

65408-0

65408-0

No. 65408-0

COURT OF APPEALS
DIVISION I OF THE STATE OF WASHINGTON

CITY OF MILL CREEK, a Washington municipal corporation,

Appellant,

v.

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

Respondents.

CITY OF LYNNWOOD'S RESPONSE BRIEF

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I. INTRODUCTION

Appellant City of Mill Creek ("Mill Creek") challenges the Snohomish County Boundary Review Board's ("Board") approval of an annexation by Respondent City of Lynnwood ("Lynnwood").

After years of planning and extensive public outreach, Lynnwood initiated annexation of land located in Lynnwood's municipal urban growth area, adjacent to Lynnwood's current boundaries (the "Annexation"). Snohomish County reviewed the Annexation and determined that it is consistent with the statutory annexation factors and objectives. *RCW 36.93.170; RCW 36.93.180*. The Board agreed, and unanimously approved the Annexation. When Mill Creek appealed to Snohomish County Superior Court, that Court affirmed the Board.

Mill Creek now appeals the Superior Court's decision, challenging the Annexation's approval as to land on the east side of Interstate 5. Mill Creek alleges that (1) for this portion of the Annexation, the Board's decision does not advance the objectives in *RCW 36.93.180*, and (2) the Board violated the Appearance of Fairness Doctrine. Neither claim has merit. The Board's approval of the Annexation in its entirety is consistent with the annexation objectives in *RCW 36.93.180*. Even if the facts cited by Mill Creek would support an Appearance of Fairness claim (and they

do not), Mill Creek waived the claim by not raising the issue when Mill Creek first learned those facts at the Board's hearing.

Therefore, Lynnwood requests that the Court affirm the Superior Court, which upheld the Board's approval of Lynnwood's Annexation.

II. STATEMENT OF ISSUES

1. Whether Mill Creek met its burden to prove that the Board's Decision, that overall Lynnwood's Annexation advances the Objectives of RCW 36.93.180, is not supported by substantial evidence, is clearly erroneous, or is error of law?
(This Issue relates to Mill Creek's Assignments of Error No. 1 through 6.)
2. Whether Mill Creek waived any claim that the Board violated the Appearance of Fairness Doctrine?
(This Issue relates to Mill Creek's Assignment of Error No. 7.)

III. STATEMENT OF THE CASE

A. Description of the City of Lynnwood.

Lynnwood is a code city operating under Title 35A RCW, in south Snohomish County. Lynnwood's current population is approximately 35,500, and its current land area is 7.8 square miles. Record (Sub 21) SC BRB Rec. 267 ("BRB Rec. ___").¹ Lynnwood contains a wide variety of residential and commercial land uses, including thriving business districts,

¹ The Board's Return of Record is listed as Clerk's Papers Sub No. 21, without Clerk's Papers page numbers. Similar to the citation format in Mill Creek's Brief, the Return of Record is cited as "Record (Sub 21) BRB Rec. [page number assigned by Board], abbreviated to "BRB Rec. ___." Mill Creek's Opening Brief ("Op. Brief"), p. 4, n. 2.

such as Alderwood Mall and commercial development surrounding the Mall. BRB Rec. 225, 232. The current Lynnwood boundaries include land on both the east and west sides of I-5. BRB Rec. 224-7.

The Puget Sound Regional Council has designated Lynnwood as a Regional Growth Center. In recent years, consistent with the Regional Growth Center designation, Lynnwood has planned for the redevelopment of its City Center. BRB Rec. 185.

B. Description of the Annexation Area.

The Lynnwood Annexation area consists of 5.7 square miles of unincorporated land in Snohomish County adjacent to the north, east and south current City boundaries. BRB Rec. 171, 224. The Annexation area's population is over 27,700, with 10,193 residences. BRB Rec. 170. Most of the area contains existing urban development, primarily residences, but the area also has some commercial development, such as in the northeast surrounding the 164th Street corridor and on Highway 99. BRB Rec. 183-4, 217, 225, 232, 673.

The Annexation area contains two urban centers planned by Snohomish County, one of which straddles the intersection of I-5 and 164th Street. BRB Rec. 034, 169, 184-5, 360. These urban centers fit well with Lynnwood's City Center and Alderwood Mall regional centers,

and the planned extension of light rail to and through Lynnwood. *Id.*

C. Lynnwood Plans to Annex the Annexation Area, Including Extensive Public Outreach.

Since 1995, the Annexation area has been in Lynnwood's planned annexation area, as established by Lynnwood's first GMA Comprehensive Plan and other planning documents. BRB Rec. 019, 020, 168.

The Annexation area is entirely within Lynnwood's Municipal Urban Growth Area ("MUGA"), and has been since it was established in 2002. BRB Rec. 019, 168, 189, 227. Municipal Urban Growth Areas are areas designated for future annexation by cities during a joint planning process between Snohomish County and the cities in the County. Thus, the Annexation area already has been designated as appropriate for annexation by Lynnwood, by both Lynnwood and Snohomish County. BRB Rec. 168, 189-90.

The portion of the Annexation area that is east of I-5 and north of 405 is also in Mill Creek's MUGA. BRB Rec. 227. But unlike Lynnwood, Mill Creek's comprehensive plan did not include that area in Mill Creek's planned annexation area. Mill Creek's City Council had made a policy decision that Mill Creek did not want to annex the area, and created a legal impediment to Mill Creek's annexation of the area. BRB Rec. 351, 353, 355. It was not until shortly before the Board hearing on

Lynnwood's Annexation that Mill Creek's City Council passed an "emergency" amendment to its comprehensive plan to remove the prohibition on annexing the area.² BRB Rec. 030-31, 361, 363-4.

Consistent with Lynnwood's MUGA, its Comprehensive Plan planned annexation area and policies, and the GMA's directive that urban areas be annexed to cities, Lynnwood initiated the extensive planning process necessary to annex the area. To this end, Lynnwood planned for land uses in the area consistent with County zoning regulations. BRB Rec. 18-9, 168-9, 178-9, 184-5. Lynnwood's Land Use Plan will support the County's urban center program once the Annexation occurs. *Id.*, 38.

Lynnwood contracted for preparation of a report that thoroughly studied financial issues associated with annexing the land. BRB Rec. 256-329. The report addressed economic feasibility, taking into account assumptions regarding taxes and other revenues, levels of services, land development, and capital facilities and staffing needed to effectively serve the Annexation area. The report concludes that the Annexation is feasible and makes economic sense. BRB Rec. 20, 192, 260, 281-2.³

² The fact remains that Mill Creek has undertaken no planning whatsoever for Mill Creek's annexation of the area. BRB Rec. 031, 363. In addition, Mill Creek's comprehensive plan still fails to recognize the existence of the County-designated urban center that straddles the intersection of I-5 and 164th Street. BRB Rec. 34.

³ The report concludes that new revenue from the Annexation area will exceed the costs of serving the area, over the 20-year study period. This time period includes both

Lynnwood reviewed its ability to provide police services to the Annexation area. Lynnwood has an established police department. Lynnwood is able to provide a level of police services that exceeds those provided by the Snohomish County Sheriff's Office. Lynnwood's police department is staffed at a level of two officers for every 1000 residents; Snohomish County's staffing level is less than one officer per 1000 residents. BRB Rec. 194-5. As a result, Lynnwood's police department has response times that are far quicker than that of Snohomish County, and is able to respond to all calls. *Id.*; BRB Rec. 21-23.

Lynnwood has its own fire department. Currently, the Annexation area receives fire service from Snohomish County Fire Protection District No. 1. BRB Rec. 196. Because Lynnwood is a city, not a special purpose district, Lynnwood provides more comprehensive fire services than the District. For example, in addition to fire suppression, Lynnwood provides fire inspection, investigation, code enforcement, and construction plan review for fire and life safety issues. BRB Rec. 23-4, 206.

Lynnwood operates its own water and sewer systems. However, under Lynnwood's proposal, water and sewer service will continue to be provided in the Annexation area by Alderwood Water and Wastewater

the first ten years after annexation, when Lynnwood will be eligible for state sales tax

District, which currently serves that area. BRB Rec. 204.

