

69639-4

69639-4

No. 69639-4-1

---

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION I

---

2013 MAR 29 PM 4:13  
COURT OF APPEALS  
DIVISION I  
1000 4TH AVENUE  
SEATTLE, WA 98101

GRANDVIEW NORTH, LLC,

Appellant/Cross-Respondent,

vs.

CITY OF BURLINGTON

Respondent/Cross-Appellant.

---

**Brief of Respondent/Cross-Appellant City of Burlington**

---

SCOTT G. THOMAS  
WSBA #23079  
Office of the City Attorney  
833 South Spruce Street  
Burlington, WA 98233  
360/755-9473  
FAX 360/755-1297

STEPHANIE CROLL  
WSBA #18005  
Keating, Bucklin, & McCormack, Inc., P.S.

Attorneys for Respondent/Cross Appellant

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION ..... 1

II. STATEMENT OF ISSUES/ASSIGNMENTS OF ERROR..... 3

    A. Response to Appeal - Statement of Issues. .... 3

    B. City of Burlington's Cross Appeal - Assignments of Error. .... 4

    C. Statement of Issues Pertaining to Assignment of Errors on Cross Appeal. .... 4

III. STATEMENT OF THE CASE..... 5

    A. The Parties to This Action ..... 5

    B. The 2001 Project ..... 5

    C. The Grandview Project. .... 6

    D. Grandview’s Traffic Studies ..... 8

    E. The Revised Traffic Study ..... 12

    F. Grandview’s Permit Application ..... 14

    G. Planning Commission Review ..... 19

    H. First Western Project..... 19

    I. Procedural History ..... 20

IV. ARGUMENT ..... 22

    A. Standard of Review – City’s Motion to Dismiss ..... 22

    B. The trial court improperly concluded that it was unnecessary for Burlington Boulevard, the owner of the Bike Shop property, to be a party to this lawsuit. .... 23

    C. The Standard of Review for Land Use Decisions is Established by the Land Use Petition Act. .... 28

    D. There is Substantial Evidence to Conclude that Grandview’s Proposal was Unsafe; Would Encroach on Burlington Boulevard’s Property; and Would Result in an Impermissible Decrease in LOS..... 31

    E. The City Correctly Interpreted and Applied the Law. .... 35

    F. The Trial Court Properly Held That Petitioner’s Constitutional Rights Had Not Been Violated. .... 36

G. The City Requests Reasonable Attorney's Fees and Costs .....	44
V. CONCLUSION.....	45

TABLE OF AUTHORITIES

**Cases**

*Abbey Rd. Grp. v. Bonney Lake*, 167 Wn.2d 242, 218 P.3d 180 (2009) .. 29

*Abbey Road v. Bonney Lake*, 167 Wn.2d 242, 249, 218 P.3d 180 (2009) 37

*Citizens to Preserve Pioneer Park LLC, v. City of Mercer Island*, 106 Wn. App. 461, 24 P.3d 1079 (2001)..... 31, 35

*Citizens v. Mercer Island*, 106 Wn. App. 461, 467, 24 P.3d 1079 (2001) 25

*Crosby v. Spokane County*, 137 Wn.2d 296, 971 P.2d 32 (1999) ..... 26

*Dev. Servs. v. Seattle*, 138 Wn.2d 107, 979 P.2d 387 (1999) ..... 30

*East Fork Hills v. Clark County*, 92. Wn. App. 838, 965 P.2d (1998)..... 37

*Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591 (2008)..... 41

*Girton v. Seattle*, 97 Wn. App. 360, 363, 983 P.2d 1135 (1999)..... 37

*Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 99, 38 P.3d 1040 (2002)..... 22

*Grant County Fire Prot. Dist. No. 5 v. Moses Lake*, 150 Wn.2d 791, 811, 83 P.3d 419 (2004) ..... 40

*Griffin v. Thurston County Bd. of Health*, 165 Wn.2d 50, 54, 196 P.3d 141 (2008)..... 28

*Holder v. Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641 (2006)..... 40

*In re Johns-Manville Corp.*, 99 Wn.2d 193, 197, 660 P.2d 271 (1983) ... 26

*Isla Verde v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002)..... 30

*Johnson v. Kittitas County*, 103 Wn. App. 212, 216, 11 P.3d 862 (2000) 40

*Knight v. City of Yelm*, 173 Wn.2d 325, 337, 267 P.3d 973 (2011) ..... 28

*Lakeside Indus, v. Thurston County*, 119 Wn. App. 886, 83 P.3d 433, (2004)..... 30

*Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 225 P.3d 448 (2010)..... 28

*Laurel Park v. Tumwater*, 790 F. Supp. 2d 1290 (2011) ..... 39

*Lazy Y Ranch Ltd. v. Behrens*, (9th Cir. 2008) ..... 31

*Lingle v. Chevron*, 544 U.S. 528 (2005) ..... 39

*Nat'l Homeowners Ass'n v. Seattle*, 82 Wn. App. 640, 643-44, 919 P.2d 615 (1996)..... 27

*Nolan v. Snohomish County*, 59 Wn. App. 876, 880, 802 P.2d 792 (1990), *rev. den.*, 116 Wn.2d 1020 (1991) ..... 27

*North Street Ass'n v. Olympia*, 96 Wn.2d 359, 368-69, 635 P.2d 721 (1981)..... 27

*Pasco v. Public Employment Relations Comm'n*, 119 Wn.2d 504, 833 P.2d 381 (1992)..... 29

*Pennell v. San Jose*, 485 U.S. 1, 14 (1988)..... 31

*Quality Rock Prods., Inc. v. Thurston County*, 126 Wn. App. 250, 260, 108 P.3d 805 (2005)..... 22

<i>Schofield v. Spokane County</i> , 96 Wn. App. 581, 980 P.2d 277 (1999) ....	30
<i>Sidis v. Brodie/Dohrmann, Inc.</i> , 117 Wn.2d 325, 815 P.2d 781 (1991)...	27
<i>Squaw Valley v. Goldberg</i> , 375 F.3d 936, 944 (9th Cir. 2004) .....	39
<i>State v. WWJ Corp.</i> , 138 Wn.2d 595, 601, 980 P.2d 1257 (1999) .....	28
<i>Veradale Valley Citizens' Planning Comm. v. Board</i> , 22 Wn. App. 229, 231, 588 P.2d 750 (1978).....	27
<i>Wenatchee Sportsmen Ass'n v. Chelan County</i> , 141 Wn.2d 169, 175, 4 P.3d 123 (2000).....	22
<i>Willowbrook v. Olech</i> , 528 U.S. 562 (2000).....	39

**Statutes**

BMC § 12.28.010(D).....	35
BMC § 12.28.100.....	17
BMC § 12.28.150.....	33
BMC § 15.08.010.....	33
BMC 12.28.010(D) .....	8
<i>HJS Dev., Inc. v. Pierce County</i> , 148 Wn.2d 451, 61 P.3d 1141 (2002)..	35
<i>Milestone Homes, Inc. v. Bonney Lake</i> , 145 Wn. App. 118, 186 P.3d 357 (2008).....	35
<i>Overhulse Neighborhood Ass'n v. Thurston County</i> , 94 Wash. App. 593, 597, 972 P.2d 470 (1999).....	23
RCW 36.70C.040.....	23
RCW 36.70C.040 (b)(i) and (ii).....	23
RCW 36.70C.040 (c) .....	23
RCW 36.70C.040(2).....	23
RCW 36.70C.130(1)(b) .....	30
RCW 36.70C.130(1)(d) .....	35
<i>Skagit Surveyors &amp; Eng'rs, LLC v. Friends of Skagit County</i> , 135 Wn.2d 542, 555, 958 P.2d 962 (1998).....	23

**Other Authorities**

HIGHWAY CAPACITY MANUAL, pg. 18-1 (2010) .....	8, 9
--	------

**Rules**

RAP 2.5(a) .....	28
------------------	----

## I. INTRODUCTION

This appeal arises under the Land Use Petition Act (LUPA”). Grandview North, LLC filed a LUPA Petition seeking reversal of the decision by the Burlington Planning Commission, which had been affirmed by the Burlington City Council, denying Grandview’s application for a land use approval. In its initial application, Grandview proposed to construct an entrance drive located partially on the property of its neighbor – over the neighbor’s objections – in order to allow Grandview to utilize an existing traffic signal that had been installed kitty-corner from Grandview’s property. The City denied the application for several different reasons. First, Grandview proposed to significantly modify the existing signalized intersection; and those modifications would result in further skewing of an already skewed intersection, which would endanger both pedestrians and vehicles. Second, the modifications would adversely affect other nearby intersections, and drop the level of service of the City’s streets below the standard that had been adopted by the City. Third, the City had no authority to issue a permit for the construction of a portion of Grandview’s project on property owned by Grandview’s neighbor, where the neighbor had not given Grandview permission to occupy or utilize its property. The Planning Commission put its foot down, and denied Grandview’s proposal. On appeal, the City Council agreed with the Planning Commission. Grandview then brought this LUPA action, but failed to serve the neighboring property owner on whose property

Grandview proposed to build a portion of its project. While the trial court erred by declining to dismiss Grandview's petition for failure to serve Grandview's neighbor, the trial court ultimately agreed with the City's decision to deny Grandview's project as proposed.

