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NO. 69639-4-I  
COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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GRANDVIEW NORTH, LLC, a Washington limited liability  
company,

Appellant,

v.

THE CITY OF BURLINGTON, a municipal corporation,

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
FOR SKAGIT COUNTY  
THE HONORABLE JOHN M. MEYER

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REPLY BRIEF OF APPELLANT

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HUTCHISON & FOSTER  
By: William B. Foster  
WSBA #8270  
P.O. Box 69  
Lynnwood, Washington 98046  
(425) 776-2147  
Attorney for Appellant

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**TABLE OF CONTENTS**

1. The Petitioner has Named and Served all Parties Required by RCW 36.70C.040(2). . . . . 1

2. The City Could Have Added the Owner of the Adjacent Property if it Considered that Person a Necessary Party. . 7

3. The Adjacent Property Owner is Neither an Indispensable or Necessary Party. . . . . 10

4. Substantial Evidence Does not Support the City’s Denial of the Land Use Application. . . . . 11

    The Intersection as Proposed is Unsafe . . . . . 11

    The Proposal does not Encroach upon the Neighbor’s Property. . . . . 11

    There is no Impermissible Decrease in Level of Service 12

CONCLUSION . . . . . 14

TABLE OF AUTHORITIES

*Crosby v. Spokane County*, 137 Wn.2d 296, 971 P.2d 32 (1999) 10

*Garrison v. Wash. State Nursing Bd.*, 87 Wash.2d 195, 196, 550 P.2d 7 (1976) ..... 4

*Rozner v. City of Bellevue*, 116 Wash.2d 342, 347, 804 P.2d 24 (1991) ..... 4

*State v. Armendariz*, 160 Wash.2d 106, 110, 156 P.3d 201 (2007) ..... 4

*State v. Thornton*, 119 Wash.2d 578, 580, 835 P.2d 216 (1992) 4

*Wash. State Human Rights Comm'n v. Cheney Sch. Dist. No. 30*, 97 Wash.2d 118, 121, 641 P.2d 163 (1982) ..... 4

**STATUTES**

RCW 36.70C.020 ..... 3

RCW 36.70C.040 ..... 1, 2

RCW 36.70C.040(2)(b) ..... 8

RCW 36.70C.040 (2)(b)(ii) ..... 2

RCW 36.70C.040(2)(c) ..... 8

RCW 36.70C.050 ..... 7

**1. The Petitioner has Named and Served all Parties Required by RCW 36.70C.040(2).**

The City first argues that the court erred in failing to grant its motion to dismiss as a result of Grandview's failure to name as a party to the LUPA action the owner of the adjacent property to the south. The City argues that because the access road that was proposed to serve the project would be constructed within an easement located, in part, upon the adjacent property, that property owner is a necessary party to the action. This argument is neither supported by the plain language of the statute, nor is it supported by any of the reported decisions.

RCW 36.70C.040 identifies the parties that are required to be included as parties to the review of the land use decision. The statute provides:

"(2) A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served on the following persons who shall be parties to the review of the land use petition:

. . .

(b) Each of the following persons if the person is not the petitioner:

. . .

(ii) Each person identified by name and address in the local jurisdiction's written decision as an owner of the

property at issue;

(c) If no person is identified in a written decision as provided in (b) of this subsection, each person identified by name and address as a taxpayer for the property at issue in the records of the county assessor, based upon the description of the property in the application;"<sup>1</sup>

The Petitioner has named and served all persons identified in the statute. The owner of the adjacent property is neither a necessary or even proper party under the LUPA statute.

RCW 36.70C.040 (2)(b)(ii) requires that each person "identified by name and address in the local jurisdiction's written decision as an owner of the property at issue".<sup>2</sup> The written decision identifies the Petitioner as the "owner of the property at issue" not the owner of the adjacent property.

RCW 36.70C.040 (2)(c) only applies if "no person is identified in a written decision" as the owner of the property at issue.<sup>3</sup> The written decision clearly identifies the Petitioner as the owner of the property, and therefore no further interpretation of the statute is required.

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<sup>1</sup> RCW 36.70C.040(2)[*emphasis added*]

<sup>2</sup> RCW 36.70C.040(2)(b)(ii) [*emphasis added*]

<sup>3</sup> RCW 36.70C.040(2)(c)

However, even if the written decision did not identify the Petitioner as the owner of the property at issue, the owner of the adjacent property would still not be a required party. Only if the owner of the property is not identified in the written decision as the owner of the property at issue need the inquiry go further. However, if that were the case here, which it is not, the inquiry is not without limits. In that event only those persons who are identified as the property owner according to the records of the county assessor, based upon the description of the property in the application is a necessary party.<sup>4</sup>

The property at issue based upon the description of the property contained in the application is parcels P24245 and P24246. The owner of the property identified in the application based upon the tax rolls is the Petitioner. Neither the adjacent parcel nor the taxpayer for the adjacent parcel is not identified anywhere in the application, or the written decision issued by the City.