In addition to thoroughly studying the matter and determining that the Annexation was economically feasible and Lynnwood would provide enhanced services, Lynnwood conducted extensive public outreach, to inform residents and property and business owners of the Annexation's impacts and to learn their concerns and opinions about the Annexation. Since 2008, Lynnwood has mailed quarterly newsletters with Annexation information, such as fiscal analysis updates, reports of recent events, and contact information, to all addresses in Lynnwood's MUGA (and in the existing City). BRB Rec. 221. In September of 2008, Lynnwood mailed a special newsletter, that described the Annexation proposal in detail, summarized the expected impacts, compared current property and utility tax rates in the County and Lynnwood, provided contact information, and announced a series of public meetings. *Id.*

During October and November 2008, Lynnwood hosted twelve public meetings, held throughout the Annexation area. BRB Rec. 221. Over 300 people attended. *Id.* Lynnwood followed up with a second round of five meetings in March 2009, for a total of 500 attendees. BRB Rec. 019, 222. Most citizens attending supported the Annexation, while

credit, and after the sales tax credit eligibility has expired. BRB Rec. 192.

wanting to know the effects. BRB Rec. 019, 221. In fact, residents and business owners in the Annexation area are already part of and identify with the Lynnwood community. BRB Rec. 178. Many have a Lynnwood mailing address, shop at Lynnwood businesses, attend school in Lynnwood, enjoy Lynnwood's park and recreation programs and facilities, and drive through Lynnwood every day. BRB Rec. 178, 217.

On November 24, 2008, the Lynnwood City Council approved the initial Future Land Use Plan Map for the Lynnwood MUGA, including the Annexation area, to establish Comprehensive Plan land use designations for the area. BRB Rec. 238.

On February 9, 2009, the City Council adopted Resolution No. 2009-04, initiating an "election method" annexation under RCW 35A.14.015 et seq. The Resolution states Lynnwood's intent to annex, and authorizes filing a Notice of Intent to Annex with the Snohomish County Boundary Review Board. BRB Rec. 237-46. The Council recognized that benefits of Annexation include "compliance with the intent of the Growth Management Act, localized control of land use and development activity that impacts city service provision, recognition of community connections, and efficiency related to minimizing piece-meal annexations over time." BRB Rec. 237.

D. The Snohomish County Boundary Review Board Approves the Lynnwood Annexation.

On March 6, 2009, Lynnwood filed its Notice of Intent to Annex with the Board. BRB Rec. 167-337. Because other agencies intended to invoke the Board's jurisdiction, Lynnwood invoked the Board's jurisdiction when it filed the Notice of Intent, to keep the matter moving along and obtain the earliest possible hearing date. BRB Rec. 169, 358.

Mill Creek, Snohomish County Fire Protection Districts No. 1 and 7, and Snohomish County also invoked the Board's jurisdiction. The Snohomish County Council determined that Lynnwood's Annexation is generally consistent with the annexation objectives stated in RCW 36.93.180, and that the County did not oppose the annexation. BRB Rec. 679-80.⁴ The County specifically recognized:

b) The county is not a full municipal service provider. The city of Lynnwood is a more capable municipal service provider and can more adequately provide necessary urban services to this area as required by current use and development. . . .

c) RCW 36.70A.110(4) and 36.115.070 both state that it is the Legislature's intent that cities are to be the primary service provider of urban services and that counties are the unit of government most appropriate to provide regional governmental services.

BRB Rec. 688. The County invoked the Board's jurisdiction only to

⁴ County staff found that annexation objectives (1), (2), (3), (4), (7), and (8) in RCW

ensure that an annexation agreement was entered before the close of the Board's hearing. *Id.* at 053, 680, 681. Both Lynnwood and the County approved the annexation agreement before the hearing. *Id.* at 054.

On May 12, 2009, the Board held its hearing on the Lynnwood Annexation. BRB Rec. 13-107. All parties were provided with full opportunity to present their positions. *Id.*; BRB Rec. 670. County staff testified that the County's concerns were resolved and it did not oppose the Annexation. BRB Rec. 054. Likewise, the City of Mukilteo spoke in favor of Lynnwood's Annexation. BRB Rec. 90-92, 379.

On May 19, 2009, the Board deliberated on Lynnwood's Annexation. Pursuant to Chapter 36.93 RCW, the Board is required to address the factors stated in RCW 36.93.170 and the objectives stated in RCW 36.93.180. An annexation must also be consistent with certain provisions of the Growth Management Act. See *RCW 36.93.157*. The Board discussed each requirement extensively, with each Board member voicing his or her opinion. BRB Rec. 132-162. The Board concluded that the Annexation met RCW 36.93.157 (BRB Rec. 132-6), that six of the nine objectives in RCW 36.93.180 were advanced and the other three did not apply (BRB Rec. 136-53), and that the factors in RCW 36.93.170

36.93.180 were furthered by Lynnwood's Annexation, and objectives (5), (6) and (9) did

supported the Annexation (BRB Rec. 153-62). The Board unanimously approved the Annexation. BRB Rec. 162-3.

On June 2, 2009, the Board unanimously adopted its written Decision, approving the Annexation. BRB Rec. 004-11. Consistent with its deliberations, the Decision finds that the Annexation furthers objectives (1), (2), (3), (4), (7) and (8) of RCW 36.93.180, that objectives (5), (6) and (9) do not apply, and the Annexation is consistent with the GMA provisions in RCW 36.93.157. BRB Rec. 006-9. The Decision concludes that "overall, the objectives of RCW 36.93.180 that are most pertinent to the proposal would be furthered by the annexation." BRB Rec. 010.

Mill Creek appealed the Board's Decision to Snohomish County Superior Court.⁵ CP 217-31. Mill Creek did not challenge the Board's Decision that the RCW 36.93.170 factors support the Annexation, or that the Annexation is consistent with the GMA pursuant to RCW 36.93.157. Mill Creek's sole claims were that (1) the Decision to approve the Annexation, east of I-5, is not consistent with the RCW 36.93.180 objectives, and (2) the Board violated the Appearance of Fairness Doctrine. CP 137-8, 220-21. The Superior Court disagreed, ruled in favor

not apply. BRB Rec. 688-9.

⁵ Snohomish County Fire District No. 1 had invoked the Board's jurisdiction, and so was named by Mill Creek as a respondent. However, Fire District No. 1 did not appear in the lawsuit and Mill Creek obtained an order of default dismissing it from the suit,

of Lynnwood on every issue, and dismissed Mill Creek's appeal. CP 12-18. Specifically, the Superior Court held that the Board's approval of Lynnwood's annexation was supported by substantial evidence, and that Mill Creek waived any appearance of fairness allegation. CP 14-17.

Mill Creek now appeals to this Court.

IV. AUTHORITY AND ARGUMENT

A. Mill Creek Can Not Establish That the Board's Decision Violates Any of the Standards for Granting Relief.

RCW 36.93.160 governs judicial review of challenges to Board actions. Judicial review of the Board's decision is based on the evidence contained in the Board's administrative record. *RCW 36.93.160(5)*. Under *RCW 36.93.160(6)*, the Court may affirm the Board's Decision, remand for further proceedings, or reverse "if any substantial rights may have been prejudiced" because the Decision is:

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

RCW 36.93.160(6).

together with other named respondents who did not appear. CP 166.

When addressing a claim that a boundary review board decision does not advance RCW 36.93.180 Objectives, Courts consistently apply the "substantial evidence" standard under RCW 36.93.160(6).⁶ This standard is "essentially the same long-standing test that appellate courts apply to trial court's findings of fact." *Snohomish County v. Hinds*, 61 Wn.App. at 378-9.⁷

To the extent Mill Creek alleges "error of law," the Court reviews issues of law de novo. *Interlake Sporting Ass'n. v. Boundary Rev. Bd.*, 158 Wn.2d 545, 551, 146 P.2d 904 (2006). However, the Court gives substantial weight to an administrative agency's interpretation of statutes that it administers.⁸ Under the "clearly erroneous" standard, a reviewing

⁶ See e.g., *Spokane County Fire Prot. Dist. v. Boundary Rev. Bd.*, 97 Wn.2d 922, 652 P.2d 1356 (1982); *City of Wenatchee v. Boundary Rev. Bd.*, 39 Wn.App. 249, 693 P.2d 135 (1984); *Snohomish County v. Hinds*, 61 Wn.App. 371, 810 P.2d 84 (1991); *King County v. Boundary Rev. Bd.*, 122 Wn.2d 648, 860 P.2d 1024 (1993); *Leer v. Boundary Rev. Bd.*, 91 Wn.App. 117, 957 P.2d 251 (1998).

⁷ Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *King County v. Boundary Rev. Bd.*, 122 Wn.2d at 675; *Leer v. Boundary Rev. Bd.*, 91 Wn.App. at 126. Under this test, reviewing courts do not substitute their judgment for that of the fact-finder. Instead, review "necessarily entails acceptance of the fact-finder's view regarding credibility of witnesses and the weight to give reasonable but competing inferences." *Hilltop Terrace Assn. v. Island County*, 126 Wn.2d 22, 34, 891 P.2d 29 (1995). The Court views the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact-finding authority. *Boehm v. Vancouver*, 111 Wn.App. 711, 716, 47 P.2d 137 (2002).

