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No. 67236-3-I  
King County Superior Court No. 10-2-31288-9 KNT  
IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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SKAGIT D06, LLC, a Washington limited liability company,  
Plaintiff/Appellant,

vs.

GROWTH MANAGEMENT HEARINGS BOARD, an agency of  
the State of Washington; and CITY OF MOUNT VERNON, a  
municipal corporation,

Defendants/Respondents.

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**APPELLANT'S OPENING BRIEF**

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## I. INTRODUCTION

This case requests review of a decision of the Growth Management Hearings Board, Western Washington Region (the “Board”) related to Ordinances 3472 and 3473 (the “Ordinances”) adopted by the City of Mount Vernon (the “City”).<sup>1</sup> The question presented to this Court is whether the Ordinances are in violation of the Growth Management Act (the “GMA”). Petitioner’s case is not property specific; instead, as with other GMA cases, the Court is asked to review the City’s actions in light of GMA requirements.

A fundamental requirement under the GMA is that counties and cities must designate Urban Growth Areas (“UGA’s”) that include both cities and their adjacent unincorporated areas. RCW 36.70A.110 (1). Within a UGA, cities and counties shall encourage urban growth and discourage sprawl. RCW 36.70A.020 (1) and (2). A UGA must be large enough to accommodate the population growth assigned to it during a designated twenty-year period. RCW 36.70A.110 (2).

Cities are the “units of local government most appropriate to provide urban governmental services.” RCW 36.70A.110 (4). The GMA defines “urban governmental services” as including “those public services and

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<sup>1</sup>Citations to the record developed before the Board are set forth in footnotes herein, referencing the “Documentary Record” and the Bates-stamped page numbers, omitting all zeros.

public facilities at an intensity historically and typically provided in cities, specifically including ... sanitary sewer systems....”

RCW 36.70A.030 (18).

Skagit County, in coordination with the City of Mount Vernon, designated a UGA that includes the City as well as surrounding unincorporated areas. As detailed below, the City and the County also adopted Comprehensive Plans with policies designed to encourage urban density residential development in the UGA. Among those policies, the City and County also planned for the extension of urban services, including sanitary sewers, throughout the unincorporated UGA.

Despite the foregoing, and relying on misuse of the GMA’s moratorium process, the City adopted Ordinances 3472 and 3473 (the “Ordinances”).<sup>2</sup> These Ordinances collectively deny sanitary sewer service to any new residential development in the unincorporated UGA. As shown herein, the Ordinances are inconsistent with mandatory GMA requirements.

Appellant, Skagit D06, LLC<sup>3</sup> filed a petition for review with the Board challenging City of Mount Vernon Ordinances 3472 and 3473.<sup>4</sup> The

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<sup>2</sup> Ordinances 3472 and 3473 are found in the Documentary Record at 1669-1677 and 1678- 1690. Copies of the Ordinances are attached hereto as Exhibits A and B for the Court’s ease of reference.

<sup>3</sup> Skagit D06, LLC has standing pursuant to RCW 36.70A.280(2)(d) and RCW 34.05.530 because Skagit D06, LLC owns property within the Urban Growth Area which is subject to Ordinances 3472 and 3473, and will incur injury due to Ordinances 3472 and 3473 because those ordinances drastically reduce and/or eliminate the possibility of development of Petitioner’s property by restricting the development potential of

Petition<sup>5</sup> asserted, *inter alia*, that Ordinances violate the GMA in the following ways:

(a) The Ordinances create a de facto moratorium adopted in violation of the GMA's procedural and substantive restrictions on moratoria contained in RCW 36.70A.390;

(b) The Ordinances improperly interfere with the City's obligation to encourage urban density development in the UGA and, conversely, encourage the conversion of undeveloped land in the UGA into sprawling, low-density development, in violation of RCW 36.70A020 (1) and (2); and

(c) Ordinance 3472 prevents the City from complying with its obligation under RCW 36.70A.110 to plan for and permit necessary urban population growth in the UGA that is projected to occur in the twenty year planning period.

On August 4, 2010, the Board issued a Final Decision and Order<sup>6</sup> (the "Board's Decision"), denying the Petition. This appeal ensues.

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Petitioner's property to the point that no economically feasible opportunity exists to develop the property.

<sup>4</sup> Documentary Record at 1-6.

<sup>5</sup> Documentary Record at 0010-0030.

<sup>6</sup> The Board's Final Decision and Order is in the Documentary Record at 2241-2272. A copy of the Board's Decision is also attached hereto as Exhibit C for the Court's ease of reference.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred in affirming the Growth Management Hearings Board's decision. Appellant understands that specific assignments of error regarding the Superior Court's decision are not necessary because this Court reviews the Board's Decision without regard to the Superior Court's findings of fact and conclusions of law. *Suquamish Tribe v. Central Puget Sound Growth Management Hearings Board*, 156 Wn. App. 743, 760, 235 P.3d 812 (2010).<sup>7</sup>

2. The Growth Management Hearings Board erred in finding that City of Mount Vernon Ordinances 3472 and 3473 do not constitute a de facto moratorium adopted in violation of RCW 36.70A.390. *See page 7, lines 16-28 (findings); page 8, lines 1-27 (findings); and page 8, lines 30-31 (conclusion).*

3. The Growth Management Hearings Board erred in finding that City of Mount Vernon Ordinances 3472 and 3473 do not violate and are consistent with RCW 36.70A.020(1) and (2). *See page 11, lines 19-30 (findings); page 12, lines 1-28 (findings); page 13, lines 1-5 (findings); page 17, lines 1-3 (conclusion).*

4. The Growth Management Hearings Board erred in finding that City of Mount Vernon Ordinances 3472 and 3473 do not violate and are consistent with RCW 36.70A.110. *See page 19, lines 25-27 (findings);*

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<sup>7</sup> Additionally, the Superior Court did not enter any specific findings or conclusions. *See*, Clerks Papers, sub number 30.

*page 20, lines 1-29 (findings); page 21, lines 1-29 (findings); page 22, lines 1-2 (findings); page 22, lines 5-6 (conclusion).*

5. The Growth Management Hearings Board erred in finding that City of Mount Vernon Ordinances 3472 and 3473 do not violate and are consistent with the Growth Management Act, chapter 36.70A RCW. *See page 30, lines 20-22 (Order).*

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the Board err, as a matter of law and application of the law to the facts, when it ruled that City of Mount Vernon Ordinances 3472 and 3473 do not constitute a de facto moratorium adopted in violation of RCW 36.70A.390?

2. Did the Board err, as a matter of law and application of law to the facts, and fail to rely on substantial evidence when it ruled that City of Mount Vernon Ordinances 3472 and 3473 do not interfere with the City's obligation to encourage urban density development and discourage the conversion of undeveloped land into sprawling, low-density development in the UGA under RCW 36.70A.020 (1) and (2)?

4. Did the Board err, as a matter of law and application of law to the facts, and fail to rely on substantial evidence when it ruled that City of Mount Vernon Ordinance 3472 does not prevent the City from complying with its obligation to plan for and permit the urban growth that is projected to occur in the City in the twenty year planning period under RCW 36.70A.110?

#### IV. STATEMENT OF THE CASE

##### A. Background City of Mount Vernon and Skagit County GMA Planning.

In 2003, Skagit County and the City of Mount Vernon established a population growth target of 19,568 additional residents for the City and its associated Urban Growth Area. This population target must be accommodated by 2025. This population target was converted to a target of 7,115 new dwelling units to be created in the UGA by 2025.<sup>8</sup>

In 2005, the City conducted a buildable lands analysis<sup>9</sup> as part of its 2006 Comprehensive Plan update. That buildable lands analysis and a review of building permits issued in the City since 2005 establishes that, as of 2009, the City had the capacity to absorb only about 2800 new residential units within its existing City limits by 2025. This is far fewer units than is necessary for the City to meet the 2025 target of 7,115 new housing units for City's full UGA (incorporated and unincorporated).<sup>10</sup> Assuming a consistent rate of growth over the next few years similar to the rate since the Buildable Lands Analysis was completed, the City will consume essentially

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<sup>8</sup> City Buildable Lands Analysis, Documentary Record at 0809.

<sup>9</sup> Documentary Record at 0809-0837.

<sup>10</sup> Documentary Record at 2110-2143. This analysis assumed the City's population target of 19,568 adopted in the Comprehensive Plan and Countywide Planning Policies, adjusted it for the building permits issued by the City between completion of the City's Buildable Lands Analysis and 2008, and determined that the City, by its own analysis can only accommodate about another 2800 residential units within existing City limits. No evidence exists in the Record which challenges or disagrees with this conclusion.

all of the residential growth capacity within the City limits by approximately 2015, fully ten years before the 2025 planning horizon.<sup>11</sup> Without significant urban residential growth in the UGA, the 2025 population growth target for the City and its UGA simply cannot be met. Therefore, **a significant amount of urban residential development must occur in the unincorporated UGA before 2025 in order to meet the adopted twenty-year growth target.**

At the time the Buildable Lands Analysis and City Comprehensive Plan updates were adopted in 2006, the City's Comprehensive Sewer Plan stated:

A number of improvements will be required to extend sewer service into the UGA and other developing areas. These are areas within the UGA, but not currently within the City limits. The City is presently initiating a study to determine the necessary improvements needed within each of these four areas to provide sewer service. It is the City's intent to determine the services that will ultimately be required, and then develop a phased approach that can be implemented as the need occurs.<sup>12</sup>

Although the 2006 Sewer Comprehensive Plan references the City's intent to adopt a phasing plan for sewer service, the City has never adopted any phasing plan.

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<sup>11</sup> Documentary Record at 2127.

<sup>12</sup> 2006 Sewer Rater Study, Documentary Record at 1956.

The 2003 Comprehensive Sewer Plan also stated “[t]he extension of sewers to the residential and commercial areas of the Eastern UGA will be developer or LID funded.”<sup>13</sup>

When the City adopted its Comprehensive Plan policy calling for extension of sewer service to the UGA, the City of Mount Vernon Municipal Code (“MVMC”) Section 13.08.060 contained the following rule applicable to extensions of sewer service to the UGA:

Outside city limit connections: Connection to the public sewer system **shall be allowed to those properties situated within the unincorporated areas of the City’s urban growth areas, as adopted and amended.** The applicant shall record an agreement, in a form approved by the City and referred to herein as an ‘agreement to connect’ with the Skagit County assessor. The agreement shall be a covenant which shall run with the land and shall be binding upon the owner and successors in interest of the property. Such agreement shall contain the following provisions: (A) An agreement to execute a property owner petition for annexation to the City of Mount Vernon, at such time as a petition to annex is presented; (B) An agreement to pay all applicable connection and assessment fees, and service fees at then applicable rates; and (C) An agreement to construct a wastewater system that meets city standards.

(Emphasis added).

**B. History of Appellant’s Request for Sewer Service, Triggering City’s Moratorium.**

Appellant Skagit D06, LLC owns property in the unincorporated portion of the UGA, located immediately adjacent to the southeast City

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<sup>13</sup> 2006 Sewer Rater Study, Documentary Record at 1957.

limits. This property and many other properties in the UGA are designated Single-Family Medium Density in the City of Mount Vernon Comprehensive Plan.

For Appellant's property and the larger area within the UGA, the City is the sole provider of sewer service. There is only one other sewer service provider in the vicinity of Mount Vernon: the Big Lake Sewer District. However, the Big Lake Sewer District, which owns and operates the Big Lake Waste Water Treatment Plant, is not a public sewer system; Big Lake is a closed system limited to serving only an existing rural community by ruling of the Washington State Boundary Review Board.<sup>14</sup>

In 2006, Skagit D06 initiated the process to annex its property to the City in order to develop the property at the urban densities as allowed and encouraged by both the County and City Comprehensive Plans. However, a series of meetings with the City Staff in 2006 and 2007 made it clear that the City staff would not support the annexation despite the adopted Comprehensive Plan policies.

Following rejection of its annexation application, Skagit D06 initiated an effort to develop its properties under the Skagit County Zoning Code, which allows urban density development in the UGA through the "Urban Residential Development Permit" (URDP) process. That process

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<sup>14</sup> Documentary Record at 2137.

requires that, before an application for development is submitted to the County, an applicant must obtain “**a determination from the City in whose UGA the project is located that adequate provision has been made for sewer service.**” Skagit County Code (SCC) 14.16.910 (2)(a)(i) (emphasis added). It is important to note, in this context, that Skagit D06 and other property owners are **required to obtain City sewer service.**<sup>15</sup> No option for any alternative source of sewer service is allowed or available.

Consequently, on November 9, 2008, Skagit D06 formally applied to the City for a determination that adequate provision for sewer service had been made.<sup>16</sup> This application was based on MVMC 13.08.060 which, as noted above, **required** that sewer service be provided to properties in the unincorporated UGA provided the applicant signed an agreement to annex, pay connection charges and construct a sewer system meeting City standards. Consistent with MVMC 13.08.060, Skagit D06’s application anticipated that sewer service meeting City standards would be provided by a combination of developer constructed improvements and improvements funded by the City’s system of connection charges imposed on new development, including Skagit D06’s project.

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<sup>15</sup> This is significant because the Board heavily relied on the conclusion that the City was not a sole source provider of sewer service to the UGA, despite the unambiguous requirement in SCC 14.16.910(2)(a)(i) that City sewer service be used.

<sup>16</sup> Documentary Record at 1570.

**C. City's Adoption of Moratorium and Failure to Complete Mandatory Work Plan.**

Instead of acting on Skagit D06's 2008 application for sewer service pursuant to MVMC 13.08.060, the City adopted a moratorium, Ordinance 3442, on February 25, 2009.<sup>17</sup> The moratorium was adopted as an "emergency" under RCW 36.70A.390, without prior public notice or public hearing. Ordinance 3442 adopted a series of "interim controls" which established a number of new requirements for any property owner requesting an extension of sewer service outside City limits and granted the City Council the discretion to deny a request for sewer service for any reason.

On March 6, 2009, without waiving its rights under its 2008 application, Skagit D06 submitted a new application for sewer service pursuant to the limitations set forth in Ordinance No. 3442.<sup>18</sup> On April 15, 2009, the City Council conducted an "after the fact" public hearing on Ordinance 3442 to decide whether to continue the moratorium. Immediately at the conclusion of that hearing, the Council adopted a revised moratorium, Ordinance 3445, which reaffirmed the interim controls in

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<sup>17</sup> Documentary Record at 1661.

<sup>18</sup> Documentary Record at 1573.

Ordinance 3442 and imposed a one year moratorium on extensions of sewer service outside the City limits.<sup>19</sup>

As required by RCW 36.70A.390 for a moratorium of one-year duration, Ordinance 3445 adopted a “Work Plan” to address the concerns which supposedly triggered the need for the moratorium on sewer connections outside the city limits and to guide future planning policy and regulation (“the Work Plan”). The Work Plan required the City to (1) update the City’s Buildable Lands/Capacity Analysis, (2) complete an analysis of the City’s wastewater treatment plant and compare its capacity to the results of the buildable lands analysis, and (3) depending on the outcome of the buildable lands analysis and capacity study of the treatment plant, make any necessary recommendations on adjustment of the size of the UGA’s and/or a phasing plan for providing sewer service that would exceed a twenty-year planning horizon. The Work Plan was to be completed within one year.

**D. Description of Ordinances 3472 and 3473 and Their Effect on Future Residential Land Development in UGA.**

Without completing any component of the required Work Plan, the City Council, on December 16, 2009, repealed Ordinances 3442 and 3445 and adopted Ordinances 3472 and 3473.

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<sup>19</sup> Documentary Record at 1661.

Ordinance 3473 imposes a very simple but draconian amendment on new sewer connections to MVMC 13.08.060:

Sewer connections shall not be allowed outside the city limits of Mount Vernon. Only after property is annexed into the City may a sewer connection be made in accordance with this Chapter.

The net effect of Ordinance 3473 is that no property in the unincorporated Mount Vernon UGA can be developed at urban densities because the City unequivocally will not provide sewer prior to annexation. While the requirement for annexation as a prerequisite for sewer service, taken alone, may seem like a rather predictable attempt by the City to impose its development standards within its UGA by insisting on annexation before it provides sewer service, that requirement must be viewed in the context of the restrictions on annexations which the City simultaneously adopted in Ordinance 3472.

Ordinance 3472 amended the Comprehensive Plan to provide that annexation of residential property will not be allowed unless a series of criteria are satisfied, including but not limited to the following:

Policy LU-29.1.3(B): The annexation of residentially zoned areas shall not occur until additional areas zoned for commercial/industrial are officially designated such that a balance between residential and commercial/industrial areas can be achieved within the City.

Policy LU-29.1.3(F): The City finds that it has the capacity to provide City services within the existing City limits, and those

services to annexation areas without major upgrades to these services.

Policy LU-29.1.3(B) operates as a semi-permanent moratorium on residential annexations until the City either annexes some unknown amount of property which is zoned commercial/industrial or rezones some unidentified amount of property within the City limits for this purpose. The City has no plan to either annex or rezone any commercial or industrial properties. As a result, Policy LU-29.1.3(B) in Ordinance 3472 effectively bans any residential annexation in the Urban Growth Area for the foreseeable future.

The effect of Policy LU-29.1.3 (F) is more insidious. This policy, on its face, sounds like it simply prohibits annexations of residential property without adequate municipal services (which include sanitary sewer service per RCW 36.70A.030(18)). But the language of the policy is more subtle than that: **it requires that adequate municipal services already exist at the time of annexation** because the City must find that major upgrades to sewer services are not required to serve the annexed area.