It should also be noted that the statute, RCW 36.70C, does not define the term "property at issue".<sup>5</sup> However, that definition can be gleaned from the provisions of RCW 36.70C.040. In this section of the

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<sup>4</sup> *Id.*[emphasis added]

<sup>5</sup> RCW 36.70C.020

statute it is clear that the "property at issue" is the property described in the application.

From the plain and unambiguous language of the statute only the owner of the property based upon the description of the property contained in the application is a necessary party to the action is a necessary party.

The primary objective of any statutory construction inquiry is to ascertain and carry out the intent of the Legislature.<sup>6</sup> When interpreting a statute, the first examination is to its plain language.<sup>7</sup> If the plain language is subject to only one interpretation, the inquiry ends because plain language does not require further interpretation.<sup>8</sup> Where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself.<sup>9</sup> Absent ambiguity or a statutory definition, we give the words in a statute their common and ordinary meaning.<sup>10</sup>

The statute at issue here could not be clearer. The petitioner

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<sup>6</sup> **Rozner v. City of Bellevue**, 116 Wash.2d 342, 347, 804 P.2d 24 (1991).

<sup>7</sup> **State v. Armendariz**, 160 Wash.2d 106, 110, 156 P.3d 201 (2007).

<sup>8</sup> *Id.*; **State v. Thornton**, 119 Wash.2d 578, 580, 835 P.2d 216 (1992).

<sup>9</sup> **Wash. State Human Rights Comm'n v. Cheney Sch. Dist. No. 30**, 97 Wash.2d 118, 121, 641 P.2d 163 (1982).

<sup>10</sup> **Garrison v. Wash. State Nursing Bd.**, 87 Wash.2d 195, 196, 550 P.2d 7 (1976)

under LUPA is required to name as a party the applicant (unless the applicant is also the petitioner); the owner of the property at issue as identified in the local jurisdiction's written decision; and only if not identified in the local jurisdiction's written decision, the taxpayer for the property at issue based upon the description contained in the application. The owner of the adjacent property is none of the above, and therefore is not a necessary party to the application based upon the clear and unambiguous language of the statute.

Assuming for the sake of argument that one might consider the statute ambiguous, the intent of the legislature can be derived by a reading of the entire statute as a whole. It is clear that the legislature intended that applicants and property owners of the property at issue be named as parties. The property at issue is clearly defined by the statute as the property that is identified in either the application or the written jurisdiction. If not identified in the written decision, then it is the owner of the property according to the tax rolls and based upon the property description contained in the application. The legislature obviously did not intend to include as property owners the owners of adjacent parcels. If the legislature had intended to include such

persons, it easily could have done so, but it did not.<sup>11</sup>

The City argues that the owner of the adjacent property must be named as a party simply because a small portion of the project may be constructed on the easement that exists between the parties. However, that conclusion cannot be reached by a reading of the statute. Taking the City's argument to its logical conclusion the city would require that any person claiming any ownership interest in the property at issue would also be a required party. Viewing an example demonstrates the absurdity of such a conclusion. Assume that the owner of the adjacent parcel had encroached upon the property at issue for a period of time sufficient to establish a claim to title by adverse possession. Under the interpretation of the statute by the City, that person would be a required party notwithstanding there is no mention of such persons in the statute.

It is clear that "owner" as used in the statute does not include owner under all legal theories, but instead is limited to owner as set forth in the application or the written decision. Only does the petitioner

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<sup>11</sup> It is also obvious that such owners may be included if they had filed an appeal of the decision of the local jurisdiction [RCW 36.70C.040(d)], but the owner of the adjacent property did not appeal the decision of the City, and therefore this portion of the statute simply does not apply.

resort to the owner as identified by the tax assessor's if the owner is not identified in either the application or the written decision. To interpret the statute otherwise would require a petitioner under LUPA to do much more than examine the record generated with the land use application, including the application, the written decision and the tax rolls. It appears obvious that the legislature intended petitioner's under LUPA to examine the record pertaining to the decision being challenged. It would be unduly burdensome to require petitioners to evaluate an unending and often uncertain number of claims to ownership, many of which may rely on facts outside of the record.