⁸ *King County Water Dist. No. 54 v. Boundary Rev. Bd.*, 87 Wn.2d 536, 542, 554 P.2d 1060 (1976) ("Courts will not substitute their own judgment for that of an administrative agency acting within the sphere of expertise"); *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 15, 57 P.3d 1156 (2002) ("... deference is appropriate where an administrative agency's construction of statutes is within the agency's field of expertise"). An agency's interpretation is upheld if it is plausible and not contrary to

court may reverse a decision only when the court, on the entire record, is left with the definite and firm conviction that a mistake was made.⁹

Here, Mill Creek argues that the Board's Decision (1) is not supported by substantial evidence, error of law, or clearly erroneous, based on alleged inconsistency with objectives in RCW 36.93.180 arising from the inclusion of land east of I-5 in the Annexation; and (2) made on unlawful procedure, based on alleged violation of the Appearance of Fairness Doctrine. Neither claim has merit.

B. The Board's Decision Approving Lynnwood's Annexation is Consistent with RCW 36.93.170 and RCW 36.93.157.

In deciding whether to approve an annexation, a boundary review board must consider statutory factors listed in RCW 36.93.170.¹⁰ Here, the Board determined the RCW 36.93.170 factors support Lynnwood's Annexation. BRB Rec. 006, 136-160. The record amply supports this conclusion (see e.g., BRB Rec. 183-207), and Mill Creek does not

legislative intent. *Pitts v. DSHS*, 129 Wn.App. 513, 523, 119 P.3d 896 (2005).

⁹ *King County v. Boundary Rev. Bd.*, 122 Wn.2d at 661; *Spokane County Fire Dist. v. Boundary Rev. Bd.*, 27 Wn.App. 491, 497, 618 P.2d 1326 (1980) ("Courts will not substitute their own judgment for that of an administrative agency acting within the sphere of its expertise").

¹⁰ These factors include but are not limited to: "(1) Population and territory; population density; land area and land uses; ... comprehensive plans and development regulations adopted under chapter 36.70A RCW; ... the likelihood of significant growth in the area and in adjacent ... areas during the next ten years; location and most desirable future location of community facilities; (2) [variety of factors related to services]; and (3) The effect of the proposal or alternative on adjacent areas, on mutual economic and social interests, and on the local governmental structure of the county." *RCW 36.93.170*.

challenge the Board's Decision on this point.

In addition, a board's decision on an annexation must be consistent with three specific provisions of the Growth Management Act, Chapter 36.70A RCW ("GMA"). *RCW 36.93.157* ("decisions of a boundary review board ... must be consistent with RCW 36.70A.020, 36.70A.110, and 36.70A.210"). The Board held that Lynnwood's Annexation was consistent with the pertinent GMA statutes. BRB Rec. 008-9, 132-35. Again, Mill Creek does not challenge the Board's Decision in this regard.

Mill Creek presents a common theme that approval of Lynnwood's Annexation somehow thwarts Mill Creek's GMA planning responsibility, or prevents it from implementing its GMA comprehensive plan or "large city" status, thereby prejudicing it. However, *RCW 36.93.157* and *RCW 36.93.170* are the statutes that require the Board to consider GMA provisions, comprehensive planning documents, and effects on adjacent areas. Mill Creek does not claim that the Board's Decision violates either statute, nor did it raise those statutes to the Board. Mill Creek waived any argument that the Board's Decision is inconsistent with the GMA or planning principles, or that it is prejudiced by alleged inability to meet growth targets or planning goals. Moreover, although alleging prejudice, Mill Creek presents no specifics as to how the Annexation east of I-5 will

prevent it from meeting any duty based on its "large city" designation.

See Op. Brief, p. 39-40, citing BRB Rec. 64-73, 748.

C. The Board's Decision Approving Lynnwood's Annexation is Consistent with the Objectives Stated in RCW 36.93.180.

In addition to considering the RCW 36.93.170 factors, a boundary review board decision on an annexation "shall attempt to achieve" the following nine objectives:

- (1) Preservation of natural neighborhoods and communities;
- (2) Use of physical boundaries, including but not limited to bodies of water, highways, and land contours;
- (3) Creation and preservation of logical service areas;
- (4) Prevention of abnormally irregular boundaries;
- (5) Discouragement of multiple incorporations of small cities and encouragement of incorporation of cities in excess of ten thousand population in heavily populated urban areas;
- (6) Dissolution of inactive special purpose districts;
- (7) Adjustment of impractical boundaries;
- (8) Incorporation as cities or towns or annexation to cities or towns of unincorporated areas which are urban in character; and
- (9) Protection of agricultural and rural lands which are designated for long term productive agricultural and resource use by a comprehensive plan adopted by the county legislative authority.

RCW 36.93.180.

The board balances these objectives, and determines whether **overall** the objectives are advanced or harmed by the proposed annexation. *King County v. Boundary Rev. Bd.*, 122 Wn.2d at 673-5; *Leer v. Boundary Rev. Bd.*, 91 Wn.App. at 126 ("there is sufficient evidence in

the record to convince a fair-minded person that, overall, the objectives of RCW 36.93.180 would be furthered rather than hindered by approval of the proposed annexation"). A reviewing Court then determines whether the board's decision in this regard is supported by substantial evidence. *King County*, 122 Wn.2d at 675. A board need not achieve all or even most of the objectives, although a decision advancing none is reversible. *Spokane County Fire Prot. Dist. v. Boundary Rev. Bd.*, 97 Wn.2d 922 at 926; *Snohomish County v. Hinds*, 61 Wn.App. at 380. Thus, the Board does not deny an annexation if only one objective (or even several) is hindered; rather, the Board considers all nine objectives and determines whether overall, the objectives are advanced or hindered.¹¹

Here, Lynnwood and Snohomish County each determined that the Annexation achieved all applicable objectives in RCW 36.93.180. BRB Rec. 209-10, 359-63, 367-71, 679, 688-9. Consistent with Lynnwood's and the County's findings, the Board determined that the Annexation achieves objectives (1), (2), (3), (4), (7), and (8), and that objectives (5), (6) and (9) do not apply. BRB Rec. 006-10, 136-63.

¹¹ Mill Creek glosses over this key element of the application of the RCW 36.93.180 objectives. The Court affirms the Board's approval of an annexation, if substantial evidence supports the Board's decision that overall, the Objectives are advanced. *King County v. Boundary Rev. Bd.*, 122 Wn.2d at 675 ("The question on review is not whether the objectives were advanced or hindered, but whether substantial evidence in the record supports a board's decision regarding achievement of the objectives").

Mill Creek alleges the Board's approval of the Annexation east of I-5 is not consistent with objectives (1), (2), (3), (4) and (7). Op. Brief, p. 2-3.¹² Each of claim of inconsistency stems from the same fact: Mill Creek objects to Lynnwood's annexation of land east of I-5, because Mill Creek would like to preserve that land's unincorporated status until some unspecified future date when Mill Creek might be willing to annex the area. Mill Creek's allegations have no merit; Lynnwood's annexation of land east of I-5 does not hinder any of the statutory annexation objectives and provides no basis for reversing the Board's Decision.¹³ The Board's Decision that overall, Lynnwood's Annexation in its entirety advances the annexation objectives, is supported by substantial evidence.

1. Lynnwood's Annexation Uses Physical Boundaries, Consistent with RCW 36.93.180(2).

Objective (2) states: "use of physical boundaries, including but not limited to bodies of water, highways, and land contours." *RCW 36.93.180(2)*. Washington courts hold that "existing roads" are an appropriate "physical boundary," which advances Objective (2). In

¹² Mill Creek agrees that Objective (8) is advanced.

¹³ Importantly, in reviewing the objectives under RCW 36.93.180, the issue before the Board, and now the Court, was whether overall Lynnwood's Annexation advances the objectives, not whether another annexation proposal that used I-5 as a boundary also would advance the objectives. Mill Creek repeatedly asserts that an annexation using I-5 as the boundary would be better, but this is not the relevant inquiry. This is a fundamental flaw in Mill Creek's position.

Spokane County Fire Prot. Dist., one-half to two-thirds of the annexation area's boundary followed existing roads and a bluff above the Spokane River, while the remainder was based on property lines and the district's current boundary. The Court noted that "physical" means "relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary," so the boundary formed by existing roads and the bluff was based on physical features under RCW 36.93.180(2). *Spokane County Fire Prot. Dist.*, 97 Wn.2d at 927. In contrast, annexation boundaries that follow lot lines are not based on "physical boundaries." *Id.*; *Snohomish County v. Hinds*, 61 Wn.App. at 381 (using lot lines "rather than roads or physical features" did not advance Objective (2)); *King County v. Boundary Rev. Bd.*, 122 Wn.2d at 677.

Here, Lynnwood's Annexation uses physical boundaries almost exclusively. The boundaries are almost entirely made up of existing roads. BRB Rec. 179-80, 203, 224-6. The few very short exceptions occur only where use of roads is not practical. BRB Rec. 209.¹⁴ Substantial evidence supports the Board's Decision that Lynnwood's

¹⁴ In one location, there is no right-of-way that connects 148th Street to I-5. In a second, the boundary surrounds one phase of a subdivision, because that subdivision is tied to an adjacent subdivision by a homeowners association, and the only access route is through the other subdivision. In a third, the City of Mountlake Terrace has already annexed land on the corner of an intersection, so the Annexation boundary is the existing Mountlake Terrace city limits. BRB Rec. 209.

