BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD

WESTERN WASHINGTON REGION

STATE OF WASHINGTON

JACK PETREE, TOM WESTERGREEN, RICHARD WHITMORE, AND A.L.R.T. CORPORATION, Petitioners, v. WHATCOM COUNTY, Respondent. and WHATCOM LAND TRUST, Intervenor.	Case No. 13-2-0018c **ORDER ON MOTION TO SUPPLEMENT THE RECORD, TAKE OFFICIAL NOTICE AND ORDER OF DISMISSAL**

This matter concerns Resolution No. 2013-009 passed by the Whatcom County Council requesting the Department of Natural Resources to reconvey 8,844 acres of state forest land to Whatcom County for park purposes. Prior to the Hearing on the Merits, the Board received two motions. First, Petitioner Jack Petree filed a motion to supplement the record and requesting the Board take official notice of minutes.[1] Second, Whatcom County (County) filed a motion seeking dismissal of the case asserting the Board lacks jurisdiction.[2]

The Board held a telephonic Hearing on the Motions on July 2, 2013. Petitioner Jack Petree appeared pro se; Petitioners Tom Westergreen, Richard Whitmore, and A.L.R.T Corporation appeared through their attorney Peter Dworkin; the County appeared through its attorney, Royce Buckingham; and Heather Wolf appeared on behalf of Intervenor

[1] Petitioner Jack Petree's Motion to Supplement the Record and Request that the Board Take Official Notice of Minutes (June 7, 2013).
[2] Whatcom County's Motion to Dismiss (June 7, 2013).

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Whatcom Land Trust. Board members William Roehl and Margaret Pageler were present with Nina Carter as the Presiding Officer.

Motion to Supplement and Take Official Notice

Petitioner Petree's motion requests the Board to supplement the record with the following documents:

1. Minutes from a Department of Natural Resources (DNR) meeting conducted on July 3, 2012.
2. An audio recording from the above July 3, 2012 DNR meeting.
3. Whatcom County's SEPA Determination of Nonsignificance (DNS) regarding the reconveyance of the property in question, plus pages 2 and 3 from the reconveyance application.
4. Minutes from the March 12, 2013 Whatcom County Council meeting.
5. Minutes from every meeting where the reconveyance was discussed.
6. Request to the Board to take official notice of all County Council meeting minutes in which the reconveyance was discussed.

During oral argument, Petitioners Westergreen, et al. did not object to Petitioner Petree's motion.[3] The County objected to three of the six items requested in the motion.[4] Specifically, it objects to supplementing the record with Items 1 and 2 because this information was not before the County Council when it took action on the Resolution, thus the information was outside the record. Furthermore, the audio recording requested in Item 2 should be in a transcript format. The County also objects to Items 5 and 6 because the request to take official notice of all meeting minutes was too broad and supplementation should be limited to information about the County's Resolution.[5]

In reviewing the request for supplementation, the Board finds that Item 1 and 2 assist the Board in understanding the context of Petitioners' complaints about the County's action.

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[3] Oral statement by Peter Dworkin, attorney for Petitioner Westergreen, et al. on July 2, 2013 during the telephonic Hearing on Motion to Dismiss.
[4] Whatcom County's Response to Petree Motion to Supplement the Record (June 19, 2013).
[5] *Id.*

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The Board **admits** Items 1 and 2, but does not require a transcript of Item 2. Regarding Item 3, the Board finds the SEPA DNS assists the Board in understanding the exact location of the property and the environmental issues addressed by the DNS. The Board **admits** Item 3. The March 12, 2013 County Council minutes specifically reference the DNR land reconveyance and the Board **admits** Item 4.

However, the Board finds Petitioner Petree's all-encompassing request in Items 5 and 6 too broad. Petitioner neither attached specific documents nor included dates for specific meeting minutes. The Board cannot review the relevance of such a wide-ranging request. Thus, the Board **denies** admission of Items 5 and 6.

