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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re City of Lynnwood North-East-South Annexation Proposal,
Snohomish County, Washington; File No. 01-2009

CITY OF MILL CREEK, a Washington municipal corporation,

Appellant,

v.

WASHINGTON STATE BOUNDARY REVIEW BOARD FOR
SNOHOMISH COUNTY; CITY OF LYNNWOOD, a Washington
municipal corporation; SNOHOMISH COUNTY, a Washington
municipal corporation; CITY OF MUKILTEO, a Washington municipal
corporation; SNOHOMISH COUNTY FIRE DISTRICT No. 7, a
Washington municipal corporation; SNOHOMISH COUNTY FIRE
DISTRICT No. 1, a Washington municipal corporation; OPUS
NORTHWEST, LLC; GORDON NESS; CLINT OLSON; and MARK
BEALES,

Respondents

**APPELLANT'S OPENING BRIEF
[REVISED]**

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COURT OF APPEALS
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I. INTRODUCTION AND RELIEF REQUESTED

This is an appeal of a decision by the Boundary Review Board of Snohomish County ("Board") allowing the City of Lynnwood ("Lynnwood") to annex land lying east of Interstate 5 and north of Interstate 405 which is located within the municipal urban growth area ("MUGA") of the City of Mill Creek ("Mill Creek"). In making that decision, the Board ignored annexation policy, misinterpreted and misapplied five of the statutory annexation objectives listed in RCW 36.93.180, and failed to recognize and apply clear legal precedent regarding the establishment of common boundaries between cities.

For those reasons, Mill Creek asks the Court to reverse the decision of the Board only as to that portion of the decision approving the annexation area lying east of Interstate 5 and north of Interstate 405 within Mill Creek's MUGA.

II. ASSIGNMENTS OF ERROR

The Board is charged with evaluating municipal annexations using the nine statutory objectives set out at RCW 36.93.180. In approving that portion of the Lynnwood annexation that crosses Interstate 5 north of Interstate 405 and into Mill Creek's MUGA, the Board failed to properly interpret and apply five of the required statutory objectives.

Mill Creek assigns error to the Board's Final Decision approving the proposed annexation and the Board's specific findings as follows:¹

1. The proposed annexation bypasses and ignores the natural physical boundary between Mill Creek and Lynnwood formed by Interstate 5 north of Interstate 405. The Board violated RCW 36.93.180(2), which requires using highways as physical annexation boundaries between cities. Mill Creek assigns error to the Board's contrary findings (Factors; Objectives at ¶2) and Final Decision (Decision at ¶2).

2. The proposed annexation artificially bisects the existing natural neighborhood and community that lies east of Interstate 5 and north of Interstate 405. The Board violated RCW 36.93.180(1), which requires the preservation of natural neighborhoods and communities. Mill Creek assigns error to the Board's contrary findings (Factors; Objectives at ¶1) and Final Decision (Decision at ¶2).

3. The proposed annexation splits the logical service areas for police, fire, and utility services existing east of Interstate 5 and north of Interstate 405. The Board violated RCW 36.93.180(3), which requires preserving logical service areas. Mill Creek assigns error to the Board's

¹ The Board's decision is in the Return on the Record ("Record") at SC BRB Rec. 4-11 ("Final Decision"). See note 2 for Record citation formats.

contrary findings (Factors; Objectives at ¶3) and Final Decision (Decision at ¶2).

4. The proposed annexation creates an abnormally irregular boundary by not following the well-recognized dividing line of Interstate 5 north of Interstate 405. The Board violated RCW 36.93.180(4), which requires prevention of abnormally irregular boundaries. Mill Creek assigns error to the Board's contrary findings (Factors; Objectives at ¶4) and Final Decision (Decision at ¶2).

5. The proposed annexation creates and exacerbates impractical boundaries by using a minor collector road east of Interstate 5 north of Interstate 405 to establish permanent city limit lines, instead of using the logical and well-recognized dividing line of Interstate 5. The Board violated RCW 36.93.180(7), which requires adjusting impractical boundaries. Mill Creek assigns error to the Board's contrary findings (Factors; Objectives at ¶7) and Final Decision (Decision at ¶2).

6. The errors in the Final Decision substantially prejudice Mill Creek by subverting its MUGA, preventing Mill Creek from meeting its regional and Growth Management Act responsibilities to plan for and grow within its declared MUGA, preventing Mill Creek from implementing its comprehensive plan, and placing the burden on Mill Creek to deal with the consequences of the Board's flawed decision.

7. The Board engaged in unlawful procedure by failing to give parties to the hearing the opportunity to object to the continued participation of one or more Board members due to an announced actual or potential conflict of interest, in violation of the Appearance of Fairness doctrine and/or its statutory codification in RCW Chapter 42.36.

III. STATEMENT OF THE CASE²

A. Focus of the Appeal

This appeal is about a proposed annexation that would allow Lynnwood to annex unincorporated land lying east of Interstate 5 north of Interstate 405, between the cities of Mill Creek and Lynnwood in Snohomish County. Mill Creek and Lynnwood are growing cities that have not reached their full size nor their final city boundaries. They share some common boundaries south of the intersection of Interstate 5 and Interstate 405, but each city's current boundaries do not yet connect with Interstate 5 north of its intersection with Interstate 405.

² The Return on Record is identified as Clerk's Papers Sub 21, and was forwarded directly to the Court via CD-rom. The Clerk's Papers do not assign the Return on Record any page numbers. See Index to Petitioner's Clerk's Papers at 2. The only available manner in which specific pages of the Return on Record ("Record") may be referenced is by the bates stamps placed on the Record by the Board. The Board assigned "SC BRB Rec." page numbers to the Record. Citations to the Record in this brief will be referred to by "Record (Sub 21) SC BRB Rec. [page number]." Clerk's Papers will be referred to by "CP (Sub #) [page number]." The January 10, 2010 Report of Proceedings previously filed with the Court will be referred to by "RP [page number]."

Mill Creek is challenging only that portion of the Board's decision that authorized Lynnwood to annex land east of Interstate 5 north of Interstate 405 and into Mill Creek's municipal urban growth area.

For purposes of the following argument, maps from the Record depicting the current city limits of Mill Creek and Lynnwood, Interstate 5 and Interstate 405, MUGA boundaries, the proposed annexation boundaries east of Interstate 5, and other matters are reproduced in **Appendix 1** for convenience.³

B. Mill Creek, Lynnwood, and Proposed Annexation Background

Mill Creek is a code city lying entirely east of Interstate 5 and north of Interstate 405. Mill Creek's current population is approximately 18,500 persons. The western boundary of Mill Creek's MUGA, which defines the ultimate size of Mill Creek in accordance with the Growth Management Act, RCW Chapter 36.70A ("GMA" or the "Act")⁴ and other regional planning documents, was established in 2003 and is contiguous with the eastern boundary of Interstate 5 north of Interstate 405.⁵

Lynnwood is a code city located southwest of Mill Creek, and lies entirely west of Interstate 5 but for two small projections south of the

³ Various annexation maps prepared by Lynnwood are at Record (Sub 21) SC BRB Rec. 224-234. Oversize maps submitted by Mill Creek are at Record (Sub 21) SC BRB Rec. 665 and 667.

⁴ RCW Chapter 36.70A.

⁵ See Section III.D below.

Interstate 5 intersection with Interstate 405. Lynnwood's city center is located well to the west of Interstate 5, generally near 44th Avenue.⁶ On March 6, 2009, Lynnwood proposed a large annexation encompassing large swaths of unincorporated land lying easterly of the current city limits.⁷ The proposed annexation would add approximately 3,690 acres (5.7 square miles) and 27,764 new residents to Lynnwood, nearly doubling its potential population to approximately 63,264 persons.⁸

C. The Disputed Annexation Area

The specific land area at issue in this appeal is that portion of the proposed annexation area lying east of Interstate 5 and north of Interstate 405 to the proposed eastern annexation boundary of Larch Way ("Disputed Annexation Area").⁹

The Disputed Annexation Area is minor component of the proposed annexation area. It visually comprises approximately 20% of the entire proposed annexation area,¹⁰ but with an estimated population of 2,169, comprises only about 7.8% of the population of the proposed

⁶ See Section III.E below.

⁷ See Record (Sub 21) SC BRB Rec. 224-234, 265, selectively reproduced in **Appendix 1**. The proposed annexation is generally described in Lynnwood's Notice of Intention to Annex (March 5, 2009) ("NOIA"), Record (Sub 21) SC BRB Rec. 167-337.

⁸ Record (Sub 21) SC BRB Rec. 4-6, 10.

⁹ See maps at Record (Sub 21) SC BRB Rec. 224-234, 265, selectively reproduced in **Appendix 1**.

¹⁰ *Id.*

annexation area.¹¹ The Disputed Annexation Area would add only about 514 net residential units per Lynnwood's 20-year growth projection, or approximately 6.6% of the 7,698 total net residential units anticipated from the proposed annexation area.¹²

Interstate 5 and Interstate 405 create a continuous barrier that severely limits access between the Disputed Annexation Area and the rest of Lynnwood. There are only three access routes available to cross the Interstates – 164th Street, Maple Road, and Larch Way.¹³ The limited access restricts Lynnwood's ability to easily, quickly and safely service the residents of the Disputed Annexation Area.¹⁴ Trying to cross Interstate 5 on these roads in the current morning and evening commutes is already difficult and time consuming, and will not get better.¹⁵

Larch Way comprises the southern entrance for the entire Disputed Annexation Area across Interstate 405 and into the extreme southwestern portion of Lynnwood. The limited access across Interstate 5 and Interstate 405 is exacerbated by the fact that the southern half of the proposed Larch Way boundary road is in such poor condition that it is identified by

¹¹ *Id.*; Record (Sub 21) SC BRB Rec. 71-72, 79, 183, and 265.

¹² Record (Sub 21) SC BRB Rec. 71-72, 79, 183, and 265.

¹³ Record (Sub 21) SC BRB Rec. 754 and 64-73.