Annexation advances Objective (2), as interpreted and applied by Courts.

Mill Creek asserts that the Larch Way Annexation boundary violates Objective (2), and that because Objective (2) uses the term "highway," I-5 is the only appropriate boundary. Mill Creek attempts to frame the analysis of Objective (2) as one of statutory interpretation, to no avail. Op. Brief, p.17-21. First, Mill Creek's position ignores the existing case law cited above addressing Objective (2), which does not limit "physical boundaries" to interstates or limited access highways.

Second, Mill Creek argues that Objective (2) is unambiguous, so the Court should look to its plain language. However, Mill Creek's position ignores the plain language used in the Objective, which states: "use of physical boundaries, **including but not limited to** bodies of water, highways, and land contours." *RCW 36.93.180(2)(emphasis added)*.¹⁵ Thus, "physical boundaries" under Objective (2) are not limited to interstate or limited access highways; physical boundaries can include other types of roads. The three types of physical boundaries listed in

¹⁵ Courts interpret statutes in manner that gives effect to all language used, with no portion rendered meaningless or superfluous. *Davis v. Dept. of Lic.*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999); *Parents Involved v. Seattle Sch. Dist.*, 149 Wn.2d 660, 685, 72 P.3d 151 (2003). Courts cannot add words or clauses to a statute when the legislature has chosen not to include that language. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2002). Mill Creek's interpretation ignores the phrase "including but not limited to" in Objective (2), renders that phrase meaningless, or otherwise requires the Court to alter or add to the language used by the legislature.

RCW 36.93.180(2) are not exclusive; the legislature clearly used the phrase "including but not limited to" in Objective (2), demonstrating intent that the list of physical boundaries were examples only, and not exclusive. Case law is in accord; any existing road or physical feature is a "physical boundary" under Objective (2). See *Spokane County Fire Prot. Dist.*, 97 Wn.2d at 927 ("existing roads" and a bluff satisfied Objective (2)); *Snohomish County v. Hinds*, 61 Wn.App. at 381 (use of lot lines "rather than roads or physical features" did not advance Objective (2)).

Third, Mill Creek cites dictionary definitions to support its position that by virtue of the term "highways," Objective (2) requires use of I-5 as the Annexation boundary. Op. Brief, p. 18. However, Mill Creek selectively cites those sources. The entire Black's Law Dictionary definition of "highway" is:

1. Broadly, any main route on land, on water, or in the air.
2. A free and public roadway or street that any person may use.

[Cases: Highways [key] 18.] "Every thoroughfare which is used by the public, and is, in the language of the English books, 'common to all the king's subjects,' is a highway, whether it be a carriage-way, a foot-way, or a navigable river. It is, says Lord Holt, the *genus* of all public ways." 3 James Kent, *Commentaries on American Law* *432 (George Comstock ed. 11th ed. 1866).

3. The main public road connecting towns or cities.
4. The entire width between boundaries of every publicly maintained way when part is open to public use for purposes of vehicular traffic.

Black's Law Dictionary (9th ed. 2009). Thus, the dictionary definition of "highway" encompasses far more than just interstate freeways or limited access highways; it includes "a free and public road that any person may use," such as Larch Way.¹⁶ Moreover, Mill Creek attempts to characterize Larch Way as "only a minor collector street in the middle of a residential neighborhood, making it sound like Larch Way is a short street that transects one subdivision. However, the record shows that Larch Way runs almost the entire length of eastern boundary of the Annexation area. It does not divide a single residential neighborhood; rather, it serves many established subdivisions, other residential areas, and commercial areas. BRB Rec. 224-7, 233-4. The Board recognized this fact when it found that Larch Way was an appropriate "physical boundary."¹⁷

Mill Creek cites *City of Richland v. Boundary Review Board*, 100 Wn.2d 864, 676 P.2d 425 (1984) to support its claim that Larch Way is not a physical boundary, and Lynnwood must use I-5 as the Annexation boundary. Op. Brief, p. 21-3. However, *City of Richland* does not even

¹⁶ Even looking at the definitions cited by Mill Creek, they include Larch Way. The maps reveal that Larch Way is a "main route," or a "direct route," on which persons can travel from residential neighborhoods to the commercial area to the north on 164th, or to I-5 to the south. BRB Rec. 224-6. In any event, the Board's finding that Larch Way is an appropriate "physical boundary" is the type of determination that is within the scope of the Board's expertise, for which Courts do not substitute their judgment.

¹⁷ Likewise, Mill Creek argues that under the principle of "noscitur a sociis," the

imply that a street such as Larch Way is not a physical boundary, or that the Larch Way boundary violates Objective (2). In *Richland*, Pasco filed a notice of intent to annex land extending from Pasco's existing boundary to the Columbia River. Two weeks later, Richland filed a notice of intent to annex part of the same area, even though Richland was on the other side of the Columbia River and in another county. Richland even proposed to provide water and sewer service to land on the opposite side of the River by extending water and sewer lines across the River. The boundary review board approved Pasco's annexation. When Richland appealed, the Court concluded that Pasco (which was on the same side of the River, had already planned to serve the entire area, and had demonstrated capability to carry out its plan), was the most logical entity to serve the area. *Richland*, 100 Wn.2d at 871. Thus, while the *Richland* court stated that the Columbia River was a "physical boundary," it did not address the issue of whether a "physical boundary" must be a limited access highway such as I-5, and provided no analysis of Objective (2).

Here, I-5 is not a "natural barrier" to provision of services akin to the Columbia River. Instead, the record establishes that I-5 poses no barrier to provision of fire, police and other services by Lynnwood, and

term "highway" should be interpreted as "significant" physical feature. Op. Brief, p. 19.

Lynnwood is not proposing to provide water and sewer services to the Annexation area (even if I-5 were a barrier). See this Response Brief, Section IV.C.3. The fact that in *Richland*, Pasco's proposal achieved the annexation objectives in no way requires the conclusion that Lynnwood's Annexation does not, that I-5 is the only boundary that meets Objective (2), or that an existing road is not a "physical boundary."

To the contrary, *Richland* supports the conclusion that Lynnwood's Annexation should be approved. In *Richland*, the Court affirmed the board's decision approving Pasco's annexation, stating: "Pasco had drawn up plans to service the entire annexation area for the next several decades and had demonstrated its capability to carry out the plan. Its plans were more ambitious and long term than were Richland's." *Richland*, 100 Wn.2d at 871. Here, Lynnwood is the only entity to have planned at all for annexation of the subject land.¹⁸ Like Pasco, Lynnwood has demonstrated capability to carry out its Annexation and serve the area.¹⁹

However, Larch Way is a significant physical feature. BRB Rec. 224-6.

¹⁸ Mill Creek states that Lynnwood's annexation must be limited to land west of I-5, because Mill Creek's MUGA boundary has been I-5 for six years. However, Lynnwood's County-approved MUGA extends east to Larch Way, and the Annexation area has been part of Lynnwood's planned annexation area since 1995. Until a few weeks before the Board's hearing, Mill Creek's comprehensive plan established its annexation area boundary far east of I-5, creating a legal prohibition (and policy decision) against Mill Creek's annexation of the subject area. BRB Rec. 030-31, 353, 355, 361-4. Even now, Mill Creek has no plan to annex the area.

¹⁹ Mill Creek incorrectly attempts to characterize Lynnwood as being in the same position as Richland (the city that lost before the boundary review board in the *Richland*

Mill Creek's statement that the Board's approval of Larch Way as an Annexation boundary "is precisely what the Supreme Court rejected in the *Richland* case" is misleading and simply incorrect. Op. Brief, p. 26. *Richland* did not even address the issue of whether an existing street is a "physical boundary." While Mill Creek complains that I-5 is its designated MUGA boundary, Larch Way is Lynnwood's designated MUGA boundary, approved by Snohomish County in a multi-jurisdictional planning process. BRB Rec. 019, 168, 189-90, 227.