Motion to Dismiss

The County's motion to dismiss raises several supporting arguments.[6] First, the Board's jurisdiction is limited by RCW 36.70A.280 which only allows the Board to hear petitions alleging adoption or amendments to comprehensive plans (CP) or development regulations (DR) are not in compliance with the Growth Management Act.[7] The County argues the Resolution relates to a change of ownership of land from DNR to the County and the Resolution does not amend the comprehensive plan or development regulations.[8] The County claims the Board has no jurisdiction over land ownership changes such as those proposed in the Resolution.

Next, the County states it will use the property for park purposes and these uses are already allowed by the current zoning for the property, either as permitted or conditionally permitted uses. The County points out the Board does not have jurisdiction over permitting.[9]

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[6] Whatcom County's Motion to Dismiss, Ex. 1 CC-4: Resolution No. 2013-009, Requesting the Reconveyance of Approximately 8,844 acres of State Forest Land Managed by the Department of Natural Resources to Whatcom County for Public Park Purposes (August 7, 2012).
[7] Whatcom County's Motion to Dismiss, at 6 and at 8-12.
[8] *Id.* at 7.
[9] *Id.* at 7.

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Further, the County maintains the resolution is not a *de facto* comprehensive plan amendment as Petitioners claim. The County distinguishes this case from *Alexanderson* and *Feil* by arguing the facts are not the same.[10]

Finally, the County asserts the Resolution's findings are not reviewable by the Board and the appeal is not ripe.[11] The County concludes the Board has no jurisdiction over Resolution No. 2013-009. Intervenor Whatcom Land Trust filed a memorandum in support of the County's Motion to Dismiss.[12] The Land Trust argues that park uses contemplated for the property are now either permitted outright or allowed by conditional use permit through Whatcom County Codes 20.43.050 and .150. Thus, Petitioners' claims are unsubstantiated because park uses and forestry uses are both allowed in the County's code and the Board has no jurisdiction over GMA-compliant county codes.[13] The Land Trust also points out the Board cannot review compliance with DNR's reconveyance statute (RCW 79.22.300)[14] – as Petitioners claim it should – because the GMHB does not have jurisdiction over this statute.[15]

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[10] *Id.* at 12-14; *Alexanderson v. Board of Clark County Commissioners*, 135 Wn. App. 541 (2006) and *Feil v. Eastern Washington Growth Management Hearings Bd.* 153 Wn. App. 394 (2009).
[11] *Id.* at 14.
[12] Whatcom Land Trust's Memorandum in Support of Whatcom County's Motion to Dismiss (June 7, 2013).
[13] *Id.* at 2-3.
[14] RCW 79.22.300 Whenever the board of county commissioners of any county shall determine that state forest lands, that were acquired from such county by the state pursuant to RCW 79.22.040 and that are under the administration of the department, are needed by the county for public park use in accordance with the county and the state outdoor recreation plans, the board of county commissioners may file an application with the board for the transfer of such state forest lands. Upon the filing of an application by the board of county commissioners, the department shall cause notice of the impending transfer to be given in the manner provided by RCW 42.30.060. If the department determines that the proposed use is in accordance with the state outdoor recreation plan, it shall reconvey said state forest lands to the requesting county to have and to hold for so long as the state forest lands are developed, maintained, and used for the proposed public park purpose. This reconveyance may contain conditions to allow the department to coordinate the management of any adjacent public lands with the proposed park activity to encourage maximum multiple use management and may reserve rights-of-way needed to manage other public lands in the area. The application shall be denied if the department finds that the proposed use is not in accord with the state outdoor recreation plan. If the land is not, or ceases to be, used for public park purposes the land shall be conveyed back to the department upon request of the department.
[15] Whatcom Land Trust's Memorandum in Support of Motion to Dismiss, at 7.