This Court now stands in the shoes of the trial court and directly reviews the City's decision to deny Grandview's project, as well as Grandview's election not to name its neighbor as a party to this lawsuit. This Court should conclude that the City properly denied Grandview's poorly-conceived project, and that Grandview's failure to serve the owner of the property on which a portion of Grandview's project would be built is a fatal shortcoming.

Finally, Grandview's contention that the City's sole reason for denying its project is because the City wants Grandview to fix a pre-existing problem, specifically, the intersection located at Costco Drive and Burlington Boulevard, is a red herring that is not supported by the record. It is true that the current intersection is skewed and operates on a split-phase signal; but it is also true that this intersection is currently safe and efficient. None of the alternatives identified in an Environmental Impact Statement issued by the City to study Grandview's proposal discussed improvements to the existing intersection as a way to mitigate the traffic issues resulting from Grandview's proposals. On the other hand, all of Grandview's proposals to the City require physical alterations to the intersection that will increase the skew and result in an intersection that is dangerous for both pedestrians and vehicles. In sum, the City respectfully

requests that this Court affirm the decisions of both the City Council and the trial court to deny Grandview's proposed project

**II. STATEMENT OF ISSUES/ASSIGNMENTS OF ERROR**

**A. Response to Appeal - Statement of Issues.**

RAP 10.3(b) provides that a statement of the issues need not be made if respondent is satisfied with the statement in the appellant's brief. The City does not agree with Assignment of Errors Nos. 3 and 4 presented by Grandview. Grandview's third Assignment of Error reads as follows:

3. Did the trial court err in determining that the intersection improvements proposed by Grandview did not comply with City ordinance, including the comprehensive plan.

Burlington's comprehensive plan is not an ordinance; rather, it is a plan adopted by ordinance. Likewise, several of the standards governing intersection improvements are national standards, adopted by reference. Finally, the determination that the intersection improvements failed to comply with relevant standards was made by the Burlington Planning Commission, and not the trial court. Therefore, the proper reformulation of Grandview's Assignment of Error No. 3 is as follows:

3. Did the trial court err in upholding the determination of the Burlington Planning Commission, that the intersection improvements proposed by Grandview did not comply with City ordinances, adopted standards, and/or with the City's adopted comprehensive plan?

Secondly, Grandview's fourth assignment of error reads as follows:

4. Did the trial court err in finding that the City's approval of the Copeland Lumber project violated Grandview's right to due process?

First, the trial court did not find that the City's approval was a constitutional violation; instead, the trial court held that there was no violation of any constitutional right. Second, Grandview does not argue that the City violated its right of due process; to the contrary, Grandview argues that its right of equal protection was violated.<sup>1</sup> The proper reformulation of Grandview's Assignment of Error No. 4 is as follows:

4. Did the trial court err in finding that the City's approval of the Copeland Lumber project did not violate Grandview's right to equal protection?

**B. City of Burlington's Cross Appeal - Assignments of Error.**

1. Did the trial court err by failing to grant the City's Motion to Dismiss for Grandview's failure to serve a taxpayer for the property at issue in this action as required by the LUPA, RCW 36.70C.040(2)(c)?

2. Did the trial court err by failing to grant the City's Motion to Dismiss for failing to serve a necessary and indispensable party pursuant to CR 19?

**C. Statement of Issues Pertaining to Assignment of Errors on Cross Appeal.**

1. Is real property that benefits from a recorded ingress/egress easement properly characterized as "property at issue," requiring all persons identified as a taxpayer of the benefitted parcel to be served with a LUPA petition in accordance with RCW 36.70C.040(2)(c)?

---

<sup>1</sup> See *Brief of Appellant* at 43, *et. seq.*

2. Is real property upon which a development project is to be built properly characterized as “property at issue,” requiring all persons identified as a taxpayer of the real property to be served with a LUPA petition in accordance with RCW 36.70C.040(2)(c)?

### **III. STATEMENT OF THE CASE**

#### **A. The Parties to This Action**

Grandview North, LLC, (“Grandview”) is a Washington Limited Liability Company. The City of Burlington (“Burlington”) is a Washington municipal corporation.

Burlington Boulevard, LLC, a non-party, is the owner of property adjacent to Grandview’s project, and on which a portion of Grandview’s project is proposed to be constructed. Burlington Boulevard, LLC, (“Burlington Boulevard”) is a Washington Limited Liability Company.<sup>2</sup>

#### **B. The 2001 Project**

The dispute now before this Court had its beginning in April of 1989 when the previous owners of Grandview’s property, Arthur and Thelma Schreifels (the “Schreifels”), and the previous owners of the adjoining property to the south, Gary and Jane Kapphahn (the “Kapphahns”), executed a joint easement for ingress, egress, and utility purposes, and recorded the easement with the Skagit County Auditor. CP 1368; 1952. The recorded easement recites that both the Schreifels and the Kapphahns “desire to use [the] property of the other for ingress,

---

<sup>2</sup> Burlington Boulevard, LLC, was inactivated by the Secretary of State on June 1, 2009.

egress, and for utility purposes. . .” CP 1368. This easement would later be incorporated into Grandview’s development proposal. See, CP 1211.

Next, in April of 2001, the then-owner of the parcel that would subsequently be acquired by Grandview, submitted an application for a binding site plan to subdivide the approximately 3.5 acre parcel. CP 1633; 1622, ¶ 3. Environmental review was conducted on the project, and the City issued a mitigated determination of non-significance (“MDNS”). CP 1634; 1623, ¶ 4. The binding site plan was not recorded and was apparently abandoned. CP 1623 at ¶ 5.<sup>3</sup>

**C. The Grandview Project.**

Grandview submitted the development proposal at issue in this lawsuit with the City on February 13, 2007. CP 477. The proposal is to develop a 3.5-acre site; the development includes a structure to house a business known as “Oil Can Henry’s,” CP 468, which provides oil changes and similar services for automobiles, CP 472; and three additional building pads (or prepared building sites) for buildings to be developed in the future. CP 475-477.

As submitted, the development proposal was conceptual in nature. CP 468, 475 and 476. For instance, it included two alternate layout schemes, with the proposed structures located in entirely different areas on the site under each alternate. *Id.* Common to both layout schemes, however, was the proposed location of the entrance driveway. CP 475,

---

<sup>3</sup> Grandview’s current project, which is the subject of this lawsuit, does not propose to subdivide the 3.5 acre parcel.

476. Entry to the site from the adjoining public street, Burlington Boulevard, was to be accomplished via a driveway constructed on the southern portion of Grandview's property, within the shared access easement that had been mutually granted by the Schreifels and the Kappahns. *Id.*<sup>4</sup> None of the documents submitted by Grandview at that time for review by the Planning Commission showed any encroachments on the neighboring property outside of the easement area, or any alterations to the existing traffic signal on Burlington Boulevard.

Grandview's property is situated across from an existing Costco store, CP 462, and Grandview proposes to situate its entry driveway as far south as possible in an attempt to make use of an existing traffic signal on Burlington Boulevard that already controls access to the Costco store, CP 1211 and 1843, ¶ 6. The access drive to Costco is named "Costco Drive," and the intersection is referred to as the "Costco Drive/Burlington Boulevard intersection." CP 1010. However, Grandview's southern property line together with the area of the ingress/egress easement is north of the existing intersection. *See*, CP 1329. It would therefore be necessary for Grandview to modify the layout of the entrance driveway from that which had been portrayed to the Planning Commission, in order to use the existing traffic signal; and doing so would require Grandview to move the traffic signal, and alter the intersection alignment. *Compare*, CP 475 and CP 1211. The Planning Commission approved one of the

---

<sup>4</sup> The entrance driveway is shown in the lower left hand corner of both preliminary site plans, CP 475 and 476.

conceptual layouts proposed by Grandview – Option “B”<sup>5</sup> – on February 21, 2007. CP 1645–46. The approved layout did not show the traffic signal modifications, or intersection realignment. *Id.* Following Planning Commission approval of Grandview’s conceptual design, Grandview proceeded to refine the design of its project, which required Grandview to prepare a traffic study.<sup>6</sup> CP 1953, line 3–5.

**D. Grandview’s Traffic Studies**

Burlington has adopted specific requirements for the preparation of a traffic study. CP 349. The City’s standards incorporate the Institute of Transportation Engineers Trip Generation Manual, *Id.*, and the Federal Transportation Research Board Highway Capacity Manual. CP 350, § V(B).<sup>7</sup> The Highway Capacity Manual provides that the intersections to be analyzed include “the most distant extent of any intersection-related queue expected to occur during the study period.” HIGHWAY CAPACITY MANUAL, pg. 18-1 (2010). *See* Appendix No. 1.

**1. Burlington’s Level of Service.** Burlington has adopted a Level of Service (“LOS”) of “C” as the overall city standard, with an acceptable LOS of “D” along Burlington Boulevard. BMC 12.28.010(D); *see also*, CP 350, § V(A).

---

<sup>5</sup> Option “B” is depicted in CP 475

<sup>6</sup> The terms “traffic study” and “transportation impact analysis” are synonymous. We use the term “Traffic Study” to refer to that document submitted to the City on June 22, 2007. CP 374. We use the term “Traffic Impact Analysis,” or “TIA” to refer to that document submitted to the City on April 18, 2008. CP 2203, *et. seq.* We understand that Grandview refers to both documents as a “TIA.” *See Brief of Appellant* at pgs. 8 and 14.