Mill Creek argues that policy supports using I-5 as the Annexation boundary. Op. Brief, p. 23-5. However, that is not the relevant issue. The pertinent inquiry is whether the Board's Decision that overall, the Annexation furthers the RCW 36.93.180 Objectives, is supported by substantial evidence. Moreover, Lynnwood's Annexation is not a "haphazard extension;" it is logical growth of Lynnwood, consistent with its Larch Way MUGA established through the GMA planning process. Even if the Larch Way boundary remains the permanent boundary between Lynnwood and Mill Creek, this violates no policy. Moreover, in

case), alleging that Lynnwood's Annexation of land on both sides of I-5 is the same as Richland's attempt to annex land on the opposite side of the Columbia River. Op. Brief, p. 13. However, just the opposite is true: it is more accurate to analogize Lynnwood to Pasco (the city that prevailed before the boundary review board in *Richland*), because like Pasco, Lynnwood is the only city that has planned in a thoughtful manner for annexation of the subject land. In fact, Lynnwood is the only city that has planned at all

the Annexation area, Snohomish County has designated the Ash Way urban center, which straddles I-5. BRB Rec. 034, 360. It is logical and practical for the entire urban center be in a single city. The Board is charged with the duty to implement the policy of RCW 36.93.180, and Courts do not interfere in the Board's exercise of its judgment within its sphere of expertise. *Spokane County Fire Dist.*, 27 Wn.App. 491, 497, 618 P.2d 1326 (1980) ("Courts will not substitute their own judgment for that of [the board] acting within the sphere of its expertise"); *King County Water Dist. No. 54*, 87 Wn.2d at 542.

Mill Creek asserts that the Board's rationale was flawed for various reasons, but for the most part this simply repeats their other complaints. Op. Brief, p. 24-6. The Board's statement that "several cities are divided by I-5" is supported by substantial evidence; actually, the record shows that 26 cities in the Puget Sound area straddle I-5 or another limited access highway.²⁰ Mill Creek argues that this does not justify creating the situation in Lynnwood, but there is nothing inherently problematic about a city containing territory on both sides of a freeway. In fact, Lynnwood

for annexation of said land.

²⁰ These include the cities of Mountlake Terrace, Bothell, Everett, Marysville, Arlington, Lynnwood, Shoreline, Seattle, Kirkland, Bellevue, Issaquah, Renton, Tukwila, Mercer Island, SeaTac, Federal Way, North Bend, Des Moines, Auburn, Kent, Lakewood, Tacoma, Sumner, Milton, Puyallup and Fife. BRB Rec. 032, 80, 360. Notably, it is not unusual for a city to contain land on both sides of Interstate 5.

already contains land on both sides of I-5. BRB Rec. 224-7.

Finally, the Board noted that Lynnwood's Annexation proposal, with the Larch Way boundary, will keep Swamp Creek within one jurisdiction to the extent possible. BRB Rec. 083, 138, 140, 142. If I-5 is used as the boundary, more of Swamp Creek be left outside of Lynnwood. Mill Creek argues that a drainage basin is not "discernible," but at least one court has discussed drainage basins in connection with Objective (2). *Snohomish County v. Hinds*, 61 Wn.App. at 381 (upholds board decision to deny annexation proposal, noting in part that the proposed boundaries would split a drainage basin).

Thus, the Board's Decision that Lynnwood's Annexation advances Objective (2) is supported by substantial evidence, and is not clearly erroneous or error of law.

2. Lynnwood's Annexation Preserves Natural Neighborhoods or Communities under RCW 36.93.180(1).

Objective (1) states: "preservation of natural neighborhoods and communities." *RCW 36.93.180(1)*. This Objective refers to "either distinct geographical areas or socially and locationally distinct groups of residents." *King County v. Boundary Rev. Bd.*, 122 Wn.2d at 676.

Mill Creek claims that inclusion of land east of I-5 in Lynnwood's Annexation, and use of Larch Way as a boundary, hinders this objective.

However, Larch Way, a collector arterial, does not bisect any geographically distinct area or socially or locationally distinct group. Larch Way does not bisect any residential subdivisions. BRB Rec. 137-38. Substantial evidence supports the Board's conclusion that Lynnwood's Annexation advances Objective (1); the record does not support Mill Creek's position.²¹

As noted by Mill Creek (Op. Brief, p. 27-8), Objective (1) addresses in part whether annexation area residents identify their community interests with the city proposing the annexation, or some other entity. *Snohomish County v. Hinds*, 61 Wn.App. at 381. Here, evidence demonstrates that the Annexation area residents identify their community interests with Lynnwood. They are, in many ways, already part of the Lynnwood community. They shop at Lynnwood businesses and use Lynnwood's recreational facilities and other services. They attend schools in Lynnwood. Many have a Lynnwood mailing address. The City held several annexation meetings at a facility on Larch Way, and no one in attendance expressed concern that an "established neighborhood" would be detrimentally affected. To the contrary, residents are pleased that

²¹ Even if this Objective was hindered, it would not require that Lynnwood's Annexation be denied or modified. See *Spokane County Fire Pro. Dist. v. Boundary Rev. Bd.*, 97 Wn.2d 922, 927, 652 P.2d 1356 (1982)(by including only half of a geographically distinct plateau, annexation would harm a natural neighborhood, but that did not offset

Lynnwood is interested in including them in the City. BRB Rec. 178, 221.

Mill Creek repeatedly asserts that the Larch Way boundary divides an existing neighborhood or community, but there is no evidence in the record of this, other than Mill Creek's bare allegations. Op. Brief, p. 27-29. The record contains no evidence that Larch Way does in fact divide any subdivision, or other cohesive community group. Board members agreed that Larch Way does not divide any community. BRB Rec. 136-140.²² In fact, if I-5 was used as the boundary, the annexation would split the urban center planned at the intersection of I-5 and 164th Street.

In any situation where an annexation is proposed in an area with urban development, there will be existing development (whether residential or commercial) on either side of the proposed boundary. This does not require the conclusion that Objective (2) is hindered. Mill Creek's position, that Objective (2) is hindered simply because the chosen boundary is a collector street, is based on an unreasonable, illogical interpretation of RCW 36.93.180(1). Mill Creek's interpretation would

other advantages of annexation).

²² During his testimony, Mill Creek's counsel invited the Board to drive Larch Way. BRB Rec. 074-75. At least one Board Member did. After viewing the boundary, the Member stated that the evidence did not support the contention that Larch Way splits a natural neighborhood or community, and the Larch Way boundary "made logical sense given the proposal that's before us. I don't see a dramatic difference between choosing I-5 or 405 in that area. There are collector streets. It's a -- it's not a little neighborhood street like the kind that I live on. It's a large arterial type of street. And I think that based on that, the boundaries that were selected do not have any apparent splitting of natural

thwart annexations of land containing urban development, contrary to the GMA's directive that cities are the most appropriate providers of services for such areas.²³ Consistent with the GMA, Lynnwood's planned annexation area has extended to Larch Way and beyond since 1995, and the Annexation area is in Lynnwood's MUGA.

Further, Objective (1) is advanced when an annexation area preserves a geographically distinct drainage basin. *King County v. Boundary Rev. Bd.*, 122 Wn.2d at 677-8. Here, the Board noted that Lynnwood's Annexation included Swamp Creek to the extent possible, but if I-5 was used as the boundary, the Swamp Creek basin would be under two jurisdictions. BRB Rec. 083, 138, 140, 142. Thus, the Annexation preserves the geographically distinct area containing the Creek.

Mill Creek states that there is no other "major" road in the eastern portion of the Annexation area that is "more prominent" than I-5, and I-5 is the most natural division, but again cites no authority for the proposition that a freeway must be used as the annexation boundary. Op. Brief, at 28-9. In fact, if Mill Creek was correct in its interpretation of Objective (1), then very few annexations could occur, because very few annexations

neighborhoods and communities." BRB Rec. 137.

²³ *RCW 36.70A.110(4)*("In general, cities are the units of local government most appropriate to provide urban governmental services"); *RCW 36.70A.210(1)*("legislature recognizes that counties are regional governments within their boundaries, and cities are

could possibly be bounded by Interstate freeways or limited access highways.²⁴ Mill Creek's interpretation of the statute is simply unreasonable and illogical, which courts seek to avoid.²⁵

Finally, Mill Creek argues that Lynnwood's Annexation harms Objective (1) because an elementary school is near the Larch Way boundary contrary to "planning principles," but provides no authority for the proposition that an annexation violates Objective (1) because a school is near a boundary, and none exists.²⁶

Thus, nothing about Lynnwood's Annexation proposal hinders Objective (1). The Board's determination that Lynnwood's Annexation advances Objective (1) is supported by substantial evidence, and is not clearly erroneous or error of law.

primary providers of urban governmental services within urban growth areas").

²⁴ As with Objective (2), Mill Creek implies that analysis of the Board's application of Objective (1) should be one of statutory interpretation. Op. Brief, p. 29. Again, even if that were the case, Courts will not substitute their judgment for that of the Board acting within its sphere of expertise. *Spokane County Fire Dist.*, 27 Wn.App. 491, 497, 618 P.2d 1326 (1980); *King County Water Dist. No. 54*, 87 Wn.2d at 542.

²⁵ *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 547, 909 P.2d 1303 (1996)(courts do not interpret statutes in a manner that leads to absurd or illogical results); *Seven Gables Corp. v. MGM/UA Ent. Co.*, 106 Wn.2d 1, 6, 721 P.2d 1 (1986)("statutory interpretation that renders an unreasonable or illogical consequence should be avoided").