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Petitioners Petree and Westergreen oppose the County's motion to dismiss.[16] Petitioner Petree argues the Board must "determine whether Whatcom County adopted a Development Regulation (DR) as defined by RCW 36.70A.030(7) when it passed the Resolution. The GMA clearly gives the Hearings Board jurisdiction to determine whether an adopted action is either an outright DR or a de facto DR."[17] Petitioner Petree argues the County's Resolution "violates various requirements of the GMA as well as the Whatcom County CP and the WCC".[18] He argues the County Resolution does not carry out the County's Comprehensive Plan policies for forest resource conservation, the Resource Lands Chapter No. 8, or County development regulations.[19] Petree also claims the County's resolution is the "key action in the reconveyance process because it legally binds both Whatcom County and the Department of Natural Resources (DNR) in very specific ways to accomplish a change in land use" required by reconveyance and this land will be "only for public park use."[20] By adopting the Resolution, Petitioner Petree asserts the County indirectly, but formally, adopted a land use change. That change, he contends, is supported by the County's SEPA Environmental Checklist which states the land will be transferred from forest management to benefit water quality and public recreation.[21] The Resolution according to Petitioner Petree is a *de facto* amendment to the County's Comprehensive Plan.[22]

Similarly, Petitioner Westergreen, et al. makes the *de facto* argument. Westergreen does not dispute that the Resolution was neither an amendment to the comprehensive plan nor development regulations, but argues the County's action was a *de facto* amendment to the use of the property.[23] The effect of the Resolution is to "prohibit what was once permitted, [which] changes the character of the property in contradiction to its current

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[16] Petitioner Jack Petree's Response to Whatcom County's Dispositive Motion (June 19, 2013), and Petitioners' Westergreen, et al.'s Memorandum in Opposition to Motion to Dismiss (June 20, 2013).
[17] Petree Response to Dispositive Motion, at 3.
[18] *Id.* at 4.
[19] *Id.* at 4-5.
[20] *Id.* at 7.
[21] *Id.* at 10 and 11.
[22] *Id.* at 13 and 14.
[23] Petitioners' Westergreen, et al.'s Memorandum in Opposition to Motion to Dismiss, at 3.

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zoning, and is in direct contradiction with stated planning goals adopted in the Whatcom County Comprehensive Plan."[24] Westergreen asserts the *Alexanderson v. Clark County* case shows that the Board must review the effect of an act to determine where jurisdiction lies.[25] Westergreen argues the case should go to the Hearing on the Merits in order for the parties to fully brief the Board. Only then will the Board be able to determine if the Resolution was a *de facto* amendment to the comprehensive plan or development regulations.

Board Discussion

The relevant statute regarding the Board's jurisdiction is RCW 36.70A.280(1)(a):

> **RCW 36.70A.280**
> Growth management hearings board — Matters subject to review.
>
> (1) The growth management hearings board shall hear and determine only those petitions alleging either:
> (a) That, except as provided otherwise by this subsection, 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. Nothing in this subsection authorizes the board to hear petitions alleging noncompliance with *RCW 36.70A.5801; (Emphasis added)

The relevant statute regarding transferring state forest lands from DNR to a county is:

> **RCW 79.22.300**
> Procedure — Reconveyance back when use ceases.
>
> Whenever the board of county commissioners of any county shall determine that state forest lands, that were acquired from such county by the state pursuant to RCW 79.22.040 and that are under the administration of the department, are needed by the county for public park use in accordance with the county and the state outdoor recreation plans, the board of county commissioners may file an application with the board

[24] *Id.* at 3.
[25] *Id.* at 4; *Alexanderson v. Board of Clark County Commissioners*, 135 Wn. App. 541 (2006).