¹⁴ Record (Sub 21) SC BRB Rec. 754, 64-73, 777 (Fire Dist. 7 Letter), 89-90, 486 ("the annexation analysis assumes a continuation of existing policies, even though they are estimated to lead to future budget shortfalls.").

¹⁵ Record (Sub 21) SC BRB Rec. 754 and 64-73.

Lynnwood as a "Near Term & High Priority" road project.¹⁶ It is further described by Lynnwood as a "large project" for which no funding is currently available yet has a 2006 estimated cost of more than \$100 million.¹⁷

Larch Way itself is only an ordinary, residential collector street that bisects an established neighborhood composed of residential subdivisions, an elementary school, and businesses.¹⁸ Larch Way runs directly adjacent to the Martha Lake Elementary School.¹⁹

D. Mill Creek's MUGA Designates Interstate 5 As The City's Western Boundary

Mill Creek engaged in a series of meetings and discussions with Lynnwood in 2002 and 2003 to establish a common MUGA with Lynnwood along Interstate 5. At the conclusion of those meetings, both cities' planning staffs agreed that *Interstate 5 north of Interstate 405 should be the common boundary between the cities due to its highly recognizable characteristics.*²⁰ Both city staffs presented the agreed Interstate 5/Interstate 405 boundary to their respective planning commissions for review, which each approved the Interstate 5/Interstate

¹⁶ Record (Sub 21) SC BRB Rec. 322 (NOIA).

¹⁷ *Id.*

¹⁸ Record (Sub 21) SC BRB Rec. 751 and 64-73.

¹⁹ *Id.*

²⁰ Record (Sub 21) SC BRB Rec. 746-47.

405 boundary.²¹

Following those decisions, on July 22, 2003, the Mill Creek City Council designated Interstate 5 and Interstate 405 as the westernmost Mill Creek MUGA boundary.²² As required by GMA, the Mill Creek comprehensive plan implemented that MUGA boundary and also designated 164th Street S.E. as the western gateway to the Mill Creek community from Interstate 5.²³

The Lynnwood City Council disregarded all the work of the city staffs and planning commissions, and the earlier decision by the Mill Creek City Council, and unilaterally extended Lynnwood's eastern MUGA boundary more than one mile beyond Interstate 5 to Larch Way.²⁴ That action created the conflicting urban growth boundary designations affecting the Disputed Annexation Area.

E. Regional Planning Supports Using Interstate 5 As The Common Boundary Between Mill Creek And Lynnwood

In 1992, 10 years before its formal MUGA designation, Mill Creek first designated an urban growth area ("UGA") around the City.²⁵ That

²¹ Record (Sub 21) SC BRB Rec. 746-47 and 64-73.

²² Record (Sub 21) SC BRB Rec. 746-47 and 64-73. Notably, the Mill Creek City Council finalized this MUGA boundary *before* any action by the Lynnwood City Council.

²³ Record (Sub 21) SC BRB Rec. 747 and 64-73.

²⁴ Record (Sub 21) SC BRB Rec. 747 and 64-73.

²⁵ Mill Creek's UGA was the very first urban growth area created in south Snohomish County, and predated GMA planning actions by the County and other

UGA designation was instrumental in fashioning a now long-standing interlocal agreement between Mill Creek and Everett that designated State Route 96, a multi-lane state highway along Mill Creek's northern MUGA boundary, as the common boundary between those two cities. As a result, there have been no disputes between Everett and Mill Creek regarding their common boundary. Subsequent annexations by both cities have been undisputed, and residents in neighborhoods on both sides of State Route 96 intuitively know where their neighborhood and respective city boundaries start and end.²⁶

On April 24, 2008, elected city and county officials of the Puget Sound Regional Council overwhelmingly passed Vision 2040, the regional growth, transportation and economic development strategy for central Puget Sound. Mill Creek was designated one of eight "large cities" in Snohomish County and was charged with the responsibility of planning for new growth over the next 30 years within its MUGA consistent with regional, county and city planning policies. Mill Creek has successfully fulfilled that responsibility, developing and opening the Mill Creek Town Center, completing annexations within its MUGA, and adopting a new East Gateway Urban Village south of State Route 96 at the northeast

cities adjacent to Mill Creek, including Lynnwood. Record (Sub 21) SC BRB Rec. 746 and 64-73.

²⁶ Record (Sub 21) SC BRB Rec. 746 and 64-73.

corner of the City. At the northwest corner of the City, south of State Route 96, Mill Creek is working on a petition-initiated annexation that would extend Mill Creek's northwesterly City boundary to its northerly MUGA boundary along the east side of Interstate 5.²⁷

By continuing to use the regionally-recognized Interstate 5 boundary as its actual MUGA boundary, Mill Creek can fulfill its regional "large city" obligations and will be able to plan for additional annexations and integrated growth specifically in the Disputed Annexation Area.²⁸

Lynnwood was designated by Vision 2040 as one of the Puget Sound region's thirteen "core" cities, and is Snohomish County's only core city with a designated Regional Growth Center ("RGC"). RGCs are intended to be key regional hubs, containing a long-range multimodal transportation system along with major cultural, civic and employment elements. Lynnwood's RGC is situated at its existing city center, located well to the west of Interstate 5 along 44th Avenue, in the same area as the Lynnwood Transit Center and the Lynnwood Convention Center. Cities with designated RGCs are expected to focus their major urban growth efforts *within their RGCs, and not through outward expansion and sprawl*,

²⁷ Record (Sub 21) SC BRB Rec. 748 and 64-73.

²⁸ *Id.*

like that proposed in the annexation at issue here.²⁹

F. Annexation Hearing And Appeals

Lynnwood, Mill Creek, Snohomish County, Fire District 1 and Fire District 7 all invoked the Board's jurisdiction to examine the proposed annexation. Those parties were concerned with the feasibility, viability, and legality of the annexation boundaries and whether the proposed annexation met the applicable legal requirements.³⁰ Mill Creek specifically invoked the Board's jurisdiction because the Disputed Annexation Area extending east of Interstate 5 north of Interstate 405 clearly did not meet five of the statutory objectives in RCW 36.93.180.³¹

At the Board's May 12, 2009 public hearing, the Board chair advised that he had a conflict disclosure to make, stating:³²

CHAIRMAN SING: I do have a disclosure. My name is Alison Sing and my family and I live in the City of Lynnwood and we have continuously lived there since the summer of 1985. I served on the Lynnwood Planning Commission from 1989 to 1999. Since my departure I have not been involved with the City of Lynnwood in any planning or discussion regarding the annexation proposal before this body tonight. Having made these two disclosures, I believe I'm capable of participating and rendering an impartial decision of the matter before this body. Thank you.

²⁹ Record (Sub 21) SC BRB Rec. 747-48 and 64-73.

³⁰ Record (Sub 21) SC BRB Rec. 4.

³¹ Record (Sub 21) SC BRB Rec. 744 and 64-65.

³² Record (Sub 21) SC BRB Rec. 16.

Now we will swear in everyone that is going to be speaking tonight or testifying, so would you please stand and raise your right hand.

Chairman Sing did not thereafter ask the attendees or parties as to whether there were any objections to his participation in the matter.

The Board issued its Final Decision on June 2, 2009. The Final Decision approved the proposed annexation as presented by Lynnwood, but with little analysis of the facts or law, and without serious discussion of the pertinent issues, particularly those presented by Mill Creek.

Mill Creek timely filed a notice of appeal to Snohomish County Superior Court on June 30, 2009. Following an appeal hearing on January 8, 2010, the Superior Court upheld the Board's decision. Mill Creek timely filed a notice of appeal to this Court on May 14, 2010.

IV. ARGUMENT

A. Legal Standards

Boundary review board decisions are appealable in accordance with RCW 36.93.160. In acting on an appeal of a Board decision, the Court may uphold or remand the case for further proceedings, or as requested by Mill Creek here, it may reverse the decision, when any one of the following six errors are found:³³

³³ RCW 36.93.160(6) (emphasis added).

The superior court may affirm the decision of the board or remand the case for further proceedings; *or it may reverse the decision if any substantial rights may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:*

- (a) In violation of constitutional provisions, or
- (b) In excess of the statutory authority or jurisdiction of the board, or
- (c) Made upon unlawful procedure, or
- (d) Affected by other error of law, or
- (e) Unsupported by material and substantial evidence in view of the entire record as submitted, or
- (f) Clearly erroneous.

With the exception of subsection (f), these are the same or similar to the standards that apply to appeals of administrative decisions of state agencies under the Administrative Procedures Act, RCW Chapter 34.05.³⁴ Under the APA, the Court reviews issues of law, application of the law, and unlawful procedure de novo.³⁵ For questions of mixed law and fact, the Court first determines the law independently, and then applies it to the facts in the Record.³⁶ An error of law standard applies to questions of statutory construction, and the Court may substitute its interpretation of the law for the Board's interpretation because it is ultimately the Court's

³⁴ Compare cited list from RCW 36.93.160(6) with RCW 34.05.570(3)(a-e).

³⁵ *City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 164 Wn. 2d 768, 779-780, 193 P.3d 1077 (2008); *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 116 Wn. App. 48, 54, 65 P.3d 337 (2003); *Tapper v. Employment Sec. Dep't*, 122 Wn. 2d 397, 403, 858 P.2d 494 (1993); *Stevens County v. Loon Lake Prop. Owners Ass'n*, 146 Wn. App. 124, 129, 187 P.3d 846 (2008).

³⁶ *Lewis County*, 157 Wn. 2d at 498.

role to determine the meaning and purpose of statutes.³⁷ Under all of these review standards, the Court analyzes, interprets, and applies the law, making the final decision itself. The Board is not given deference on these legal questions.