The critical fact not acknowledged in Ordinance 3472 is that almost the entire UGA is not presently served by sanitary sewers. To the contrary, the central premise of the City's 2033 Comprehensive Sewer Plan is that sewer service will be extended to the Urban Growth Area in the future, as

development takes place.<sup>20</sup> In fact, the City not only adopted a Comprehensive Plan to extend sewer service to the UGA in the future, the City also adopted a sewer connection charge and has been collecting money from property owners to pay for the extension of sewer mains to the UGA.<sup>21</sup> By prohibiting annexations which require upgrades to the sewer system, in light of the fact that the basic premise of the City's adopted Sewer Comprehensive Plan is that sewers will be extended at the time of development and paid for by a combination of developer fees and local improvement districts, the new policy creates the perfect Catch-22 for property owners. They cannot obtain sewer service and develop their properties without annexation, but they cannot annex unless sewer service already exists, which is not possible because the City's plan for sewer service in the UGA assumes that sewer service will be constructed and paid for at the time of development by the property owners needing sewer service.

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<sup>20</sup> Documentary Record at 0151.

<sup>21</sup> Documentary Record at 2144-2240. The sewer connection charges currently imposed by the City will not pay for all of the improvements necessary to connect UGA properties to the City sewer system. The City Sewer Comprehensive Plan contemplates that sewers to the UGA's will be extended by a combination of City-constructed improvements (financed by sewer connection charges) and developer financed extensions from the City system. The City's Final Report on the Wastewater Connection Charge (Documentary Record Bates Nos. 0424-0510, which indicates that the Connection Charge includes the City's share of the cost of future improvements needed to serve portions of the UGA which do not currently have sewer service but are expected to receive such service pursuant to the Sewer Comprehensive Plan. See, particularly, Bates Documentary Record Bates Nos. 0446, to the Connection Charge Report which identifies some \$26 million in sewer system improvements to be constructed in the UGA. The cost of most of these future facilities was included in the connection charge now assessed by the City.

Despite the fact that the City has an adopted Plan to extend sewer service to the UGA and is collecting money from property owners to pay for such extensions, the City has now prohibited anyone from connecting to the sewer system outside the City limits or annexing to the City unless the sewer service already exists. Since the City's Sewer Comprehensive Plan calls for the extension of sewer service to the UGA, by a combination of City sewer main extensions to be constructed in the future but not presently available, **the net effect of Ordinances 3472 and 3473 is that no residential urban development in the UGA can or will be allowed unless and until these Ordinances are repealed or dramatically modified.**

Skagit D06 does not claim that all forms of residential development in the UGA are prohibited by the combination of the Ordinances. Property owners in the UGA are still permitted to develop at a density of one unit per five acres using septic systems. However, development on five-acre lots with septic systems is not urban development. It is rural development and, if it occurs to any considerable extent within the UGA, it will constitute the precise kind of land wasting sprawl that the GMA was designed to avoid within areas designated for urban development, including the UGA. The net effect of Ordinances 3472 and 3473 is a perpetual moratorium on annexation of residential property to the City and on any new urban density residential development in the unincorporated UGA.

## V. LEGAL ANALYSIS

### A. Standard of Review.

This Court reviews the appeal of a Board decision by applying the standards of the Administrative Procedure Act ("APA") directly to the record presented to the Board. *Suquamish Tribe v. Central Puget Sound Growth Management Hearings Board*, 156 Wn. App. 743, 760, 235 P.3d 812 (2010); *Honesty in Environmental Analysis and Legislation v. Central Puget Sound Growth Management Hearings Board (HEAL)*, 96 Wn. App. 522, 526, 979 P.2d 864 (1999). This Court does not consider any findings or conclusions entered by the trial court. *Valentine v. Department of Licensing*, 77 Wn. App. 838, 844, 894 P.2d 1352, review denied, 127 Wn.2d 1020, 904 P.2d 300 (1995).

The Standard of Review in an appeal under the APA is established by RCW 34.05.570 (3). Relevant to this case are the following:

The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

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

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;  
or

...

(i) The order is arbitrary or capricious.

RCW 34.05.570 (3).

The question of whether an agency has erroneously interpreted or applied the law is reviewed de novo. *HEAL*, 96 Wn. App. at 526. Although the reviewing court accords deference to an agency interpretation of the law where the agency has specialized expertise in dealing with such issues, the Court is not bound by an agency's interpretation of a statute. *Id.*, citing *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 959 P.2d 1091 (1998).

In reviewing agency findings under RCW 34.05.570 (3)(e), substantial evidence is defined as “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” *Redmond v. CPSGMHB*, 136 Wn.2d 38, 46.

Comprehensive Plans and development regulations are presumed valid when reviewed by the Board. RCW 36.70A.320 (1). The GMA requires deference to be given to cities and counties in their planning processes, affording this presumption of validity. RCW 36.70A.320 (1).

However, the Board must still take an active role in reviewing challenge policies and regulations. The Board’s role is not merely a rubber stamp; the Board must critically review the challenged actions. *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 435 n. 8, 166 P.3d 1198 (2007). As the Board itself recognized: “The City of Mount Vernon’s actions are not

boundless; its actions must be consistent with the requirements of the GMA.”<sup>22</sup> See also, *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wash.2d 543, 561, 14 P.3d 133 (2000) (county or city discretion is bounded by the GMA’s goals and requirements). If a party demonstrates that the City’s action is a clearly erroneous application of the GMA, then deference is no longer appropriate and the decision maker, whether the Board or this Court, must find that the action is out of compliance with the GMA. *Quadrant Corporation et al. v. State of Washington Growth Management Hearings Board*, 154 Wn.2d 224, 248, 110 P.3d 1132 (2005).

**B. Ordinances 3472 and 3473 Create a Moratorium on Urban Development in the UGA’s in Violation of RCW 36.70A.390.**

A moratorium has been described by the Board as a temporary, draconian measure which the Growth Management Act allows only where it is necessary to allow a City to have the time to undertake necessary planning. See, *SHAG v. City of Lynnwood*, CPSGMHB Case No. 01-3-0014 Order on Motions (August 3, 2001). The GMA expressly limits a moratorium to either six months without a work plan or one year if a work plan is adopted as part of the moratorium. RCW 36.70A.390.

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<sup>22</sup> Board Decision at pp. 3-4, Documentary Record at 2243-2244.

The Board has also held that a city may not refuse to allow urban development “through the device of a moratorium.” *MBA/Camwest v, City of Sammamish*, CPSGMHB Case No. 05-3-0027, Final Decision and Order, page 13 (August 4, 2005).

A moratorium on development is not limited to a situation where absolutely no development can occur at all on a given piece of property or area. Instead, a moratorium exists where a city denies a property owner the ability to submit an application for an otherwise permissible use or activity under the governing zoning even if other uses are not barred. *See e.g. Biggers v. City of Bainbridge*, 162 Wn.2d 683, 169 P.3d 14 (2007) (moratorium barred certain types of shoreline development but exempted others). In this case, this rule is significant because the effect of Ordinances 3472 and 3473 is to ban urban density residential development, which requires sanitary sewer service, while allowing large lot, rural style development on five-acre lots without urban services (i.e., on septic systems).

Where a City does adopt a moratorium, the City must comply with the provisions of RCW 36.70A.390. Those requirements include a provision that the moratorium must not exceed one year in duration and then, only if a work plan is implemented to address the issues giving rise to the need for a temporary moratorium on permit applications.

The City has imposed what is now an ongoing, perpetual moratorium on urban density development of residential property in the Mount Vernon UGA because Ordinances 3472 and 3473 indefinitely bar property owners from obtaining public sewer service in the unincorporated UGA, even if the private property owners are willing to pay for the extension of sewer service. As a result, Skagit D06 cannot develop its property at an urban density of four units per acre (as called for in both the County and City Comprehensive Plans). Moreover, these same properties cannot even be developed at an interim density of one unit per acre which is allowed by Skagit County under limited circumstances, because the County Code requires the applicant to obtain proof that the area will be served by public sewer within six years.<sup>23</sup> As a result of Ordinances 3472 and 3473, such proof is no longer available.

The only permissible development now allowed for the residential zones in the UGA is five-acre lots with septic systems, a traditional form of rural development which is specifically disfavored as sprawl in urban growth areas.

The Board, in its decision, inexplicably concludes “The Board finds that Ordinance Nos. 3472 and 3473 do not establish a moratorium, or even a

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<sup>23</sup> SCC 14.16.910(3)(b)(i), Documentary Record at 1701.

de facto moratorium, within the meaning of RCW 36.70A.390.”<sup>24</sup> The Board’s analysis starts correctly, explaining that a moratorium “exists when a city denies a property owner the ability to submit an application for an otherwise permissible use or activity under the governing zoning even if other uses are not barred.”<sup>25</sup>

The Board concedes that the effect of Ordinances 3472 and 3473 is to prohibit extension of sewer service outside the City limits, stating:

While landowners once had the ability to “submit an application for an otherwise permissible use or activity, that activity (connection to public sewers outside the city limits) is no longer permissible.”<sup>26</sup>

The Board recognized that property owners in the UGA are required to provide proof of the availability of sewer service before submitting an application to develop their property. Despite the Board’s acknowledgement that the clear effect of the two Ordinances was to deny property owners the right to apply for development permits for uses and densities otherwise allowed by applicable comprehensive plans and development regulations, the Board then concludes that the Ordinances do not create a “moratorium” because the new policies are “apparently permanent.” In other words, defying logic, the Board determined that if Ordinances 3472 and 3473 were temporary, they would violate the Growth Management Act because they

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<sup>24</sup> Board decision at p. 7, Documentary Record at 2247.

<sup>25</sup> Board Decision at p. 7, Documentary Record at 2247.

<sup>26</sup> Board Decision at pp. 7-8, Documentary Record at 2247-2248.

deny property owners the right to apply for development approval of permitted activities, but they somehow escape scrutiny because they are permanent regulations. The Board cites no legal authority for this illogical conclusion, which completely ignores the prohibition in RCW 36.70A.390 on any moratorium which exceeds one year in duration.

As detailed above, the City recognized its obligation to provide sewer service in the UGA when it adopted its Comprehensive Plan, Sewer Comprehensive Plan and Sewer Connection charges. That obligation was codified in MVMC 13.08.060 which **required** that sewer service be provided to properties in the UGA if the applicant signed an agreement to annex, pay connection charges and construct a sewer system meeting City standards. The City reversed this policy in Ordinances 3442 and 3445 by adopting a prohibition on sewer connections in the unincorporated UGA and decreeing that annexation of property in the unincorporated UGA was subject to a series of conditions that essentially prohibit annexation of any residential area that requires an extension of sewer service<sup>27</sup>. The City acknowledged that its new policies, as expressed in Ordinances 3442 and

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<sup>27</sup> As discussed previously, Ordinance 3472 bans annexations unless sewer service already exists. In addition, Ordinance 3472 bans new residential annexations unless some unspecified additional area of commercial or industrial property is added to the City. The City has no plans to add commercial or industrial properties, essentially creating a separate basis for rejecting any application to annex residential property even if sewer service is already available.

3445, created a moratorium under RCW 36.70A.390.<sup>28</sup> Ordinance 3445 specifically referred to Ordinance 3442 as a moratorium and extended that moratorium for a year.<sup>29</sup> As authorized by RCW 36.70A.390, the City specified the length of the moratorium as one year pursuant to the statutory provision allowing a moratorium to last for up to one year if necessary to implement the adopted Work Plan. *Id.*

Despite the Work Plan required by Ordinance 3445 and RCW 36.70A.390, the City failed to complete either an updated buildable lands analysis or the treatment plant analysis. Instead, in Ordinances 3472 and 3473, the City transformed the temporary moratorium created by Ordinances 3442 and 3445 into a new semi-permanent moratorium by adopting Comprehensive Plan Policy LU-29.1.3 and development regulations on annexations which ban new sewer system connections in the UGA indefinitely without the benefit of the any of the analysis required by the Work Plan to address the issues which supposedly originally justified the moratorium.

This is not harmless error. Because the City never completed its Work Plan, Ordinances 3472 and 3473 were adopted without consideration of information and analysis that the City previously determined was

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<sup>28</sup> Ordinance 3442 explicitly referenced RCW 36.70A.390 as its authority to adopt a moratorium and interim controls and cited the need to conduct a public hearing pursuant to that statute within sixty days.

<sup>29</sup> Ordinance 3445, Section 3, Documentary Record at 1661.

necessary to evaluate any proposed permanent amendments to its annexation and sewer connection policies. The Countywide Planning Policies, the GMA population targets for Mount Vernon and its UGA, the City Comprehensive Plan and the County Sewer Comprehensive Plan were all based on the premise that a significant portion of the urban growth allocated to the City of Mount Vernon by the Countywide Planning Policies would occur in the Urban Growth Area. Without any analysis of the impact on that assumption or the City's ability to comply with its GMA obligations, the City has reversed its policy on sewer extensions in the UGA and indefinitely prohibited such extensions.

RCW 36.70A.390 prohibits moratoria which exceed one year in duration. The City's Mount Vernon's moratorium on applications requiring sewer service in its UGA violates this prohibition. The Board decision should be reversed.

**C. Ordinances 3472 and 3473 Will Prevent the City from Satisfying its Duty to Permit the Urban Growth Projected to Occur During the Twenty-Year Growth Target Period.**

RCW 36.70.020 identifies a series of goals to be achieved by GMA-based planning. Cities "must use the planning goals to point the way for the enactment of development regulations and comprehensive plans that substantively comply with the GMA." *Association of Rural Residents v. Kitsap*

County, CPSGMHB 93-3-0010, Final Decision and Order, page 423 (June 3, 1994).

RCW 36.70A.020 (1), (Goal 1) provides:

Urban growth. Encourage development in urban areas where adequate public facilities and services exist **or can be provided** in an efficient manner. [Emphasis added]

RCW 36.70A.020 (2), (Goal 2) provides:

Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

The Board has itself reiterated the importance of the goals in RCW 36.70A.020 as follows:

[T]he substantive element of RCW 36.70A.020 is the heart of the GMA. All development regulations and comprehensive plans must comply with the Act's planning goals. . . . **Comprehensive plans and implementing development regulations will be held to the highest standard of compliance** . . .

*Association of Rural Residents*, 93-3-0010, page 424 (FDO) (emphasis added).

Planning Goals 1 and 2 “operate as organizing principles at the county-wide level” and “direct a tangible and measurable outcome.” *Bremerton v. Kitsap County*, CPSGMHB 95-3-0039, Final Decision and Order, page 25 (October 6, 1995). The City must achieve both procedural and substantive compliance with the goals in RCW 36.70A.020. *Rabie v. Burien*, CPSGMHB No. 93-3-0005c, Final Decision and Order, pages 5-6 (October 19, 1998).

The Board has recognized that a lack of urban services in a UGA precludes development at urban densities and threatens to create low-density sprawl (i.e., large lot development on septic systems), which contravenes Goal (2). *ARD/Diehl v. Mason County*, WWGMHB Case No. 06-2-0006, Order Finding Non-Compliance, page 9 (November 14, 2007).

- i. The Ordinances violate Goals (1) and (2) of RCW 36.70A.020.

The basis for the Board's conclusion regarding Goals (1) and (2) is not at all clear. The Board did not address how the Ordinances do or do not encourage urban growth or reduce sprawl. Instead, the Board focused on whether property owners on the periphery of the UGA have a right to develop their property sooner than the very end of the twenty-year planning period.<sup>30</sup> The Board totally ignored the plain language of the Ordinances and Appellant's arguments related to how the Ordinances will regulate development. The Board simply never considered the Ordinances themselves and what resulting land development could occur under the terms of the Ordinances. As a result, the Board's decision failed to erroneously interpret and apply Goals (1) and (2) to the Ordinances and failed to support its decision with substantial evidence.

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<sup>30</sup> See e.g., Board's Decision at p. 12, Documentary Record at 2252.

Contrary to the Board's decision, Ordinances 3472 and 3473 thwart Goals (1) and (2) in fundamental ways that destroy the City's ability to comply with its obligations under the GMA.

At the same time, the City's Ordinances simultaneously require annexation prior to the provision of sewer service in the UGA, yet prohibit such annexations indefinitely and permanently. As a result, the Ordinances act as a complete bar to any meaningful urban development in the UGA within the twenty-year planning period ending in 2025.

Rather than encouraging urban development, as required by RCW 36.70A.020 (1), the Ordinances outright discourage urban development. The Ordinances leave no alternative for residential property owners other than developing their property with five-acre, rural lots using septic systems, despite being inside the UGA. Such a pattern of land development is a direct violation of the GMA's prohibition on sprawling low-density development within urban areas. RCW 36.70A.020 (2).

Once a UGA is developed with five-acre rural lots on septic systems, it will be difficult, if not impossible, to redevelop those areas at urban densities with urban services as required by the adopted Comprehensive Plan. The development of urban services ranges from extremely difficult to impossible when an existing pattern of large lots in separate ownership has been allowed to occur, especially if those lots have

been developed. Owners of single-family homes on five-acre lots with functioning septic systems do not have the resources or incentive to pay to extend urban facilities and services such as sanitary sewers. A pattern of large lot sprawl development will persist for generations in the Urban Growth Area if Ordinances 3472 and 3473 are not invalidated.

The Ordinances represent the essence of bad planning: sprawling rural density development based on a refusal to provide sanitary sewer service in the designated urban growth area, which then forces premature conversion of otherwise rural land. Once the inevitable pattern of five-acre lots on septic systems develops under the Ordinances, neither the County nor the City will have any ability to compel homeowners to redevelop their property in the future to meet urban development standards. The City and County will be forced to expand the UGA, converting less suitable rural areas to urban in order to accommodate the urban density growth that could and should have been accommodated in the existing UGA. This scenario is completely unnecessary and created only as a result of the Ordinances.

The GMA has already weighed and balanced these considerations and directed cities to support, encourage and accommodate growth in urban growth areas and to provide urban services in urban growth areas. RCW 36.70A.020 (1) and (2). The City may not ignore its duty to promote urban development in its UGA. RCW 36.70A.020 bars the City from artificially

stopping new urban development in the Urban Growth Area based on considerations totally unrelated to the actual ability to provide urban level facilities and services. The City has many other ways to address its concerns without violating RCW 36.70A.020 (1) and (2).