<sup>7</sup> A copy of relevant portions of the Highway Capacity Manual are attached as Appendix No. 1.

2. **Traffic signal coordination.** To coordinate its traffic signals with each other, Burlington has implemented an actuated-coordinated system of traffic signals on the South Burlington Boulevard corridor. CP 367. The Highway Capacity Manual as adopted by the City requires intersections to be analyzed as part of a coordinated system. HIGHWAY CAPACITY MANUAL pg. 18-1; Chapter 17 (2010). See Appendix No. 1.

3. **Grandview's initial Traffic Study submittal.** On May 24, 2007, the City's Public Works Director received an email from a consultant hired by Grandview to prepare a traffic study, Rahul Jain of Gibson Traffic Consultants (hereinafter, "Gibson"). CP 462.<sup>8</sup> Gibson proposed seven intersections to analyze in the traffic study. *Id.* Burlington's City Engineer responded by email on May 29, 2007, and advised Gibson that the seven intersections to be studied would be acceptable, "as long as the [Level of Service] does not drop a grade in other locations." (Emphasis added.) CP 394.

Gibson prepared its traffic study, which was delivered to the City on September 18, 2007.<sup>9</sup> CP 374. Upon receipt, it became apparent to City staff that the study contained numerous errors, CP 449, and the City retained Gary Norris, P.E., of Garry Struthers Associates, Inc., to review

---

<sup>8</sup> Because several different staff members of Gibson provided traffic consultation services to Grandview, we refer to them collectively as "Gibson."

<sup>9</sup> There appears to be a disagreement as to the date the Traffic Study was submitted to the City. Grandview contends that the Traffic Study was submitted on June 22, 2007. See, *Brief of Appellant* at p. 8. However, the record supports a conclusion that the traffic study was submitted on September 18, 2007. CP 363, 374.

the Gibson traffic study. Mr. Norris delivered his analysis to the City on October 16, 2007. CP 366–369. In his analysis, Mr. Norris identified several shortcomings of the traffic study, and problems with the protocols used by Gibson in preparing its traffic study. *Id.*

In particular, Mr. Norris stated that Gibson’s “LOS analysis is based on an erroneous approach.” CP 367. Mr. Norris first pointed out that the City of Burlington had long ago implemented an actuated-coordinated system of traffic signals.<sup>10</sup> *Id.* The Gibson study, however, used a “stand alone optimized intersection analysis.” *Id.* Stated another way, Gibson had studied the Burlington Boulevard/Costco Drive signal as though it were in a vacuum, unaffected by and not affecting other traffic signals operating in the vicinity, whereas the approach adopted by the City is to study each signal as operating as part of a coordinated system. Mr. Norris recommended that Gibson obtain the signal timing plans from the Washington State Department of Transportation (“WSDOT,” the state agency that maintains the traffic signals in Burlington, *see* CP 492), and “provide an analysis of [the] coordinated system based on the present WSDOT adopted parameters.” CP 367.

This was not the only shortcoming of the Gibson analysis that Mr. Norris identified. Mr. Norris observed that traffic from Grandview’s project would likely use the Costco development as a shortcut to avoid other nearby traffic signals, exiting the Costco development through an

---

<sup>10</sup> See Section D(2), above.

intersection on a nearby arterial street.<sup>11</sup> CP 366. Mr. Norris described this latter intersection as being critical, because its operation impacts coordination of nearby Interstate 5 entry and exit ramp signals. CP 367.

Further, Mr. Norris pointed out that the trips forecast by Gibson to be produced by the Grandview development, as well as the distribution and assignment of those trips, were questionable and inaccurate. *Id.* Mr. Norris concluded the existing traffic volumes used by Gibson were based on traffic counts conducted before nearby “pipeline” developments had opened their doors, and the more recent volumes should have been reflected in the data used by Gibson. CP 368.

Finally, Mr. Norris observed that the proposed site plan provided no sidewalk on the southern side of the property, thereby forcing pedestrians to cross the driveway to access the site sidewalk. CP 370. In Mr. Norris’ opinion, this condition would “create unnecessary conflicts between pedestrians and vehicles.” *Id.* Mr. Norris ultimately concluded that the traffic study prepared by Gibson did not “present an accurate picture of the existing and future conditions” on South Burlington Boulevard, and the study should be redone. CP 373. Mr. Norris’ analysis of the Gibson Traffic Study was forwarded to Gibson and to Grandview’s engineer on October 18, 2007. CP 356.

After receiving Mr. Norris’ comments on its traffic study, Gibson recommenced work on its study. *See generally*, CP 326–178. Gibson

---

<sup>11</sup> In his comments on the draft EIS, COSTCO’s traffic engineer Andrew Dempsy, P.E., shared this concern. CP 1392–93.

proposed an adjustment to its methods of defining trip generation and assignment – one of the flaws in the traffic study identified by Mr. Norris – and discussed that issue with Mr. Norris. CP 211. However, Gibson did not address the issue of revising its traffic study to incorporate the operation of the Burlington Boulevard/Costco Drive signal into the remainder of the traffic signal system. *Id.* Mr. Norris explained that because Gibson continued to analyze the Burlington Boulevard/Costco Drive intersection in isolation, Gibson had not accurately identified the LOS on the Burlington Boulevard corridor. CP 165. Finally, Mr. Norris reported to the City that he did not believe Gibson even understood the concept of integrating the Burlington Boulevard/Costco Drive intersection into the coordinated signal program that existed on Burlington Boulevard. CP 138.

**E. The Revised Traffic Study**

On February 6, 2008, Grandview presented to the City a revised development proposal. CP 58, 68–70. Gibson’s traffic engineer, Edward Koltonowski, said that he now understood the City’s concerns, and that he would revise the traffic study to correct the deficiencies in the earlier study. CP 58. In particular, Gibson agreed to integrate the Burlington Boulevard/Costco Drive intersection into Burlington’s coordinated signal program. *Id.* In March of 2008, Gibson’s new Traffic Impact Analysis was completed, and on April 18, 2008 that analysis was submitted to the City. CP 1336; 1215, *et. seq.*

Mr. Norris reviewed Gibson’s revised Traffic Impact Analysis and

verified that LOS remained an issue. CP 1011. Specifically, Mr. Norris observed that while Gibson had concluded that “[a]ll the study intersections would operate at [an] acceptable LOS C or better under the existing traffic conditions . . .”, Gibson’s data showed that the Burlington Boulevard/Gilkey Road intersection would operate at LOS D. *Id.* Mr. Norris also pointed out that the LOS in the south bound direction on George Hopper Road would drop from “D” to “F.” CP 1012. Mr. Norris also identified issues with queue capacity. While Gibson’s analysis showed two intersections would operate at an acceptable LOS, the queue length (car stacking) of those same intersections would exceed capacity. CP 1011. Grandview’s own access road was inadequate to accommodate the traffic queues expected to be generated. CP 1012–13. Mr. Norris also observed that all traffic queues had been improperly calculated and should actually be increased by 25%. CP 1012.

Mr. Norris went on to note that the number of vehicle trips generated by the development was still based on improper assumptions. CP 1011. Gibson’s analysis relied upon undocumented estimates of pass-by trips, which were then credited against the anticipated site trip generation, and which lead to an understatement of the anticipated trips generated by the development and resultant LOS impacts of the project. *Id.* To credit pass-by trips, Gibson would have to provide data justifying calculations of those pass-by trips. *Id.* Mr. Norris was not the only traffic engineer to conclude that Gibson had improperly studied the Burlington Boulevard/Costco Drive intersection as an isolated intersection; David

Markley, P.E., of Transportation Solutions, Inc., a consultant engaged by the neighboring Costco development, also reached that conclusion. In fact, at a public hearing before the Planning Commission, Markley stated that just because “an individual signal operates at an adequate level of service does not alone qualify a project to move forward.” CP 1361. Engineer Markley went on to say that other intersections should be included in Gibson’s traffic study, *id.*, and reaffirmed an earlier letter written by Andrew Dempsey, P.E., of his firm that made the same point. *Id.*; *see also*, CP 1391 - 1394.

**F. Grandview’s Permit Application**

On April 15, 2008, Grandview submitted a permit application for its project. CP 1336; 1873 ¶ 4. The City’s Planning Director conducted a threshold environmental review, determined that Grandview’s project may have a significant adverse environmental impact, and on June 19<sup>th</sup> issued a Determination of Significance (“DS”) and Request for Comments on the Scope of an Environmental Impact Statement (“EIS”). CP 1873 ¶ 7; CP 1879–80.

The City issued a draft EIS on April 29, 2009, CP 1452–1570, and a final EIS on January 27, 2011. CP 1373–1394. The City identified the potential impacts resulting from the Grandview proposal as involving safety and traffic impacts including Grandview’s proposal to,

[use] a corner of the property to the south for the curb radius and relocating the driveway for the Bike Shop immediately adjacent to the corner, a potentially dangerous design that requires drivers to

cross the lanes of traffic at the signal if heading west or north. (Emphasis added.)

CP 1375.<sup>12</sup> The final EIS identified several options to mitigate the environmental impacts of Grandview's proposal, including moving the site access northerly (away from the existing intersection). CP 1376.