Appellate courts review the Board's decision directly, applying the standards in RCW 36.93.160(6) to the record before the Board, not to the intervening decision of the superior court.³⁸

For its part, the Board is required to investigate every proposed annexation and ensure that, insofar as possible, it meets all of the nine statutory objectives listed in RCW 36.93.180.³⁹ To uphold the decision, there must be "sufficient evidence in the record to convince a fair-minded person that, overall, the objectives of RCW 36.93.180 will be furthered by approval of the proposed annexation."⁴⁰ This standard is replicated in RCW 36.93.160(6)(e), which was explained by the Washington Supreme Court as follows:⁴¹

The statute's reference to the 'entire record' supports the proposition that judicial review of the RCW 36.93.180

³⁷ *Postema v. Pollution Control Hearings Board*, 142 Wn. 2d 68, 77, 11 P.3d 726 (2000).

³⁸ *King County v. Washington State Boundary Review Board for King County*, 122 Wn. 2d 648, 671, 860 P.2d 1024 (1993).

³⁹ The Board's final decision "shall attempt to achieve [those] objectives."

⁴⁰ *Leer v. Whatcom County Boundary Review Board*, 91 Wn. App. 117, 124, 957 P.2d 251 (1998).

⁴¹ *King County v. Wash. State Boundary Review Board*, 122 Wn. 2d 648, 673-74, 860 P.2d 1024 (1993) (emphasis added).

objectives is to involve examination of *each of the objectives*. *It would be anomalous to interpret this provision as requiring a reviewing court to uphold a board decision based on the furtherance of only one objective when the remainder of the record manifestly displayed the hindrance of the other eight.*"

Significantly, the Board had (but did not use) the express authority to "*modify or deny*" a proposed annexation when "there is evidence on the record to support a conclusion that the action is *inconsistent with one or more of the objectives under RCW 36.93.180.*"⁴²

For the reasons explained in this brief, the Board's decision allowing the proposed annexation to cross Interstate 5 and Interstate 405 violates five of the statutory objectives for legal and factual reasons, and thus overall the decision does not further the goals and objectives of RCW 36.93.180. The Board erred when it approved the proposed annexation without modifying the boundaries to delete the area lying east of Interstate 5 and Interstate 405.

B. The Board Failed To Use The Physical Boundary Of Interstate 5 For The Proposed Annexation, Violating RCW 36.93.180(2)

RCW 36.93.180(2) ("Objective 2") requires that annexations "use ... *physical boundaries*, including but not limited to bodies of water, *highways*, and land contours."⁴³ Objective 2 provides explicit legislative

⁴² RCW 36.93.150 (emphasis added).

⁴³ RCW 36.93.180(2) (emphasis added).

direction to use physical features such as *highways* (and not, for example, mere streets or roads) in establishing annexation boundaries.

The Board failed to properly interpret and apply Objective 2 when it approved a proposed annexation boundary between two cities that crosses the most obvious physical boundary and barrier between them – Interstate 5. This error is compounded because the Board approved a permanent boundary ending at Larch Way – a poorly maintained, minor collector road located in the middle of a residential neighborhood and bordering a school. This is clearly the Board's most obvious failure.

1. The "Physical Boundary" Objective Supports Using Interstate 5 As The Common Boundary Between Mill Creek And Lynnwood

The Board misinterpreted the meaning, intent, and application of Objective 2. The basic rules of statutory interpretation and construction applicable to this situation were summarized by the Washington Supreme Court in *Tenino Aerie v. Grand Aerie* as follows:⁴⁴

The construction of a statute is a question of law that this court reviews de novo. In interpreting a statute, the primary objective of the court is to ascertain and carry out the intent and purpose of the legislature in creating it. To determine legislative intent, the court looks first to the language of the statute. If the statute is unambiguous, its meaning is to be derived from the plain language of the statute alone.

⁴⁴ *Tenino Aerie v. Grand Aerie*, 148 Wn. 2d 224, 239-40, 59 P.2d 655 (2002) (citations omitted) (emphasis added).

Legislative definitions provided in a statute are controlling, but *in the absence of a statutory definition, courts may give a term its plain and ordinary meaning by reference to a standard dictionary.* [...]

An unambiguous statute is not subject to judicial construction. "A statute is ambiguous if it can reasonably be interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable." This court is not "obliged to discern any ambiguity by imagining a variety of alternative interpretations."

Objective 2 is short, clear and unambiguous, so the Court should look at its plain language. *Highway* is not defined in RCW Chapter 36.93, but is defined, with a typical meaning, in *Black's Law Dictionary* (7th ed.) as "1. Broadly, any *main route* on land, on water, or in the air. [...] 3. *The main public road connecting towns or cities.*"⁴⁵

Interstate 5 and Interstate 405 are each a "main route" and a "main public road connecting towns or cities." Larch Way is neither. Larch Way is not a highway nor main road of any sort, but is only a minor collector street in the middle of a residential neighborhood. It is so poorly constructed that it is listed on Lynnwood's major road projects list, but is unfunded. The Board misinterpreted and misapplied Objective 2 when it approved using that street as a permanent annexation boundary.

⁴⁵ Emphasis added. *Accord American Heritage Dictionary of the English Language* (____) ("1. *A main public road connecting towns and cities.* 2. Any *main route*, on land, over water, or in the air.") (emphasis added); *Webster's Ninth New Collegiate Dictionary* (1985) ("a public way: *esp: a main direct road*") (emphasis added).

Because the statute and its terms are clear, and because the facts are undisputed that Larch Way is only a minor collector street, the Court can and should correct the interpretation and application of this statute and reverse the Board's decision on this point.

While there is no need to resort to other tools of statutory construction at this point, the Court could also look to the principle of "noscitur a sociis, which provides that a single word in a statute should not be read in isolation, and that 'the meaning of words may be indicated or controlled by those with which they are associated.'"⁴⁶ In Objective 2, *highway* is paired with *bodies of water* and *land contours*, all of which denote *significant* physical features, not minor or undistinguished features. Once again, Larch Way does not satisfy this criteria.

When the Legislature uses specific words in a statute and chooses not to use others, the Court should give meaning to the words used. When selecting a perpetual annexation boundary between two growing cities,⁴⁷ not only is proper interpretation and application of statutory language critical, but annexation policy comes into play. The Board failed to recognize the overarching policy that *meaningful* physical boundaries

⁴⁶ *State v. Roggenkamp*, 153 Wn. 2d 614, 623, 106 P.3d 196 (2005).

⁴⁷ Lynnwood's urban growth boundary ends at Larch Way, thus signifying the easternmost limit of Lynnwood's potential growth.

should be used to define permanent boundaries between cities.⁴⁸ When that is not done by the Board, as in this case, it leads to numerous consequential problems.⁴⁹

Lynnwood's NOIA superficially recognizes the importance of Objective 2 by stating that its proposed annexation "uses existing *major roads* as the annexation boundaries", but then says the only exceptions to this are three locations where "using a *public road* is impractical."⁵⁰ Lynnwood thus infers that Larch Way is a "major road" that satisfies the requirements of Objective 2, which it obviously does not. The Board never recognized this problem, never looked behind Lynnwood's unsupported and incorrect assertion, and never analyzed this issue in the Final Decision.⁵¹

Contrary to all of that, Interstate 5 and Interstate 405 are the obvious *highways* that comprise the "*main route*" or the "public roads *connecting towns or cities*" serving as the best *physical boundary* between Lynnwood and Mill Creek. Significantly, there is no evidence in the Record as to why Interstate 5 is impractical for this purpose. Indeed, quite the opposite is true – Interstate 5, together with Interstate 405, comprise a

⁴⁸ See *City of Richland v. Franklin County Boundary Review Board*, 100 Wn. 2d 864, 676 P.2d 425 (1984), discussed in the following Section IV.B.2.

⁴⁹ See Sections IV.C through IV.G below.

⁵⁰ Record (Sub 21) SC BRB Rec. 209 (emphasis added).

⁵¹ Record (Sub 21) SC BRB Rec. 6:3-4, 7:5-12 (Final Decision).

continuous physical barrier that separates the area to the east from all of the rest of Lynnwood.⁵²

Objective 2 is best served by using Interstate 5/Interstate 405 as the permanent boundary for this proposed annexation, not Larch Way.

2. Case Law Supports Interstate 5 As The Permanent Boundary Between Mill Creek And Lynnwood

Case law is very clear as to the meaning and application of Objective 2. In *City of Richland v. Franklin County Boundary Review Board*, 100 Wn. 2d 864, 676 P.2d 425 (1984) ("*Richland*"), the Franklin County boundary review board considered the annexation of unincorporated territory lying between two cities, Richland and Pasco. The board in that case approved the annexation proposed by Pasco, which annexed land up to the Columbia River and used the Columbia River as the natural and permanent annexation boundary between Pasco and Richland.⁵³

Following a decision by the State Department of Transportation to build a new bridge across the Columbia River, Richland proposed a competing annexation that would "*annex a smaller area immediately*

⁵² There are only three limited access routes available to cross Interstate 5/Interstate 405 in the Disputed Annexation Area – 164th Street, Maple Road, and Filbert/Larch Way. See maps at Record (Sub 21) SC BRB Rec. 224-234, 667, selectively reproduced in **Appendix 1**; Record (Sub 21) SC BRB Rec. 754; RP 52-61.

⁵³ *Richland*, 100 Wn. 2d at 866.

across the Columbia River" toward Pasco.⁵⁴ The Washington Supreme Court affirmed the rejection of Richland's proposal to cross the Columbia River, analyzing the pertinent statutory objectives as follows:⁵⁵

The Pasco annexation achieved the statutory objectives of creating and preserving logical service areas and using physical boundaries. It also prevented abnormally irregular boundaries.

[...] In addition, *Pasco's annexation would use the Columbia River as a boundary. Richland's plans were to annex a smaller area immediately across the Columbia River and to provide it with services by extending sewer and water lines across the river. Richland's proposal would extend its boundaries across the Columbia and into Franklin County. Richland argued that the land remaining between its newly created boundaries across the Columbia and Pasco could be annexed and serviced by Pasco.*

From this, it is evident that Pasco was *the most logical municipality to provide the entire annexation area with the needed services and to provide the soundest growth pattern for the area.*

Richland applies the objectives of RCW 36.93.180 as they are meant to apply to annexation of unincorporated land between two growing cities. When a significant natural boundary like the Columbia River presents itself, it is inherently the best boundary to use because it recognizes the physical logic of the municipal locations and provides the *"soundest growth pattern for the area."*

⁵⁴ *Richland*, 100 Wn. 2d at 866, 871.