Appellant respectfully requests that this Court reverse the Board's decision that Ordinances 3472 and 3473 are consistent with RCW 36.70A.020.

- ii. The Board's conclusion that Ordinances 3472 and 3473 "phase" development is not supported by substantial evidence or the Ordinances' plain language.

The Board concluded that efficient "phasing" of urban infrastructure is a key component in transforming governance from counties to cities and consistent with Goals (1), Urban Growth, and (2), Reduce Sprawl, of RCW 36.70A.020.<sup>31</sup> Based on its comments, the Board clearly assumed that the Ordinances phase urban development.<sup>32</sup> Relying on this assumption, the Board concluded that the Ordinances were consistent with RCW 36.70A.020 (1) and (2).<sup>33</sup>

Despite this assumption, the Board did not describe the phasing process it was relying upon or identify the document in which the City supposedly established a phasing plan. The reason for the Board's failure is

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<sup>31</sup> Board Decision at p. 13, Documentary Record at 2253.

<sup>32</sup> Board Decision at p. 12-13, Documentary Record at 2252-2253.

<sup>33</sup> Board Decision at p. 17, Documentary Record at 2257.

simple: there is no adopted City phasing plan and no phasing process. There is no provision in Ordinances 3472 and 3473 that phases urban development. To the contrary, Ordinances 3472 and 3473 do nothing to provide efficient phasing of urban infrastructure. The City did not provide any analysis of either ordinance that shows how they phase development in the UGA in any way. There is simply no phasing plan of any level of specificity or phasing criteria anywhere in the record.

The Board did not make any findings that demonstrated actual phasing or any phasing criteria. The denial of sewer service for the foreseeable future without more is not “phasing”; this denial is a bar to urban growth in the UGA.

- iii. The Board has improperly created a ‘bright-line rule’ in finding that the Ordinances comply with RCW 36.70A.020.

The Board’s decision relies on what has become a bright-line rule established by the Board. The Board repeatedly and increasingly bases its decisions regarding RCW 36.70A.020 (1) and (2) on one simple question: is there is any remote or theoretical chance that property in the UGA could develop at an urban density within the twenty-year growth target?<sup>34</sup> See e.g., *City of Sedro-Woolley v. Skagit County*, CPSGMHB Case No. 03-2-0013c, Compliance Order, page 13 (June 18, 2004); *Master Builders*

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<sup>34</sup> Board decision at p. 13, Documentary Record at 2253.

*Association of King and Snohomish Counties v. City of Arlington*, CPSGMHB Case No. 04-3-0001, Final Decision and Order, page 18 (July 14, 2004). If a City or County policy or regulation meets this test, the Board will now rubber-stamp it as compliant. The Board no longer seriously considers (a) whether urban development actually can occur or is likely to occur under the challenged regulations, and (b) whether the challenged regulations actually encourage development in urban areas where urban facilities and services exist or can be provided efficiently (Goal 1) and reduce the inappropriate conversion of undeveloped land into sprawling, low-density development (Goal 2). The Board's new bright-line rule allows the Board to avoid a true evaluation of whether the challenged policy or regulation complies with the GMA's Goals by simply finding that a theoretical possibility that compliance might be achieved is sufficient to insulate challenged regulations from realistic scrutiny.

If the legislature intended RCW 36.70A.020 (1) and (2) to be satisfied by any theoretical chance of property in the UGA developing at an urban density within the twenty-year growth target based on the assumption of future legislative action, the legislature could have included this standard in the GMA. No such standard exists in RCW 36.70A.020. Very much to the contrary, Goals 1 and 2 have a strongly directive quality: urban growth **shall** be encouraged and sprawl reduced.

This Court has rejected the Board's creation and imposition of 'bright-line rules.' *Suquamish*, 156 Wn. App. 743, 762. Despite *Suquamish*, the Board has developed criteria that are not found anywhere in RCW 36.70A.020 for evaluating the substantive requirements of Goals 1 and 2. Appellant requests that this Court reject the Board's bright-line rule for whether a policy or regulation complies with RCW 36.70A.020 (1) and (2).

- iv. The Board has created directly conflicting obligations and duties depending on whether a challenge is brought under RCW 36.70A.020 versus RCW 36.70A.110.

It is a long standing rule of statutory interpretation that statutes must be read in harmony wherever possible. *Emwright v. King County*, 96 Wn.2d 538, 543, 637 P.2d 656 (1981). The Board's interpretation of what duties RCW 36.70A.020 (1) and (2) imposes on cities and counties directly conflicts with the Board's interpretation of what is required under RCW 36.70A.110.

The Board now imposes very different duties on a city or county with respect to urban growth depending only on which statute the Board is reviewing. This issue is important because actions involving UGAs commonly involve challenges under both RCW 36.70A.020 (1) and (2) and RCW 36.70A.110. *See e.g., KCRP v. Kitsap County et al (KCRP VI)*, CPSGMHB Case No. 06-3-0007, Order Finding Partial Compliance, page 8

(Legal Issue 4) (March 16, 2007); *MBA/Camwest v. City of Sammamish (Camwest III)*, CPSGMHB Case No. 05-3-0041, Final Decision and Order, page 4 (Legal Issues 4 and 5) (February 21, 2006).

Under RCW 36.70A.020 (1) and (2), the Board created the bright-line rule explained above: if there is a theoretical chance a city could meet the twenty-year growth target, the Board no longer reviews the challenged regulation or policy further. In direct contradiction, the Board takes the exact opposite position when reviewing a challenge brought under RCW 36.70A.110, discussed below: “accommodating the growth allocated to meet a one-time projected 20-year growth target does not extinguish a city’s GMA obligations.” *Camwest III*, CPSGMHB Case No. 05-3-0041, Final Decision and Order, page 14 (February 21, 2006).

The Board’s inconsistent treatment of city actions under RCW 36.70A.020 (1) and (2) and RCW 36.70A.110 cannot be explained. Instead, Appellant requests that this Court reject the Board’s attempt to evade its duty to seriously review compliance under RCW 36.70A.020 (1) and (2). These GMA Goals create an unequivocal duty to encourage urban development and reduce sprawl. The Board should be required to seriously review compliance under these Goals. As shown herein, the Ordinances cannot satisfy the standards imposed by these fundamental GMA Goals.

**D. Ordinance 3472 Will Prevent the City from Complying with its Obligation to Permit the Urban Growth that is Projected to Occur in the City in the Twenty-Year Planning Period.**

The duty to provide urban facilities to the **entire** UGA requires a City to actively plan for services, not just wait for failure or otherwise close its eyes to the unincorporated UGA. *KCRP v. Kitsap County et al (KCRP VI)*, CPSGMHB Case No. 06-3-0007, Order Finding Partial Compliance, page 12 (March 16, 2007). UGA planning requires “anticipation of future events, developing strategies and taking action to address them.” *Id.*

- i. The GMA imposes an affirmative duty on the City to encourage urban growth and to ensure the twenty-year growth targets will be met by including not just areas, but also densities sufficient to permit urban growth.

RCW 36.70A.110 (2) requires the City and Skagit County to “include areas and densities sufficient to permit the urban growth that is projected to occur within the county or city for the succeeding twenty-year period...” The GMA unequivocally instructs that “**Each urban growth area shall permit urban densities...**” RCW 36.70A.110 (2). The Board has repeatedly held that “**providing urban infrastructure to the UGA within the twenty-year planning horizon is a required component of comprehensive plans.**” *KCRP VI*, CPSGMHB Case No. 06-3-0007, Order Finding Partial Compliance at 12 (citing RCW 36.70A.110 and other statutes and authorities).

The City has a duty to match land use planning and infrastructure development to serve the total UGA area and its allocated population target. *Fallgatter v. City of Sultan (Fallgatter V)*, CPSGMHB 06-3-0003, Final Decision and Order, pages 14-16 (June 29, 2006).

As the Board itself has succinctly stated, the GMA imposes an affirmative duty on the City to encourage urban growth within their UGA's:

**[J]ust as the GMA has required counties to alter past practices by discouraging more dense and intense development in rural areas, so, to must cities alter past practice by now actively encouraging urban growth within their corporate limits and their county-designated UGAs.**

...

In view of the various provisions of the Act regarding the role of cities as the primary providers of urban governmental services, the Act's predilection for compact urban development (footnote omitted), and the above cited provisions of *Edmonds* [duty to accommodate allocated population and employment growth] and *Hensley II* [growth accommodation duty must be reflected in land use designations and capital facility element], the Board agrees with the heart of Appellants' argument. **The Board holds that the GMA imposes an affirmative duty upon cities to "give support to," "foster" and "stimulate" urban growth throughout the jurisdictions' UGAs within the twenty-year life of their comprehensive plans.**

*Kaleas v. Normandy Park*, CPSGMHB Case No. 05-3-0007c, Final Decision and Order, pages 12-13 (July 19, 2005), *citing Benaroya et al. v. City of Redmond (Benaroya I)*, CPSGMHB Case No. 95-3-0072c, Finding of Compliance, page 8 (March 13, 1997) (emphasis in original).

Cities are required to encourage urban growth and act as the primary providers of urban governmental services. RCW 36.70A.110; *see also* RCW 36.70A.020 (1). A City's duty does not end because a City can theoretically accommodate its assigned growth target. *Kaleas*, Final Decision at 13. For example, the Board in *Kaleas* held that the City was out of compliance with GMA because 84% of the City was zoned for low density, large lot development even though the City could, on paper, accommodate the twenty-year growth target.

Therefore, Normandy Park **may not close its eyes, or borders, to growth just because it can accommodate the growth targets it is assigned.** It must also foster and stimulate urban growth within its borders – in appropriate locations and in a compact urban form.

*Kaleas*, Final Decision at 13 (emphasis added).

RCW 36.70A.110 imposes this affirmative duty to foster and stimulate urban growth and to ensure that the twenty-year growth targets are met on all City Comprehensive Plan policies. Never the less, the Board has also reviewed development regulations for consistently with RCW 36.70A.110. *See e.g. Camwest III*, CPSGMHB Case No. 05-3-0041, Final Decision and Order, page 20 (February 21, 2006) (Board found that development regulations creating a growth phasing lottery violated RCW 36.70A.110). Therefore, Ordinance 3472 alone and in combination with

Ordinance 3473 must be reviewed under the foregoing standards and duties imposed on the City.

- ii. Ordinance 3472 alone, and in combination with Ordinance 3473, acts as a bar to the City's ability to meet the twenty-year growth target, and blocks both the City's affirmative duty to foster urban growth and provision of urban densities in the UGA.

The City adopted a Comprehensive Plan, a Sewer Comprehensive Plan and a Sewer Connection Charge all based on the premise that the City would use a combination of developer funded sewer system extensions and public construction of sewer facilities to develop the sewer system capable of providing urban sewer service within the UGA. These plans were consistent with the City's duty to match land use planning and infrastructure development to serve the total UGA area and allocated population. Those plans were all developed based upon the City's assigned twenty-year population target number.

By adopting Ordinances 3472 and 3473, the City rendered all this planning as well as the creation of the UGA boundaries meaningless. The Ordinances halt urban residential development in the unincorporated UGA indefinitely. The City has impermissibly refused to plan for and provide urban infrastructure within the UGA within the twenty-year planning horizon, in direct violation of its obligations under the GMA. The City adopted the Ordinances without any consideration of the City's duty under

RCW 36.70A.110 to accommodate the UGA's twenty-year population target. Despite the undisputed evidence that the City cannot accommodate its population target by restricting residential development to the incorporated portion of the UGA, the City used the Ordinances to shut the doors on urban residential development in the unincorporated UGA.

Ordinance 3472 alone, and in combination with Ordinance 3473, denies sewer service to residential properties in the UGA by making sewer service dependent on annexation but then making annexation dependent on conditions that a private property owner has no ability to fulfill, such as showing that adequate sewer service already exists and that some unknown, unplanned amount of additional commercial/industrial development has been zoned. The City will no longer extend sanitary sewer service, *i.e.* critical urban infrastructure, to the unincorporated UGA, indefinitely. Any claim from the City to the contrary, *i.e.* that it is not actually denying sewer service, would be disingenuous under the plain language of the Ordinances.

Ordinance 3472 alone, and in combination with Ordinance 3473, stops all urban development in the UGA indefinitely and with no recourse for a property owner. Absent future legislative action, which is not required anywhere under the Ordinances, the City cannot meet its twenty-year growth targets for the UGA. Development of residential properties in the unincorporated UGA is necessary to meet the adopted population targets for

the UGA. The Ordinances have completely and permanently stopped that urban growth. Ordinance 3472 alone, and in combination with Ordinance 3473, is in clear and direct violation of the GMA mandates found in RCW 36.70A.110.

- iii. The Board erroneously concluded that the City is not the sole source provider of sewer service to the unincorporated UGA.

While the general rule is that a city is not required to provide utility service outside their city limits, the significant exception to this rule applies in this case: a city has a duty to provide sewer service if either the city is the sole provider of sewer service to an area outside its city limits **or** if the city holds itself out as willing to supply such utility service to such area. *Yakima County Fire Protection District 12 v. City of Yakima*, 122 Wn.2d 371, 858 P.2d 245 (1993); *see also Brookens v. Yakima*, 15 Wn. App. 464, 550 P.2d 30 (1976).

As the exclusive provider of sewer and water service, the City must supply all those in the UGA who request such service.

*Nolte v. City of Olympia*, 96 Wn. App. 944, 982 P.2d 659 (1999).

In this case, the Board acknowledged this “sole source provider” exception. However, the Board concluded this exception did not apply by finding that the City is not the sole source provider of sewer service to the subject portion of the UGA.

The Board's finding was based exclusively on a comment in a City of Mount Vernon staff memorandum that asked whether sewer service could be available to the Appellant's property from the Big Lake Sewer District.<sup>35</sup>

The Board's finding in this regard was not supported by substantial evidence. Further, the Board's foray into this area of law belied the Board's failure to recognize the regulatory Catch-22 created by the Ordinances.

First, the record includes substantial evidence that the City is the sole provider of sewer service for Appellant's property and the larger area within the UGA. As noted in the above Statement of the Case, only one other sewer service provider exists near Mount Vernon but it serves only a rural area outside the UGA called the Big Lake Sewer District. That District is not a public sewer system; Big Lake is a closed system limited to serving only an existing rural community by ruling of the Washington State Boundary Review Board.<sup>36</sup> Simply, the City is the sole provider of sewer service to the UGA. As a result, the City was able to adopt the Ordinances as a way to effectively stop urban growth in the UGA.

Second, the Board's finding fails to either recognize or understand the requirement in SCC 14.16.910 that properties in the UGA obtain sewer

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<sup>35</sup> Board Decision at p. 21, Documentary Record at 2261.

<sup>36</sup> Documentary Record at 2137.

service from the City. An applicant for development in the UGA like Skagit D06 must obtain “a determination **from the City** in whose UGA the project is located that adequate provision has been made for sewer service.” SCC 14.16.910. Therefore, even the possibility that service might be theoretically available from a non-City source is meaningless.

There is no option for property owners in the UGA to seek another source of sewer service; they are required to use **City** sewer service. The Board’s failure to recognize this fact and the inescapable conclusion that the “sole source” rule applies to the City of Mount Vernon caused the Board to erroneously conclude that development at urban densities was still possible in the UGA without City sewer service. In turn, this allowed the Board to erroneously conclude that Ordinance 3472 does not interfere with the City’s obligation to meet its population growth targets. The Board’s decision on this issue must be reversed.

## **VI. CONCLUSION**

Based on the foregoing analysis, Appellant Skagit DO6 respectfully requests that the Court reach the following conclusions:

1. Ordinances 3472 and 3473 are not in compliance with the Growth Management Act because they constitute a de facto moratorium adopted in violation of RCW 36.70A.390 requirements.

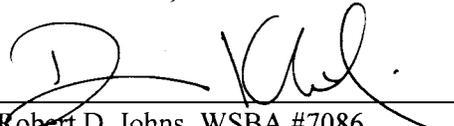
2. Ordinances 3472 and 3473 are not in compliance with the Growth Management Act because they substantially interfere with the fulfillment of the GMA goals set forth in RCW 36.70A.020 (1) and (2).

3. Ordinance 3472 is not in compliance with the Growth Management Act because it is inconsistent with RCW 36.70A.110.

Based on these conclusions, Skagit D06 requests that the Court reverse the Board's decision.

DATED this 15<sup>th</sup> of August, 2011.

JOHNS MONROE MITSUNAGA  
KOLOUŠKOVÁ, PLLC

By   
Robert D. Johns, WSBA #7086  
Duana T. Koloušková, WSBA #27532  
Attorneys for Petitioner/Appellant  
Skagit D06, LLC.

# EXHIBIT A

ORDINANCE NO. 3472

**AN ORDINANCE OF THE CITY OF MOUNT VERNON, WASHINGTON RELATING TO LAND USE AND PLANNING; ADOPTING NEW OBJECTIVES AND POLICIES IN THE LAND USE ELEMENT OF THE CITY COMPREHENSIVE PLAN RELATING TO ANNEXATIONS.**

**WHEREAS**, the Mount Vernon Comprehensive Plan has consistently been maintained in compliance with the Washington State Growth Management Act, as amended, since its initial adoption in 1995; and

**WHEREAS**, the Washington State Growth Management Act (GMA) requires the City of Mount Vernon to take legislative action to review and, if needed, revise its Comprehensive Plan and development regulations on a regular basis; and, following extensive public process the City Council adopted an updated and revised Comprehensive Plan and associated development regulations in January of 2006; and

**WHEREAS**, hearings were conducted on November 17<sup>th</sup> and December 16<sup>th</sup> 2009, preceded with appropriate notice published in the Skagit Valley Herald on October 20, 2009, concerning proposed amendments to the Comprehensive Plan; and,

**WHEREAS**, the notice of adoption of the proposed amendments has been duly transmitted in compliance with RCW 36.70A.106(1); and,

**WHEREAS**, the SEPA Threshold Determination of Non-significance, non-project action, was published on October 20, 2009; and,

**WHEREAS** the City Council finds that the attached revised Comprehensive Plan reflects the best interests of the citizens of the City of Mount Vernon, Washington; and,

**WHEREAS**, it is the intent of the City Council that the attached revised Comprehensive Plan shall serve as a future guide for anticipating and influencing the orderly and coordinated development of land and building uses within the City of Mount Vernon.

**NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF MOUNT VERNON, WASHINGTON, DOES HEREBY ORDAIN AS FOLLOWS:**

**Section 1. FINDINGS OF FACT.**

The Mount Vernon City Council makes the following findings:

- A. The City has followed SEPA requirements and those requirements for public participation under the Growth Management Act (GMA) and adopted by the City of Mount Vernon in Resolution No. 491.

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EXHIBIT A

**Section 2. CONCLUSIONS OF LAW.**

The Mount Vernon City Council makes the following conclusions of law:

- A. The proposed additions to the Land Use Element of the Comprehensive Plan regarding annexations ensure that the City's development regulations are consistent with the City's Comprehensive Plan.
- B. It is within the best interests of the City, promoting the safety, health and general welfare of the public, to control how and when urban growth occurs within the City and unincorporated Urban Growth Areas.
- C. Mount Vernon has expended considerable resources in planning for the orderly, timely and contiguous development and annexation of property situated in unincorporated urban growth areas and that development that is contrary to orderly, timely and contiguous development shall materially alter and cause harm to the City by impacting the level of essential government services such as police and fire services, as well as the capacity to provide municipal utility services such as sewer and storm water service within the City.

**Section 3. PLANNING COMMISSION RECOMMENDATION ADOPTED.** The City Council adopts the Planning Commission's findings of fact and conclusions of law attached in their entirety.

**Section 4. COMPREHENSIVE PLAN AMENDED.** Exhibit A attached hereto and incorporated herein in its entirety by this reference is hereby adopted and the proposed changes shall be included in the Land Use Element of the Comprehensive Plan of the City of Mount Vernon.

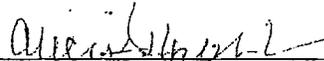
**Section 5. SEVERABILITY.** In the event any term or condition of this ordinance or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other terms, conditions, or applications of this ordinance which can be given effect without the invalid term, condition, or application. To this end, the terms and conditions of this ordinance are declared severable.

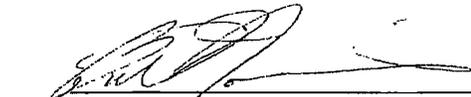
**Section 6. PLAN UPDATED.** City staff are hereby directed to complete preparation of the final Comprehensive Plan Document, including correction of any typographical or OTHER edits consistent herewith.

**Section 7. EFFECTIVE DATE.** This ordinance shall be in full force and effect five days after its passage, approval and publication as provided by law.

PASSED AND ADOPTED this 16<sup>th</sup> day of December, 2009.

SIGNED AND APPROVED THIS 16<sup>th</sup> day of December, 2009

  
ALICIA D. HUSCHKA, Finance Director

  
BUD NORRIS, Mayor

Approved as to form:

  
KEVIN ROGERSON, City Attorney

Published December 22, 2009

EXHIBIT A

MOUNT VERNON COMPREHENSIVE PLAN LAND USE ELEMENT GOAL, OBJECTIVE AND  
POLICIES WITH REGARD TO ANNEXATIONS. PROPOSED CHANGES IN TRACKING  
FORMAT:

<b>Goal LU-29:</b>	<b>Annex properties into the City when the City Council finds the annexation is justified.</b>
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**Objective LU-29.1** Encourage development and re-development within the existing City limits before additional lands are annexed into the City.

Policy LU-29.1.1 The first priority of the City shall be to annex and provide urban services (i.e., sewer, fire, transportation, drainage, parks, open space, schools and landscaping, etc.) on a priority basis to those areas immediately adjacent to the City where available services can most easily and economically be extended.

Policy LU-29.1.2 Work with Skagit County to establish procedures for the development of land within the Urban Growth Areas.

Policy LU-29.1.3 The City Council shall not initiate an annexation unless the following criteria can be met with a proposal. These criteria have been developed following the adoption of the City's Buildable Lands Analysis and E.D. Hovee's report entitled, "Commercial and Industrial Land Needs Analysis", dated September 2006. These reports show that the City does not have a balance between projected residential and commercial/industrial uses.

- A. The annexation area is determined to be necessary and appropriate to meet the population and/or employment targets.
- B. The annexation of residentially zoned areas shall not occur until additional areas zoned for commercial/industrial are officially designated such that a balance between residential and commercial/industrial uses can be achieved within the City.
- C. The annexation is a logical extension of the City's boundaries.
- D. The City finds that adequate municipal services exist to serve the area, and that the factors outlined within RCW 36.93.170(2) are complied with.
- E. The City finds that the boundaries of the proposed annexation are drawn in a manner that makes the provision of public services geographically and economically feasible.
- F. The City finds that it has the capacity to provide City services within the existing City limits; and, those services to annexation areas without major upgrades to these services.
- G. The City finds that there are not negative economic impacts to the City with the extension of services.
- H. The City finds that it can afford to provide City services without having to use funds that would otherwise be spent on already incorporated areas of the City.
- I. The City finds that the annexation will not create a financial stress on the City's ability to provide required services to the annexation area.

EXHIBIT A

Objective LU-29.2 Preservation of natural neighborhoods and communities.

Objective LU-29.3 Creation and preservation of logical service areas.

Policy LU-29.3.1 Annex areas into the City based on the premises of limiting sprawl, providing for efficient provision of public services and facilities, serving areas where the cost of extending infrastructure consistent with adopted capital improvement plans is the most cost efficient, and avoiding "leap-frog" development and annexations.

Objective LU-29.4 Prevent abnormally irregular boundaries.

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**CITY OF MOUNT VERNON  
PLANNING COMMISSION & CITY COUNCIL  
PROPOSED ADDITIONS AND AMENDMENTS TO  
THE LAND USE ELEMENT OF THE COMPREHENSIVE PLAN**

**FINDINGS OF FACT, CONCLUSIONS OF LAW and RECOMMENDATION**

On November 17, 2009 the City of Mount Vernon Planning Commission held a public hearing to consider additions and amendments to the Land Use Element of the Comprehensive Plan; and on December 16, 2009 the City Council held a public hearing to consider the same additions and amendments to the Comprehensive Plan.

All persons present at the hearings wishing to speak were heard and all written comments were considered, along with the written staff report submitted by Rebecca Lowell. Based on the testimony and other evidence, the Planning Commission and City Council hereby adopt the following:

**A. FINDINGS OF FACT**

1. The hearings of November 17<sup>th</sup> and December 16<sup>th</sup> 2009 were preceded with appropriate notice, published in the Skagit Valley Herald on October 20, 2009.
2. Notice of adoption of the proposed amendments has been duly transmitted in compliance with RCW 36.70A.106(1).
3. A SEPA Threshold Determination of Non-significance, non-project action, was published on October 20, 2009.
4. The Mount Vernon Comprehensive Plan has consistently been maintained in compliance with the Washington State Growth Management Act, as amended, since its initial adoption in 1995.
5. The Washington State Growth Management Act (GMA) requires the City of Mount Vernon to take legislative action to review and, if needed, revise its Comprehensive Plan and development regulations on a regular basis and that following extensive public process the City Council adopted an updated and revised Comprehensive Plan and associated development regulations in January of 2006.

Based on the foregoing Findings of Fact, the Planning Commission and City Council hereby makes the following:

**B. CONCLUSIONS OF LAW**

1. The proposed additions to the Land Use Element of the Comprehensive Plan regarding annexations ensure that the City's development regulations are consistent with the City's Comprehensive Plan.
2. The requirements for public participation in the development of this amendment as required by the State Growth Management Act (GMA) and by the provisions of City of Mount Vernon Resolution No. 491 have all been met.
3. The proposed amendments are found to be in compliance with the State Growth Management Act.
4. It is within the best interests of the City, promoting the safety, health and general welfare of the public, to control how and when urban growth occurs within unincorporated Urban Growth Areas.
5. Mount Vernon has expended considerable resources in planning for the orderly, timely and contiguous development and annexation of property situated in unincorporated urban growth area and that development that is contrary to orderly, timely and contiguous development shall materially alter and cause harm to the City by impacting the level of essential government services such as police and fire services, as well as the capacity to provide municipal utility services such as sewer and storm water service within the City.

The Mount Vernon City Council adopted Ordinance 3472 on December 16, 2009. An Ordinance of the City of Mount Vernon, Washington, relating to land use planning; adopting new objectives and policies in the land use element of the City Comprehensive Plan relating to annexations. Anyone wishing to view or receive the ordinance in its entirety should contact the Mount Vernon Finance Office, 910 Cleveland, Mount Vernon WA 98273.

Published: December 22, 2009

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# EXHIBIT B

**ORDINANCE NO. 3473**

**AN ORDINANCE OF THE CITY OF MOUNT VERNON, WASHINGTON, RELATING TO LAND USE, PLANNING AND UTILITY EXTENSIONS; REPEALING ORDINANCE 3442 and 3445; AND, AMENDING MOUNT VERNON MUNICIPAL CODE TITLE 13 SEWERS; CHAPTER 13.08; AND SECTION 13.08.060 REGARDING THE REGULATION OF SANITARY SEWER CONNECTIONS OUTSIDE THE CITY LIMITS.**

**WHEREAS**, the Mount Vernon Comprehensive Plan has consistently been maintained in compliance with the Washington State Growth Management Act, as amended, since its initial adoption in 1995; and

**WHEREAS**, the Washington State Growth Management Act (GMA) requires the City of Mount Vernon to take legislative action to review and, if needed, revise its Comprehensive Plan and development regulations on a regular basis; and

**WHEREAS**, following extensive public process the City Council adopted an updated and revised Comprehensive Plan and associated development regulations in January of 2006; and

**WHEREAS**, the City conducted hearings of November 17<sup>th</sup> and December 16<sup>th</sup> 2009, preceded with appropriate notice, published in the Skagit Valley Herald on October 20, 2009, regarding amendments to the City Comprehensive Plan and development regulations; and,

**WHEREAS**, the notice of adoption of the proposed amendments has been duly transmitted in compliance with RCW 36.70A.106(1); and,

**WHEREAS**, the SEPA Threshold Determination of Non-significance, non-project action, was published on October 20, 2009.

**NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF MOUNT VERNON, WASHINGTON, DOES HEREBY ORDAIN AS FOLLOWS:**

**SECTION 1. FINDINGS OF FACT.**

The Mount Vernon City Council makes the following findings of fact:

1. The City has followed SEPA requirements and those requirements for public participation under the Growth Management Act (GMA) and adopted by the City of Mount Vernon in Resolution No. 491.
2. A planning goal of the GMA [RCW 36.70A.020(12)], is for local jurisdictions to adopt planning policies in their Comprehensive Plan and development regulations to ensure the orderly and planned development of public facilities and services at the time when such development would be needed without decreasing current service levels.

3. Although the GMA contemplates that a city is the appropriate provider of utility services within its urban growth areas, a city is not obligated by the GMA to so provide such services at any particular time.
4. RCW 35.67.310, and RCW 35A.080.010 provides that a city "may" permit or provide connections with any of its sewers or utility service from property beyond its limits and that the Washington State Supreme Court has held that the use of "may" grants a power that is purely discretionary and that a City is not bound to provide municipal utility services to persons residing outside its boundaries.
5. The Countywide Planning Policies (CPPs), at Policy 12.6, states that "Development shall be allowed only when and where all public facilities are adequate, and only when and where such development can be adequately served by regional public services without reducing services elsewhere; and, at Policy 12.7, that "Public Facilities and services needed to support development shall be available concurrent with the impacts of development." The City Council finds that it is within the best interests of the City, and promotes the public safety, health and general welfare of the public, to control how and when urban growth occurs within the City as well as within unincorporated Urban Growth Areas; and, that the availability and provision of urban services is a basic tool of this control and consist with the CPPs. The City's Planning Policy LU-25.1.6 states that the City should encourage infill development on vacant properties with existing public services and public utilities.
6. The City has adopted into its Comprehensive Plan Annexation Planning Policy Goal LU-29 stating that the City annex properties into the City only when the City Council finds such annexation is justified.
7. The City has adopted into its Comprehensive Plan Objective LU-29.1 to encourage development and re-development within the existing City limits before additional lands are annexed into the City.
8. The City has conducted and adopted into its Comprehensive Plan a buildable lands analysis and is considering the capacity of its utility systems and, without more, concludes that it is uncertain that it may be able to accommodate the additional service demands beyond that needed to meet new development and redevelopment within the current City limits.
9. The City has adopted into its Comprehensive Plan Policy LU- 29.1.4 that sets forth annexation criteria which includes the City should find that it has capacity to provide City services within existing City limits; and those services to annexation areas without major upgrades to these services prior to annexation.

10. The City's Comprehensive Sewer Plan identified as one of the City's goals, "to minimize water quality degradation and to maintain compliance with the requirements of the City's Washington Department of Ecology Wastewater Discharge Permit. An ongoing program of sewer system repair and replacement, and enforcement of development standards, will contribute to the reduction of combined sewer overflows, sewer system infiltration and exfiltration. These efforts will promote health and safety of the public, protection of the environment, and enhance the economic vitality of the City."
11. The City has carefully planned for growth and development with supporting utility systems, including wastewater services. The City cannot hold and has not held itself out as a supplier of municipal utility services to all who request such services in the absence of controlling law and policy, and particularly in the absence of available capacity. Unlike some cities, the City of Mount Vernon has not contracted for or committed to limit its discretion and control regarding extension of utility services. See, in contrast, *Nolte v. City of Olympia*, 96 Wn. App. 944 (1999).
12. On April 15, 2009, the City Council met at a regularly scheduled meeting and discussed the nature of applications relating to the City's expansion or extension of municipal utilities, including expansion of storm water and sewer into Urban Growth Areas and its effects and impacts upon the public health safety and welfare, the City's ability to provide effective levels of service over the twenty year planning horizon, capacity needs, infill development requirements, and the need for measured, planned, phased and incremental development of its municipal utilities. On February 25, 2009, the City Council adopted Ordinance 3442 declaring an emergency and enacting an interim regulation and official control governing requests to extend municipal utilities into unincorporated urban growth areas. On April 15, 2009, the City Council allowed and received public testimony regarding the continuation of Ordinance 3442; and adopted Ordinance 3445 that confirmed and continued Ordinance 3442.
13. The City's NPDES for discharges from its Wastewater Treatment Plant (WWTP) expires in November 2010. The Washington Department of Ecology by correspondence of March 17, 2009, states that the City should immediately begin evaluation of the WWTP and to seek renewal of the NPDES. The City is in that process, but does not expect in the near term that WWTP capacity will assure capacity for other than existing development, redevelopment and new development within the City.
14. To serve the wastewater treatment needs of the City of Mount Vernon the City has previously invested considerable resources in improvements to its WWTP and other facilities.

15. Failure to adequately plan and serve needs of the City through measured and planned growth may result in noncompliance with State and Federal discharge permits resulting in fines and other enforcement measures including requiring the City to expend further funds to provide for emergency capital improvements to its WWTP and related facilities.
16. Conditions resulting in excess demand on the City's wastewater treatment capacity may result in unregulated discharges of insufficiently-treated wastewater into the environment including the aquifer, surface waters or waters of statewide significance which endangers the public safety, health and welfare.
17. Mount Vernon has expended considerable resources in planning for the orderly, timely and contiguous development *and* annexation of property situated in unincorporated urban growth areas; and that development that is contrary to orderly, timely and contiguous development shall materially alter and cause harm to the City by impacting the level of essential government services such as police and fire services, as well as the capacity of municipal utility services such as sewer and storm water service to serve planned development within the City.

## **SECTION 2. CONCLUSIONS OF LAW.**

The Mount Vernon City Council makes the following conclusions of law:

1. The repealing of Ordinance 3442 and Ordinance 3445 and the amendments to MVMC 13.08.060 ensure that the City's development regulations are consistent with the City's Comprehensive Plan.
2. The requirements for public participation in the development of this amendment as required by the State Growth Management Act (GMA) and by the provisions of City of Mount Vernon Resolution No. 491 have all been met.
3. The proposed amendments are found to be in compliance with the State Growth Management Act.
4. It is within the best interests of the City, and promotes the safety, health and general welfare of the public, to control how and when urban growth occurs within the City and within unincorporated Urban Growth Areas.
5. A proliferation of acceptance of requests to extend sewer without a comprehensive examination of the cumulative impacts to City utilities and other public services will likely result in the creation of capacity issues, lack of coordinated development, unplanned utility rate increases, and hazards for unregulated discharges and violations of the City's discharge permits which jeopardize the safety, health and general welfare of the public.

**SECTION 3. REPEALER.** The following are hereby repealed in their entirety:

A. Ordinance No. 3442, enacted February 25, 2009.

Entitled:

AN ORDINANCE ADOPTING IMMEDIATE INTERIM OFFICIAL CONTROLS, REGULATIONS AND POLICY REGARDING THE EXTENSION OF MUNICIPAL UTILITIES TO UNINCORPORATED URBAN GROWTH AREAS PROVIDING FOR SEVERABILITY; DECLARING AN EMERGENCY AND ESTABLISHING AN IMMEDIATE EFFECTIVE DATE.

B. Ordinance No. 3445, adopted on April 15, 2009.

Entitled:

AN ORDINANCE OF THE CITY OF MOUNT VERNON, WASHINGTON RELATING TO LAND USE PLANNING; ADOPTING FINDINGS OF FACT AND CONCLUSIONS; RATIFYING, CONFIRMING AND CONTINUING ORDINANCE 3442 ADOPTED ON FEBRUARY 25, 2009; PROCLAIMING AN EMERGENCY; AND, ADOPTING INTERIM REGULATION AND CONTROLS FOR APPLICATIONS OR REQUESTS TO THE CITY TO EXTEND MUNICIPAL UTILITIES TO UNINCORPORATED URBAN GROWTH AREAS.