1. **Encroachment on Burlington Boulevard's Property.** As part of its review, the City noted discrepancies between the conceptual plan as approved by the Planning Commission, and the new application. The City's Engineer testified that the permit drawings showed that while the buildings and other predominant features of Grandview's project would be constructed on real property owned by Grandview, a portion of the entrance driveway and other site infrastructure (including utilities, a catch basin, and sidewalks) would be built on neighboring property owned by Burlington Boulevard and being used as a bike shop (the "Bike Shop" property). CP 1886, ¶¶ 4 & 5. Although Burlington Boulevard and Grandview's predecessor had granted each other a mutual ingress and egress easement, CP 1368,<sup>13</sup> the infrastructure Grandview proposed to build on Burlington Boulevard's property was outside of the easement area; and there was no indication that Grandview had obtained permission from Burlington Boulevard for these encroachments. CP 1886, ¶ 6.

In addition, Grandview's design provided access to Burlington

---

<sup>12</sup> The "Bike Shop" is a business situated on Burlington Boulevard's property. Burlington Boulevard is the successor to the Kappahns, *see*, CP 1367, and its property is sometimes referred to as the "Bike Shop Property." The Bike Shop is a separate entity, and a tenant of Burlington Boulevard. *See*, CP 1368.

<sup>13</sup> *See* discussion of easement above at Section IV(B).

Boulevard's property via a driveway located within the turning radius of the access roadway. The City's Public Works Director viewed this as "dangerous" and "unworkable." CP 1700. Section 12.28.150 of Burlington's Municipal Code grants the city engineer the discretion to prohibit such driveways if the driveway causes a traffic hazard.

Grandview's proposed construction of improvements on Burlington Boulevard's property, without Burlington Boulevard's permission, was an issue raised by the City during two prior lawsuits filed by Grandview over this project. *See*, CP 1699 ¶ 5;<sup>14</sup> 1843 ¶ 4.<sup>15</sup> The record is clear that Burlington Boulevard had not been made aware that Grandview intended to encroach on its property at the time of Grandview's initial submittal to the City, CP 2551, ¶ 5; 2558 ¶ 1, and was opposed to having Grandview's proposed improvements constructed on its property. CP 1368; 1389. Grandview was particularly concerned about loss of use of its easement. CP 1399.

**2. Intersection Alteration and Realignment.** As part of its building permit submittal, Grandview proposed to modify the Burlington Boulevard/Costco Drive intersection by relocating the traffic signals, increasing the skew of an already skewed intersection, and modifying the crosswalks. CP 1329–1331. The access drive that would be situated on Grandview's parcel was significantly offset from Costco Drive. *See* CP 1329. The offset would require traffic exiting from Grandview's site and

---

<sup>14</sup> See discussion below at section IV(H)(1).

<sup>15</sup> See discussion below at section IV(H)(2).

crossing Burlington Boulevard to continue on to Costco Drive to find the correct lane of Costco Drive at an angle, a potentially hazardous layout. CP 1375.

**3. Grandview's "Conceptual Driveway Improvement."**

On September 15, 2010, Grandview submitted to the City a "conceptual driveway improvement," intended to eliminate Grandview's encroachment on Burlington Boulevard's property. CP 2530. This conceptual plan was the first plan presented to the City which showed Grandview's proposed project as being located entirely on Grandview's property and not encroaching on Burlington Boulevard's property. CP 1629-30 ¶ 23. To avoid encroaching on Burlington Boulevard's property, the conceptual plan "squared-off" the entrance driveway's southern curb line; doing so shifted the entrance driveway to the north, onto Grandview's property, and further away from the existing intersection. CP 2531. This skewed the proposed intersection even further. At the same time, moving the entrance driveway away from Burlington Boulevard's property, and installing a curb line along the driveway, deprived Burlington Boulevard of use of its own access easement. See, CP 452; 1399.

Upon review the City determined that the conceptual plan did not comply with the City's Geometric Design Standards, BMC § 12.28.100 *et. seq.*, or with the City's Fire Code. The City's Public Works Director explained that the City's Geometric Design Standards set a minimum curb radius at intersections, to allow for the turning movements of trucks (including safety vehicles, such as fire engines.) CP 1700 ¶ 11. The

City's Fire Chief stated, "I have evaluated the Grandview north site plan[.] I find that fire apparatus access is insufficient throughout the site and does not conform to Fire Code requirements." CP 1412. The City's Assistant Public Works Director concluded that the City's Geometric Design Standards would "not allow Grandview to 'square off' the curb radius under the proposed reconfigured intersection to avoid encroachment on [Burlington Boulevard's] property . . ." CP 1843 ¶ 7. Burlington's Assistant City Engineer also examined the proposed "conceptual" design and concluded that the design was unsafe, stating

I sure wouldn't want to be a pedestrian trying to navigate around this skewed intersection. There are so many issues with this design. Traffic movements will be significantly delayed. The proposed traffic island between oil can and bike shop [sic] will be a maintenance burden from all the vehicles hitting it, plus difficult for pedestrian movements. The right in alignment has no curvature/radius, so it will back up vehicles on the boulevard. The left turn out is problematic, not safe. Lastly, they're only proposing two crosswalks, which will deter a lot of pedestrians.

CP 1411 (emphasis added). City staff raised these problems with the conceptual design with Grandview, and solicited comments from Grandview as to other potential solutions that, if successful, would have provided access to Grandview's project. CP 1692. Grandview made no further submittals to the City, CP 1630 ¶ 24, and there is no further evidence in the record suggesting that Grandview pursued its conceptual design.

**G. Planning Commission Review**

On February 16, 2011, the Burlington Planning Commission met to consider Grandview's revised proposal. CP 1407. The Planning Commission noted that it had approved the building setback on February 21, 2007, but that the plans submitted at that time by Grandview did not show the Costco Drive/Burlington Boulevard intersection. *Id.* The Commission found, in pertinent part, that several alternatives to Grandview's proposal had been identified in the Draft EIS, CP 1408-09, and that Grandview's proposal "includes using a corner of the property to the south." CP 1408. The Commission further found that the proposal would result in the construction of a driveway located within the turning radius of the Bike Shop Property that was unsafe, CP 1411, and that the revised entrance driveway did not allow fire department access. CP 1412. Ultimately, the Planning Commission found that the proposal had two fatal flaws, i.e., unlawful appropriation of the neighbor's property, and an unsafe entry design. CP 1412. The Commission concluded that the proposal would result in probable significant environmental impacts, and denied the development proposal. CP 1413.

**H. First Western Project**

Grandview alleges that the City's grant of a conditional use permit ("CUP") to a nearby project results in an equal protection violation. The CUP application was filed by First Western Development Services to demolish two existing buildings, and redevelop the site with two free-standing retail buildings. CP 1992. Unlike Grandview's proposal, First

Western's development will be interconnected with a neighboring and existing development to its south and with the Costco development that surrounds First Western's development on the north and west. *Id.*; *see also*, CP 1996; 2002. This interconnection with adjoining developments allows First Western to utilize the Costco Drive/Burlington Boulevard signalized intersection in its current, safe configuration without any changes to the intersection. CP 1996, 1998. Unlike Grandview, First Western did not propose to realign and/or further skew the existing intersection, nor alter the current pedestrian facilities of that intersection. *Id.*

**I. Procedural History**

1. **The first lawsuit.** Grandview filed a complaint in the Skagit County Superior Court against the City on July 9, 2008, under LUPA and the federal Civil Rights Act, 42 U.S.C. § 1983, challenging the City's issuance of a Determination of Significance ("DS") under SEPA. CP 1915. The Superior Court, the Hon. Michael Rickert, dismissed the lawsuit as premature on March 16, 2009. CP 1779-80.

2. **The second lawsuit.** On January 7, 2011, Grandview brought a Petition for a Writ of Mandamus. CP 1752-1759. The Skagit County Superior Court, the Hon. Dave Needy, dismissed the petition as premature on the City's motion on February 1, 2011. CP 1620-21.

3. **Appeal to Burlington City Council.** Grandview appealed the Planning Commission's decision to the Burlington City Council, CP 1370-72, which affirmed the Planning Commission's decision on May 12,

2011. CP 1348-1356.

4. **The current lawsuit.** The current lawsuit was brought by Grandview on April 28, 2011, as a LUPA petition and a complaint for damages, including damages under the federal civil rights act for alleged violation of the Equal Protection Clause of the 14<sup>th</sup> Amendment to the U.S. Constitution. CP 3-15. Due to the federal damage claim, the City removed this matter to federal court; the LUPA appeal was then remanded on July 11, 2011 (although the federal court retained jurisdiction over all claims brought under the U.S. Constitution and 42 U.S.C. § 1983, and stayed proceedings until conclusion of the state LUPA appeal). CP 2782. Grandview had failed to name the owners of the Bike Shop property in their LUPA, thus, the City brought a motion to dismiss for failure to serve a necessary and indispensable party on September 2, 2011, CP 2512, prior to the time that Grandview noted an initial hearing pursuant to RCW 36.70C.080. CP 2575. The trial court denied the City's motion to dismiss. CP 2598; 2840-41.