⁵⁵ *Richland*, 100 Wn. 2d at 871 (emphasis added).

Lynnwood is in the same position here as was Richland in the *Richland* case. Lynnwood is trying to annex land lying on the other side of a major physical barrier (Interstate 5/Interstate 405), and is trying to provide and manage extensive and complex urban services in an area that is effectively isolated from the rest of the city of Lynnwood (including its urban core) because it can only be reached from the west by three access roads, two of which are residential collectors (Larch Way and Maple) and one of which (Larch Way) is recognizably in need of major, but unfunded, improvements.⁵⁶ Unlike the Snohomish County Board, the Franklin County boundary review board and the Supreme Court recognized that such an annexation boundary is both impractical and contrary to the directive of RCW 36.93.180(2).

3. Policy Supports Using Interstate 5 As The Permanent Boundary Between Mill Creek And Lynnwood

The Legislature's adopted policy in RCW 36.93.010 makes clear that the function of boundary review boards is to prevent "*haphazard extension* of and competition to extend municipal boundaries" and ensure that "residents and businesses in those areas may rely on the *logical growth of local government affecting them.*" This policy was recognized in the early case of *Orchard Grove Water Ass'n v. King County Boundary*

⁵⁶ Record (Sub 21) SC BRB Rec. 754 and 64-73, selectively reproduced in **Appendix 1.**

*Review Board*⁵⁷ and reiterated in the *Richland* case.⁵⁸

The approval of Larch Way as an annexation boundary actually contravenes this policy by creating a haphazard boundary extension and thwarting a logical growth pattern by both Mill Creek and Lynnwood.

4. The Board's Analysis Of The Interstate 5 Boundary Is Flawed And Inconsistent With Statutory Objectives, The Law, The Facts, And Annexation Policy

The Board disregarded the Interstate 5 physical boundary in its annexation analysis and erroneously approved Larch Way, basing that decision on the following comment:⁵⁹

Several Washington cities are divided by Interstate 5. The proposal includes all of Swamp Creek and its tributaries within the boundaries of the City of Lynnwood. The boundaries make logical sense particularly as it pertains to Interstate 5 by having only the City of Lynnwood work in conjunction with the Washington State Department of Transportation.

The Board's rational for designating Larch Way as an appropriate annexation boundary under RCW 36.93.180(2) is conclusory and unsupported for several reasons.⁶⁰ First, the statement ignores all of the foregoing issues regarding the intent and language of Objective 2,

⁵⁷ 24 Wn. App. 116, 600 P.2d 616 (1979).

⁵⁸ *Richland*, 100 Wn. 2d 869 ("One of the purposes of this statutory scheme is the resolution of claims to unincorporated territory between competing municipalities.").

⁵⁹ Record (Sub 21) SC BRB Rec. 7:5-12 (Final Decision).

⁶⁰ Record (Sub 21) SC BRB Rec. 7.

applicable case law, annexation policy, and the physical reality of Interstate 5. Second, whether other cities are divided by Interstate 5 does not justify *creating* that situation here, particularly in the face of a clear statutory admonition to use major *highways* as physical annexation boundaries between growing cities, prevent the *haphazard extension* of city boundaries, and ensure *logical growth*. Third, there is no mention of the historical fact that Interstate 5 was first built *directly through* many cities that *already existed* (e.g., Seattle, Tacoma).⁶¹ Fourth, the justification of enabling "only the City of Lynnwood" to work with the State Department of Transportation ("DOT") on Interstate 5 is meaningless because there is no explanation of *what* Lynnwood would work on with the DOT. More importantly, DOT obviously works now with literally *dozens* of different jurisdictions along the entire length of Interstate 5, which belies the significance (and inferred advantage) of the Board's statement.⁶² And fifth, the Swamp Creek justification is substantially overstated because the basin boundary is not discernable "on the ground" and extends through multiple jurisdictions in any event.⁶³

None of the Board's reasons are individually, nor collectively, a sufficient reason to overcome the plain words of the statute, applicable

⁶¹ RP 29:9-20.

⁶² RP 31:17-25.

⁶³ RP 30-31.

policy, and previous case law. And even if they were, they would not solve the other problems created by the Larch Way annexation boundary discussed in the following Sections.

Overall, the Final Decision is seriously flawed because Larch Way is not a highway, is not a major road, does not connect cities or town, and is not any other kind of obvious physical feature that meets the statutory objective or intrinsically denotes a city boundary. This mistake is compounded by the fact that Larch Way is Lynnwood's permanent easternmost MUGA boundary, and if ultimately approved will serve in perpetuity as Lynnwood's permanent city limit line with Mill Creek.⁶⁴ This is surely not what the Legislature envisioned in adopting RCW 36.93.180(2).

The Board's approval of Larch Way as a major annexation boundary is precisely what the Supreme Court rejected in the *Richland* case. Just like the Columbia River in that case, it is evident from any map that the only highway or major road on the eastern boundary of Lynnwood's proposed annexation is Interstate 5 and Interstate 405. These freeways are clearly recognizable, highly identifiable, intensely logical, consistent with regional planning principles, and have been formally

⁶⁴ Record (Sub 21) SC BRB Rec. 224-234, 265, 667, selectively reproduced in **Appendix 1**; RP 32:12-19. See Sections IV.C-IV.G below as to the problems that will follow from this result.

designated by Mill Creek as its western MUGA boundary for more than seven years. Rejecting that natural dividing line and choosing instead a residential collector street in the middle of an existing residential neighborhood is contrary to law and policy, contrary to good planning, and contrary to the *Richland* precedent.

The Board's decision to disregard Interstate 5 and approve Larch Way as Lynnwood's final city limit line and permanent annexation boundary is clearly erroneous. The Court should overrule the Board's mistake and revise the annexation boundary accordingly.

C. The Board Failed To Preserve Natural Neighborhoods And Communities When It Approved Larch Way As The Proposed Annexation Boundary, Violating RCW 36.93.180(1)

RCW 36.93.180(1) calls for the "preservation of natural neighborhoods and communities" ("Objective 1"). Objective 1 applies to "either distinct geographical areas or socially and locationally distinct groups of residents."⁶⁵ The Washington Supreme Court stated unequivocally that "The purpose of the first statutory objective is '*preservation*', ... *not* '*creation*' of communities."⁶⁶ As applied in *Snohomish Co. v. Hinds*, this objective looks in part to where the residents

⁶⁵ *Spokane County Fire Prot. Dist. 9 v. Spokane County Boundary Review Board*, 97 Wn. 2d 922, 927 note 2, 652 P.2d 1356 (1982). See also *Leer v. Whatcom County Boundary Review Board*, 91 Wn. App 117, 124, 957 P.2d 251 (1998); *Snohomish Co. v. Hinds*, 61 Wn. App. 371, 381, 810 P.2d 84 (1991).

⁶⁶ *King County v. Wash. State Boundary Review Board*, 122 Wn. 2d 648, 677 note 15, 860 P.2d 1024 (1993) (emphasis added).

within the annexation area think they belong – with the annexing jurisdiction, the unincorporated County, or another nearby jurisdiction.⁶⁷ The Board's approval of an annexation across the natural barrier of Interstate 5 and along the Larch Way residential collector street actually *divides* the existing community and thus does not meet the "preservation" requirement of Objective 1.⁶⁸

Lynnwood's NOIA states in conclusory fashion that its annexation boundaries "follow established major roads and therefore have no impact on existing neighborhood and communities."⁶⁹ The Board follows suit, stating that "the proposal maintains natural neighborhoods" and that Larch Way does "not split a natural neighborhood."⁷⁰

The Board's factual analysis and decision on Objective 1 are simply wrong. While some *major* roads are used for selected boundaries on the northern and southern portions of the proposed annexation, that is not the case on the eastern portion that crosses Interstate 5. There is no other *major* road in the eastern portion of the proposed annexation that is

⁶⁷ 61 Wn. App. 371, 381, 810 P.2d 84 (1991).

⁶⁸ RP 19-21.

⁶⁹ Record (Sub 21) SC BRB Rec. 209. Compare that conclusion with the statement of Lynnwood's Planner that, in the exact situation north of 164th Street east of I-5, Lynnwood's MUGA "was not particularly rational. It cut through the middle of the lake and seemed to chop up a residential area." *Id.* at 37.

⁷⁰ Record (Sub 21) SC BRB Rec. 7. As with all of the other BRB's conclusions, there is no citation to any supporting evidence for the statement.

more prominent than Interstate 5.⁷¹ Interstate functions as the most normal and natural division between Lynnwood and all the neighborhoods, communities and cities lying easterly of Interstate 5.

Larch Way is a residential collector street that *bisects* an established neighborhood composed of several residential subdivisions, an elementary school, and businesses.⁷² Approving that road as the eastern annexation boundary actually carves off a portion of the current naturally created neighborhood and forces it into the larger Lynnwood community west of Interstate 5. That result is clearly a misinterpretation and misapplication of RCW 36.93.180(1).

It is a well-accepted planning principle that neighborhood activity centers such as schools, parks, and community facilities should be located at the *center of neighborhoods* to enable residents, users and students to conveniently access them.⁷³ Properly siting these types of activity centers helps add to the identity of the neighborhood and creates a sense of place for the residents.⁷⁴ The Board ignored this principle and these facts because Larch Way is *directly adjacent to Martha Lake Elementary*

⁷¹ Record (Sub 21) SC BRB Rec. 75 and 64-73.

⁷² Record (Sub 21) SC BRB Rec. 751, 64-73, and 82.

⁷³ Record (Sub 21) SC BRB Rec. 751 and 64-73. Elementary schools, like community centers, serve as cohesive facilities that help bond residents to their neighborhoods and their community. *Id.*

⁷⁴ Record (Sub 21) SC BRB Rec. 751 and 64-73.