**2. *The City Could Have Added the Owner of the Adjacent Property if it Considered that Person a Necessary Party.***

It is clear that the legislature considered the possibility that there may be parties who are not necessary parties, but who may be proper parties needed for the just adjudication of the petition when it enacted RCW 36.70C.050. This section provides:

"RCW 36.70C.050. Joinder of parties.

If the applicant for the land use approval is not the owner of the real property at issue, and if the owner is not accurately identified in the records referred to in RCW 36.70C.040(2) (b) and (c), the applicant shall be responsible for promptly securing the joinder of the owners. In addition, within fourteen days after service

each party initially named by the petitioner shall disclose to the other parties the name and address of any person whom such party knows may be needed for just adjudication of the petition, and the petitioner shall promptly name and serve any such person whom the petitioner agrees may be needed for just adjudication. If such a person is named and served before the initial hearing, leave of court for the joinder is not required, and the petitioner shall provide the newly joined party with copies of the pleadings filed before the party's joinder. Failure by the petitioner to name or serve, within the time required by RCW 36.70C.040(3), persons who are needed for just adjudication but who are not identified in the records referred to in RCW 36.70C.040(2)(b), or in RCW 36.70C.040(2)(c) if applicable, shall not deprive the court of jurisdiction to hear the land use petition."<sup>12</sup>

If the City believed that other parties were "needed for just adjudication of the petition", it had an affirmative duty under this statute to notify the Petitioner as to the identity of such persons. The LUPA petition was filed in April of 2011, and the City's Motion to dismiss was made nearly five (5) months later. The City's Motion was the first time that the Petitioner heard that the City believes the owner of the adjacent property is a necessary party.

There is no doubt that the owner of the adjacent property is not identified in the records referred to in either RCW 36.70C.040(2)(b) or RCW 36.70C.040(2)(c). Because these persons are not identified

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<sup>12</sup> [*Emphasis added*]

in the records that the petitioner is entitled to rely upon, the legislature specifically provided that the failure to name and serve these parties within the normal twenty-one (21) day statute of limitation would not deprive the court of jurisdiction to consider the petition. This is a clear exception to the requirement that all necessary parties be named in the petition and service be made upon them within 21 days of the decision being challenged.

This provision is also a clear demonstration of the legislature's intent that petitioners have a right to rely on the record generated by the local jurisdiction. In the event the local jurisdiction fails to maintain an adequate record that would allow identification of necessary parties, petitioners are not to be penalized.

The instant case had been pending for nearly five (5) months, and until the City made its motion to dismiss it had not identified parties it believes are necessary for just adjudication of the merits. It should further be noted that if the neighboring property owner disagrees with the Petitioner's anticipated improvement of the easement, this issue is not one that can be resolved in the pending action. The sole authority of the court under a LUPA petition is to determine the propriety of the City's denial of the land use decision.

It is without the authority to ascertain the rights amongst the parties to an easement as to the proper exercise of either party's easement rights.

**3. *The Adjacent Property Owner is Neither an Indispensable or Necessary Party.***

The City argues that “Numerous Washington decisions hold that the owner of property directly affected by a land use decision or a person with an interest in the property which is the subject of the land use decision is a party that must be joined in judicial proceedings.”<sup>13</sup> However, the case relied upon by the City is distinguishable from the instant case. First of all Crosby was a pre-LUPA case and proceeded under the writ procedure. The writ statute did not include even similar language as is contained in LUPA to identify the necessary parties to the action. In fact, in holding that the neighboring property owner was not an Indispensable party the court in Crosby noted that the writ statute did not mandate that the neighboring parties be made parties to the action. Therefore, reliance upon writ cases is not helpful to the City.

Moreover, the court in Crosby held that the neighboring

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<sup>13</sup> Brief of Respondent at 26 citing **Crosby v. Spokane County**, 137 Wn.2d 296, 971 P.2d 32 (1999).

property owners were not indispensable parties, and dismissal of the writ action was not warranted.

**4. *Substantial Evidence Does not Support the City's Denial of the Land Use Application.***

4.1 The Intersection as Proposed is Unsafe. The City attempts to justify its denial of the land use application upon the assertion, unsupported by the record, that the design of the intersection was unsafe. However, a glaring flaw in this argument is that the intersection is in existence at the present time, and has been since Costco was developed. In fact, the intersection is signaled on all four (4) legs, including the portion that lies upon Grandview's property. Although the quantity of traffic eastbound through the intersection may increase as a result of the improvement of Grandview's property, the plain and simple fact is that traffic currently uses the eastbound leg of the intersection. Other than the bald assertion that the intersection as proposed would be unsafe.

This assertion is especially troubling when the original requirements imposed upon the previous applicant included completion of the fourth leg of the intersection. (CP 479).