C. Repeal shall not revive ordinances.

The repeal of an ordinance shall not repeal the repealing clause of an ordinance or revive any ordinances which have been repealed thereby.

**SECTION 4. AMENDED SECTION 13.08.160.** Section 13.08.060 of the Mount Vernon Municipal Code is hereby amended to read as follows:

**13.08.060 Outside City Limit Connections.**

Sewer connections shall not be allowed outside the city limits of Mount Vernon. Only after property is annexed into the City may a sewer connection be made in accordance with this Chapter. This ordinance shall not apply to any sewer connection outside the City limits that exists or any sewer connection agreement between the City and property owner in effect prior to the effective date of this ordinance.

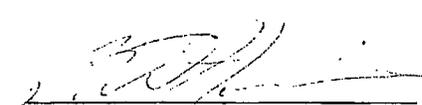
**SECTION 5. CITY CODE AND REVISIONS.** City staff are hereby directed to complete preparation of the final ordinance, including correction of any typographical or editorial edits.

**SECTION 6. SEVERABILITY.** In the event any term or condition of this ordinance or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other terms, conditions, or applications of this ordinance which can be given effect without the invalid term, condition, or application. To this end, the terms and conditions of this ordinance are declared severable. In the event this ordinance or application thereof to any person or circumstances is held invalid, it shall not serve to repeal the repealing clause of any ordinance or revive any ordinances which have been repealed thereby.

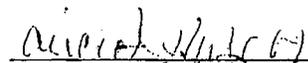
**SECTION 7. SAVINGS.** Ordinance No. 3442 and Ordinance No. 3445, which is repealed by this ordinance, shall remain in force and effect until the effective date of this ordinance.

**SECTION 8. EFFECTIVE DATE.** This ordinance shall be in full force and effect five days after its passage, approval and publication as provided by law.

PASSED AND ADOPTED this 16<sup>th</sup> day of December, 2009.

  
BUD NORRIS, Mayor

SIGNED AND APPROVED this 16<sup>th</sup> day of December, 2009.

  
ALICIA D. HUSCHKA, Finance Director

Approved as to form:

  
Kevin Rogerson, City Attorney

Published December 22, 2009

**CITY OF MOUNT VERNON  
PLANNING COMMISSION & CITY COUNCIL  
PROPOSED AMENDMENTS TO DEVELOPMENT CODE**

**FINDINGS OF FACT, CONCLUSIONS OF LAW and RECOMMENDATION**

On November 17, 2009 the City of Mount Vernon Planning Commission held a public hearing to consider amendments to the City's development code; and on December 16, 2009 the City Council held a public hearing to consider the same amendments.

All persons present at the hearings wishing to speak were heard and all written comments were considered, along with the written staff report submitted by Rebecca Lowell. Based on the testimony and other evidence, the Planning Commission and City Council hereby adopt the following:

**A. FINDINGS OF FACT**

1. The City has followed SEPA requirements and those requirements for public participation under the Growth Management Act (GMA) and adopted by the City of Mount Vernon in Resolution No. 491.
2. A planning goal of the GMA [RCW 36.70A.020(12)], is for local jurisdictions to adopt planning policies in their Comprehensive Plan and development regulations to ensure the orderly and planned development of public facilities and services at the time when such development would be needed without decreasing current service levels.
3. Although the GMA contemplates that a city is the appropriate provider of utility services within its urban growth areas, a city is not obligated by the GMA to so provide such services at any particular time.
4. RCW 35.67.310, and RCW 35A.080.010 provides that a city "may" permit or provide connections with any of its sewers or utility service from property beyond its limits and that the Washington State Supreme Court has held that the use of "may" grants a power that is purely discretionary and that a City is not bound to provide municipal utility services to persons residing outside its boundaries.

5. The Countywide Planning Policies (CPPs), at Policy 12.6, states that "Development shall be allowed only when and where all public facilities are adequate, and only when and where such development can be adequately served by regional public services without reducing services elsewhere; and, at Policy 12.7, that "Public Facilities and services needed to support development shall be available concurrent with the impacts of development." The City Council finds that it is within the best interests of the City, and promotes the public safety, health and general welfare of the public, to control how and when urban growth occurs within the City as well as within unincorporated Urban Growth Areas; and, that the availability and provision of urban services is a basic tool of this control and consist with the CPPs. The City's Planning Policy LU-25.1.6 states that the City should encourage infill development on vacant properties with existing public services and public utilities.
6. The City has adopted into its Comprehensive Plan Annexation Planning Policy Goal LU-29 stating that the City annex properties into the City when the City Council finds such annexation is justified.
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8. The City has conducted and adopted into its Comprehensive Plan a buildable lands analysis and is considering the capacity of its utility systems and, without more, concludes that it is uncertain that it may be able to accommodate the additional service demands beyond that needed to meet new development and redevelopment within the current City limits.
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10. The City's Comprehensive Sewer Plan identified it is the City's goal, "to minimize water quality degradation and to maintain compliance with the requirements of the City's Washington Department of Ecology Wastewater Discharge Permit. An ongoing program of sewer system repair and replacement, and enforcement of development standards, will contribute to the reduction of combined sewer overflows, sewer system infiltration and exfiltration. These efforts will promote health and safety of the public, protection of the environment, and enhance the economic vitality of the City".

11. The City has carefully planned for growth and development with supporting utility systems, including wastewater services. The City cannot hold and has not held itself out as a supplier of municipal utility services to all who request such services in the absence of controlling law and policy, and particularly in the absence of available capacity. Unlike some cities, the City of Mount Vernon has not contracted for or committed to limit its discretion and control regarding extension of utility services. See, in contrast, *Nolte v. City of Olympia*, 96 Wn. App. 944 (1999).
12. On April 15, 2009, the City Council met at a regularly scheduled meeting and discussed the nature of applications relating to the City's expansion or extension of municipal utilities, including expansion of storm water and sewer into Urban Growth Areas and its effects and impacts upon the public health safety and welfare, the City's ability to provide effective levels of service over the twenty year planning horizon, capacity needs, infill development requirements, and the need for measured, planned, phased and incremental development of its municipal utilities. On April 15, 2009, the City Council allowed and received public testimony regarding the continuation of Ordinance 3442. On February 25, 2009, the City Council adopted Ordinance 3442 declaring an emergency and enacting an interim regulation and official control governing requests to extend municipal utilities into unincorporated urban growth areas
13. The City's NPDES for discharges from its Wastewater Treatment Plant (WWTP) expires in November 2010. The Washington Department of Ecology by correspondence of March 17, 2009, states that the City should immediately begin evaluation of the WWTP and to seek renewal of the NPDES. The City is in that process, but does not expect in the near term that WWTP capacity will assure capacity for other than existing development, redevelopment and new development within the City.
14. To serve the wastewater treatment needs of the City of Mount Vernon the City has previously invested considerable resources in improvements to its WWTP and other facilities.
15. Failure to adequately plan and serve needs of the City through measured and planned growth may result in noncompliance with State and Federal discharge permits resulting in fines and other enforcement measures including requiring the City to expend further funds to provide for emergency capital improvements to its WWTP and related facilities.
16. Conditions resulting in excess demand on the City's wastewater treatment capacity may result in unregulated discharges of insufficiently-treated wastewater into the environment including the aquifer, surface waters or waters of statewide significance which endangers the public safety, health and welfare.

17. Mount Vernon has expended considerable resources in planning for the orderly, timely and contiguous development *and* annexation of property situated in unincorporated urban growth areas; and that development that is contrary to orderly, timely and contiguous development shall materially alter and cause harm to the City by impacting the level of essential government services such as police and fire services, as well as the capacity of municipal utility services such as sewer and storm water service to serve planned development within the City.

Based on the foregoing Findings of Fact, the Planning Commission and City Council hereby makes the following:

**B. CONCLUSIONS OF LAW**

1. The proposed repealing of Ordinance 3442 and Ordinance 3445 and the amendments to MVMC 13.08.060 ensure that the City's development regulations are consistent with the City's Comprehensive Plan.
2. The requirements for public participation in the development of this amendment as required by the State Growth Management Act (GMA) and by the provisions of City of Mount Vernon Resolution No. 491 have all been met.
3. The proposed amendments are found to be in compliance with the State Growth Management Act.
4. It is within the best interests of the City, promoting the safety, health and general welfare of the public, to control how and when urban growth occurs within the City and within unincorporated Urban Growth Areas.
5. A proliferation of acceptance of requests to extend sewer without a comprehensive examination of the cumulative impacts to City utilities and other public services will likely result in the creation of capacity issues, lack of coordinated development, unplanned utility rate increases, and hazards for unregulated discharges and violations of the City's discharge permits which jeopardize the safety, health and general welfare of the public.

10

The Mount Vernon City Council adopted Ordinance 3473 on December 16, 2009. An Ordinance of the City of Mount Vernon, Washington, relating to land use, planning and utility extensions; repealing Ordinance 3442 and 3445; and amending Mount Vernon Municipal Code Title 13 Sewers; Chapter 13.08; and Section 13.08.060 regarding the regulation of sanitary sewer connections outside the City limits. Anyone wishing to view or receive the ordinance in its entirety should contact the Mount Vernon Finance Office, 910 Cleveland, Mount Vernon WA 98273.

Published: December 22, 2009

# EXHIBIT C

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BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
WESTERN WASHINGTON REGION  
STATE OF WASHINGTON

SKAGIT D06, LLC,  
  
Petitioner,  
  
v.  
  
CITY OF MOUNT VERNON,  
  
Respondent.

Case No. 10-2-0011  
**FINAL DECISION AND ORDER**

**I. PROCEDURAL BACKGROUND**

*Petition for Review*

On February 16, 2010, Skagit D06, LLC (Petitioner) filed a Petition for Review (PFR). The PFR challenges the City of Mount Vernon's (City) adoption of Ordinance Nos. 3472 and 3473 which amended the City's Comprehensive Plan and Development Regulations. Ordinance 3473 amended Mount Vernon Municipal Code (MVMC) 13.08.060 to require annexation before the City extends sewer service. Ordinance 3472 adopted several annexation policies.

*Motions*

On April 19, 2010 the Board granted Petitioner's Motion to revise Issue 6(e) in the form set forth elsewhere in this order.<sup>1</sup>

Petitioner's Motion to Supplement the Record with the Final Report, Wastewater Connection Charge, July 2008, prepared by HDR Engineering, was granted on the basis that it might be

<sup>1</sup> Order on Skagit D06's Motion to Revise Issue 6(E) and City's Motion for Clarification of Issue 7(E).

1 necessary for the Board to consider in reaching its decision as it appears to contain  
2 information relating to sewer capacity in the UGA, a matter at issue in this appeal. However,  
3 Petitioner's Motion to Supplement the Record with Skagit County Ordinance No. 020050007  
4 was denied, as that exhibit is already in the record.<sup>2</sup>  
5

6 The City's Motion to Dismiss this appeal based on a lack of Board jurisdiction was denied by  
7 the Board on May 20, 2010.<sup>3</sup> The Board held that both ordinances under appeal were  
8 adopted pursuant to the GMA, giving the Board jurisdiction to hear the appeal.  
9

10 The City's Motion to Supplement the Record, or In the Alternative, Take Official Notice of  
11 the City's updated Buildable Lands Analysis (BLA) was denied at the Hearing on the Merits  
12 (HOM). As the City noted in its motion, the BLA was completed June 16, 2010, after the  
13 adoption of Ordinance Nos. 3472 and 3473. In addition, the City stated at the HOM the BLA  
14 had yet to be reviewed by the City's Planning Commission or City Council.  
15

16  
17 *Hearing on the Merits*

18 The Hearing on the Merits (HOM) was held on June 30, 2010, in Mount Vernon,  
19 Washington. Board members Nina Carter, William Roehl and James McNamara were  
20 present; Board Member James McNamara presiding. Petitioner was represented by Robert  
21 Johns; the City of Mount Vernon was represented by Kevin Rogerson.  
22

23 **II. BURDEN OF PROOF AND JURISDICTION**

24  
25 *Burden of Proof*

26 Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations, and  
27 amendments of them, are presumed valid upon adoption.<sup>4</sup> This presumption creates a  
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30

31 <sup>2</sup> Order on Petitioner's Motion to Supplement the Record, May 6, 2010.

32 <sup>3</sup> Order Denying City's Motion to Dismiss for Lack of Board Jurisdiction, May 20, 2010.

<sup>4</sup> RCW 36.70A.320(1) provides: [Except for the shoreline element of a comprehensive plan and applicable development regulations] comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.

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Growth Management Hearings Board  
319 7<sup>th</sup> Avenue SE, Suite 103  
P.O. Box 40953  
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1 high threshold for challengers as the burden is on the Petitioner to demonstrate that any  
2 action taken by the City of Mount Vernon was not in compliance with the GMA.<sup>5</sup>

3  
4 The Board is charged with adjudicating GMA compliance and, when necessary, invalidating  
5 noncompliant plans and development regulations.<sup>6</sup> The scope of the Board's review is  
6 limited to determining whether the City of Mount Vernon has complied with the GMA only  
7 with respect to those issues presented in a timely petition for review.<sup>7</sup> The GMA directs that  
8 the Board, after full consideration of the petition, shall determine whether there is  
9 compliance with the requirements of the GMA.<sup>8</sup> The Board shall find compliance unless it  
10 determines the City's action is clearly erroneous in view of the entire record before the  
11 Board and in light of the goals and requirements of the GMA.<sup>9</sup> In order to find the City of  
12 Mount Vernon's action clearly erroneous, the Board must be "left with the firm and definite  
13 conviction that a mistake has been committed."<sup>10</sup>

14  
15  
16 In reviewing the planning decisions of cities and counties, the Board is instructed to  
17 recognize "the broad range of discretion that may be exercised by counties and cities" and  
18 to "grant deference to counties and cities in how they plan for growth."<sup>11</sup> However, the City  
19  
20  
21

22 <sup>5</sup> RCW 36.70A.320(2) provides: [Except when city or county is subject to a Determination of Invalidity] the  
23 burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this  
chapter is not in compliance with the requirements of this chapter.

24 <sup>6</sup> RCW 36.70A.280, RCW 36.70A.302

25 <sup>7</sup> RCW 36.70A.290(1)

26 <sup>8</sup> RCW 36.70A.320(3)

27 <sup>9</sup> RCW 36.70A.320(3)

28 <sup>10</sup> *City of Arlington v. CPSGMHB*, 162 Wn.2d 768, 778, 193 P.3d 1077 (2008)(Citing to *Dept. of Ecology v.*  
*PUD District No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 1993); See also, *Swinomish Tribe,*  
*et al v. WWGMHB*, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007); *Lewis County v. WWGMHB*, 157 Wn.2d  
488, 497-98, 139 P.3d 1096 (2006).

29 <sup>11</sup> RCW 36.70A.3201 provides, in relevant part: In recognition of the broad range of discretion that may be  
30 exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the  
boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements  
31 and goals of this chapter. Local comprehensive plans and development regulations require counties and cities  
to balance priorities and options for action in full consideration of local circumstances. The legislature finds that  
32 while this chapter requires local planning to take place within a framework of state goals and requirements, the  
ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and  
implementing a county's or city's future rests with that community.

FINAL DECISION AND ORDER

Case No. 10-2-0011

August 4, 2010

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Growth Management Hearings Board

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1 of Mount Vernon's actions are not boundless; its actions must be consistent with the goals  
2 and requirements of the GMA.<sup>12</sup>

3  
4 Thus, the burden is on Petitioner to overcome the presumption of validity and demonstrate  
5 the challenged action taken by the City of Mount Vernon is clearly erroneous in light of the  
6 goals and requirements of the GMA.

7  
8 *Jurisdiction*

9 The Board finds the Petition for Review was timely filed, pursuant to RCW 36.70A.290(2).  
10 The Board finds Petitioner has standing to appear before the Board, pursuant to RCW  
11 36.70A.280(2). The Board finds it has jurisdiction over the subject matter of the petition  
12 pursuant to RCW 36.70A.280(1).<sup>13</sup>

13  
14 **III. ISSUES AND DISCUSSION**

15  
16 *The Challenged Actions*<sup>14</sup>

17 In response to required upgrades to its century old sewer system so as to protect water  
18 quality within the Skagit River, the City of Mount Vernon began a review of how it could  
19 adequately plan for improvements within the Mount Vernon Urban Growth Area (UGA) in  
20 order to meet the area's development needs as demonstrated by its allocated population,  
21 land capacity analysis, and buildable lands analysis. As part of this process, though not  
22 under challenge in these proceedings, the City adopted two moratoria and interim controls  
23 related to the extension of sewer service outside of the City's municipal boundaries. Then,  
24 on December 16, 2009, after conducting two public hearings, one before the Planning  
25

26  
27  
28 <sup>12</sup> *King County v. CPSGMHB*, 142 Wn.2d 543, 561, 14 P.2d 133 (2000)(Local discretion is bounded by the  
29 goals and requirements of the GMA). See also, *Swinomish*, 161 Wn.2d at 423-24. In *Swinomish*, as to the  
30 degree of deference to be granted under the clearly erroneous standard, the Supreme Court has stated: The  
31 amount [of deference] is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give  
32 the [jurisdiction's] actions a "critical review" and is a "more intense standard of review" than the arbitrary and  
capricious standard. *Id.* at 435, Fn.8.

<sup>13</sup> This finding is supported by the Board's May 20, 2010 Order Denying City's Motion to Dismiss for Lack of Board Jurisdiction.

<sup>14</sup> This section was developed based on factual information presented in both the Petitioner's and the City's Briefs.

