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

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

vs.

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

Defendants/Respondents.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The Growth Management Act (the “GMA”):

. . . imposes an affirmative duty upon cities to “give support to,” “foster” and “stimulate” urban growth throughout the jurisdictions’ UGAs within the twenty-year life of their comprehensive plans.

Benaroya et al. v. City of Redmond (Benaroya I), CPSGMHB Case No. 95-3-0072c, Finding of Compliance (March 13, 1997) at 8.

However, in adopting Ordinances 3472 and 3473, the City abruptly stopped all urban residential development in the unincorporated Urban Growth Area (“UGA”) by (i) refusing to extend sewer, a crucial urban service, absent actual annexation of the property into the City, yet (ii) simultaneously imposing mandatory, preconditions that are vague, without measurable standards and impossible for any owner of property in the unincorporated UGA to meet. As a result of the Ordinances, and absent some future action by the City, which the Ordinances neither plan for nor require, no annexations can occur. No owner of residential property in the unincorporated UGA can either annex that property into the City or otherwise obtain sewer service.

Ordinances 3472 and 3473 indefinitely stop urban residential development in the unincorporated UGA with no consideration given to the City’s duty to foster and stimulate urban growth in the UGA or how the City will meet its twenty-year population growth target.

II. REPLY REGARDING STATEMENT OF THE CASE

A. The City's Description of its Sewer System Is Significantly Incomplete.

The City argues that it has an “old sewer system” that needs significant upgrades before it will have the capacity to serve the unincorporated UGA.¹ The City fails to admit that, based on its own 2004 Sewer Plan, the City has since completed a multi-million dollar upgrade to its wastewater treatment plant (WTP) that dramatically increased both the capacity of that part of its sewer system and its ability to meet modern effluent standards.² The City also fails to disclose that it dramatically increased its sewer connection charges to pay for a major expansion of its network of sewer mains and pump stations both within the City and in the unincorporated UGA.³ The purpose and net effect of the City's improvements is to increase sewer capacity and serve the coming urban growth contemplated for the entire UGA, including the unincorporated UGA.⁴

The City also incompletely asserts that the current National Pollution Discharge Elimination System (“NPDES”) permit for its wastewater plant has a capacity limit that is close to being exceeded, and as a result, the City can only allow a modest amount of infill development within the City limits.⁵ This

¹ *City's Response and Cross Appeal Brief*, pages 5-7.

² *See e.g.*, DR 002118-002125.

³ DR 002144-002152, Ordinance 3414 (increased sewer connection charges); *See also* DR – 2153-002240, 2008 Comprehensive Rate Study.

⁴ DR 002119, 002124, 002128 (charts prepared by civil engineer Keith Goldsmith showing a treatment capacity increase in the WTP from 7.6 million gallons per day to 15.0 million gallons per day due to the 2009 improvements to that plant, well above the 9.6 million gallon per day capacity needed to serve the projected 2025 population for the City and its UGA).

⁵ *City's Response and Cross Appeal Brief*, pages 6-7.

capacity limit was based on the design of its wastewater treatment plan before the recently completed upgrades. The City's NPDES permit is due for renewal. At that time, the capacity limits in the permit can and will be modified to reflect the significant increase in capacity the City recently completed.⁶

B. The City Cannot Accommodate the Twenty-Year Population Target Inside the City Limits.

The City also asserts that its UGA is too large and that it does not need urban residential growth in the unincorporated UGA to meet its population targets. The City bases its argument on: (1) an incomplete explanation of the 2005 Buildable Lands Report related to the City's buildable land capacity, and (2) a claim that the City produced a new Buildable Lands Report that the City wishes this Court to effectively take judicial notice of, even though the Growth Board specifically denied the City's request that the Report be added to the Record based on RCW 36.70A.290(4).

- i. The City's Buildable Lands Report recognizes that a substantial amount of urban residential growth must take place in the unincorporated UGA before 2025.*

The population projections contained in the 2005 Buildable Lands Report ("BLR") are based on the UGA as a whole, without distinguishing incorporated from unincorporated areas.⁷ The BLR's review of buildable land availability jointly in the incorporated City limits and the unincorporated UGA was consistent with the GMA's requirement that the City and Skagit County

⁶ See DR 002120.