*School.*⁷⁵ Instead of being *central* to the neighborhood as it currently is, the Martha Lake Elementary School will now be located on the *outermost edge* of Lynnwood's "new" neighborhood.

Contrary to the admonition to preserve existing neighborhoods, the Final Decision will actively *undermine* the existing neighborhood by having Lynnwood residents on one side, and eventual Mill Creek residents on the other side, of a small residential collector the street. This result is wholly inconsistent with Objective 1 and the admonition of *Spokane County Fire Prot. Dist. 9*. The Court should find that the Board misinterpreted and misapplied RCW 36.93.180(1).

D. The Board Failed To Create Or Preserve Logical Service Areas When It Approved Larch Way As The Proposed Annexation Boundary, Violating RCW 36.93.180(3)

RCW 36.93.180(3) calls for the "*creation and preservation of logical service areas*" ("Objective 3"). The Board did neither here, first destroying the existing service area by dividing it in half, and then creating an illogical service area in its place. The Board's only basis for declaring Objective 3 satisfied was to cite Lynnwood's asserted ability to provide police and fire services at comparable levels and because Lynnwood had a "long range plan" to deal with those needs.⁷⁶

⁷⁵ Record (Sub 21) SC BRB Rec. 751 and 64-73.

⁷⁶ Record (Sub 21) SC BRB Rec. 7:13-18 (Final Decision) and 179 (NOIA).

This conclusion misses the entire point of Objective 3, which is the *preservation or creation of logical service areas*. Because there is no analysis of that issue, the Board tacitly failed to address this objective at all, and did not perform its duty. The Court should conclude that this mistake alone is either unlawful procedure, other error of law, or clearly erroneous action warranting reversal under RCW 36.93.160.

Instead of logical service areas, the Board focused on service *levels*. But its reliance on Lynnwood's asserted ability to provide adequate services is misplaced because the evidence of that is scarce at best, and because it substitutes a future, assumed service capability for a hard analysis of today's concrete service demands. For example, Lynnwood is admittedly not planning on immediately adding new staff or service providers (like police) to accommodate the proposed annexation area with its new population of *27,700 persons*.⁷⁷ Instead, Lynnwood is planning on a *five year* staffing transition period.⁷⁸ Second, the NOIA offered no evidence that municipal services were currently lacking in the Disputed Annexation Area, or would be made better.⁷⁹ Merely relabeling the services as "Lynnwood services" instead of, for example, "Snohomish

⁷⁷ Record (Sub 21) SC BRB Rec. 183, 195-96, 467, 753 ("Lynnwood Fire Department suggested that they would likely not require additional staff and equipment to serve these areas.").

⁷⁸ Record (Sub 21) SC BRB Rec. 316 (NOIA fiscal analysis).

⁷⁹ Record (Sub 21) SC BRB Rec. 167-337 (NOIA).

County services", is hardly proof that they will be delivered in any better fashion. Third, the underlying fiscal assumptions leave large analytical holes, stating for example that "This study does not evaluate whether Lynnwood's existing levels of service, staffing, or expenditures are acceptable or sustainable within existing resources,"⁸⁰ while simultaneously acknowledging that just one-time costs alone for the proposed annexation total \$2,939,000.⁸¹

When considering the real issue of logical service areas, it is clear that extending the proposed annexation into the Disputed Annexation Area will actually *create* an illogical service area. Interstate 5 is a continuous physical barrier that separates the Disputed Annexation Area from Lynnwood. There are only three limited access routes available to cross the Interstate in this area – 164th Street, Maple Road, and Filbert/Larch Way.⁸² Lynnwood's attempt to service the area east of the Interstate 5 will be severely constrained by the physically limited number of access points and the response time delays due to these limited access points, an

⁸⁰ Record (Sub 21) SC BRB Rec. 273 (NOIA fiscal analysis).

⁸¹ Record (Sub 21) SC BRB Rec. 308 (NOIA fiscal analysis) and 486 (NOIA fiscal analysis) ("[T]he annexation analysis assumes a continuation of existing policies, even though they are estimated to lead to future budget shortfalls."). As to the last point, the reality of the annexation is that Lynnwood will not only have 27,000 more residents to serve, but many of them will now live far from the city center and across a major interstate freeway, using existing resources. *Id.* The Board failed to look critically at the evidence on this topic.

⁸² Record (Sub 21) SC BRB Rec. 754 and 64-73.

especially critical factor for police, fire, and medical services (e.g., trying to cross the Interstate 5 at the principal 164th Street crossing in the current morning and evening commutes is already difficult and time consuming, and will not get better).⁸³

On the planning side, the Board was made aware of the fact that the Disputed Annexation Area was first adopted within Mill Creek's MUGA, not Lynnwood's, and that nearly all parties (City staffs, both Planning Commissions, and the Mill Creek City Council) had agreed and approved a common boundary along Interstate 5.⁸⁴ The proposed Larch Way boundary clearly and unnecessarily divides the existing logical service area.

In *Snohomish Co. v. Hinds*, the city of Everett proposed an "inverted T" annexation that ran south along both sides of State Route 527 to State Route 96.⁸⁵ The board in that case (the same Snohomish County Board as the instant case) rejected the annexation because it did not comply with the first four statutory objectives of RCW 36.93.180 (the same critical objectives at issue in this case).⁸⁶ The Court of Appeals upheld that decision in part because, with regard to Objective 3, the

⁸³ Record (Sub 21) SC BRB Rec. 754, 64-73, 777 (Fire Dist. 7 Letter), and 89-90.

⁸⁴ Record (Sub 21) SC BRB Rec. 754 and 64-67.

⁸⁵ *Hinds*, 61 Wn. App. at 374.

⁸⁶ *Hinds*, 61 Wn. App. at 380.

proposed annexation boundary "might create 'possible confusion in jurisdiction for fire and police response.'"⁸⁷

There is no better jurisdictional demarcation line in the Disputed Annexation Area than Interstate 5. There is no possibility of police, fire or ambulance crews being confused by city boundaries predicated on the Interstate 5 freeway line.⁸⁸ The same cannot be said of a residential collector road within a residential neighborhood.

It was legal error for the Board to first ignore and then misinterpret Objective 3, and then misapply it as justification for an annexation boundary along Larch Way that divides the existing logical service area. The Court should reverse the Final Decision on that point and exclude the Disputed Annexation Area from the proposed annexation.

E. The Board Failed to Prevent Abnormally Irregular Boundaries When It Approved Larch Way As The Proposed Annexation Boundary, Violating RCW 36.93.180(4).

RCW 36.93.180(4) calls for the "prevention of abnormally irregular boundaries" ("Objective 4"). Objective 4 does not focus "on whether the annexation boundaries are straight or crooked, but rather whether a proposed annexation *causes or prevents unnatural projections*

⁸⁷ *Hinds*, 61 Wn. App. at 381. See also Section IV.B above discussing the *Richland* case.

⁸⁸ Record (Sub 21) SC BRB Rec. 745, 753-55, and 777.

or odd, *impractical shapes*."⁸⁹

By including the Disputed Annexation Area, the proposed annexation in this case creates an unnatural projection and an impractical shape. The annexation boundary correctly tracks the natural Interstate 5 boundary line north of 164th Street, but then turns abruptly east at 164th Street, runs easterly to Larch Way, then runs southerly and southeasterly to Interstate 405.⁹⁰ This creates an unnatural and impractical projection because it destroys an existing logical service area (violating Objective 3), divides an existing neighborhood (violating Objective 1), and fails to use the most prominent physical boundary in the area (violating Objective 2). This result is compounded because that situation will *permanently* exist due to the fact that Larch Way is the easternmost MUGA boundary of Lynnwood – all other territory to the east falls within Mill Creek's undisputed MUGA boundary.

The Board's analysis of Objective 4 is limited to the single statement that the proposed annexation "corrects" several *other* irregular boundaries.⁹¹ While that may be globally true for such a large annexation, the Board once again misses (perhaps intentionally) the contested issue

⁸⁹ *King County v. Washington State Boundary Review Board*, 122 Wn. 2d 677, 678, 860 P.2d 1024 (1993) (emphasis added).

⁹⁰ See maps at Record (Sub 21) SC BRB Rec. 224-234, 265, selectively reproduced in **Appendix 1**.

⁹¹ Record (Sub 21) SC BRB Rec. 7:20 (Final Decision).

that was directly before it. By affirmatively creating this irregular projection using the Larch Way boundary, the proposed annexation does not meet Objective 4.⁹² Had the Board simply approved the proposed annexation *without including the Disputed Annexation Area*, it would *still* have "corrected" the *other* existing irregular boundaries, and in addition it would have *prevented* the creation of a new impractical projection and it would have *continued* using the same permanent boundary along Interstate 5 that it established north of 164th Street. All in all, this result is far and away more consistent with the policy of RCW 36.93.010 to *prevent haphazard extensions* and *foster logical growth* of adjoining municipalities.

By approving the Larch Way boundary and including the Disputed Annexation Area in the proposed annexation, the Board's decision is contrary to Objective 4 and *King County v. Washington State Boundary Review Board*. The Court should find that the Board misinterpreted and misapplied this objective and so violated RCW 36.93.180(4).

⁹² Lynnwood will likely argue that it has already moved east of Interstate 5 farther south, but that situation is different for two important reasons: (i) the southerly area is located *solely* within Lynnwood's MUGA, and (ii) Lynnwood's ultimate southeastern boundary will be *Interstate 405*. Just as Lynnwood is using an interstate highway as its ultimate corporate boundary in the *southeast*, so too should it use Interstate 5 in the *northeast*.

F. The Board Failed to Adjust Impractical Boundaries When It Approved Larch Way As The Proposed Annexation Boundary, Violating RCW 36.93.180(7)

RCW 36.93.180(7) calls for the "adjustment of impractical boundaries" ("Objective 7"). Mill Creek is not aware of any decision that has considered Objective 7 in detail. However, it is clear from the legal principles and analytical elements of the other statutory objectives that an annexation that crosses Interstate 5, ends at a residential collector street like Larch Way, and includes the Disputed Annexation Area, only creates problems and impracticalities, it does not solve them.