Grandview filed a motion to supplement the administrative record, which is very rarely allowed in LUPA appeals. CP 1929-1934. The City objected to supplementing the record. CP 2601-2616. The trial court granted Grandview's motion to supplement the administrative record, and also allowed the City to take discovery. CP 1946-1948. In its response to interrogatories, Grandview admitted that it is not a member of a "protected" or "suspect" class. CP 2194-2197 (Interrogatory Nos. 2-8) and CP 2200-2201 (Grandview's Responses).

The trial court entered its Findings of Fact, Conclusions of Law Regarding Constitutional Issues, and Order Affirming the Decision of the Burlington City Council on November 8, 2012. CP 2504–2511. Grandview appealed the trial court’s order affirming the decision of the Burlington City Council, CP 2502, and the City cross-appealed the trial court’s denial of the City’s motion to dismiss. CP 2838–2841.

#### IV. ARGUMENT

##### A. Standard of Review – City’s Motion to Dismiss

The determination of whether a court has jurisdiction is a question of law that is reviewed *de novo*. *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 175, 4 P.3d 123 (2000). A trial court’s denial of a motion to dismiss is reviewed for an abuse of discretion. *Quality Rock Prods., Inc. v. Thurston County*, 126 Wn. App. 250, 260, 108 P.3d 805 (2005). A trial court abuses its discretion when its decision is “manifestly unreasonable or based on untenable grounds.” *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 99, 38 P.3d 1040 (2002). A court’s decision is manifestly unreasonable,

if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

*Grandmaster Sheng-Yen Lu*, 110 Wn. App. at 99.

**B. The trial court improperly concluded that it was unnecessary for Burlington Boulevard, the owner of the Bike Shop property, to be a party to this lawsuit.**

LUPA governs the review of land use decisions made by local governments, and specifies procedural requirements which invoke the superior court's jurisdiction. RCW 36.70C.040; *see Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998). Under LUPA, a superior court's jurisdiction is not invoked, and the court may not grant review unless a land use petition is timely served on the necessary parties. RCW 36.70C.040(2); *Overhulse Neighborhood Ass'n v. Thurston County*, 94 Wash. App. 593, 597, 972 P.2d 470 (1999).

In addition to the local jurisdiction and each person who filed an appeal to the local jurisdiction's decision, RCW 36.70C.040 provides that a land use petition must be served on (1) each person identified by name and address in the local jurisdiction's written decision as an applicant for the permit or approval at issue; and (2) each person identified by name and address in the local jurisdiction's written decision as an owner of the property at issue. RCW 36.70C.040 (b)(i) and (ii). That statute goes on to provide that in the event no person is identified in the written decision as the applicant or owner of the property at issue, then the appellant is to serve "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[.]" RCW 36.70C.040 (c).

In this case, the written decision from which Grandview appeals

identifies Grandview as the “applicant,” but does not identify the owner of the “property at issue.” CP 1407–1422. In accordance with RCW 36.70C.040 (c), it is thus necessary to turn to the application for a description of the property, and then identify the owner of that property.

The permit application form submitted by Grandview does not include a property description. CP 1926. However, section 15.16.010 of the Burlington Municipal Code (“BMC”) defines a complete application as consisting of the “elements required by RCW 19.27.095 (State Building Code Act), and Sections 106.3.1 through 106.3.4.2 of the International Building Code (“IBC”).” RCW 19.27.095(2)(a) provides in pertinent part that a building permit application must include “[t]he legal description, or the tax parcel number assigned pursuant to RCW 84.40.160, and the street address if available, and may include any other identification of the construction site by the prime contractor[.]” Section 106 of the IBC generally describes various construction documents, and section 106.3 provides that the building official shall examine the “construction documents.”

Accordingly, Grandview’s application, as defined by Burlington’s municipal code, includes Grandview’s construction documents. Grandview’s construction documents explicitly refer to the easement granted by Burlington Boulevard (the owner of the Bike Shop property) to Grandview’s predecessor in interest (including the Skagit County Auditor’s recording number for the easement), thus identifying Burlington Boulevard as an owner of the “property at issue.”

1. **Grandview's failure to serve Burlington Boulevard**  
**deprived the trial court of jurisdiction under LUPA.** Pursuant to RCW 36.70C.040, it was necessary for Grandview to serve its LUPA petition on Burlington Boulevard in order to establish jurisdiction in the trial court. Burlington Boulevard has a property interest in the mutual ingress/egress easement that Grandview proposes to use solely for its own use, as set forth in the development plans Grandview filed with the City on April 15, 2008. CP 1336. In addition, Burlington Boulevard has a separate property interest in its own private property (property that is not encumbered by the easement), on which Grandview proposed to build infrastructure that would only serve Grandview's project. Because Burlington Boulevard is the owner of a portion of the site on which Grandview's project would be constructed, Grandview's failure to serve Burlington Boulevard with the LUPA petition deprived the trial court of jurisdiction. As such, the only option that was available to the trial court was to dismiss the petition. *Citizens v. Mercer Island*, 106 Wn. App. 461, 467, 24 P.3d 1079 (2001).

Moreover, Grandview has long been well aware of the need to serve Burlington Boulevard with its LUPA petition. Although Grandview relies on a conceptual plan submitted to the City to argue that the issue of encroachment on Burlington Boulevard's property was resolved, Grandview's argument fails for three reasons. First, the conceptual plan is not acceptable because it violated the fire code and Burlington's municipal code, as the layout would prevent fire engines and similar large vehicles

from entering the site. Second, the layout was dangerous for pedestrians. And third, the layout would exclude Burlington Boulevard from using the mutual ingress/egress easement, again depriving Burlington Boulevard of a valuable property right. Each of these fatal flaws was discussed in the Findings and Conclusions of the Planning Commission that Grandview appeals from. CP 1408–09.

This Court can be assured that dismissal is not an extraordinary outcome. 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 involving that decision. *See, Crosby v. Spokane County*, 137 Wn.2d 296, 971 P.2d 32 (1999) (in a writ proceeding, a property owner is a necessary party when the proceeding will affect the owner's interest in his or her property.)

**2. Burlington Boulevard was a necessary and indispensable party under CR 19.** Even if the trial court had jurisdiction, the trial court was compelled to dismiss the action as a consequence of Grandview's failure to join a necessary and indispensable party, pursuant to CR 19. An analysis of CR 19 requires two steps. *In re Johns-Manville Corp.*, 99 Wn.2d 193, 197, 660 P.2d 271 (1983). First, under CR 19(a), it is necessary to determine if a party is needed for a just adjudication. *Id.* Second, if the absent party is needed, but it is not possible to join the party, then it is necessary to determine whether the party is indispensable. *Id.*

Washington courts have consistently held that property owners are necessary and indispensable parties in land use cases. *See, e.g., Nat'l Homeowners Ass'n v. Seattle*, 82 Wn. App. 640, 643-44, 919 P.2d 615 (1996) (Under CR 19, purchaser of property that had obtained land use permits was necessary party); *North Street Ass'n v. Olympia*, 96 Wn.2d 359, 368-69, 635 P.2d 721 (1981) *overruled on other grounds*; *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 815 P.2d 781 (1991) (appeal of county's decision to approve subdivision dismissed where petitioner knew of property owners at all times yet failed to name the property owners in a timely manner). Finally, in a proceeding in which the outcome will affect a landowner's use of his or her property, the landowner is an indispensable party. *Nolan v. Snohomish County*, 59 Wn. App. 876, 880, 802 P.2d 792 (1990), *rev. den.*, 116 Wn.2d 1020 (1991). Such is the case here.

Grandview proposes to do two things that will impact Burlington Boulevard's property: (1) exclude Burlington Boulevard from using the mutual access easement; and (2) build improvements on a portion of Burlington Boulevard's property outside of the easement area without Burlington Boulevard's permission. The City raised this issue in the trial court below, noting that the City could not be compelled to grant a permit to Grandview to utilize Burlington Boulevard's property without Burlington Boulevard first being made a party to the lawsuit. The issue of Burlington Boulevard being deprived of its property is of constitutional magnitude. *See, Veradale Valley Citizens' Planning Comm. v. Board*, 22 Wn. App. 229, 231, 588 P.2d 750 (1978). A party may raise a manifest

error affecting a constitutional right for the first time in the appellate court. RAP 2.5(a); *State v. WWJ Corp.*, 138 Wn.2d 595, 601, 980 P.2d 1257 (1999).

Because Grandview's project would have such dramatic impacts on Burlington Boulevard's property, the trial court's only option was to find that Burlington Boulevard was a necessary and indispensable party. Upon doing so, the trial court was required to enter an order of dismissal. The trial court's decision to deny the City's Motion to Dismiss was outside the range of acceptable choices, and thus manifestly unreasonable, and an abuse of discretion.

C. **The Standard of Review for Land Use Decisions is Established by the Land Use Petition Act.**

Judicial review of land use decisions is governed by LUPA, *Griffin v. Thurston County Bd. of Health*, 165 Wn.2d 50, 54, 196 P.3d 141 (2008), and the standards set out in RCW 36.70C.130(1) are applied to the administrative record that was before the body responsible for the land use decision. *Knight v. City of Yelm*, 173 Wn.2d 325, 337, 267 P.3d 973 (2011). A court is to give substantial deference to both the legal and factual determinations of the legislative body, as the local authority with expertise in land use regulations. *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 415, 225 P.3d 448 (2010). The party who filed a LUPA petition bears the burden of establishing that one of the statutory standards set out in RCW 36.70C.130(1) has been violated. In other words, Grandview has the burden of proof in this appeal.