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> for the transfer of such state forest lands.
>
> Upon the filing of an application by the board of county commissioners, the department shall cause notice of the impending transfer to be given in the manner provided by RCW 42.30.060. If the department determines that the proposed use is in accordance with the state outdoor recreation plan, it shall reconvey said state forest lands to the requesting county to have and to hold for so long as the state forest lands are developed, maintained, and used for the proposed public park purpose. This reconveyance may contain conditions to allow the department to coordinate the management of any adjacent public lands with the proposed park activity to encourage maximum multiple use management and may reserve rights-of-way needed to manage other public lands in the area. The application shall be denied if the department finds that the proposed use is not in accord with the state outdoor recreation plan. If the land is not, or ceases to be, used for public park purposes the land shall be conveyed back to the department upon request of the department.

The property proposed for reconveyance is zoned Commercial Forestry under Whatcom County Code:

> **Commercial Forestry (CF) District**
> **WCC 20.43.010 Purpose.**
> The purpose of this district is to implement the forestry designation of the Comprehensive Plan, pursuant to RCW 36.70A.170, by providing for and encouraging the long-term productivity, commercial management and sustained use of forest resources. In addition, the district provides for uses that are compatible with forestry activities, while ***maintaining water quality*** and soil productivity. (Emphasis added)

The following uses are permitted outright in the commercial forestry district in accordance with Whatcom County Code:

> **WCC 20.43.050 Permitted uses.**
> Unless otherwise provided herein, permitted, accessory and conditional uses shall be administered pursuant to the applicable provisions of Chapter 20.80 WCC (Supplementary Requirements) and Chapter 20.84 WCC (Variances, Conditional Uses, Administrative Approval Uses and Appeals), the Whatcom County SEPA Ordinance, the Whatcom County Subdivision Ordinance and the Whatcom County Shoreline Management Program.

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> **.051** The cultivation, harvest, and production of forest products or any forest crop…
> **.052** Operation of sawmills, chippers, shake and shingle mills, scaling stations; log dumps, sorting and storage areas…
> **.053** The management and propagation of fish and wildlife.
> **.054** ***Watershed management practices…***
> **.055** Surface mining, rock crushing, washing and sorting subject to the Forest Practices Act…
> **.056** ***Public forest preserves***, wildlife reserves, natural systems education, and/or interpretive areas.
> **.057** Temporary use of recreational vehicles…
> **.058** Hydroelectric power generation facilities….
> **.059** Storage of explosives operated in compliance with Chapter 70.74 RCW.
> **.060** ***Trails, trailheads,*** restroom facilities and associated parking areas for no more than 30 vehicles.
> **.061** Private, noncommercial, recreation occupancy…
> **.062** Gravel bar scalping projects within the jurisdiction of the Shoreline Management Program.
> **.063** One one-story detached accessory storage building per lot. (Emphasis added)

Whatcom County also allows conditional uses in that district:

> **WCC 20.43.150 Conditional uses.**
> The conditional uses listed herein shall be administered pursuant to the applicable provisions of Chapter 20.80 WCC (Supplementary Requirements) and Chapter 20.84 WCC (Variances, Conditional Uses and Appeals), the Whatcom County SEPA Ordinance, the Whatcom County Subdivision Ordinance and the Whatcom County Shoreline Management Program. Applicable conditional use permit criteria are established in the provisions of WCC 20.43.900 and will not be subject to the conditional use criteria provided for in WCC 20.84.220.
> **.151** Construction and operation of water diversion structures...
> **.153** Surface mining, rock crushing…
> **.154** ***Operation of dispersed, primitive recreational facilities***…
> **.155** The operation of facilities intended to provide education related to forestry and the purpose of this district, including but not limited to conservation laboratories. (Emphasis added)

The Board reviewed the action taken through the County's Resolution, the briefs of the parties and their oral arguments during the Hearing on Motions. The Board's jurisdiction

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is limited to RCW 36.70A.280 which allows it to rule on the adoption of or amendments to comprehensive plans or development regulations. Here, Whatcom County neither amended its comprehensive plan nor its development regulations. Thus, the Board lacks jurisdiction over the County's adoption of the Resolution.