1 Commission and the other before the City Council, the City adopted Ordinance Nos. 3472  
2 and 3473.

3  
4 Ordinance No. 3472 adopts new objectives and policies for the City's Comprehensive Plan  
5 Land Use Element relating to annexations under Goal LU-29. Specifically, Policy LU-29.1.3  
6 sets forth nine criteria which must be met before an annexation will be initiated and  
7 municipal/public services will be provided.

8  
9 Ordinance No. 3743 repealed the prior moratorium and interim regulations and enacted  
10 development regulations regarding the regulation of sewer connections outside of the City's  
11 municipal boundaries. These regulations are found at MVMC 13.08.060.

12  
13 **A. Are the challenged Ordinances a de facto moratorium?**

14 Issues 1 through 5 are premised upon the argument that the City imposed a *de facto*  
15 moratorium in violation of RCW 36.70A.390. They will be discussed together. As set forth in  
16 the Board's Pre-Hearing Order, these issues are:

17  
18 **Issue 1:** Whether Ordinance Nos. 3472 and 3473 violate RCW 36.70A.390 by  
19 imposing a *de facto* moratorium on residential development within the Urban Growth  
20 Area without complying with the requirement of RCW 36.70A.390 that the City must  
21 adopt findings of fact which justify a moratorium?

22 **Issue 2:** Whether Ordinance Nos. 3472 and 3473 violate RCW 36.70A.390 by  
23 imposing a *de facto* permanent moratorium on residential development within the  
24 Urban Growth Area without complying with the requirement of RCW 36.70A.390 that  
25 the City must limit the time period during which a moratorium is in effect to six months?

26 **Issue 3:** Whether Ordinance Nos. 3472 and 3473 violate RCW 36.70A.390 by  
27 imposing a *de facto* moratorium on residential development within the Urban Growth  
28 Area for a time period exceeding six months without complying with the requirement of  
29 RCW 36.70A.390 that the City adopt a work plan to resolve the issues which  
30 purportedly justify the moratorium?

31 **Issue 4:** Whether Ordinance Nos. 3472 and 3473 violate RCW 36.70A.390 by not  
32 being based on completion of the City's work plan adopted in Ordinance No. 3445 as a  
condition of the prior moratorium?

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**Issue 5:** Whether the City failed to act to complete its work plan under Ordinance No. 3445 within one year or before adoption of comprehensive plan amendments?

Applicable Law

RCW 36.70A.390 provides, in relevant part:

A county or city governing body that adopts a moratorium, interim zoning map, interim zoning ordinance, or interim official control without holding a public hearing on the proposed moratorium, interim zoning map, interim zoning ordinance, or interim official control, shall hold a public hearing on the adopted moratorium, interim zoning map, interim zoning ordinance, or interim official control within at least sixty days of its adoption, whether or not the governing body received a recommendation on the matter from the planning commission or department. If the governing body does not adopt findings of fact justifying its action before this hearing, then the governing body shall do so immediately after this public hearing. A moratorium, interim zoning map, interim zoning ordinance, or interim official control adopted under this section may be effective for not longer than six months, but may be effective for up to one year if a work plan is developed for related studies providing for such a longer period. A moratorium, interim zoning map, interim zoning ordinance, or interim official control may be renewed for one or more six-month periods if a subsequent public hearing is held and findings of fact are made prior to each renewal.

\* \* \*

Board Analysis and Findings

Petitioner argues that Ordinances 3472 and 3473 operate to create a *de facto* multi-year moratorium, yet the City failed to adopt findings of fact to justify a moratorium. Petitioner asserts that while RCW 36.70A.390 provides for six month or one year moratoria, the City ordinances under appeal create a permanent moratorium because they bar property owners from obtaining public sewer service in the unincorporated UGA indefinitely, even if they are willing to pay for the extension of sewer service.<sup>15</sup>

Petitioner further contends the City justified the adoption of a moratorium by Ordinance Nos. 3442 and 3445 based on its commitment to complete the work plan described in Ordinance

<sup>15</sup> Petitioner's Prehearing Brief at 12-14.

1 3444, yet it did not complete that work plan prior to the adoption of Ordinances 3472 and  
2 3473. Thus, Petitioner asserts the City failed to complete the analysis of its buildable land  
3 capacity or update the analysis of its wastewater treatment capacity, both of which were  
4 necessary to evaluate policies or regulations restricting new sewer connections in the  
5 UGA.<sup>16</sup>  
6

7 Conditioning sewer service on annexation does not transform the challenged Ordinances  
8 into moratoria, the City argues.<sup>17</sup> The City notes it cannot exert regulatory control over the  
9 unincorporated UGA and it is Skagit County zoning that governs development. It states  
10 land owners in the unincorporated UGA may still submit land use applications to the County  
11 and develop in accordance with the Skagit County Code.<sup>18</sup> Because the Ordinances do not  
12 establish a moratorium, the City contends, findings of fact and a work plan were not  
13 needed.<sup>19</sup>  
14

15  
16 The Board finds that Ordinance Nos. 3472 and 3473 do not establish a moratorium, or  
17 even a *de facto* moratorium, within the meaning of RCW 36.70A.390. As Petitioner itself  
18 states, "a moratorium exists where a city denies a property owner the ability to submit an  
19 application for an otherwise permissible use or activity under the governing zoning even if  
20 other uses are not barred."<sup>20</sup> Yet, under the City's current regulations, "Sewer connections  
21 shall not be allowed outside the city limits of Mount Vernon. Only after property is annexed  
22 into the City may a sewer connection be made in accordance with this Chapter."<sup>21</sup> Contrast  
23 this language with the language in place prior to the amendment under appeal; "Connection  
24 to the public sewer shall be allowed to those properties situated within the unincorporated  
25 areas of the City's urban growth areas, as adopted and amended. . . ." While landowners  
26 once had the ability to "submit an application for an otherwise permissible use or activity",  
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<sup>16</sup> Id. at 14.  
<sup>17</sup> City's Pre-Hearing Brief at 9-10.  
<sup>18</sup> Id. at 11.  
<sup>19</sup> Id. at 14.  
<sup>20</sup> Petitioner's Pre-Hearing Brief at 11.  
<sup>21</sup> MVMC 13.08.160

1 that activity (connection to public sewer outside the city limits) is no longer permissible.  
2 *Prior* to the amendment of MVMC 13.08.060, a right to sewer connections outside the City  
3 limits existed. The City could not refuse to accept such applications except by adopting a  
4 moratorium, which it did via former Ordinances 3442 and 3445. However, Ordinances 3442  
5 and 3445 have been repealed.<sup>22</sup> Following the adoption of Ordinance Nos. 3472 and 3473,  
6 no such right to City sewer service extension exists. The City amended its comprehensive  
7 plan and development regulations, apparently permanently. Thus, it cannot be said that the  
8 City is operating under a moratorium. It is instead operating under new, permanent  
9 regulations which do not provide for the extension of sewer outside the City limits and,  
10 therefore, RCW 36.70A.390 does not apply.  
11

12  
13 In addition, it is agreed by the parties that landowners in the non-municipal UGA may  
14 develop their property in accordance with the current zoning.<sup>23</sup> The impact of the  
15 challenged ordinances is they are not able to develop at a density that Petitioner argues is  
16 more appropriate in a UGA. The Board addresses the question of whether Ordinance Nos.  
17 3472 and 3473 violate other provisions of the GMA by impeding urban development  
18 elsewhere in this Order. However, for the purposes of Issues 1 through 5, it cannot be said  
19 that property that can be developed consistent with its present zoning is under a  
20 moratorium.  
21

22  
23 Because the Board finds the City did not adopt a moratorium, it follows that the  
24 requirements associated with a moratorium under RCW 36.70.390 do not apply, and the  
25 City has not violated them. Thus, the City had no obligation to adopt a work plan or findings  
26 of fact justifying its action.  
27

28 **Conclusion**

29 The Board concludes Petitioner has failed to carry its burden of proof in demonstrating the  
30 City's adoption of Ordinance Nos. 3472 and 3473 violated RCW 36.70A.390.  
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<sup>22</sup> See Ordinance 3473, Section 3.

<sup>23</sup> See, Petitioner's Pre-Hearing Brief at 12; City's Pre-Hearing Brief at 10.

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**B. Did the City fail to be guided by the GMA's Goals?**

As set forth in the Board's Prehearing Order and revised by its April 19 Order, Issue 6 provides:<sup>24</sup>

**Issue 6:** Whether the City failed to be guided by the goals contained in RCW 36.70A.020, for the following reasons:

- a. Ordinance Nos. 3472 and 3473 fail to encourage urban growth with the UGA in violation of the Goal contained in RCW 36.70A.020(1) because the net effect of Ordinance Nos. 3472 and 3473 interferes with and prevents residential development within the Urban Growth Area at urban densities.
- b. Ordinance Nos. 3472 and 3473 fail to encourage urban growth with the UGA in violation of the Goal contained in RCW 36.70A.020(1) because the net effect of Ordinance Nos. 3472 and 3473 interferes with and prevents residential development within the Urban Growth Area in locations where adequate public facilities and services exist or can be provided in an efficient manner.
- c. Ordinance Nos. 3472 and 3473 fail to prevent urban sprawl in violation of the Goal contained in RCW 36.70A.020(2) because the Ordinances not only fail to reduce the inappropriate conversion of undeveloped land into sprawling, low-density development, the Ordinances actually encourage the inappropriate conversion of undeveloped land into sprawling, low-density development.
- d. Ordinance Nos. 3472 and 3473 fail to encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types in violation of the goal contained in RCW 36.70A.020(4) because the Ordinances substantially restrict the availability of an adequate supply of housing in the Urban Growth Areas adjacent to the City of Mount Vernon.
- e. Ordinance Nos. 3472 and 3473 fail to promote economic development that is consistent with: (1) Chapter 2 the Plan which set population targets and allocate anticipated growth to various parts of the City and the UGA's; (2) Sections 3.5.1 and 3.5.3 of the Plan to the extent that Ordinance Nos. 3472 and 3473 are inconsistent with the population targets and allocate anticipated growth to various parts of the City and the UGA's and interfere with the City's goal of providing a range of housing types; and (3) Policies HO 1.1.1, 1.1.2, 1.1.3, and 2.2.2 in Chapter 3 of the Plan. in violation of the Goal contained in RCW 36.70A.020(5).
- f. Ordinance Nos. 3472 and 3473 fail to protect private property rights in violation of the Goal contained in RCW 36.70A.020(6).

<sup>24</sup> On April 19, 2010 the Board granted Petitioner's Motion to revise Issue 6(e). Order on Skagit D06's Motion to Revise Issue 6(E).

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g. Ordinance Nos. 3472 and 3473 violate the goal contained in RCW 36.70A.020(12) because the City has failed to assure that public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

Applicable Law

RCW 36.70A.020, which sets forth the goals of the GMA, initially states:

The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040. The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations.

The goals which have been explicitly noted by the Petitioner in their issue statement are:

(1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.

(2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

(4) Housing. Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock.

(5) Economic development. Encourage economic development throughout the state that is consistent with adopted comprehensive plans, promote economic opportunity for all citizens of this state, especially for unemployed and for disadvantaged persons, promote the retention and expansion of existing businesses and recruitment of new businesses, recognize regional differences impacting economic development opportunities, and encourage growth in areas experiencing insufficient economic growth, all within the capacities of the state's natural resources, public services, and public facilities.

(6) Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

(12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at

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the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

Board Analysis and Findings

- Goals 1 and 2 – Urban Growth and Reducing Sprawl

Petitioner argues that the ordinances requiring annexation prior to the provision of sewer service eliminate the possibility of meaningful urban development in the unincorporated portion of the UGA, contrary to Goal 1 of the GMA. Consequently, Petitioner asserts, there is no alternative for residential property owners but to develop five acre rural-style lots on septic systems, thwarting Goal 2's anti-sprawl focus.<sup>25</sup>

In response, the City argues that in order to "encourage development in urban areas where adequate public facilities exist or can be provided in an efficient manner" as stated in Goal 1, and to follow Goal 2's guidance to "reduce the inappropriate conversion of undeveloped land into sprawling, low-density development", the GMA requires cities to phase UGA development so that it can be adequately planned for and supported.<sup>26</sup>

As noted *supra*, Goals 1 and 2 seek to locate urban growth in areas served by adequate facilities and reduce sprawling, low-density development. It appears to the Board that Petitioner is taking the position that not allowing property owners within the unincorporated portion of the UGA to be annexed and developed on City supplied sewer based on their own timeframe, rather than when the City is prepared to extend service, violates the stated GMA goals. However, there is no support for this position in the GMA or Board and court decisions. The GMA envisions a hierarchy of development within the UGA – first in areas already characterized by urban growth which have adequate existing public facilities/services, second in areas characterized by urban growth, but that will be served by both existing and additionally needed facilities, and lastly in the remaining areas of the

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<sup>25</sup> Petitioner's Prehearing Brief at 16.  
<sup>26</sup> City's Prehearing Brief at 15.  
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1 UGA.<sup>27</sup> As the City correctly points out, "If a City were required to extend sewer service to  
2 every property in the unincorporated UGA, this would create chaotic, leap-frog  
3 development".<sup>28</sup>  
4

5 In the Central Board case of *Master Builders Association of King and Snohomish Counties*  
6 *v. Arlington*, the Board dealt with the assertion that a requirement of annexation to Arlington  
7 as a condition of city sewer service is the same as a denial of sewer service to the  
8 unincorporated part of the Urban Growth Area (UGA). The Central Board found:  
9

10 The approach the City has chosen to managing growth, specifically the  
11 provision of sewer service, is a valid option which the City may choose in order  
12 to transform governance and phase development within the UGA.<sup>29</sup>

13 This Board has previously noted, in response to allegations similar to those of Petitioner that  
14 "[I]t is not unreasonable for those property owners on the periphery to wait to the end of the  
15 20-year planning period to subdivide their property into lots smaller than five acres."<sup>30</sup> The  
16 Board finds orderly development within the UGA is called for by RCW 36.70A.110 and  
17 Ordinance Nos. 3472 and 3473 are consistent with GMA Goals 1 and 2.  
18

19 In addition, an analysis of the City's process for determining when and how sewer service  
20 will be extended to the non-incorporated UGA is contained in a City of Mount Vernon Staff  
21 Report from the Community and Economic Development Department.<sup>31</sup> While that staff  
22 report was prepared in response to Skagit DO6's request for sewer service, the analysis is  
23 germane to the issue of the timeframe for extending sewer service within the UGA. In its  
24 report, the City noted the subject site was at the end of a twenty year plan to extend sewer  
25 inside the East Service Area of the UGA. It further notes that the City's' adopted  
26 Comprehensive Sewer Plan Update contains the City's plans for sanitary sewer extension to  
27  
28

29  
30 <sup>27</sup> RCW 36.76.70A.110(3), in part.

<sup>28</sup> City's Prehearing Brief at 17.

31 <sup>29</sup> *Master Builders Association of King and Snohomish Counties v. Arlington*, CPSGMHB No. 04-3-0001, FDO  
32 at 11 (7/14/04).

<sup>30</sup> *City of Sedro-Woolley v. Skagit County*, WWGMHB No. 03-2-0013c, CO (6/18/04).

<sup>31</sup> See, City's Prehearing Brief, Tab 15, Staff Report in Response to a Request for an Agreement to Provide  
Sanitary Sewer Service Outside the City Limits.

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Growth Management Hearings Board  
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1 the area and that extending sewer earlier than planned would "leap frog" other infill  
2 development by transferring available sewer capacity outside the City. Such factors are  
3 valid considerations to be taken into account by a local jurisdiction. Efficient phasing of  
4 urban infrastructure is a key component to transformance of governance and is consistent  
5 with Goals 1 and 2.  
6

7 • Goal 4 – Housing

8 Petitioner alleges the ordinances are contrary to Goal 4 because they restrict residential  
9 development in the UGA to five-acre lot developments, encouraging mega-mansion style  
10 housing and little else.<sup>32</sup> In response, the City states ensuring urban facilities and services  
11 are supplied to residential development, without decreasing current service levels, promotes  
12 the GMA's housing goal.<sup>33</sup> It notes that over half of the east UGA is already developed with  
13 homes averaging just over 2,000 square feet.  
14

15  
16 Goal 4 seeks to ensure not only housing affordable to all economic sectors but also a  
17 variety of residential densities and types. The Board does not find that refusing to extend  
18 sewer service to an area outside the city limits thwarts Goal 4. As noted above, properties  
19 on the periphery of the UGA may not be developed until late in the 20 year planning period,  
20 but, once sewer is extended, more intensive levels of development can occur. Further,  
21 asserting the City's policies with regard to property at the margin of the UGA runs contrary  
22 to Goal 4 fails to consider the City's zoning code as a whole and the opportunities the City  
23 provides for affordable housing within its municipal boundaries. The GMA goals are to be  
24 used "exclusively for the purpose of guiding the development of comprehensive plans and  
25 development regulations."<sup>34</sup> However, while the GMA goals "collectively convey some  
26 conceptual guidance for growth management," the GMA "explicitly denies any order of  
27 priority among the thirteen goals" and it is evident that "some of them are mutually  
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32 <sup>32</sup> Petitioner's Prehearing Brief at 17.

<sup>33</sup> City's Prehearing Brief at 18.

<sup>34</sup> RCW 36.70A.020

1 competitive."<sup>35</sup> The local jurisdiction is entitled to balance the goals of the GMA so long as  
2 in so doing it does not violate the goals. Here, the Petitioner has not demonstrated the  
3 City's decision to not extend sewer service and thereby delay more intense development of  
4 the UGA violates Goal 4.