This Court may reverse the City's final decision only if Grandview proves that one of the following standards has been met:

\* \* \*

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

\* \* \*

(f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1).

1. **Applicable Inquiry for review of claims that a land use decision is an erroneous interpretation of the law.** Review under subsection 36.70C.130(1)(b) presents questions of law which a court is to review *de novo*. *Abbey Rd. Grp. v. Bonney Lake*, 167 Wn.2d 242, 250, 218 P.3d 180 (2009). A reviewing court is to give due deference to the local authority's construction of the law within its expertise. *Id.* To determine whether the City misinterpreted its own Code, this Court must give unambiguous ordinances their plain meaning. *Pasco v. Public Employment Relations Comm'n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992). An unambiguous ordinance is one that is susceptible to only one

reasonable interpretation. *Lakeside Indus, v. Thurston County*, 119 Wn. App. 886, 83 P.3d 433, (2004).

If, on the other hand, an ordinance is ambiguous, the Court must defer to the City's interpretation of its own laws, rules and regulations. RCW 36.70C.130(1)(b) ("allowing for such deference as is due the construction of a law by a local jurisdiction with expertise"); *Dev. Servs. v. Seattle*, 138 Wn.2d 107, 117, 979 P.2d 387, 392 (1999) ("[I]n any doubtful case, the court should give great weight to the contemporaneous construction of an ordinance by the officials charged with its enforcement.").

**2. Applicable Inquiry for review of claims that a land use decision is not supported by substantial evidence.** A challenge under RCW 36.70C.130(1)(c) is examined to determine whether there is a "sufficient quantity of evidence in the record to persuade a reasonable person that the declared premise is true." *Isla Verde v. City of Camas*, 146 Wn.2d 740, 751-52, 49 P.3d 867 (2002). Evidence, and any reasonable inferences drawn therefrom, are viewed in the light most favorable to the party that prevailed in the highest forum exercising fact-finding authority. *Schofield v. Spokane County*, 96 Wn. App. 581, 588, 980 P.2d 277 (1999). In this case, the City has prevailed in all forums to date.

**3. Applicable Inquiry for review of claims that the land use decision is clearly erroneous.** In reviewing a challenge to the decision-makers' application of the law to the facts under the clearly erroneous standard of RCW 36.70C.130(1)(d), "[t]he test is whether the

reviewing court is left with the definite and firm conviction that a mistake has been committed." *Citizens to Preserve Pioneer Park LLC, v. City of Mercer Island*, 106 Wn. App. 461, 473, 24 P.3d 1079 (2001).

**4. Applicable Inquiry for review of claims that the land use decision violates the constitutional rights of the party seeking relief.** Grandview asserts a violation of its right to equal protection, but Grandview does not claim it is a member of a protected or suspect class; instead, Grandview brings a "class of one" claim. *See, Lazy Y Ranch Ltd. v. Behrens*, (9th Cir. 2008). In considering such claims, a court is to apply the rational basis test. *See, e.g., Pennell v. San Jose*, 485 U.S. 1, 14 (1988). The rational basis test is deferential; the City need only demonstrate that its decisions are "rationally related to a legitimate state interest." *Pennell v. San Jose*, 485 U.S. at 16.

**D. There is Substantial Evidence to Conclude that Grandview's Proposal was Unsafe; Would Encroach on Burlington Boulevard's Property; and Would Result in an Impermissible Decrease in LOS.**

The precise question before this Court is whether there was substantial evidence before the Burlington Planning Commission and City Council to support any one of three of the City's conclusions, to wit: (1) that Grandview's proposal would result in an intersection design that was unsafe and violated the City's ordinances; and/or (2) that Grandview's proposal would impermissibly encroach on Burlington Boulevard's property; and/or (3) that Grandview's proposal would result in an impermissible decrease in the LOS of Burlington's streets. In fact, the

record demonstrates that there is substantial evidence to support all three of these conclusions.

1. **Grandview's proposal would result in an intersection design that was unsafe.** The evidence before the City was clear and uncontroverted that the intersection design was unsafe. Grandview's design proposes to provide access to Burlington Boulevard's property via a driveway located within the turning radius of the access roadway. BMC § 12.28.150 provides that driveways within 150 feet of an intersection may be prohibited if there are potential traffic hazards, with the determination of the extent of such a traffic hazard left to the sole discretion of the city engineer. Here, the city engineer has concluded that the proposed design is "dangerous and unworkable." CP 1700. There is nothing in the record to suggest otherwise. Grandview has not even attempted to dispute this conclusion. The Court is not presented here with a question of evaluating two competing views to determine if there is substantial evidence to support the City's conclusion that Grandview's intersection designs are unsafe; to the contrary, there is nothing in this record to support an argument that Grandview's intersection design will be safe – no evaluation of pedestrian movements, no analysis of vehicle movements, no engineer's opinion, no evidence of any type.

Moreover, this was not the only safety concern identified. Based on its design, Grandview would be required to omit a sidewalk on its southern property line, forcing pedestrians to cross at the skewed signal. As the City's traffic consultant, Gary Norris, observed that the proposed

design would “create unnecessary conflicts between pedestrians and vehicles.” CP 370. In such a conflict, the pedestrian will always lose. In addition, and as discussed in the Final EIS, Grandview’s design would result in an offset intersection that would be difficult for motorists to navigate as they attempted to cross Burlington Boulevard onto Costco Drive.

The record is devoid of any evidence to refute these conclusions, and the City properly concluded that Grandview’s design was unsafe.

**2. Grandview’s proposal encroaches on Burlington**

**Boulevard’s property.** In its brief to this Court, Grandview admits that its initial design encroaches on Burlington Boulevard’s property. *See, Brief of Appellant* at 21. Grandview goes on to rely on the “conceptual” intersection design that it gave to the City at a later date, but that it failed to pursue during the review process. And there were good reasons to abandon that design, in light of the fact that it would prevent fire apparatus from entering Grandview’s site, and would thus violate the state fire code,<sup>16</sup> as well as the geometric design standards set out in Burlington’s municipal code. *See*, BMC § 12.28.150.

The record clearly reflects Grandview’s dilemma: it must choose between relying on its initial design that impermissibly encroaches on Burlington Boulevard’s property (CP 1210), or relying on the conceptual design that it subsequently abandoned, which does not permit necessary

---

<sup>16</sup> In accordance with RCW 19.27.031(3), the City of Burlington has adopted the 2009 edition of the International Fire Code. *See* BMC § 15.08.010.

access by fire apparatus and violates the City's design standards. (CP 2530) The City considered both of these options. CP 1407 - 08. There are no other options available in this record, and there was substantial evidence before the City requiring denial of Grandview's proposal.

3. **Grandview's proposal would result in an impermissible decrease in the LOS on Burlington's streets.** Grandview takes a maverick approach to reading its own Traffic Impact Analysis, ignoring declines in service that its own consultant tabulated. The City's traffic consultant reviewed Grandview's traffic analysis and pointed out that while Grandview's consultant (Gibson) stated that all intersections would operate at an acceptable level of service, in fact Gibson's data showed that the Burlington Boulevard/Gilkey Road intersection would operate at LOS D, and that the LOS in the south bound direction on George Hopper Road would drop from "D" to "F." This decline in the LOS violates the City's ordinances, as well as the City's comprehensive planning policies. In addition, Mr. Norris noted that while Grandview's consultant believed that two intersections would operate at an acceptable LOS, the queue length of those intersections would exceed capacity, leading ultimately to a decreased LOS. And Grandview's own roadway was inadequate to accommodate expected queue lengths. What is more, Mr. Norris pointed out that Grandview's analysis was based upon improper assumptions, and did not even reflect reality – in reality, queue lengths and LOS would be worse. A second, independent traffic engineer, David Markley, P.E., concurred with Mr. Norris' observations. Again, there is nothing in this

record to suggest that Mr. Norris was in error.

The evidence before the City was compelling, and unchallenged. Grandview's design was unsafe, would encroach on Burlington Boulevard's property, and would result in environmental impacts by impermissibly decreasing traffic LOS.

**E. The City Correctly Interpreted and Applied the Law.**

In contending that the City erroneously interpreted or applied the law, Grandview has taken on two very high burdens under LUPA. First the Court must defer to the Planning Commission's - not Grandview's - interpretation of the law. *See supra* Section V(C)(1). Second, ordinances must be construed to effectuate their legislative intent. *Milestone Homes, Inc. v. Bonney Lake*, 145 Wn. App. 118, 126, 186 P.3d 357 (2008); see also *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 472, 61 P.3d 1141 (2002) ("Courts must reasonably construe ordinances with reference to their purpose.").

Finally, the City's final decision cannot be reversed unless Grandview proves the City clearly erred in applying the law to the facts presented. RCW 36.70C.130(1)(d). The Court may overturn the City only if it has a "definite and firm conviction that a mistake has been made." *Citizens to Preserve Pioneer Park*, 106 Wn. App. at 473.