4.2 The Proposal does not Encroach upon the Neighbor's

Property. The City knows that the proposal that was considered by the Planning Commission would not encroach upon the neighbor's property, but instead, would be confined to the easement that existed between the two properties. Despite knowing this, the City misled the Planning Commission by continuing to assert that an encroachment would result. (CP 1419) The City continues that with these misleading comments here. However, it is clear that the submittal to the Planning Commission placed the access drive entirely within the easement. (CP 1419) The City attempts to argue that the design that did not encroach upon the neighboring property was somehow "conceptual". But nothing could be further from the truth. Following a meeting with the City Grandview redesigned the access so that it was entirely within the easement.

4.3 There is no Impermissible Decrease in Level of Service.

The City's argument that LOS declines as a result of the proposed development is entirely unsupported by the record. Instead, after conducting not one, but two traffic studies the opinion of the only expert who performed an actual analysis (GTC) concluded that there was no impermissible decrease in LOS. <sup>14</sup>The City's consultant, GSA,

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<sup>14</sup> See LOS Tables at CP 2241-2243

has not conducted any analysis other than to review and comment on the GTC study.

Furthermore, the City argues that the LOS does, in fact, dip below acceptable LOS, from D to F at Burlington Blvd and Gilkey Road.<sup>15</sup> However, this conclusion is a misinterpretation of the data tables contained in the TIA. LOS according to property traffic analysis must be considered on the average, not merely by examining one observation timing. This misinterpretation is demonstrated by the TIA submitted to the City for the Copeland project. That TIA reported that LOS at Burlington Blvd. and Costco would be E, an unacceptable level for “Weekday PM Peak Hour”. (CP 2080). Yet, despite this apparent failure to adhere to the adopted LOS standards, the City approved the Copeland project.

This record is replete with the opinions of Grandview’s expert consultant, GTC, that the project will not result in a decrease in LOS below acceptable standards. On the other hand, there is no similar opinion expressed by the City’s consultant. Instead the City’s consultant noted:

“The GTC analysis has shown that, although in the

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<sup>15</sup> Brief of Respondent at 34.

2010 with development time horizon the Boulevard will operate at LOS D."<sup>16</sup>

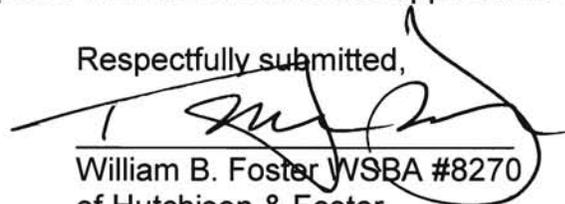
Even the City's consultant admits that the GTC analysis properly concludes that LOS will not fall below permissible standards. However, instead of examining the LOS standards, the consultant focused on the desire to phase out split-phase signals, notwithstanding the fact that the intersection currently and has since its inception operated in split-phase mode.

### **CONCLUSION**

The City denied Grandview's land use application by ignoring its own duly adopted ordinances, and relied instead on requiring Grandview to correct a condition that the City itself created. To add insult to injury, it did not apply those same standards to an applicant across the street.

The Court should reverse the decision of the trial court, and direct that the City should approve Grandview's land use application.

Respectfully submitted,



William B. Foster WSBA #8270  
of Hutchison & Foster  
Attorneys for Petitioner

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<sup>16</sup> CP 1013

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**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON**

**DIVISION I AT SEATTLE**

GRANDVIEW NORTH, LLC, a Washington  
limited liability company,

Appellant,

vs.

THE CITY OF BURLINGTON, a municipal  
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Respondent.

NO. 69639-4-1

CERTIFICATE OF SERVICE

**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date I caused a true and correct copy of the Reply Brief of Appellant to be delivered to the counsel of record listed below in the manner described:

Mr. Scott G. Thomas, Esq.  
City of Burlington  
833 South Spruce Street  
Burlington, Washington 98233

- Via first-class U.S. Mail
  - Via Certified Mail
  - Via Overnight Courier
  - Via Legal Messenger
  - Via Email
- [stthomas@ci.burlington.wa.us](mailto:stthomas@ci.burlington.wa.us)

Ms. Stephanie E. Croll, Esq.  
Keating, Bucklin & McCormack, Inc.  
800 Fifth Avenue, Suite 4141  
Seattle, Washington 98104

- Via first-class U.S. Mail
  - Via Certified Mail
  - Via Overnight Courier
  - Via Legal Messenger
  - Via Email
- [scroll@kbmlawyers.com](mailto:scroll@kbmlawyers.com)

DATED this 1st day of July, 2013, at Lynnwood, Washington.



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Elaine M. Wilkinson, Legal Assistant