5  
6 • Goal 5 – Economic Development

7 Next, Petitioner alleges the ordinances violate Goal 5, the economic development goal, by  
8 severely restricting the supply of housing for employees and customers of new businesses  
9 and redirecting potential new and existing businesses to other markets that have a growing  
10 population.<sup>36</sup> The City responds that economic development cannot responsibly occur if it  
11 is not within the capacity of the City's public services and facilities.<sup>37</sup> It notes Goal 5  
12 provides that the encouragement of economic development is to take place "within the  
13 capacities of the state's natural resources, public services, and public facilities".<sup>38</sup> The City  
14 argues, and the Board agrees, that merely because the Petitioner and those similarly  
15 situated cannot *presently* develop their properties to the extent they desire does not indicate  
16 the City is restricting the supply of housing for employees and customers of new  
17 businesses. There has been no showing that opportunities for development are so limited  
18 elsewhere in the City that the refusal to extend sewer beyond the City limits inhibits  
19 economic development.

20 The Board does not find a policy that delays extension of sewer service to the periphery of  
21 the UGA until annexation violates Goal 5.

22  
23 • Goal 6 – Property Rights

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30 \_\_\_\_\_  
31 <sup>35</sup> REVISITING THE GROWTH MANAGMENT ACT: Washington's Growth Management Revolution Goes to  
32 Court, Richard L. Settle, 23 Seattle Univ. L. R. 5, 11, quoted with approval in *Quadrant Corp. v. Hearings Bd.*,  
154 Wn.2d 224, 246 (2005).

<sup>36</sup> Petitioner's Prehearing Brief at 18.

<sup>37</sup> City's Prehearing Brief at 19.

<sup>38</sup> RCW 36.70A.020(5).

1 Petitioner argues the ordinances thwart Goal 6. In particular, it asserts the City has not  
2 given any consideration to the rights of those property-owners in the unincorporated  
3 portions of the UGA who have now been told they cannot apply for annexation and  
4 extension of sewer service needed to develop their properties at urban densities until the  
5 City either annexes more commercial and industrial land or rezones property for such uses.  
6 Restricting the development of such properties to five acre lots on septic is contrary to Goal  
7 6, Petitioner asserts.<sup>39</sup>  
8

9  
10 The City argues there is no property right to annexation or sewer service, and even without  
11 sewer service or annexation, property in the unincorporated UGA may develop under Skagit  
12 County zoning.<sup>40</sup>  
13

14 The Board has previously stated that in order for Petitioner to prevail in a challenge based  
15 on Goal 6, they must prove the action taken by a local jurisdiction is *both arbitrary and*  
16 *discriminatory*; showing only one is insufficient to overcome the presumption of validity  
17 accorded to local jurisdictions by the GMA. Additionally, the Petitioner must show the action  
18 has impacted a legally recognized right.<sup>41</sup>  
19

20 Petitioner appears to base its Goal 6 claim upon a right to annexation or to sewer extension.  
21 Neither of these are the types of rights the Legislature intended to be protected under Goal  
22 6.<sup>42</sup> Thus, since the "right" to annexation or to extension of sewer service outside city  
23 limits is not the type of "right" this Board or the courts has ever recognized as being a  
24 protected property right, Petitioner's contention as to Goal 6 fails. Since the Board finds no  
25 property right for which Goal 6 would warrant protection, the Board does not need to  
26 address whether the City's action was arbitrary and discriminatory.  
27  
28

29  
30 <sup>39</sup> Petitioner's Prehearing Brief at 19.

<sup>40</sup> City's Prehearing Brief at 20.

31 <sup>41</sup> *Pt. Roberts Registered Voters Assoc. v. Whatcom County*, WWGMHB Case No. 00-2-0052 at 4 (FDO, April  
32 6, 2001) (citing *Achen v. Clark County*, WWGMHB Case No. 95-2-0067 (FDO, Sept. 20, 1995)).

<sup>42</sup> See e.g. *See Achen v. Clark County*, WWGMHB Case No. 95-2-0067 FDO (holding the Legislature did not  
intend to protect unrecognized rights such as the right to subdivide or develop land for maximum personal  
financial gain but rather those which are legally recognized by statute, constitution, or court decision).

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- Goal 12 – Public Facilities and Services

Finally, with regard to alleged goal violations, Petitioner argues the ordinances ignore the premise of the City's Comprehensive Plan, Sewer Comprehensive Plan and sewer connection charges – that upgrades to the sewer system will be paid for by a combination of developer funded extensions and connection charges.<sup>43</sup> By banning applications which require future sewer system improvements, the City has created a system that guarantees the City cannot be the urban facilities and service provider for the UGA, in violation of Goal 12, Petitioner argues.

The City notes Goal 12 of the GMA provides for local governments to ensure public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use *without decreasing current service levels below locally established minimum standards*.<sup>44</sup> It argues that phasing of service does not amount to a ban on utility service.<sup>45</sup> The City further argues that it has the discretion to determine proper phasing of concurrency.

The Board finds Petitioner has not carried its burden to prove a violation of Goal 12. This Board has previously held it is sufficient to have plans in place to make such facilities available within the 20 year planning horizon.<sup>46</sup> The City has adequately demonstrated it has a plan to serve the UGA but, to the extent the plan relies on gravity flow in some areas, property owners situated in a manner such as Petitioner may find their property is served later than others, and near the end of the 20 year planning period. Such a scenario does not demonstrate a violation of Goal 12.

**Conclusion**

<sup>43</sup> Petitioner's Prehearing Brief at 19.  
<sup>44</sup> RCW 36.70A.020(12)  
<sup>45</sup> City's Prehearing Brief at 22.  
<sup>46</sup> *ICAN v. Jefferson County*, WWGMHB No. 07-2-0002 CO (8/12/07)

1 The Board concludes Petitioner has failed to carry its burden of proof in demonstrating the  
2 City's adoption of Ordinance Nos. 3472 and 3473 violated RCW 36.70A.020(1), (2), (4), (5),  
3 (6) or (12).  
4

5 **C. Is the City prevented from complying with its urban growth obligations?**

6 As set forth in the Board's Prehearing Order, Issue 7 provides:

7 **Issue 7:** Whether Ordinance Nos. 3472 and 3473 violate RCW 36.70A.110 for the  
8 following reasons:  
9

- 10 a. Ordinance Nos. 3472 and 3473 will, in violation of RCW 36.70A.110(2), prevent  
11 the City of Mount Vernon from complying with its obligation to permit the urban  
12 growth that is projected to occur in City for the succeeding twenty-year period.  
13 b. Ordinance Nos. 3472 and 3473 will, in violation of RCW 36.70A.110, preclude  
14 the provision of urban services within the Urban Growth Area and encourage  
15 low density development within the Urban Growth Area that is not served by  
16 urban services.

16 Applicable Law

17 The applicable portions of RCW 36.70A.110 are subsections (2) and (3):

18 (2) Based upon the growth management population projection made for the  
19 county by the office of financial management, the county and each city within the  
20 county shall include areas and densities sufficient to permit the urban growth that  
21 is projected to occur in the county or city for the succeeding twenty-year period,  
22 except for those urban growth areas contained totally within a national historical  
23 reserve. As part of this planning process, each city within the county must include  
24 areas sufficient to accommodate the broad range of needs and uses that will  
25 accompany the projected urban growth including, as appropriate, medical,  
26 governmental, institutional, commercial, service, retail, and other nonresidential  
27 uses.

28 Each urban growth area shall permit urban densities and shall include greenbelt  
29 and open space areas. In the case of urban growth areas contained totally within  
30 a national historical reserve, the city may restrict densities, intensities, and forms  
31 of urban growth as determined to be necessary and appropriate to protect the  
32 physical, cultural, or historic integrity of the reserve. An urban growth area  
determination may include a reasonable land market supply factor and shall  
permit a range of urban densities and uses. In determining this market factor,  
cities and counties may consider local circumstances. Cities and counties have

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discretion in their comprehensive plans to make many choices about accommodating growth.

\* \* \*

(3) Urban growth should be located first in areas already characterized by urban growth that have adequate existing public facility and service capacities to serve such development, second in areas already characterized by urban growth that will be served adequately by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources, and third in the remaining portions of the urban growth areas. Urban growth may also be located in designated new fully contained communities as defined by RCW 36.70A.350.

Board Analysis and Findings

Petitioner asserts the City is failing in its GMA duty to encourage urban growth. Further, it argues, based on our Supreme Court's ruling in *Yakima County Fire Protection District 12 v. City of Yakima*<sup>47</sup>, that the City, as the exclusive provider of a utility such as sewer, has a duty to provide this service.

In particular, Petitioner argues that the ordinances will prevent the City from satisfying its duty to permit the urban growth projected to occur during the twenty-year growth target period.<sup>48</sup> Petitioner notes RCW 36.70A.110(2) requires the City and Skagit County to "include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period" and that the City is required to provide the necessary urban infrastructure to the UGA within that time period. Petitioner acknowledges the City has adopted a Comprehensive Plan, Sewer Comprehensive Plan, and Sewer Connection Charge all based on the premise the City would use a combination of developer-funded sewer extensions, and public construction of sewer facilities to develop a sewer system capable of serving the UGA., However, it argues that Ordinance Nos. 3472 and 3473 instead would halt all further urban residential development in the unincorporated

<sup>47</sup> 122 Wn.2d 371 (1993).  
<sup>48</sup> Petitioner's Prehearing Brief at 21.  
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1 UGA.<sup>49</sup> Shutting down development in this manner would fail to accommodate the City's  
2 2025 population target, Petitioner alleges.

3  
4 In addition, Petitioner argues Ordinance Nos. 3472 and 3473 preclude the provision of  
5 urban services while encouraging low density development within the UGA not served by  
6 urban services.<sup>50</sup> Noting RCW 36.70A.110(3) links the phasing of urban development to  
7 the availability of infrastructure, Petitioner argues the City has instead artificially prohibited  
8 urban development of residential lands until some unspecified amount of  
9 commercial/industrial land capacity is added within the City limits.<sup>51</sup> Petitioner characterizes  
10 this as a misguided effort by the City to increase its commercial tax base.  
11

12  
13 Turning to the issue of appropriate densities within the UGA, the City argues it has provided  
14 for urban densities, with plan provisions that call for net development densities between 4.0  
15 and 7.23 dwelling units per acre for standard subdivisions in the Single Family Residential  
16 neighborhoods. Outside the municipal borders, the City argues it has planned for  
17 transitioning to urban development.  
18

19 The City points out RCW 36.70A.110 does not apply to development regulations, and  
20 therefore is inapplicable to Ordinance 3473 which amended City Code 13.08.060.<sup>52</sup> The  
21 Board agrees with this assessment and further consideration of Issue 7 will be limited to  
22 consideration of the Comprehensive Plan amendments contained in Ordinance 3472.<sup>53</sup>  
23

24 The City argues Petitioner has failed to meet its burden of proof because it has not  
25 demonstrated how any of the annexation policies are not valid annexation decision  
26 considerations. The Board agrees. Newly adopted Mount Vernon Comprehensive Plan  
27  
28

29 \_\_\_\_\_  
30 <sup>49</sup> Id. at 22.

31 <sup>50</sup> Id.

32 <sup>51</sup> Id. at 23.

<sup>52</sup> City's Prehearing Brief at 23-24.

<sup>53</sup> RCW 36.70A.110 is entitled "Comprehensive Plan – Urban Growth Areas" and sets forth various requirements for the establishment of UGAs within comprehensive plans. The Board finds nothing in this provision related to development regulations.

1 Policy LU-29.1.3 provides nine criteria to be met before the City Council may initiate an  
2 annexation. Petitioner focuses on criteria contained in policies LU-29.1.3(B), (D) and (F):

3 Policy LU-29.1.3(B): The annexation of residentially zoned areas shall not occur  
4 until additional areas zoned for commercial/industrial are officially designated  
5 such that a balance between residential and commercial /industrial uses can be  
6 achieved within the City.

7 Policy LU-29.1.3(D): The City finds that adequate municipal services exist to  
8 serve the area, and that the factors outlined within RCW 36.93.170(2) are  
9 complied with.

10 Policy LU-29.1.3(F): The City finds that it has the capacity to provide City  
11 services within the existing City limits; and, those services to annexation areas  
12 without major upgrades to these services.

13 Petitioner argues that Policy LU-29.1.3(B) operates as a perpetual moratorium on residential  
14 annexations until the City either annexes some unknown commercial/industrial area or  
15 rezones some unidentified property within the City limits for this purpose.<sup>54</sup> However,  
16 nothing in this policy is demonstrably contrary to RCW 36.70A.110. To the contrary, RCW  
17 36.70A.110(2) mandates that the City "must include areas sufficient to accommodate the  
18 broad range of needs and uses that will accompany the projected urban growth including,  
19 as appropriate, medical, governmental, institutional, commercial, service, retail, and other  
20 nonresidential uses". As the City points out, "Planning for urban growth requires not just  
21 residential land, but land for the jobs and services urban residents require."<sup>55</sup> Deciding on  
22 the appropriate mix of land uses to be brought into the City via annexation is a matter  
23 clearly within the City's discretion.  
24  
25  
26

27 Policies LU-29.1.3(D) and (F) likewise establish criteria that make annexation contingent  
28 upon the availability of adequate municipal services. This too is consistent with the GMA, in  
29 particular, RCW 36.70A.110(3) which requires that :  
30  
31  
32

<sup>54</sup> Petitioner's Prehearing Brief at 7.

<sup>55</sup> City's Prehearing Brief at 24-25.

1 Urban growth should be located first in areas already characterized by urban growth  
2 that have adequate existing public facility and service capacities to serve such  
3 development, second in areas already characterized by urban growth that will be  
4 served adequately by a combination of both existing public facilities and  
5 services and any additional needed public facilities and services that are provided  
6 by either public or private sources...

7 The Board disagrees with Petitioner's allegation that *Yakima County Fire Protection District*  
8 *12 v. City of Yakima*<sup>56</sup> stands for the proposition that the City, as the exclusive provider of  
9 sewer, has a duty to provide this service to properties outside city limits. In *Yakima*, the  
10 Court held that "Under RCW 35.67.310, which provides that a city "may permit connections  
11 with any of its sewers . . . from property beyond its limits", the City has authority to provide  
12 service outside its borders. (Italics ours.) The use of "may" in RCW 35.67.310 supports the  
13 City's argument that the power granted by RCW 35.67.310 is discretionary and that the City  
14 is not bound to provide sewer service to persons residing outside its boundaries."<sup>57</sup> The  
15 *Yakima* Court recognized an exception to this "no duty" rule in circumstances where a city  
16 "holds itself out" as willing to supply sewer or water service to an area or where a city is the  
17 exclusive supplier of sewer or water service in a region extending beyond the borders of the  
18 city.<sup>58</sup> However, there is no evidence that Mount Vernon has held itself out as the sole  
19 source provider of sewer service. To the contrary, the City's May 18, 2009 "Staff Report in  
20 Response to a Request for an Agreement to Provide Sanitary Sewer Service Outside the  
21 City Limits" notes "[T]he City of Mount Vernon is not the exclusive provider or sanitary sewer  
22 service in the proximity of the project site".<sup>59</sup> Instead, referring to the Petitioner's property in  
23 the eastern UGA, the City stated, "The Big Lake sewer district is located directly to the east  
24 of the subject site. Staff does not believe the applicant has contacted the sewer district to  
25 see what steps would need to be taken to have the district provide sanitary sewer service to  
26 the site."<sup>60</sup> While the focus of the appeal is not the provision of sewer service to a site-

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31 <sup>56</sup> *Yakima County Fire Protection District 12 v. City of Yakima*. 122 Wn.2d 371, 381 (1993).

32 <sup>58</sup> Id. at 382.

<sup>59</sup> Exhibit 15 to City's Prehearing Brief, at 2.

<sup>60</sup> Id. at 27.

1 specific parcel, this record does demonstrate that the City is not the sole source provider of  
2 sewer service, thus making *Yakima* distinguishable.

3  
4 **Conclusion**

5 The Board concludes Petitioner has failed to carry its burden of proof in demonstrating the  
6 City's adoption of Ordinance Nos. 3472 and 3473 violated RCW 36.70A.110.

7  
8 **D. Did the City fail to utilize the Attorney General's checklist?**

9 As provided in the Board's Prehearing Order, Issue 8 states:

10 **Issue 8:** Whether Ordinance Nos. 3472 and 3473 failed to be based on a checklist  
11 to ensure there is not an unconstitutional taking of private property in violation of  
12 RCW 36.70A.370?

13  
14 Petitioner indicates that it has abandoned Issue 8.<sup>61</sup>

15  
16 **Conclusion**

17 The Board concludes Petitioner has abandoned Legal Issue 8.

18  
19 **E. Were the City's actions inconsistent with the Skagit County CPPs?**

20 As set forth in the Board's Prehearing Order, Issue 9 states:

21 **Issue 9:** Whether Ordinance Nos. 3472 and 3473 fail to comply with RCW  
22 36.70A.100 and RCW 36.70A.210 by being inconsistent with the following adopted  
23 Skagit County Countywide Planning Policies: Policies 1.1, 1.2, 1.3, 1.7, 2.1, 2.2, 4.1,  
24 6.1, 12.5, 12.6, and 12.7?

25  
26  
27 **Applicable Law**

28 RCW 36.70A.100 provides:

29 The comprehensive plan of each county or city that is adopted pursuant to RCW  
30 36.70A.040 shall be coordinated with, and consistent with, the comprehensive  
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<sup>61</sup> Petitioner's Prehearing Brief at 10.  
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plans adopted pursuant to RCW 36.70A.040 of other counties or cities with which the county or city has, in part, common borders or related regional issues.

RCW 36.70A.210 provides, in relevant part:

(1)The legislature recognizes that counties are regional governments within their boundaries, and cities are primary providers of urban governmental services within urban growth areas. For the purposes of this section, a "countywide planning policy" is a written policy statement or statements used solely for establishing a countywide framework from which county and city comprehensive plans are developed and adopted pursuant to this chapter. This framework shall ensure that city and county comprehensive plans are consistent as required in RCW 36.70A.100 Nothing in this section shall be construed to alter the land-use powers of cities.