²⁶ The record indicates that several schools are near existing city limits. BRB 230. More importantly, city annexation boundaries are not driven by the location of an existing school. A city annexation does not change school district boundaries or school service areas, which are set by the school district. BRB Rec. 359.

3. Lynnwood's Annexation Creates and Preserves Logical Services Areas, Consistent with RCW 36.93.180(3).

Objective (3) states: "creation and preservation of logical service areas." *RCW 36.93.180(3)*. Mill Creek claims the Board "first destroy[ed] the existing service area by dividing it in half, and then creat[ed] an illogical service area in its place." *Op. Brief*, p. 30. Mill Creek cites no evidence to support this contention, other than to assert that failure to use I-5 as the boundary creates an illogical service area.

Mill Creek first argues that the Board failed to address Objective (3), because the Board focused on service levels. *Id.* p. 31 ("instead of logical service areas, the Board focused on service *levels*"). This objection is misplaced. One relevant measure of a logical service area is whether the levels of service are increased or maintained. For example, in *King County v. Boundary Review Board*, the Court found that that Objective (3) was furthered, in part because police response times would be superior after the city's annexation. 122 Wn.2d at 676. The Board's Decision is not clearly erroneous or error of law because the Board considered the superior service levels that Lynnwood will provide.

Importantly, the record is replete with evidence supporting the Board's Decision that Lynnwood's Annexation will advance Objective (3). The record demonstrates that Lynnwood's services will exceed those

currently provided, including but not limited to fire, police, land use, and other municipal services. BRB Rec. 021-24, 194-99, 204, 206. Lynnwood's police response times are faster than those of Snohomish County, the current police service provider. BRB Rec. 021-23, 194-95. Lynnwood has already developed a detailed staffing plan and has planned for police beats that fully integrate both sides of I-5 into a coordinated patrol network. BRB Rec. 22, 346, 361. Lynnwood's fire services will exceed the services provided by the current fire districts. BRB Rec. 026, 196-99. Because Lynnwood is a city, it is authorized to provide fire inspection, code enforcement, and other fire-related services that exceed those provided by the fire districts. BRB Rec. 023-24, 206. Lynnwood has planned to add personnel to both its police and fire departments. BRB Rec. 194-9, 205-6, 361-2. Notably, residents of the Annexation area, including the area east of I-5, are not entirely satisfied with existing services; generally they are pleased that Lynnwood is interested in including them in the City. BRB Rec. 221.²⁷

²⁷ Mill Creek implies that Lynnwood's designation as a "core city" with a regional growth center makes Lynnwood's Annexation inappropriate, alleging it creates "urban sprawl." Op. Brief, p. 11-12. The designation of a regional growth center in Lynnwood does not make it inappropriate for Lynnwood to annex land; to the contrary, the regional growth center (and its City Center) provides Lynnwood with ability to plan for and accommodate additional urban development in that center, rather than in the Annexation area's residential zones. This is entirely consistent with the desires of residents, who are unhappy with increased density planned by Snohomish County. BRB Rec. 34, 358-9.

Notwithstanding the established record on Lynnwood's ability to provide superior services, Mill Creek alleges that evidence of Lynnwood's increased service levels is scarce, and "substitutes a future, assumed service capability" for analysis of today's service demands. Op. Brief, p. 31. However, until the Annexation is final, the area will not be in Lynnwood's service area, so any analysis of ability to serve is of "future, assumed service capability." Mill Creek complains that Lynnwood does not plan to "immediately" add new staff, but the record shows that Lynnwood plans to add 47 police employees over three years, and the fire department plans to add 39 members. BRB Rec. 021-2, 028. The transition could include contracts with service providers. BRB Rec. 318.

Next, Mill Creek argues that the Annexation creates an illogical service area because I-5 is a physical barrier to Lynnwood's provision of services east of I-5. Op. Brief, p. 32-33. However, the record amply supports the Board's Decision that use of Larch Way as a boundary creates no impediment to Lynnwood's provision of services, and does not hinder Objective (3). Regarding the claim that I-5 "creates" a barrier to provision of police, fire, and other services, Snohomish County and the Fire District (which currently serve the Annexation area) each have service areas that straddle I-5, and provide service on both sides of I-5. BRB Rec. 228.

Lynnwood's Annexation does not change the status quo in this regard. BRB Rec. 228, 376. There is no evidence that I-5 is a barrier to those jurisdictions' services. At least three access points exist (four, if the I-5 access to 164th is included) that allow travel from one side of I-5 to the other. BRB Rec. 225-6, 362. Lynnwood will operate from the same fire stations as the Fire District, and has planned police beats on both sides of I-5. BRB Rec. 022, 026-28. In sum, the Larch Way boundary does not create any difficulty in serving the area east of I-5. Mill Creek has no evidence to the contrary.²⁸

Mill Creek asserts that use of Larch Way as the boundary could create possible confusion over police, fire and ambulance response, citing *Snohomish County v. Hinds*. Op. Brief, p. 33-4. *Snohomish County v. Hinds* is easily distinguishable from this case. In *Hinds*, Everett proposed to annex an inverted "T" shaped area extending south from the current city boundary, that included the north-south SR 527 highway corridor, with 132nd Street running east-west through the bottom of the "T." *Hinds*, 61 Wn.App. at 374. In holding that substantial evidence supported the

²⁸ Interestingly, Mill Creek asserts that Lynnwood should not be permitted to annex land east of I-5 because I-5 is a barrier to services, and the area's unincorporated status should be preserved so Mill Creek can annex it at some undefined future date. However, Mill Creek has only one means of directly accessing the area from Mill Creek's existing territory (164th Street SE), while Lynnwood has four. BRB Rec. 362. Using Mill Creek's logic, Lynnwood's Annexation fulfills Objective (3) to a greater extent than

Board's conclusion that denial of the annexation would achieve the RCW 36.93.180 Objectives, the Court noted that the Board concluded that the annexation might create possible confusion in jurisdiction for fire and police response." *Hinds*, 61 Wn.App. at 381.

Here, the Annexation area's configuration is nothing like a "long, inverted 'T.'" The mere fact that the area includes land on both sides of I-5 will not confuse service providers; there is no testimony or other evidence supporting that conclusion.²⁹ Again, the current fire, police and ambulance providers (Fire District No. 1 and Snohomish County) serve both sides of I-5, and confusion does not exist.³⁰ BRB Rec. 026. Mill Creek's argument on this point is not supported by the record.

Mill Creek also cites to *City of Richland* to support its contention that Lynnwood's Annexation will hinder Objective (3). Op. Brief, p. 34, n. 87. As discussed above, *Richland* is also easily distinguishable from Lynnwood's Annexation. In *Richland*, Richland proposed to annex land on the opposite side of the Columbia River from its existing territory, and

would an annexation by Mill Creek.

²⁹ To support its "confusion" argument, Mill Creek cites to its own letter and testimony, and to a letter from Fire District No. 7, that makes the bare statement that the I-5 boundary will avoid confusion, without explaining what confusion could occur or how the situation will be different from the current service providers, which serve on both sides of I-5. Op. Brief, p. 33 n. 83.

³⁰ Snohomish County does not object to Lynnwood's Annexation. Fire District No. 1 did not even appear in this lawsuit after being named. If the Larch Way boundary will truly cause confusion or other problems for adjacent fire and police service providers, the

to provide water and sewer service by extending utility lines across the River. The Court concluded that Pasco, which was on the same side of the River, had already planned to serve the entire area and demonstrated ability to carry out its plan, and filed the first Notice of Intent to Annex, was the most logical city to serve the area. *Richland*, 100 Wn.2d at 871. Here, I-5 is not a "natural barrier" to services akin to the Columbia River. Instead, the record establishes that I-5 poses no barrier to Lynnwood's provision of fire, police and other services. Lynnwood is not proposing to provide water and sewer services to the Annexation area (even if I-5 were a barrier to those services).

Mill Creek argues that the Annexation area is within Mill Creek's MUGA, and that "nearly all" parties agreed to a common boundary along I-5. To the extent this is relevant to Objective (3), the Annexation area has been in Lynnwood's planned annexation area since 1995, and has been in Lynnwood's County-approved MUGA since 2002. While Lynnwood's planning staff and planning commission may have indicated that I-5 could be an appropriate MUGA boundary, Lynnwood's City Council (the only body with authority to make the decision) determined that Lynnwood's MUGA boundary should be Larch Way, and Snohomish County agreed.

service providers would have raised the objection.

BRB Rec. 168, 189-90, 227.