As with the other statutory objectives, the Board offers no analysis of Objective 7, but only a one sentence comment that "Use of Larch Way as the eastern boundary is a more practical boundary than the existing boundary."⁹³ The Board's statement would be equally true if the annexation terminated along the Interstate 5 boundary. As before, the Board did not look critically at the new boundary or its feasibility in the context of annexation policy, case law, or the specific contest before it, but evaded all of those meaningful issues by seizing on a simplistic answer.

Importantly, nothing about *crossing* Interstate 5 changes or minimizes any impractical boundary – it only creates another one to deal with. Utilizing Larch Way as the boundary between 164th Street S.E. and

⁹³ Record (Sub 21) SC BRB Rec. 8:4-5 (Final Decision).

Filbert Road unnecessarily creates an isolated pocket of Lynnwood separated from the rest of the city by Interstate 5 for all the reasons stated in the foregoing Sections. In the long term, the new impractical boundary never gets better because Lynnwood's MUGA ends at Larch Way – Lynnwood will never have annexations farther to the east, and thus will never be able to make its eastern boundary more practical.

In short, the best "adjustment of impractical boundaries" in this case would have been to *refrain from creating it at all*. Had the Board used Interstate 5 as the eastern boundary of the proposed annexation from its northerly point to its southerly point, the net result would have been to follow an existing, regular, natural, and prominent boundary, thus avoiding the creation of isolated City pockets having impractical boundaries, illogical service areas and divided neighborhoods.

The Court should find that the Board misinterpreted and misapplied Objective 7 and thus violated RCW 36.93.180(7).

G. Mill Creek Is Substantially Prejudiced By The Board's Approval Of Larch Way As The Proposed Annexation Boundary

The Board's decision to allow Larch Way to serve as the final annexation boundary, instead of Interstate 5, will substantially prejudice Mill Creek for at least five distinct reasons.

First, it permanently destroys Mill Creek's present, long-standing MUGA boundary. That boundary was established in 2003 following "years of growth management planning performed by the Puget Sound Regional Council, Snohomish County, and Mill Creek."⁹⁴ Allowing the Board to establish Larch Way as a permanently intrusive annexation boundary makes a mockery of all the preceding coordinated planning efforts, "rendering Mill Creek's large city designation inconsistent with regional demands, regional geography, and regional expectations."⁹⁵

Second, it prevents Mill Creek from achieving its regionally-approved, "large city" growth targets by permanently removing a significant piece of territory from Mill Creek's MUGA. Mill Creek will be unable to rely on that land for residential population growth, employment and commercial service needs, and will be unable to effectively utilize the 164th Street/Interstate 5 access to meet its transportation facilities requirements.⁹⁶

Third, it prevents Mill Creek from implementing its GMA-sanctioned comprehensive planning goals, which are based on and designed to match its MUGA boundaries. It will specifically prevent Mill

⁹⁴ Record (Sub 21) SC BRB Rec. 745. It also predates Lynnwood's designation in the Disputed Annexation Area.

⁹⁵ Record (Sub 21) SC BRB Rec. 748.

⁹⁶ Record (Sub 21) SC BRB Rec. 748.

Creek from implementing its ultimate, uniform and logical city boundaries,⁹⁷ and will prevent Mill Creek from utilizing the 164th Street access to Interstate 5 as its western gateway.⁹⁸

Fourth, it permanently saddles Mill Creek with the burden of dealing with the aftermath of Lynnwood's bad planning and the Board's bad decision. Specifically, because the remainder of the territory east of Interstate 5 is within Mill Creek's MUGA, Mill Creek will have to deal with the now divided Larch Way neighborhood, the resulting illogical service area, and the irregular city boundaries.

Fifth, it prematurely causes all of the associated negative effects described in this brief, and precludes further discussion and coordinated planning actions by Mill Creek and Lynnwood concerning the Disputed Annexation Area. Mill Creek's Community Development Director, Bill Trimm, pointed out:⁹⁹

If the Board limits Lynnwood's proposed annexation to the west side of Interstate 5, Lynnwood could still assume the role of planning the expansion of the transit facilities and related transit-oriented development that is planned for the west side of Interstate 5, while enabling Mill Creek to

⁹⁷ See map depicting Mill Creek's MUGA at Record (Sub 21) SC BRB Rec. 227, 665; RP 4:10-22.

⁹⁸ Record (Sub 21) SC BRB Rec. 747. Beyond this, the Board should not have the ability to *sub silentio* overrule the regionally-acknowledged legitimacy of Mill Creek's GMA planning efforts. The Board should recognize that the Disputed Annexation Area is just that, and leave its resolution to the two cities in the context of regional planning and GMA.

⁹⁹ Record (Sub 21) SC BRB Rec. 748.

fulfill its large city obligations and create a unified plan for the [east] side of Interstate 5. Allowing both cities to plan appropriate developments on each side of Interstate 5 will positively reflect each community's respective values in terms of design, land use mix, and access, and will create opportunities for properly allocated development and coordination with regional service providers.

These are all seriously negative and permanent consequences of the Board's decision to ignore the Interstate 5 boundary. What is worse, they are entirely unnecessary consequences, since the Disputed Annexation Area would remain unincorporated for at least some limited future time period. By properly interpreting and applying the objectives of RCW 36.93.180 to this proposed annexation, an unquestionably better result will be obtained. Not only would all of the substantial prejudice to Mill Creek be avoided, but Mill Creek and Lynnwood could engage in continued discussion to decide and implement an appropriate and coordinated plan for the Disputed Annexation Area.

Balanced against all of that, Lynnwood loses nothing by eliminating the Disputed Annexation Area from its proposed annexation. Lynnwood will still meet its population requirements to obtain the special tax financing authorized by RCW 82.14.415(3)(a)(ii),¹⁰⁰ will have even more uniform and regular city boundaries, and will have less demand on its limited resources.

¹⁰⁰ Record (Sub 21) SC BRB Rec. 219 (NOIA).

H. The Board Followed Improper Procedure in Violation of the Appearance of Fairness Doctrine and RCW Chapter 42.36

It has long been the rule in Washington that a hearing must not only be fair, it must appear to be fair.¹⁰¹ The Appearance of Fairness "doctrine has been developed to preserve the highest public confidence in those governmental processes which bring about zoning changes or which formulate property use and land planning measures."¹⁰² In *Sherman v. State*,¹⁰³ the court succinctly stated "The appearance of fairness doctrine requires that an administrative body must be fair, free from prejudice, and have the appearance of impartiality." This doctrine has been codified in part at RCW Chapter 42.36 for certain local government quasi-judicial proceedings.¹⁰⁴

At the May 12, 2009 public hearing on the annexation proposal, the Board chair advised that he had a conflict disclosure to make, but after doing so did not ask the attendees or parties as to whether there were any objections to his participation in the matter.

¹⁰¹ *Swift v. Island County*, 87 Wn. 2d 348, 552 P.2d 175 (1976) and cases cited therein.

¹⁰² *Swift*, 87 Wn. 2d at 361.

¹⁰³ 128 Wn. 2d 164, 188, 905 P.2d 355 (1995).

¹⁰⁴ RCW 42.36.010. "Application of the appearance of fairness doctrine to local land use decisions shall be limited to the quasi-judicial actions of local decision-making bodies as defined in this section. Quasi-judicial actions of local decision-making bodies are those actions of the legislative body, planning commission, hearing examiner, zoning adjuster, board of adjustment, or boards which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding." (Emphasis added).

While it is true that "When a party does not take advantage of the opportunity to preclude a decision-maker from participating in a decision on appearance of fairness grounds, that party waives the right to later challenge the decision on such grounds,"¹⁰⁵ here there was no invitation to do so. Immediately after making his disclosure, the Chairman moved directly to taking testimony and hearing the evidence in the case. He offered no opportunity for the parties or other attendees to challenge his disclosure. That course of conduct effectively precluded any challenge, thus ensuring that the hearing would go forward without a necessary procedural step having been made.

All of the parties and attendees, Mill Creek among them, were affected by this procedural error, and it is now impossible to know the affect of that failure on the outcome of the hearing. In the absence of a decision by the Court reversing the Board's decision on the merits, Mill Creek asks the Court to remand this matter back to the Board with instructions to hold another hearing on the proposed annexation.

V. CONCLUSION

The Board erroneously decided this case because it misinterpreted and misapplied the applicable statutory objectives of RCW 36.93.180.

¹⁰⁵ *King County v. Central Puget Sound Bd.*, 91 Wn. App. 1, 34, 951 P.2d 1151 (1998).

Had it properly applied that law, the Board would have found that the Disputed Annexation Area did not belong in the proposed annexation, and could have modified the annexation accordingly.

For all of the foregoing reasons, Mill Creek respectfully asks the Court to reverse and modify the Board's Final Decision to exclude the Disputed Annexation Area from the proposed annexation and establish the easterly boundary of the proposed annexation as the east side of Interstate 5 north of Interstate 405, consistent with the proposed annexation boundary northerly of 164th Street.

RESPECTFULLY RESUBMITTED this 20th day of September, 2010.