⁷ DR 000809, Buildable Lands Report (background statement).

coordinate to establish the size and boundaries of the UGA in order to accommodate urban densities and meet population growth targets. RCW 36.70A.110(2).

The BLR assumed that urban residential development can and will occur in the unincorporated UGA before 2025. With the BLR was adopted (and going back to its agreement on the UGA boundaries with the City in 1996), the City was holding itself out as the sewer service provider to the unincorporated UGA based on then Mount Vernon Municipal Code Section 13.06.060.⁸ The City also commissioned its 2003 Urban Growth Area Sewer Service Study (the “2003 Sewer Study”) because the City recognized it was required to provide sewer service to all properties in the UGA.⁹

An additional 2,395 homes, i.e. a population of 6,586, can be accommodated within the City limits.¹⁰ This is substantially less than the amount of additional homes (4,688 units) or population (12,892 people) that the City is required to accommodate by 2025 according to that same report.¹¹ In the BLR, the City found that two adjustments to the amount of buildable area are necessary to ensure the amount of truly buildable land is reasonably accurate: (1) it must be decreased to account for property owners who would be unwilling to develop or subdivide their properties within the twenty-year planning cycle;

⁸ Skagit D06 cited this code language on page 9 of its *Opening Brief*.

⁹ *DR 001337*, 2003 Urban Growth Area Sewer Service Study. This Study reviews ways to serve the full UGA with sewer but does not suggest any phasing or timing of such service.

¹⁰ *DR 000236-237*, Staff Report.

¹¹ *DR 000228*, Staff Report.

(2) it must be decreased to account for significant portions of vacant and undeveloped land, both in the City limits and in the unincorporated UGA that are unbuildable because of wetlands, floodplains and other environmentally sensitive areas.¹² Under all scenarios, the City has insufficient residential development capacity inside its City limits and must allow a substantial amount of additional urban density residential development in the unincorporated UGA between now and 2025. **Ordinances 3472 and 3473 leave the City and property owners with no plan to meet the 2025 growth target.**

The City plays a shell game with the numbers. The City now admits there is not sufficient land inside the City limits alone to accommodate the twenty year growth target.¹³ Even so, the City pleads that its ability to only accommodate as little as one-half of the 2025 population target should somehow be sufficient under RCW 36.70A.110. The City asserts, without evidentiary foundation, that it believes it might be able to accommodate more population within its City limits in part **by relying on future residential growth on commercially zoned land** (land it argues elsewhere is insufficient to meet commercial land needs). Yet, even with these unsubstantiated nuances to the numbers, the City still cannot accommodate the 20-year population target without either extending sewer to the unincorporated UGA (the only way to get urban density residential development) or annexing additional area into the City.

¹² *DR 000816*, Buildable Lands Report.

¹³ *City's Response and Cross Appeal Brief*, pages 8-9.

The City's claim that the UGA is oversized is untimely, highly inappropriate and belies the City's underlying motivation for Ordinances 3472 and 3473. The City agreed to the UGA boundaries with Skagit County in 1996. In both years 2000 and 2006, the City had actually determined it needed to **increase** the UGA.¹⁴ Clearly the political winds have changed since 2006. The use of tactics such as Ordinances 3472 and 3473 as a way to shirk the City's duty to provide urban services and foster urban growth should be rejected.

ii. The City's reference to a newer Buildable Lands Report is improper and would impermissibly derail this Court's review.

The City improperly alludes to a new Buildable Lands Report in trying to address its deficiency regarding the population targets.¹⁵ The Board denied the City's attempt to supplement the record with this second Buildable Lands Report it, which the City did not appeal.¹⁶ The Court's review, just as the Board's, must be bound to the record on which the City relied in adopting Ordinances 3472 and 3473. RCW 36.70A.290(4). Good reason exists for such a rule: the Ordinances were not based on that later Buildable Lands Report, and this Court cannot evaluate the reliability of that Report or all public comment related to it which the record does not contain. Instead, the City should have completed the Work Plan that it had committed to before it adopted permanent regulations in

¹⁴ DR 001382, Commercial and Industrial Lands Needs Analysis. Review processes in 2000 and 2006 called for at least an additional 188 acres to be added to the UGA.