In this case, Grandview mistakenly argues that the City has misapplied, or ignored, BMC § 12.28.010(D), the City's Level of Service Standards. Those standards unambiguously provide that,

D. The city of Burlington comprehensive transportation plan has adopted level of service “C” for all streets except Burlington Boulevard, for which a level of service “D” is adopted. If a traffic study meeting the specifications of the city engineer is prepared that demonstrates that the development causes the level of service to decline below the adopted standards, then transportation improvements or strategies to accommodate the impacts of development are required to be made concurrent with the development, or the development permit application shall be denied. (Emphasis added.)

Grandview’s revised traffic impact analysis did not meet the specifications of the city engineer, as it understated the traffic impacts resulting from Grandview’s project. In particular, Grandview did not submit any evidence to the City in support of its calculation of pass-by trips, the result being that the number of vehicle trips attributed by Grandview to its development was artificially low. CP 1005. At the same time, Grandview ignored the limitations on queue lengths, which also contribute to a decline in the LOS. CP 1012. Even taking into account these traffic study deficiencies, Grandview’s study still shows a decline in the LOS from “D” to “F” in the south bound direction on George Hopper Road. Id. BMC § 12.28.010(D) establishes the LOS for this roadway as “C.” The ordinance is unambiguous, as is the conclusion that Grandview’s project would violate that ordinance.

**F. The Trial Court Properly Held That Petitioner’s Constitutional Rights Had Not Been Violated.**

Under the LUPA, an alleged constitutional violation presents a question of law that the Court reviews *de novo*. *Abbey Road v. Bonney*

*Lake*, 167 Wn.2d 242, 249, 218 P.3d 180 (2009); *Girton v. Seattle*, 97 Wn. App. 360, 363, 983 P.2d 1135 (1999).

1. **The City continues to object to the trial court's order allowing supplementation of the Administrative Record.** It is undisputed that nothing in the administrative record before the Planning Commission or City Council would support a claim for violation of a constitutional right against the City. So, at the last minute before its LUPA brief was due in the trial court, Grandview filed a motion to supplement the record with documents related to the City's review and approval of an unrelated development project filed by a different company, First Western, *i.e.*, the Copeland Lumber site. CP 1929–1945. Grandview wanted to compare these separate and distinct projects on the alleged basis that Grandview and First Western were “similarly situated,” yet the City had presumably treated the applicants’ differently, thereby violating Grandview’s right to equal protection. *Id.* The City objected to supplementing the record on the basis that Grandview’s request did not meet any of the standards for supplementing a LUPA record under RCW 36.70C.120(2). CP 2601-2612; 2613-14; 2615-16. The City continues to believe the LUPA record in this matter should not have been supplemented because, *inter alia*, the documents from First Western are neither relevant nor do they meet any of the LUPA standards for supplementation, including the fact that they do not constitute “newly discovered evidence.” *See, e.g., East Fork Hills v. Clark County*, 92. Wn. App. 838, 965 P.2d (1998). The City asks this Court to overturn the trial

court's order allowing supplementation (CP 1946) and, in addition, strike those documents added to the record after-the-fact regarding First Western.<sup>17</sup>

If the Court agrees that First Western's documents were improperly added to the record, then Grandview's equal protection claim is completely unsupported and should be denied as a matter of law. Thus, the Court need not consider the City's remaining arguments with regard to Grandview's constitutional claims, and can skip forward to page 44 of the City's brief.

**2. The Court Should Deny Grandview's Constitutional Arguments For Lack Of Jurisdiction.** Grandview has not presented a constitutional claim over which either the trial court or this Court has jurisdiction. First, Grandview's federal constitutional claims have been removed to federal court and are currently stayed there. Second, Grandview has not presented any authority or argument to support a state constitutional claim. Accordingly, the City respectfully requests that their claim for violation of constitutional rights be denied.

**a. Federal constitutional claim.** In its Complaint, Petitioner alleged that Burlington violated its rights to equal protection under both the state and federal constitutions. CP 5. In light of Petitioner's alleged violation of federal constitutional law, *i.e.*, that the City violated his right to equal protection under the 14<sup>th</sup> Amendment to the U.S. Constitution, the

---

<sup>17</sup> Specifically, the records that the City asks this Court to strike and disregard are numbered CP 1986-2493. The City brings this Motion to Strike pursuant to RAP 17.4(d).

City removed this case to federal court. CP 2688 The federal court remanded the LUPA appeal to Superior Court, but retained jurisdiction of Grandview's federal constitutional claims and stayed all federal proceedings. CP 2782. Thus, because all questions regarding alleged violations of the U.S. Constitution remain under the jurisdiction of the federal court, the City does not believe that either the trial court or this Court has jurisdiction to consider them.

b. **State constitutional claim.** With regard to an alleged state constitutional violation, *i.e.*, that the City violated the privileges and immunities clause under art. 1, § 12 of the Washington State Constitution, Grandview has completely failed to provide any argument or authority in its briefing to support such a claim. For instance, Grandview cites only three cases in support of its constitutional claims, and all three of these cases address federal law only, *i.e.*, the Equal Protection Clause of the 14<sup>th</sup> Amendment of the U.S. Constitution: *Laurel Park v. Tumwater*, 790 F. Supp. 2d 1290 (2011); *Willowbrook v. Olech*, 528 U.S. 562 (2000); and *Squaw Valley v. Goldberg*, 375 F.3d 936, 944 (9th Cir. 2004), *overruled on other grounds by Lingle v. Chevron*, 544 U.S. 528 (2005).<sup>18</sup> None of these cases discuss Washington law. Furthermore, art. 1, § 12 of the Washington Constitution is not analogous to the federal Equal Protection Clause, and a plaintiff must provide an independent constitutional analysis of the state provision. *Grant County Fire Prot. Dist. No. 5 v. Moses Lake*,

---

<sup>18</sup> See, Grandview's Brief, p. 44, *et. seq.*

150 Wn.2d 791, 811, 83 P.3d 419 (2004). Grandview has not briefed – nor addressed in any manner – how the City allegedly violated his rights under art. 1, § 12 of the Washington Constitution. A party that fails to cite to authority on an issue in an opening brief abandons that issue. *Holder v. Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641 (2006). A court should not consider issues abandoned on appeal. *Id.* Accordingly, the City asks the Court not to consider Grandview’s unsupported state constitutional claims.

3. **Grandview’s Constitutional Claims were Properly Denied By the Trial Court on the Merits.** To the extent this Court considers Grandview’s constitutional claims, the City will address Grandview’s arguments under both an equal protection analysis pursuant to the Federal Constitution, and a privileges and immunities analysis pursuant to the Washington Constitution. Grandview did not assign error to any of the Findings of Fact made by the trial court in the Order denying Grandview’s constitutional claims. CP 2494-2501. Thus, those facts are verities on appeal. *Johnson v. Kittitas County*, 103 Wn. App. 212, 216, 11 P.3d 862 (2000).

4. **Federal Equal Protection Analysis.** Grandview argues the City violated Grandview’s right to equal protection under the Fourteenth Amendment by “intentionally treat[ing] Grandview differently from others similarly situated,” referring to First Western’s development

project.<sup>19</sup> Grandview does not claim it is a member of a protected or suspect class. CP 2194 – 2197, and 2200 - 2201. Instead, Grandview attempts to proceed forward on what is known as a “class of one” claim. A plaintiff may establish an equal protection claim under a “class of one” theory, but only if the plaintiff proves that he was intentionally and irrationally “singled out” from others who were similarly situated. *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591 (2008). As explained by the Ninth Circuit Court of Appeals, the “class of one” theory is unusual because the plaintiff does not allege that the defendants discriminated against a group with whom he shares characteristics, but rather that the defendants simply harbor animus against the plaintiff in particular and therefore treated the plaintiff arbitrarily. *Lazy Y Ranch v. Behrens*, 546 F.3d 580, 592 (9th Cir. 2008). In considering such evidence, the Court should apply the rational basis test because neither a suspect classification nor a fundamental right is implicated. *See, e.g., Pennell v. San Jose*, 485 U.S. 1, 14 (1988). The rational basis test is deferential; the City need only demonstrate that its decisions are “rationally related to a legitimate state interest.” *Pennell*, 485 U.S. at 16. Although a plaintiff may bring a “class of one” claim, there must be evidence that a public official intentionally treated the plaintiff differently from others similarly situated. *Nurre v. Whitehead*, 580 F.3d 1087, 1098 (9th Cir. 2009). Here, Grandview has not presented any evidence to demonstrate that it is

---

<sup>19</sup> *See, Grandview's Brief*, p. 44.

similarly situated to any other developer. Thus, Grandview cannot meet its burden to establish even a *prima facie* case of a federal equal protection claim.

Grandview tries to rely on the City's approval of the nearby First Western project to anchor its argument that it was treated differently than other developers. In its briefing, Grandview argues that the two projects were virtually identical. But, as the trial court found, Grandview's comparison of its intended project with First Western's project is woefully inaccurate. In making this comparison, Grandview simply ignores how different the two projects are. While Grandview proposes to significantly alter and rebuild the Costco Drive/Burlington Boulevard intersection, thereby resulting in an intersection that is dangerous for both pedestrians and vehicles, First Western proposes to utilize the existing intersection in its current, safe, configuration. While Grandview proposes to build an intersection that does not comply with the City's construction standards as it will limit the entry of emergency vehicles to the site, First Western suffers from no such limitation. The projects are not "similarly situated," but instead vastly different.<sup>20</sup>

Furthermore, the City's interests lie in protecting public safety, and Grandview has submitted only unsafe proposals. As such, the City's decision to deny Grandview's proposal was rationally related to the City's interests. Thus, even if this Court had jurisdiction to consider

---

<sup>20</sup> The differences are laid out with specificity for the Court's convenience at pages 4-5 of the City's Surreply filed in the trial court LUPA matter. CP 2833 -- 2834.