SHORT CRESSMAN & BURGESS PLLC

By 
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Attorneys for City of Mill Creek

CERTIFICATE OF SERVICE

Linda Cooper hereby certifies that on this 20th day of September 2010, I caused a true and correct copy of the foregoing document to be delivered via email and First Class Mail to the following attorneys of record:

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Linda Cooper

APPENDIX 1



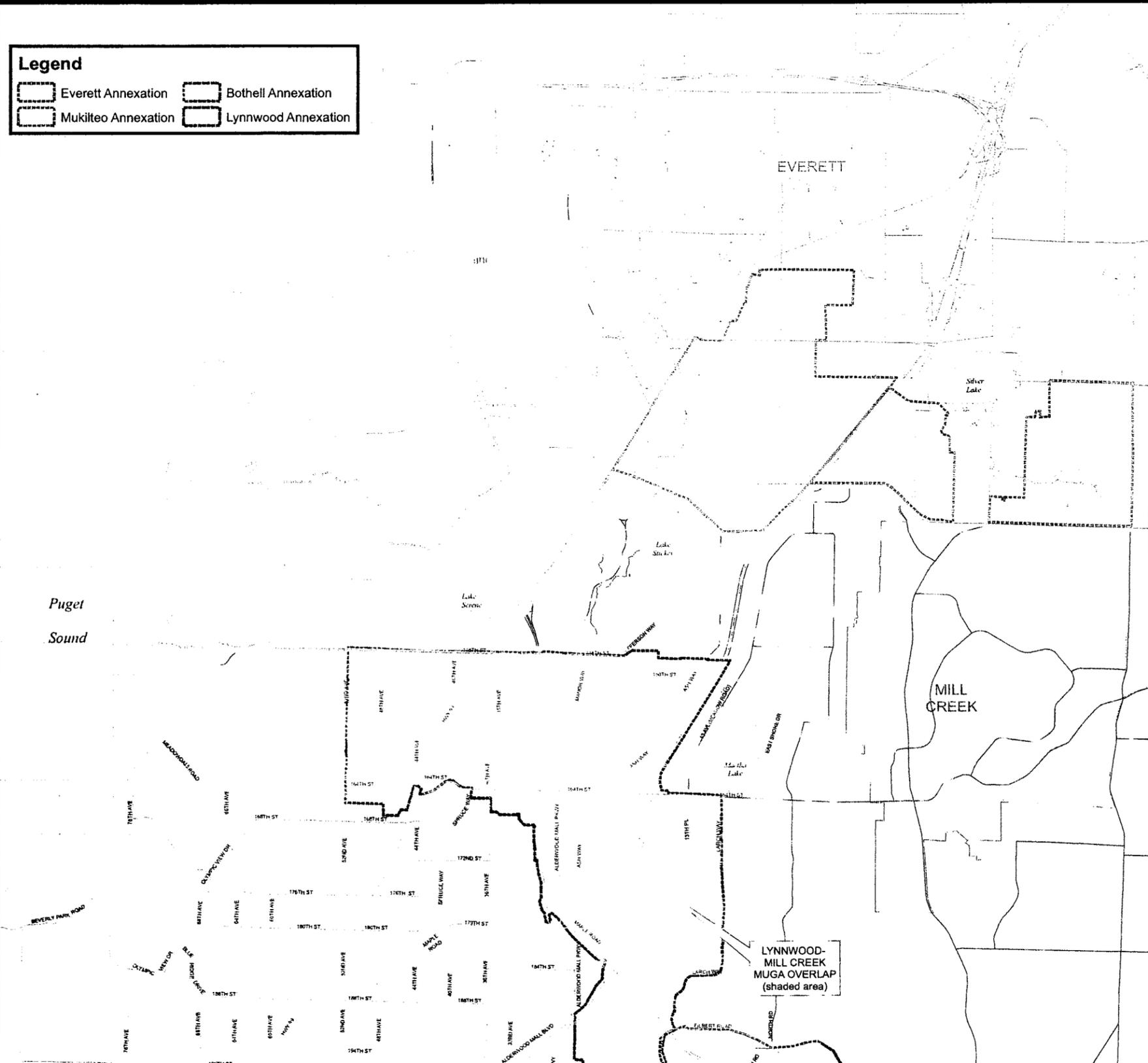
Lynnwood North-East-South (NES) Annexation

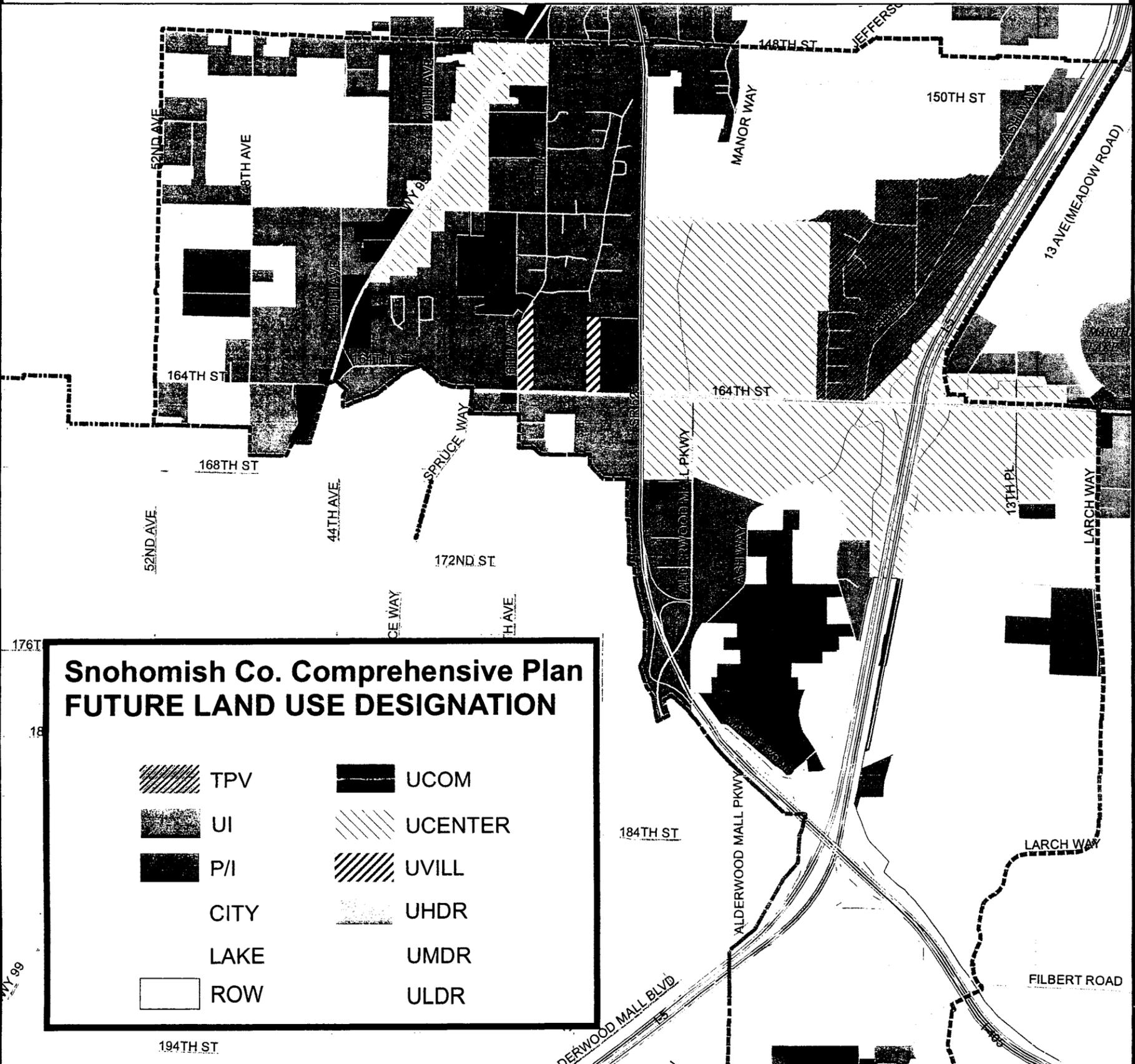
Cities & MUGAs

Created by the City of Lynnwood
Community Development Department
G:\2008\ANX\0003-MUGA\NOI maps\Cities & MUGAs.pdf