Board Analysis and Findings

Petitioner argues RCW 36.70A.210 requires Comprehensive Plan policies to be consistent with Countywide Planning Policies (CPPs) and the City is required to follow the CPPs applicable to its jurisdiction.<sup>62</sup> The City takes the position that only comprehensive plans are reviewed for consistency with CPPs, not development regulations. Therefore, because Ordinance 3473 adopts development regulations it is not appropriate to review it for consistency with the Skagit County CPPs.<sup>63</sup> The Board concurs and only Ordinance 3472 will be reviewed for consistency with Skagit County's CPPs.

- CPPs 1.1 and 1.2

Urban growth shall be allowed only within cities and towns, their designated Urban Growth Areas and within any non-municipal urban growth areas already characterized by urban growth, identified in the County Comprehensive Plan with a Capital Facilities Plan meeting urban standards. (CPP 1.1)

Cities and towns and their urban growth areas shall include areas and densities sufficient to accommodate as a target 80% of the county's 20-year population projection. (CPP 1.2)

<sup>62</sup> Petitioner's Prehearing Brief at 24.

<sup>63</sup> City's Prehearing Brief at 25.

1 Petitioner argues Ordinances 3472 and 3473 are inconsistent with CPPs 1.1 and 1.2, which  
2 require urban growth to be located in designated UGAs, "based on the same arguments set  
3 forth under Legal Issue 8, above."<sup>64</sup> However, Petitioner abandoned Legal Issue 8 and  
4 consequently provided no argument in support of that Issue. Therefore, this aspect of Issue  
5 9, in the absence of any supporting argument, must be considered abandoned as well.  
6

7 • CPPs 1.3, 2.1 and 12.5

8 Urban growth areas shall provide for urban densities of mixed uses and shall direct  
9 development of neighborhoods which provide adequate and accessible urban  
10 governmental services concurrent with development. The GMA defines urban  
11 governmental services as those governmental services historically and typically  
12 delivered by cities, and includes storm and sanitary sewer systems, domestic waster  
13 systems, street cleaning services, fire and police protection services, public transit  
14 services, and other public utilities associated with urban areas and normally not  
associated with non-urban areas. (CPP 1.3)

15 Contiguous and orderly development and provision of urban services to such  
16 development within urban growth boundaries shall be required. (CPP 2.1)

17 Lands designated for urban growth by this Comprehensive Plan shall have an urban  
18 level of regional public facilities prior to or concurrent with development. (CPP 12.5)  
19

20 Petitioner also argues Ordinances 3472 and 3473 are inconsistent with CPP 1.3 (UGAs to  
21 provide for urban densities and development concurrent with services), CPP 2.1 (contiguous  
22 and orderly development and provision of urban services with development with UGA  
23 boundaries) and CPP 12.5 (lands designated for urban growth to have an urban level of  
24 regional public facilities prior to or concurrent with development). Petitioner argues the  
25 ordinances make the provision of urban services contingent upon discretionary criteria  
26 based on factually unsupported assumptions, instead of conditioning approval of urban  
27 development on the adequacy of urban services concurrent with new development.<sup>65</sup>  
28

29 Petitioner suggests a potential developer of residential land will be required to develop five  
30 acre lots unless it can be shown that sewer service using existing sewer mains exists, and  
31

32  

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<sup>64</sup> Petitioner's Prehearing Brief at 25.

<sup>65</sup> Id.

1 even if that were possible, the City retains authority to “randomly deny sewer connections  
2 for any reason.”<sup>66</sup>

3  
4 In response, the City points out the entire 2025 population allocation does not have to be  
5 accommodated in a single proposal and until the property is annexed and urban services  
6 are available, it is consistent with the GMA to develop as five acre lots. This, it argues, is  
7 consistent with CPP 2.1 which provides for “[c]ontiguous and orderly development and  
8 provision of urban services . . . “  
9

10 The annexation policies adopted by Ordinance No. 3472 were based upon a legislatively  
11 adopted Conclusion of Law that:

12  
13 Mount Vernon has expended considerable resources in planning for the orderly,  
14 timely and contiguous development and annexation of property situated in  
15 unincorporated urban growth areas and that development that is contrary to  
16 orderly, timely and contiguous development shall materially alter and cause  
17 harm to the City by impacting the level of essential government services such as  
18 police and fire services, as well as the capacity to provide municipal utility  
19 services such as sewer and storm water service within the City.<sup>67</sup>

20 Thus, this is consistent with CPP policies to “direct development of neighborhoods which  
21 provide adequate and accessible urban governmental services concurrent with  
22 development” (CPP 1.3), require contiguous and orderly development and provision of  
23 urban services (CPP 2.1), and that lands designated for urban growth have an urban level  
24 of regional public facilities prior to or concurrent with development. (CPP 12.5). It is also  
25 consistent with the City’s own policies which require a finding that adequate municipal  
26 services exist to serve the area (Policy LU-29.1.3 D) and a finding that the boundaries of the  
27 proposed annexation are drawn in a manner that makes the provision of public services  
28 geographically and economically feasible (Policy LU-29.1.3 E). Taken together the City’s  
29 annexation policies further serve to ensure the GMA provision that urban growth should be  
30 located first in areas already characterized by urban growth that have adequate existing  
31

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<sup>66</sup> Id. at 26.

<sup>67</sup> Ordinance 3472 at 2.

1 public facility and service capacities to serve such development, second in areas already  
2 characterized by urban growth that will be served adequately by a combination of both  
3 existing public facilities and services and any additional needed public facilities and services  
4 that are provided by either public or private sources, and third in the remaining portions of  
5 the urban growth areas.<sup>68</sup> The annexation policies adopted by the City are not inconsistent  
6 with these CPPs.  
7

8 • CPP 1.7

9 Development within established urban growth boundaries shall, as a minimum,  
10 conform to those urban development standards in effect within the respective  
11 municipality as of April, 1, 1999. Bayview Ridge UGA urban standards for roads,  
12 sewer, and storm water shall meet or exceed those in effect in the City of Burlington  
13 on April 1, 1999. UGAs with populations of over 1500 or a Commercial/Industrial  
14 land allocation (new) over 100 acres shall have, as a minimum, the following levels  
15 of urban law enforcement and fire service levels: [LOS for law enforcement and fire  
then follow] (CPP 1.)

16 Petitioner also argues Ordinances 3472 and 3473 are inconsistent with CPP 1.7 (requiring  
17 the development within UGAs to conform to urban development standards in effect as of  
18 April 1, 1999), by reducing urban densities to levels far below urban development standards  
19 in effect in 1999. Petitioner argues the Ordinances are inconsistent with CPP 1.7 because,  
20 prior to their adoption, areas of proposed urban residential development were not required  
21 to be annexed as a precondition of sewer service by the City.  
22

23  
24 In response, the City points out CPP 1.7 establishes minimum concurrency standards for  
25 law enforcement and fire, not density minimums, which are established in the County zoning  
26 code.<sup>69</sup>  
27

28 While recognizing the thrust of CPP 1.7 appears to address LOS standards, it does also  
29 mention "urban development standards" in effect as of April 1, 1999. However, the effect of  
30 Ordinances 3472 and 3473 is not to change the zoning of land within the UGA and thereby  
31

32

<sup>68</sup> RCW 36.70A.110(3).

<sup>69</sup> City's Prehearing Brief at 27.

1 reduce urban densities as the zoning of those properties is a matter of County control. At  
2 most, it could be said the allowable density of property not yet served by sewer is restricted  
3 until such time as sewer is made available. Petitioner has not shown the density allowed on  
4 these unserved properties has been reduced by the City to a level below that allowed for  
5 unsewered properties, i.e. a reduction below the County-established standard. As to the  
6 imposition of the requirement that the properties must be annexed as a condition of sewer  
7 service, this CPP makes it clear the urban development standards in place as of April 1,  
8 1999 established "a minimum" for development within the UGA. Nothing in CPP 1.7  
9 prohibited the adoption of higher standards for all land within the UGA. The Board finds no  
10 inconsistency between Ordinances 3472 and 3473 and CPP 1.7.

11  
12 • CPP 2.2

13 Development within the urban growth area shall be coordinated and phased through  
14 interagency agreements. (CPP 2.2)

15  
16 Petitioner argues Ordinances 3472 and 3473 were adopted in the absence of any  
17 coordination with the County or interlocal agreements, and thus are in conflict with CPP 2.2  
18 which requires development within the UGA to be coordinated and phased through  
19 interagency agreements.<sup>70</sup>

20  
21 The City asserts the annexation policies are consistent with this policy because they ensure  
22 levels of service are addressed during annexation.<sup>71</sup> It further argues that no further  
23 agreements with the County are needed as the County Code defers to the City on whether  
24 to provide sewer service.

25  
26  
27 The Skagit County Code, SCC 14.16.910(2)(a)(ii),<sup>72</sup> provides that:

28 (ii) The terms of such agreement regarding provision of sewer shall be between  
29 the city and the property owner. This determination by the city shall be within the  
30 city's sole discretion, as the sewer service provider, and shall not be subject to

31  
32 <sup>70</sup> Petitioner's Prehearing Brief at 26.

<sup>71</sup> City's Prehearing Brief at 27.

<sup>72</sup> Ex. 35

1 appeal by or to the County under any circumstances. **Each city shall establish**  
2 **its own procedures** and criteria for reviewing and deciding these requests for  
3 determination **regarding sewer service in the unincorporated UGA,**  
4 **including, but not limited to, whether the city will agree to any extensions**  
5 **outside of the city limits without annexation.** (emphasis added)

6 Thus, the County has considered the issue of sewer extension and has agreed to defer  
7 to the City's discretion on this matter. Nothing in CPP 2.2 requires the City to seek  
8 County approval prior to the adoption of annexation policies.

9  
10 • CPP 4.1

11 Local governments shall allow for an adequate supply of land use options to provide  
12 housing for a wide range of incomes, housing types and densities. (CPP 4.1)

13  
14 Finally, with regard to this CPP, Petitioner argues Ordinances 3472 and 3473 disregard  
15 CPP 4.1 by permanently restricting development in the unincorporated UGA to five acre  
16 lots.

17  
18 The City responds that it can accommodate all residential growth allocated through 2025  
19 and the land designated for housing is adequate. It argues five acre lot sizes in the  
20 unincorporated UGA, where utility service is not yet available, is consistent with the GMA.

21  
22 The Board finds nothing in Ordinances 3472 and 3473 is contrary to CPP 4.1. This CPP is  
23 one of a number of *County-Wide* Planning Policies. That housing densities will be limited  
24 until such time as sewer is available to a particular area of the unincorporated UGA is *not* to  
25 say that an adequate supply of land use options are not provided for elsewhere, county-  
26 wide. Nor does it demonstrate the City failed to allow for an adequate supply of land use  
27 options overall in its comprehensive plan.

28  
29  
30 • CPPs 6.1, 12.6 and 12.7

31  
32

1 Petitioner has not presented any argument with regard to CPPs 6.1, 12.6 or 12.7 and  
2 therefore that portion of Issue 9 will be deemed abandoned.<sup>73</sup>

3  
4 **Conclusion**

5 The Board concludes Petitioner has failed to carry its burden of proof in demonstrating the  
6 City's adoption of Ordinance Nos. 3472 and 3473 violated RCW 36.70A.100 and RCW  
7 36.70A.210.

8  
9 **F. Do the challenged ordinances preclude EPFs?**

10 As set forth in the Board's PHO, Issue 10 provides:

11 **Issue 10:** Whether Ordinance Nos. 3472 and 3473 fail to comply with RCW  
12 36.70A.200 by creating a scheme that would act to preclude the siting of essential  
13 public facilities such as group homes?  
14

15  
16 **Applicable Law**

17 RCW 36.70A.200(5) provides;

18 No local comprehensive plan or development regulation may preclude the  
19 siting of essential public facilities."

20  
21 **Board Analysis and Findings**

22 Petitioner notes RCW 36.70A.200 specifically includes group homes as essential public  
23 facilities (EPFs) and, while the City can impose reasonable permitting and mitigation  
24 requirements, it cannot preclude group homes.<sup>74</sup> Petitioner further argues the preclusion of  
25 sewer service to group homes makes the siting of such essential public facilities "incapable  
26 of being accomplished" in the unincorporated UGA since extension of sewer would be  
27 conditioned on meeting the standards for annexation.<sup>75</sup>  
28  
29  
30

31 <sup>73</sup> *WEC v. Whatcom County*, WWGMHB Case No. 95-2-0071, FDO, (12/20/95); *OEC v. Jefferson County*,  
32 WWGMHB Case No. 94-2-0017, FDO (2/16/95). Fairness requires that an issue must be addressed in the  
petitioner's opening briefing or the respondent will not have an opportunity to respond to it.

<sup>74</sup> Petitioner's Prehearing Brief at 27.

<sup>75</sup> *Id.*

1 In response, the City argues Skagit County, not the City, regulates EPFs in the  
2 unincorporated portions of the county and the County's regulations do allow for EPFs, such  
3 as group homes.<sup>76</sup> The City points out that a jurisdiction does not have a duty to allow  
4 EPFs on every site but, instead, EPFs such as group homes may be dispersed throughout a  
5 jurisdiction.<sup>77</sup>  
6

7 The Board finds Petitioner has not demonstrated Ordinance Nos. 3472 and 3473 preclude  
8 the siting of EPFs. In fact, MVMC 17.15.030(B) specifically provides that group homes "are  
9 permitted as a matter of right in the R-1 district". While Petitioner's property, located within  
10 the County, is presently precluded from being annexed into the City due to the City's  
11 annexation policies, this is not to say the City, in and of itself, is precluding the siting of  
12 group homes within the area under the City's planning authority.  
13

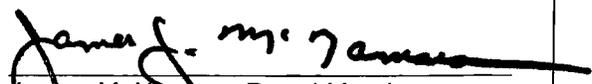
14  
15 **Conclusion**

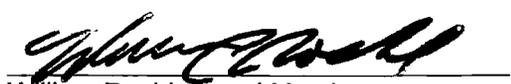
16 The Board concludes Petitioner has failed to carry its burden of proof in demonstrating the  
17 City's adoption of Ordinance Nos. 3472 and 3473 violated RCW 36.70A.200.  
18

19 **V. ORDER**

20 The Board having concluded that Petitioner has failed to demonstrate that Ordinance Nos.  
21 3472 and 3473 are a clearly erroneous violations of RCW 36.70A, the Growth Management  
22 Act, this appeal is denied and case No. 10-2-0011 is dismissed.  
23

24 So ORDERED this 4th day of August, 2010.  
25

26   
27 James McNamara, Board Member

28   
29 William Roehl, Board Member  
30

31  
32  

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<sup>76</sup> City's Prehearing Brief at 28.  
<sup>77</sup> Id.  
FINAL DECISION AND ORDER  
Case No. 10-2-0011  
August 4, 2010  
Page 30 of 31

  
Nina Carter, Board Member

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

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

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior Court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior Court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate Court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

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

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**BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
WESTERN WASHINGTON REGION**

Case No. 10-2-0011  
Skagit D06, LLC v. City of Mount Vernon

**DECLARATION OF SERVICE**

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

I am the Executive Assistant to the Growth Management Hearings Board. On the date indicated below a copy of the FINAL DECISION AND ORDER in the above-entitled case was sent to the following through the United States postal mail service:

Robert D. Johns  
Duana T. Kolouskova  
Johns Monroe Mitsunaga Kolouskova, PLLC  
1601 114<sup>th</sup> Avenue SE Suite 110  
Bellevue, WA 98004

Mayor Bud Norris  
City of Mount Vernon  
910 Cleveland Avenue  
Mount Vernon, WA 98273

Kevin Rogerson  
P. Stephen DiJulio  
Mount Vernon City Attorney  
910 Cleveland Avenue  
Mount Vernon, WA 98273-4231

DATED this 4<sup>th</sup> day of August, 2010.

  
Paulette Yorke, Executive Assistant

No. 67236-3-I  
King County Superior Court No. 10-2-31288-9 KNT  
IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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SKAGIT D06, LLC, a Washington limited liability company,  
Plaintiff/Appellant,

vs.

GROWTH MANAGEMENT HEARINGS BOARD, an agency of  
the State of Washington; and CITY OF MOUNT VERNON, a  
municipal corporation,

Defendants/Respondents.

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AFFIDAVIT OF SERVICE

---

Atty: Robert D. Johns, WSBA #7086  
Atty: Duana T. Koloušková, WSBA #27532  
JOHNS MONROE MITSUNAGA KOLOUŠKOVÁ PLLC  
1601 – 114<sup>th</sup> Avenue S.E., Suite 110  
Bellevue, WA 98004-6969  
T: 425-451-2812 / F: 425-451-2818

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STATE OF WASHINGTON )  
 )ss.  
COUNTY OF KING )

Evanna L. Charlot, being first duly sworn on oath, deposes and says:

1. I am a citizen of the United States, over the age of 18 years of age, and am competent to testify to the facts herein.
2. On this date, I caused to be served via Legal Messenger Delivery, a true and correct copy of the following documents: APPELLANT'S OPENING BRIEF upon counsel as stated below:

Kevin Rogerson, Esq.  
P. Stephen DiJulio, Esq.  
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*Attorneys for Resp. City of Mt. Vernon*

In Association with:

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*Attorneys for Resp. Growth Management Hearings Board*

Pursuant to RCW 9A.72.085, I certify under penalty of perjury under the laws of the State of Washington that the foregoing statement is true and correct.

DATED this 15<sup>th</sup> day of Aug, 2011, in Bellevue, Washington.

  
EVANNA L. CHARLOT

STATE OF WASHINGTON )  
 )ss.  
COUNTY OF KING )

SIGNED AND SWORN to (or affirmed) before me on Aug. 15, 2011 by  
Evanna L. Charlot.



  
Darrell S. Mitsunaga (print name)  
Notary Public residing in Sammamish, WA.  
My appointment expires 1-23-13