Grandview's federal equal protection claim, the trial court properly held that such claim fails as a matter of law. The City respectfully requests that this decision be upheld on appeal.

**5. Washington State Privileges and Immunities Analysis.**

In considering a privileges and immunities claim under art. I, § 12 of the Washington state constitution, the first step is to determine whether the right claimed is a privilege or immunity. *Madison v. State*, 161 Wn.2d 85, 95, 163 P.3d 757 (2007). There is clearly no "immunity" at issue here, so Grandview must, by process of elimination, be attempting to rely on some type of privilege. "For a violation of art. I, § 12 to occur, the law, or its application, must confer a privilege to a class of citizens." *Grant County Fire Prot. Dist. No. 5 v. Moses Lake*, 150 Wn.2d 791, 812, 83 P.3d 419 (2004). *Grant County* explained that "privileges" are "those fundamental rights which belong to the citizens of the state by reason of [their state] citizenship." *Grant County*, 105 Wn.2d at 813. Although the precise definition of a privilege within the meaning of art. I, § 12 remains unclear (*Madison v. State*, 161 Wn.2d at 95), early decisions defined such privileges to include,

those fundamental rights which belong to the citizens of the state by reason of such citizenship. These terms, as they are used in the constitution of the United States, secure in each state to the citizens of all states the right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law; the rights to the usual remedies to collect debts, and to enforce other personal

rights; and the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from.

*State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902).

As our Supreme Court stated, “[i]f there is no constitutional privilege or immunity at issue, the case is decided.” *Andersen v. King County*, 158 Wn.2d 1, 62, 138 P.3d 963 (2006). Grandview fails to identify what “privilege,” if any, has been violated. Grandview’s failure to identify any privilege that was allegedly violated by the City is fatal. Hence, Grandview’s state constitutional claim was properly denied by the trial court, and the City respectfully requests that such denial be upheld on appeal.

But even if the Court were, *sua sponte*, to identify a privilege for Grandview, Petitioner’s claim still fails. Again, Grandview mistakes First Western as being similarly situated when, in fact, it is not. For the same reasons that Grandview’s federal equal protection claim fails, its claim under art. I, § 12 of the Washington Constitution must also fail: quite simply, as a matter of law, there are significant differences between the projects that compel different results. Specifically, Grandview proposes to alter an existing intersection which would undeniably result in a dangerous facility; whereas First Western proposes to utilize that same existing (currently safe) intersection without altering it. *See*, CP 2833 – 2834.

**G. The City Requests Reasonable Attorney’s Fees and Costs**

Grandview requests fees and costs pursuant to RCW 4.84.370(1).

But this statute provides an award of fees and costs to an applicant only if the applicant prevailed before the local jurisdiction, the trial court, and the court of appeals. Here, Grandview lost before both the Burlington City Council and the trial court. Thus, even if Grandview were to substantially prevail before this Court, its request for fees pursuant to RCW 4.84.370(1) would have to be denied. On the other hand, should the City substantially prevail before this Court, then it hereby requests an award of its reasonable attorney's fees and costs incurred on appeal pursuant to RCW 4.84.370(2). *First Pioneer Trading Co. v. Pierce County*, 146 Wn. App. 606, 191 P.3d 928, *rev. den.*, 165 Wn.2d 1053 (2008). The City also requests an award of fees and costs as the prevailing party pursuant to RAP 18.1.

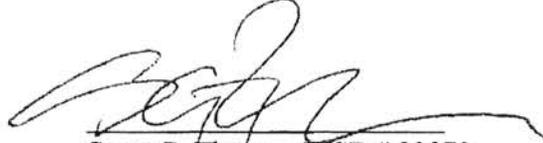
#### V. CONCLUSION

The trial court below determined that it jurisdiction to review Grandview's LUPA challenge, despite that fact that Burlington Boulevard had not been served with the petition, and was therefore unable to protect its property rights. In this respect, the trial court was in error, and the trial court's decision to deny the City's motion to dismiss should be overturned.

At the same time, Grandview cannot meet its burden of proving that the Burlington Planning Commission improperly denied Grandview's land use application, and Grandview's challenge should be dismissed. Costs and fees should be awarded to the City.

DATED this 29th day of May, 2013.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'S. G. Thomas', written over a horizontal line.

Scott G. Thomas, WSB # 23079  
Attorney for Appellant

---

**RESPONDENT'S APPENDIX NO. 1**

---

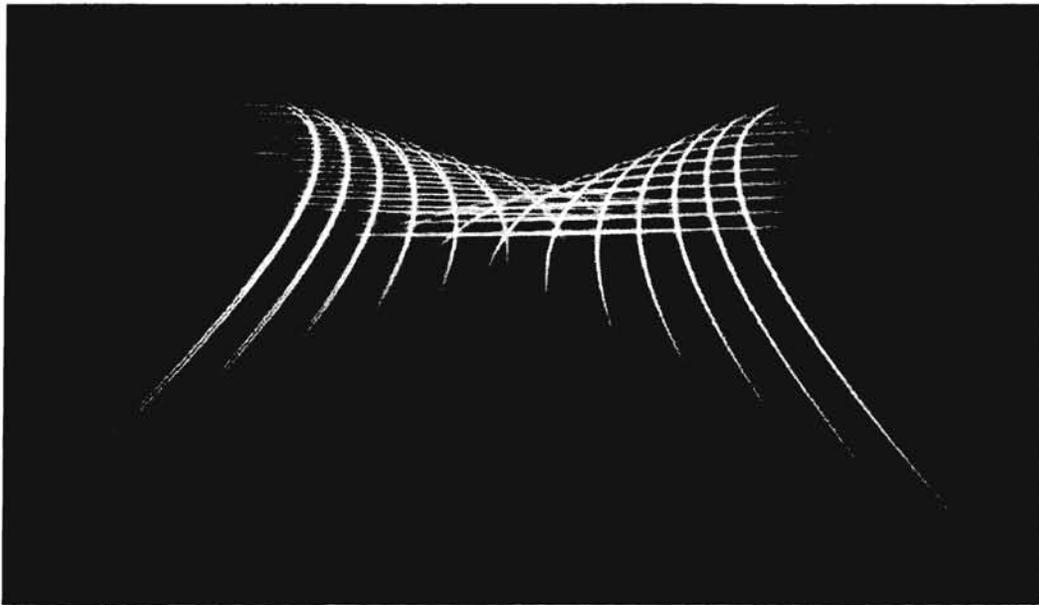
GRANDVIEW NORTH, LLC,  
Appellant/Cross-Respondent,

vs.

CITY OF BURLINGTON  
Respondent/Cross-Appellant.

# HCM2010

HIGHWAY CAPACITY MANUAL



CHAPTER 18  
**SIGNALIZED INTERSECTIONS**



TRANSPORTATION RESEARCH BOARD  
*OF THE NATIONAL ACADEMIES*

WASHINGTON, DC | [WWW.TRB.ORG](http://www.trb.org)

## 1. INTRODUCTION

Chapter 18, *Signalized Intersections*, describes a methodology for evaluating the capacity and quality of service provided to road users traveling through a signalized intersection. However, the methodology is much more than just a tool for evaluating capacity and quality of service. It includes an array of performance measures that describe intersection operation for multiple travel modes. These measures serve as clues for identifying the source of problems and provide insight into the development of effective improvement strategies. The analyst using this methodology is encouraged to consider the full range of measures.

### OVERVIEW OF THE METHODOLOGY

This chapter's methodology applies to three- and four-leg intersections of two streets or highways where the signalization operates in isolation from nearby intersections.

The influence of an upstream signalized intersection on the subject intersection's operation is addressed by input variables that describe platoon structure and the uniformity of arrivals on a cyclic basis. Chapter 17, *Urban Street Segments*, describes a methodology for evaluating an intersection that is part of a coordinated signal system.

### Analysis Boundaries

The intersection analysis boundaries are not defined at a fixed distance for all intersections. Rather, they are dynamic and extend backward from the intersection a sufficient distance to include the operational influence area on each intersection leg. The size of this area is leg-specific and includes the most distant extent of any intersection-related queue expected to occur during the study period. For these reasons, the analysis boundaries should be established for each intersection according to conditions during the analysis period. The influence area should extend at least 250 ft back from the stop line on each intersection leg.

### Analysis Level

Analysis level describes the level of detail used when the methodology is applied. Three levels are recognized:

- Operational,
- Design, and
- Planning and preliminary engineering.

The operational analysis is the most detailed application and requires the most information about traffic, geometric, and signalization conditions. The design analysis also requires detailed information about traffic conditions and the desired level of service (LOS) as well as information about geometric or signalization conditions. The design analysis then seeks to determine reasonable values for the conditions not provided. The planning and preliminary engineering analysis requires only the most fundamental types of information

## 18. Signalized Intersections