Legend

	Everett Annexation		Bothell Annexation
	Mukilteo Annexation		Lynnwood Annexation

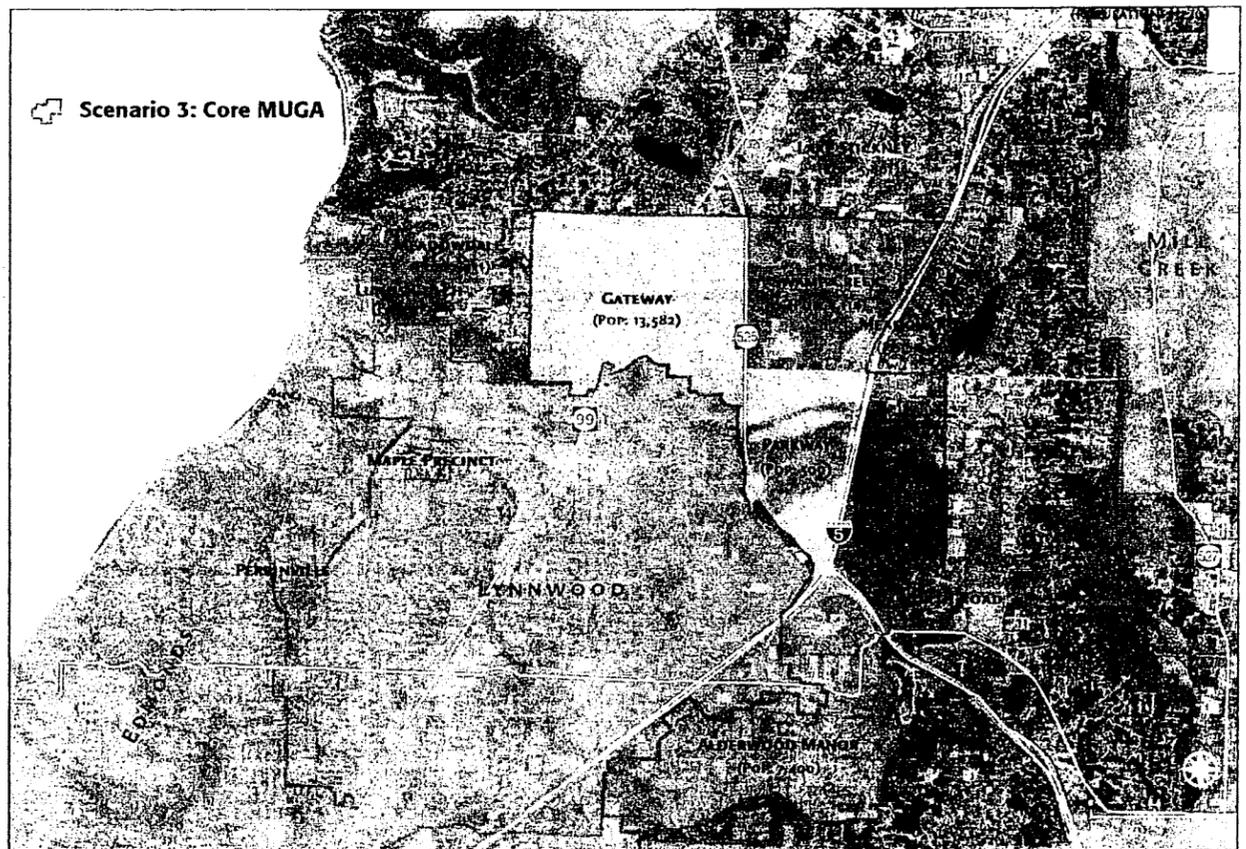




**Snohomish Co. Comprehensive Plan
FUTURE LAND USE DESIGNATION**

- | | |
|---|---|
|  TPV |  UCOM |
|  UI |  UCENTER |
|  P/I |  UVILL |
| CITY |  UHDR |
| LAKE | UMDR |
|  ROW | ULDR |

WY 99

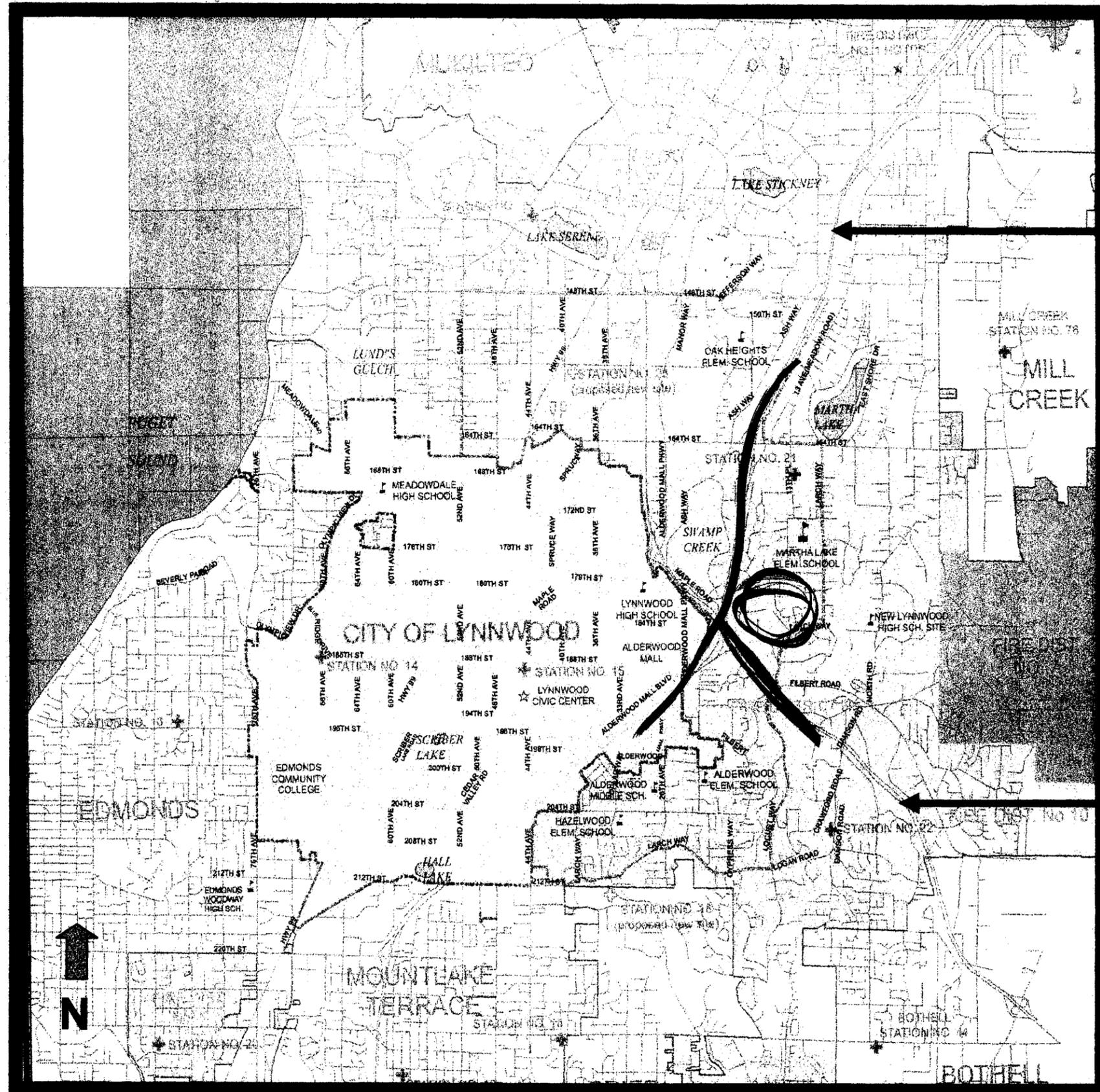


Source: City of Lynnwood, 2008; Berk & Associates, 2008

1.2 Planning-Level Study

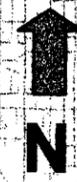
This study is a planning-level study with financial projections 20 years into the future. The analysis has been constructed to assist the City with decisions regarding potential annexations and as such the key financial elements focus on the revenue and cost areas where annexation is likely to have the greatest impact. The financial projections presented in this report should not be confused with a budget, as there are several financial elements excluded from this analysis which would be integrated into a budget forecast. The most significant of these are the various fund balances, which are very important from a budget perspective, but which are largely irrelevant to an annexation decision.

I-5 / I-405 Common Boundary

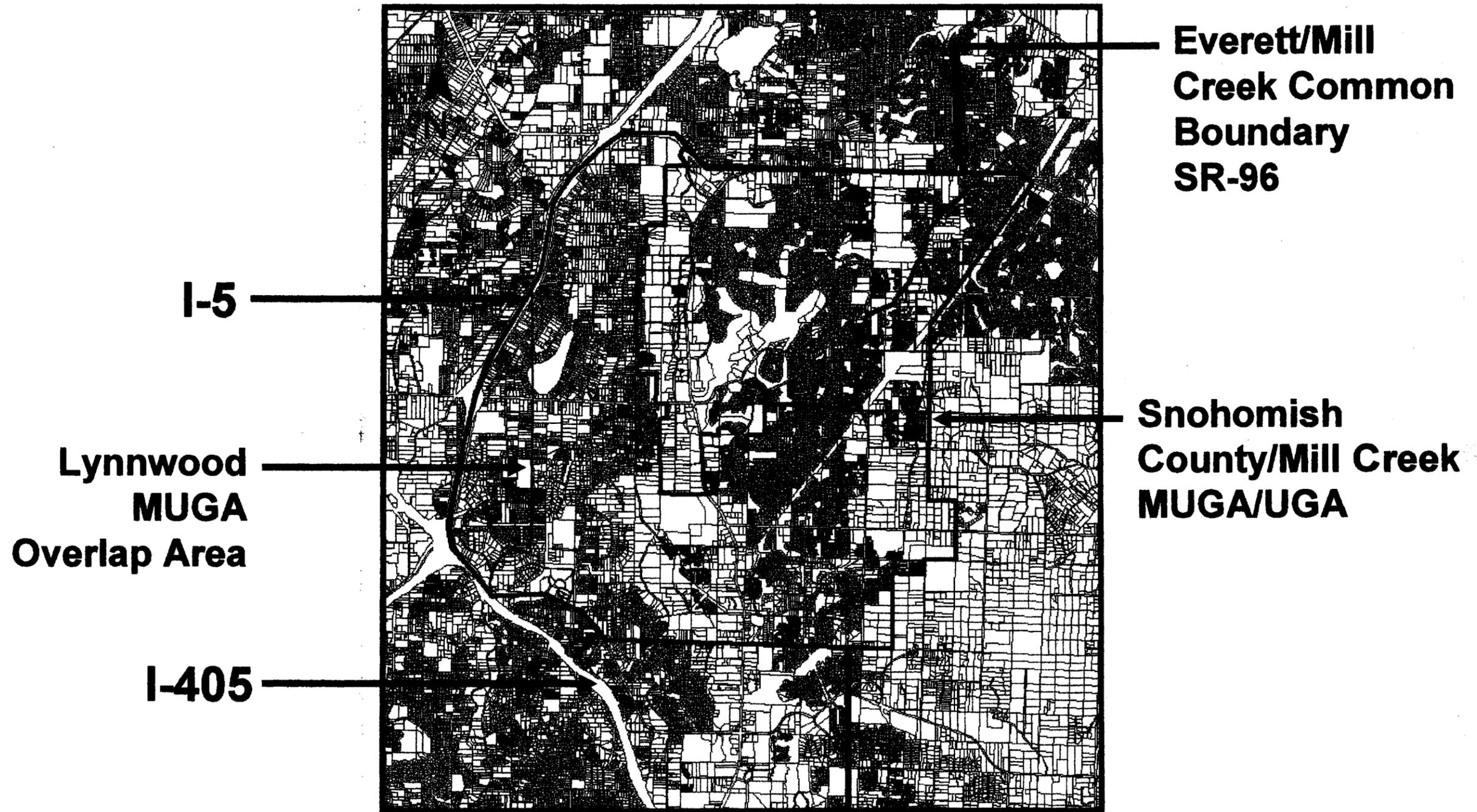


I-5

I-405



Mill Creek MUGA Boundaries



Everett/Mill
Creek Common
Boundary
SR-96

I-5

Lynnwood
MUGA
Overlap Area

Snohomish
County/Mill Creek
MUGA/UGA

I-405

196th Street SE
Bothell/Mill Creek
Common Boundary



- LEGEND**
- City Limits
 - Municipal Urban Growth Area
 - Lynnwood MUGA Overlap Area