Petitioners' argument that park uses of the land contradict the County's CP and DRs is not sustained by a plain reading of Whatcom County's development regulations. The Board finds the County's Commercial Forestry (CF) District (WCC 20.43.010), WCC 20.43.050 Permitted Uses and WCC 20.43.150 Conditional Uses allow park uses within commercial forestry districts. The Board finds a challenge to the land uses allowed in the Commercial Forestry District would be untimely as the County's development regulations were adopted and not appealed years ago. The Board does not have jurisdiction over a collateral attack on land uses that are already permitted through previously unchallenged development regulations.

As for the argument that the Resolution is a *de facto* amendment to the County's CP or DRs, the Board looks to *Alexanderson v. Board of Clark County Commissioners.*[26] There the Court of Appeals ruled that a local government action could constitute a *de facto* comprehensive plan amendment bringing it within the Board's jurisdiction for review. The Court of Appeals ruled that a Memorandum of Understanding (MOU) between Clark County and the Cowlitz Tribe committing the County to provide water service to a proposed development was a *de facto* amendment to the County's comprehensive plan policy prohibiting such water service. The Court reasoned the MOU was a *de facto* amendment because its terms superseded the plan:

> 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 and not a development agreement outside the Board's jurisdiction.[27]

[26] 135 Wn. App. 541, 144 P.3d 1219 (2006).
[27] *Alexanderson v. Bd. of Comm'rs*, 135 Wn. App. 541, 550.

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The Court reversed the Board's dismissal based on a lack of jurisdiction and remanded the matter for a Board decision on the merits. The Board has subsequently acknowledged its jurisdiction to review *de facto* comprehensive plan amendments where a city or county action has the effect of superseding plan provisions:

> Thus, the Court of Appeals *Alexanderson* ruling requires the Board to take an additional step in determining its jurisdiction where the challenged action is alleged to override provisions of a comprehensive plan and constitute a de facto amendment.[28]

Here, the County's Resolution began a process with DNR which may or may not result in a change of ownership to the land. A change in ownership is not a change in land use. In this case, unlike the MOU in *Alexanderson*, the Resolution does not govern the use of the land. Finally, Whatcom County's current Commercial Forestry District policies are not superseded or contradicted. As the Board ruled in *Campbell v. City of Everett*[29] and *Petso v. Snohomish County,*[30] there is no basis for finding a *de facto* amendment when the challenged action is consistent with provisions of the comprehensive plan. Thus, the Board finds and concludes the County's action did not constitute a *de facto* comprehensive plan or development regulation amendment. The Board concludes it does not have jurisdiction of this matter and the Petition for Review must be dismissed.

ORDER

Based on the Motion to Supplement and Take Official Notice, the Board **admits** Items 1, 2, 3 and 4 into the record. The Board **denies** supplementation of the record with Item 5 and **does not** take official notice of Item 6.

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[28] *Alexanderson, et al. v. City of La Center*, GMHB Case No. 12-2-0004, Order on Dispositive Motions (May 4, 2012), at 11; see also GMHB Case No. 11-3-0012, *Your Snoqualmie Valley v. City of Snoqualmie,* Order on Motions (March 8, 2012), at 12-13 (Pre-annexation Agreement in direct conflict with City CP policies was a *de facto* plan amendment).
[29] CPSGMHB Case No. 06-3-0031, Order of Dismissal (November 9, 2006).
[30] CPSGMHB Case No. 07-3-0006, Order of Dismissal (April 11, 2007).

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Based on the Motion to Dismiss and the above discussion, the Board lacks jurisdiction to hear the challenge to Resolution No. 2013-009. Case No. 13-2-0018c, *Jack Petree, and Tom Westergreen, et al. v. Whatcom County* is **DISMISSED.**

DATED this 17th day of July, 2013.

_____
Nina Carter, Board Member

_____
Margaret Pageler, Board Member

_____
William Roehl, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.[31]

[31] Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), -840.
A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970.
It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

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