Thus, the record supports the conclusion that Lynnwood will provide superior service to that currently available to residents of the Annexation area. Lynnwood is the only city "ready, willing and able" to provide urban municipal services to the area. Nothing about Lynnwood's Annexation proposal hinders Objective (3). The Board's Decision that Lynnwood's Annexation preserves a logical service area and advances Objective (3) is supported by substantial evidence, and is not clearly erroneous or error of law.

4. Lynnwood's Annexation Prevents Abnormally Irregular Boundaries, Consistent with RCW 36.93.180(4).

Objective (4) addresses "prevention of abnormally irregular boundaries." *RCW 36.93.180(4)*. The focus of Objective (4) is not simply whether annexation boundaries are straight or crooked, but whether the proposed annexation causes or prevents unnatural projections or odd, impractical shapes. *King County v. Boundary Review Board*, 122 Wn.2d at 678. In *Spokane County Fire District v. Boundary Rev. Bd.*, the Court affirmed a Board decision approving an annexation, even though the existing boundary was straight and the new boundary was not, noting the straight boundary could only be maintained if the district were to annex land exclusively that ran the full length of the current boundary:

To expect development in this manner would not be reasonable, practical, or beneficial. Annexation areas simply do not manifest themselves in such a manner. Moreover, RCW 36.93.180(4) requires this Board to "attempt to achieve ... [the] prevention of ABNORMALLY irregular boundaries." While the boundary of this annexation does not establish a straight city boundary line, it is not abnormally irregular, but reflects an attempt to achieve a proper annexation boundary utilizing RCW 36.93.180(1), (2), (3), (4) ...

Spokane County Fire District v. Boundary Rev. Bd., 27 Wn.App. at 597; compare *Snohomish County v. Hinds*, 61 Wn.App. at 381 (annexation area with flag pole, inverted "T" shape that almost exclusively avoided residential development in favor of commercial development and vacant land supported a finding that the area was abnormally irregular).

Regarding Objective (4), Mill Creek simply repeats its position that Lynnwood should not be permitted to use Larch Way as the Annexation boundary, and that I-5 should be the boundary. However, the Annexation does not create an "abnormally irregular boundary" or an "impractical shape" simply because it uses Larch Way as the boundary rather than I-5. To the contrary, the Larch Way boundary replaces a currently existing irregular boundary. BRB Rec. 210, 224, 226, 362, 689. It replaces boundaries that currently follow property lines with physical boundaries consisting of streets. BRB Rec. 210; see Objective (2). Even Mill Creek agrees that the Annexation boundary corrects some irregular

boundaries. Op. Brief, p. 35.

Mill Creek attempts to characterize the Larch Way boundary as creating an "irregular" projection, but a cursory review of the maps depicting the Annexation area shows that the Annexation area is nothing like the "inverted T-shaped" annexation area that was held to hinder Objective (4) in *Hinds*. Mill Creek argues that the Larch Way boundary is "irregular" because it does not follow the same boundary line used north of 164th, but Lynnwood explained that the reason it did not include the MUGA territory north of 164th in this Annexation is that that short segment of the MUGA boundary cuts through Martha Lake and a residential subdivision. BRB Rec. 037. The Board's Decision that Lynnwood's Annexation advances Objective (4) is supported by substantial evidence, and is not clearly erroneous or error of law.

5. Lynnwood's Annexation Adjusts Impractical Boundaries, Consistent with RCW 36.93.180(7).

Objective (7) addresses "adjustment of impractical boundaries." *RCW 36.93.180(7)*. Regarding Objective (7), again Mill Creek simply repeats its position that Lynnwood should not be permitted to use Larch Way as the Annexation boundary, and that I-5 should be the boundary. Mill Creek asserts that the Board's Decision that use of Larch Way as the east boundary is more practical than the current boundary "would be

equally true if the Annexation terminated along the Interstate 5 boundary." Op. Brief, p. 37. Again, the pertinent inquiry is not whether an I-5 boundary would advance the annexation objectives, but whether the Board's Decision that the boundary selected by Lynnwood advances the objectives is supported by substantial evidence. Lynnwood's Annexation does not create an impractical boundary simply because it includes land east of I-5. The record demonstrates that the Annexation will "smooth out" some irregular boundaries and replace boundaries that follow lot lines with boundaries that follow existing roads. BRB Rec. 210, 224, 226, 362, 689. The Board's conclusion that the Annexation advances Objective (7) is supported by substantial evidence, and is not clearly erroneous.

6. Lynnwood's Annexation Will Annex an Unincorporated Area that is Urban in Character, Consistent with RCW 36.93.180(8).

Objective (8) addresses "... annexation to cities or towns of unincorporated areas which are urban in character." *RCW 36.93.180(7)*. The Board concluded that Lynnwood's Annexation furthers Objective (8) by annexing land that is already urban in character. BRB Rec. 008, 150-52. Mill Creek does not dispute this ruling.

D. The Board Did Not Violate the Appearance of Fairness Doctrine.

The Appearance of Fairness Doctrine requires a quasi-judicial

hearing body to be fair, free from prejudice, and have the appearance of impartiality. *Narrowview Preservation Ass'n v. City of Tacoma*, 84 Wn.2d 416, 420, 526 P.2d 897 (1974). The Doctrine is based on the importance of public confidence in the system to have hearings that appear to be fairly conducted. *Chrobuck v. Snohomish County*, 78 Wn.2d 858, 870, 480 P.2d 489 (1971). The Doctrine is satisfied "if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing." *Org'n to Preserve Agricultural Lands v. Adams County*, 128 Wn.2d 869, 889, 913 P.2d 793 (1996); *Swift v. Island County*, 87 Wn.2d 348, 361, 552 P.2d 175 (1976)(test is "[w]ould a disinterested person, having been apprised of the totality of a [commissioner's] personal interest in a matter being acted upon, be reasonably justified in thinking that partiality may exist").

The Doctrine was codified with respect to local land use decisions, limiting "ex parte communications" between the decision-maker and opponents or proponents. *RCW 42.36.060*.³¹ As with the judicial doctrine, the statute applies only to "quasi-judicial" decisions, as defined in the statute. *RCW 42.36.010; 42.36.060*.³²

³¹ Mill Creek cites the statute, but does not allege that an improper "ex parte" communication occurred. Op. Brief, p. 12, 42-43. Thus, even if the Court determined this case involves a "land use decision," the statutory doctrine would not apply.

³² Courts use a four-part test to determine if an action is quasi-judicial, which focuses

1. The Superior Court Properly Determined that Mill Creek Waived any Appearance of Fairness Claim.

Under both the statutory and judicial Appearance of Fairness Doctrines, a party wishing to assert that a decision-maker violated the Doctrine must raise the claim at the first possible opportunity, as soon as facts supporting the allegation are known. When an alleged basis for such a claim is known but not raised prior to issuance of a decision, the decision may not be invalidated on appearance of fairness grounds. "A party with such information may not sit back, hoping to achieve a desirable result from the board despite the perceived unfairness, and then use that information to challenge an adverse result." *City of Bellevue v. Boundary Rev. Bd.*, 90 Wn.2d 856, 863, 586 P.2d 470 (1978)(states rule in context of boundary review board proceedings); *RCW 42.36.080*.³³

As explained in the judicial context:

Were the rule otherwise a litigant, notwithstanding his

on whether the action is functionally similar to court proceedings: (1) whether the court could be charged with the duty at issue in the first instance; (2) whether courts have historically performed such duties; (3) whether the action involves application of existing law to facts for the purpose of declaring liability rather than a response to changing conditions through enactment of a new law of prospective application; and (4) whether the action more clearly resembles ordinary business of courts, as opposed to legislators or administrators. *Raynes v. Leavenworth*, 118 Wn.2d 237, 244, 821 P.2d 1204 (1992).

³³ *RCW 42.36.080* states: "anyone seeking to rely on the appearance of fairness doctrine to disqualify a member of a decision-making body from participating in a decision must raise the challenge as soon as the basis for disqualification is made known to the individual. **Where the basis is known or should reasonably have been known prior to the issuance of a decision and is not raised, it may not be relied on to invalidate the decision.**" (Emphasis added).

knowledge of the disqualifying factor, could speculate on the successful outcome of the case and then, having put the court, counsel and the parties to the trouble and expense of the trial, treat any judgment entered as subject to successful attack.

