *Futurewise v. Whatcom County*, No. 05-2-0013, Final Decision and Order (WWGMHB September 20, 2005).

GMA or the County's comprehensive plan without an enforceable agreement like the MOU. Were the land to gain trust status while the MOU was considered invalid, the Tribe would not be bound by any County growth regulations at all. Had the Hearings Board opted instead to sever one provision of the MOU, the Tribe would be bound by the remaining, GMA-compatible provisions—thus, severance of the identified provision would have acted to make the MOU GMA-compatible. The Hearings Board did not follow the procedure prescribed by statute in that it did not weigh whether there was "reasonable risk" of development before it issued an invalidity order.<sup>22</sup> Thus, the Hearings Board committed a procedural error when it issued the order.

Because the MOU is a part of the Tribe's federal application for trust status, a declaration of invalidity prejudices the Tribe. The Tribe's application has been pending for years, and the MOU is one means by which the Tribe has proposed, in its application for trust status, to mitigate the effects of its project. To have an order of invalidity regarding the MOU that could compromise the Tribe's application is patently unfair when the order was made at best unnecessarily and at worst in error.

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<sup>22</sup> As to the Hearings Board's concern that allowing the MOU to stand could cause the federal government to rely on the document in deciding the Tribe's application for trust status, such a consideration clearly falls outside of the Hearings Board's jurisdiction. The existence of the Tribe's federal trust application has no bearing whatsoever on whether the County had the authority to enter the MOU—to the extent that the Hearings Board considered the pending federal application, it committed patent legal error.

Further, the Tribe's authority to contract and its reputation as a sovereign nation were diminished by the Hearings Board's invalidation order. For a board with very limited authority to purport to invalidate a governing document of a sovereign nation is a serious affront, particularly when, in doing so, the Hearings Board committed procedural error.

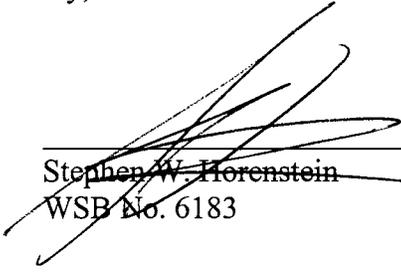
#### **V. Conclusion**

The Tribe has appeared here to take issue with the Hearings Board's construction of the following: the *Alexanderson* opinion, the statutory jurisdiction provisions, and the statutory procedure that it is obligated to follow. By issuing an order that the MOU is invalid, the Hearings Board exceeded its statutory power, exceeded the scope of the Court of Appeals' remand, and disregarded the statutory procedural rules that it is to follow. The Tribe asks that this Court adopt a straightforward, commonsense construction of these authorities and correct the errors made by the Hearings Board.

The Tribe respectfully requests that this Court dismiss Alexanderson's GMA-based challenges to the MOU, since the County's adoption of a new comprehensive growth plan has rendered the issues in dispute moot. In the alternative, the Tribe requests that at minimum this Court remand the matter to the Hearings Board, with instruction that it determine the validity of each section of the agreement in reference to the

County's new comprehensive plan. Continuing to litigate the issues under the superseded comprehensive plan violates principles of judicial economy and perpetuates a legal fiction. Or, as the Division II *Alexanderson* court commented, "To hold that the comprehensive plan has not been amended, where what was previously forbidden is now allowed, is to exalt form over function."<sup>23</sup> The same rationale applies here—the new comprehensive plan allows what was previously forbidden, and to continue on as though it does not wastes the resources of all parties, in order to exalt form over function.

Dated this 6<sup>th</sup> day of May, 2008.



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<sup>23</sup> *Alexanderson*, 135 Wn. App. at 550.

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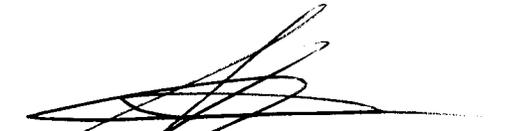
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DATED this 6<sup>th</sup> day of May, 2008.

  
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Stephen W. Horenstein