Brauhn v. Brauhn, 10 Wn.App. 592, 597, 518 P.2d 1089 (1974)(claim of judge's bias waived where petitioner waits to raise claim until appeal); see *Choate v. Swanson*, 54 Wn.2d 710, 716, 344 P.2d 502 (1959)(party waived claim that judge was biased by not raising the claim when she first became aware of the facts, as "[s]he undoubtedly would have accepted a favorable judgment. Under such facts, one cannot gamble on a favorable decision and complain when it is adverse").³⁴

Here, Mill Creek alleges that participation of one Board Member, Chairman Sing, in the proceedings violated the Appearance of Fairness. Mill Creek does not claim any improper ex parte communication or financial connection on the part of Chair Sing. Mill Creek bases its claim solely on Chair Sing's disclosure at the start of the Board's hearing that he

³⁴ See also *Hill v. Dept. of Labor and Industries*, 90 Wn.2d 276, 280, 580 P.2d 636 (1978)("Plaintiff, with full knowledge of the alleged irregularity, failed to object at any point in the administrative process. The right to raise the question before the Superior Court has been waived"); *Buckley v. Snapper Power Equip. Co.*, 61 Wn.App. 932, 939, 813 P.2d 125 (1991)(where appellant did not raise issue of improper ex parte contact until a motion for reconsideration, appellant waived the claim); *Williams & Mauseth Ins. Brokers v. Chapple*, 11 Wn.App. 623, 626, 524 P.2d 431 (1974)("litigant who for the first time during trial learns of grounds for disqualification must promptly make his objection known, such as by moving for mistrial. ... He may not, after learning of grounds for disqualification, proceed with the trial until the court rules adversely to him and then claim the judge is disqualified").

lives in Lynnwood, and previously served on the Lynnwood Planning Commission from 1989 until 1999. Op. Brief, p. 12, 42-3.

Even assuming that the "disclosed" facts would support an Appearance of Fairness claim, Mill Creek waived any such claim by failing to raise the allegation immediately after the disclosure. Chair Sing made the statement on the record, at the start of the Board's proceedings. All parties were present at the time. After Chair Sing spoke, no party raised any objection to Chair Sing's participation. During the hearing, all parties, including Mill Creek, were given one-half hour to present their position, including any objections to any procedure or participation of any Board member. BRB Rec. 670. Mill Creek had multiple representatives in the hearing room, including Mill Creek's City Attorney. In fact, Mill Creek's Planning Director and City Attorney each made a presentation to the Board, and neither raised any Appearance of Fairness claim. BRB Rec. 64-79. Mill Creek was given the opportunity to present rebuttal testimony and argument, and Mill Creek's Planning Director and City Attorney each did so. BRB REC. 096-7. Again, neither raised an Appearance of Fairness issue during rebuttal. *Id.*

At the conclusion of the May 12, 2009 hearing, the Board informed all the parties that it would deliberate the matter on May 19,

2009. BRB Rec. 106. At the May 19 meeting, Mill Creek did not raise any Appearance of Fairness allegation, either orally or in writing. BRB Rec. 129-63. At the May 19 meeting, the Board informed the parties that it would adopt its written Decision on June 2. BRB Rec. 163. At the June 2 meeting, Mill Creek did not raise appearance of fairness, in any form.

Thus, at the beginning of the Board's hearing on May 12, 2009, Mill Creek knew of the facts that it claims are grounds for an Appearance of Fairness claim. Mill Creek failed to raise the claim when it gained knowledge of those facts, or at any time before the Board adopted its written Decision, even though Mill Creek had ample opportunity to do so. Therefore, Mill Creek waived the claim.

Mill Creek alleges that the Board "precluded any challenge," because Chair Sing "offered no opportunity" for the parties to challenge his disclosure. Op. Brief, p. 43. However, the Board did nothing to preclude Mill Creek or any other party from raising the issue at any time during the proceedings. Any party could have spoken directly after Chair Sing's statement. Any party could have voiced an objection during its initial presentation. Any party could have raised an objection during its rebuttal. Any party could have objected at the May 19 or June 2 meetings, and any party could have sent a letter to the Board stating an objection at

any time before the May 19 deliberations or June 2 Decision. Mill Creek was represented by its City Attorney throughout the Board's proceedings. Mill Creek's claim that it was somehow prevented from objecting is unsupported by the record and borders on frivolous.

2. Even if Mill Creek Had Not Waived its Appearance of Fairness Allegation, Mill Creek Cannot Establish that the Board Violated the Appearance of Fairness Doctrine.

In the context of administrative proceedings, the Appearance of Fairness Doctrine exists in tension with the presumption that public officials will properly perform their duties. To overcome the presumption, a party invoking the Doctrine must come forth with evidence of actual or potential bias. *NationsCapital Mortgage Corp. v. Dept. of Fin. Inst.*, 133 Wn.App. 723, 759, 137 P.3d 78 (2006)(no appearance of fairness violation for combination of investigative and adjudicative functions, or disqualified officer appointing replacement).³⁵ The party asserting a violation of the Doctrine by an administrative body must produce sufficient evidence demonstrating bias of the decision-maker; mere speculation is not enough.

³⁵ Citing *Org. to Preserve Ag. Lands v. Adams County*, 128 Wn.2d 869, 890, 913 P.2d 793 (1996) (evidence that commissioner received 63 phone calls from a waste management company insufficient to demonstrate actual or potential bias because the commissioner had other matters pending with the company unrelated to the proceeding); *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992) (no appearance of unfairness where presentence report was prepared by an allegedly biased person as there was no evidence of judge's actual or potential bias); *Magula v. Dep't of Labor & Indus.*, 116 Wn.App. 966, 972-73, 69 P.3d 354 (2003)(no appearance of unfairness where 6 electricians are among the 13 voting members deciding whether electrical work must be

Bunko v. Puyallup Civil Service Commission, 95 Wn.App. 495, 503, 975 P.2d 1055 (1999); see *In re Haynes*, 100 Wn.App. 366, 996 P.2d 637 (2000)(applies rule to administrative sentence review board).

For example, in *Magula v. Dep't of Labor & Indus.*, the state electrical board affirmed an administrative decision that only licensed electrical contractors could install certain equipment. Magula contended the board violated appearance of fairness, because six board members were electricians who could benefit from the decision. The Court held there was no appearance of fairness violation, as only electricians have the necessary expertise to be on the board and there was no showing that any board member had a direct financial interest:

The appearance of fairness doctrine applies to administrative tribunals acting in a quasi-judicial capacity. *City of Hoquiam v. Pub. Employment Relations Comm'n*, 97 Wn.2d 481, 488, 646 P.2d 129 (1982). "[T]he presumption is that 'public officers will properly and legally perform their duties until the contrary is shown.' " *Id.* at 489 (quoting *Rosso v. State Pers. Bd.*, 68 Wn.2d 16, 20, 411 P.2d 138 (1966)).

A party asserting an appearance of fairness claim must show evidence of actual or potential bias to support that claim. *Swoboda v. Town of La Conner*, 97 Wn.App. 613, 628, 987 P.2d 103 (1999). The party must produce sufficient evidence demonstrating bias, e.g., personal or pecuniary interest on the part of the decision maker; mere speculation is not enough.

Magula v. Dep't of Labor & Indus., 116 Wn.App. at 972-73.

performed by electricians rather than general contractors).

Mill Creek bases its Appearance of Fairness claim on the mere fact that Chair Sing resides in Lynnwood, and served on the Lynnwood Planning Commission from 1989 until 1999. Mill Creek has no evidence of any actual bias, such as financial interest, in the Annexation. Every party, including Mill Creek, was given full opportunity to present its position. The Board fully deliberated on each annexation objective. Nothing in the proceedings would cause a reasonable person to conclude that any party could not or did not obtain a fair hearing before the Board, simply because Chair Sing resides in Lynnwood and was on Lynnwood's Planning Commission ten years ago.

Further, the Court may only reverse the Board's Decision "if any substantial rights may have been prejudiced." *RCW 36.93.160(6)*. Even if Chair Sing's participation created an Appearance of Fairness issue, Chair Sing is only one Board Member. All five Members unanimously approved the Decision, and all of its components. BRB Rec. 10, 132-63. Because the other four Members reached the same conclusions on the Annexation, Chair Sing's participation did not prejudice any right.

V. CONCLUSION

Lynnwood's Annexation is the result of years of careful planning, for both the economic and policy impacts of the Annexation, and is

consistent with the desires of the residents of the Annexation area. The Annexation is consistent with the GMA's directive that cities are the most logical, appropriate service providers for urban areas. Lynnwood is ready, willing and able to accomplish the Annexation and serve the area. The Board's Decision that overall, Lynnwood's Annexation in its entirety advances the RCW 36.93.180 Objectives is supported by substantial evidence, and is not clearly erroneous or error of law. In fact, the Board determined that the Annexation advances all relevant Objectives. And, Mill Creek waived any Appearance of Fairness claim. Therefore, Lynnwood requests that this Court affirm the Superior Court, which upheld the Board's approval of Lynnwood's Annexation in its entirety.

DATED this 20th day of October, 2010.

INSLEE, BEST, DOEZIE & RYDER, P.S.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of October, 2010 I caused to be served true and correct copies of the foregoing Response Brief of the City of Lynnwood on the court and counsel as follows:

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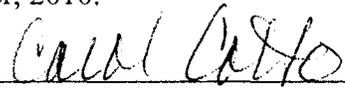
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I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 20th day of October, 2010.



Carol Cotto