¹⁵ *City's Response and Cross Appeal Brief*, page 9, 21.

¹⁶ Transcript of Board Hearing, page 9. The Board refused to consider the new Report because it was not a basis for adoption of Ordinances 3472 and 3473 and was not part of the official administrative record.

Ordinances 3472 and 3473. The Work Plan had set forth how the City would proceed with its planning for orderly phasing of growth in the UGA, including not just a new Buildable Lands Report, but also an updated sewer analysis, which could reflect both the City's increased sewer capacity as well as the extent to which the unincorporated UGA could be served and at what cost to which areas.¹⁷

C. Information from the City's Commercial and Industrial Land Analysis Shows Ordinances 3472 and 3473 do Not Provide an Orderly Process of Urban Growth.

The City fails to recognize that its own Commercial and Industrial Land Needs Analysis is also based on an assumption that development will occur both within the City limits and in the unincorporated UGA.¹⁸ According to its own analysis, the City needs to allow urban growth in the unincorporated UGA in order to meet its commercial and industrial land targets. However, the City's own analysis necessitates the extension of sewer service into the unincorporated UGA in order for commercial or industrial uses to develop.¹⁹ The unincorporated UGA is not zoned such that all desirable commercial or industrial land is immediately adjacent to the City limits. Instead, to provide sewer service to any such desirable land in the unincorporated UGA, the City also has to serve the intervening residential land, allowing it as well to develop at urban densities. Presumably, that land will also pay for such sewer service. Yet

¹⁷ DR 001666-1667, Work Plan attached to Ordinance 3445.

¹⁸ DR 001380, Commercial and Industrial Land Needs Analysis.

¹⁹ DR 001381.

the policies in Ordinances 3472 bar sewer service in this scenario because it would involve extension of sewer services into the unincorporated UGA or annexation of residential areas. Ordinances 3472 and 3473 are simply unworkable even in scenarios desirable to the City.

D. Skagit D06's Case is Not Specific to Only its Property.

This case is not a property specific challenge; Skagit D06 has challenged Ordinances 3472 and 3473 due to their noncompliance with GMA mandates, not based on the impact of those ordinances on Skagit D06's property. Skagit D06 asserted that the Ordinances had an adverse impact on its property solely to establish that Skagit D06 had standing to bring this action. The City does not claim Skagit D06 lacks standing. The City's attempt to color this case as property specific should be rejected.

Despite the foregoing, Skagit D06 must correct two of the City's property-specific statements.

First, the City claims that Skagit D06's property is subject to some kind of phasing plan that calls for the Skagit D06 property to be developed at the end of the twenty-year planning cycle.²⁰ The City relies only on speculation contained in a Staff Report drafted to support the City's rejection of Skagit D06's request for a sewer service availability letter. The Staff Report merely speculates that Skagit D06's property is at the end of the twenty-year planning cycle, without reference to any actual phasing plan or policies. The Staff Report does not

²⁰ *City's Response and Cross Appeal Brief*, page 15, 32.

reference any phasing plan simply because there is no City plan, ordinance, policy or even informal report that establishes any sort of phasing plan, let alone one that designates the Skagit D06 property as the last to be developed. The only other documentation that the City cites to was its 2003 Sewer Study, which reviewed what would be potentially necessary to serve every portion of the UGA but did not propose any particular phasing plan or hierarchy of service.²¹ Notably, that study was commissioned based on the City's plan to serve the unincorporated UGA with sewer service.²²

Second, the City claims the cost of providing sewer service to Skagit D06 is in excess of \$14 million. This assumes that the most circuitous and expensive sewer service route would be required – a route that essentially circles the entire UGA east of the City. The City ignores existing sewer mains much closer to the Skagit D06 property that could be connected to, for a much lower cost and without such major system upgrades.²³

III. LEGAL ANALYSIS

A. The City's Adoption of Ordinances 3472 and 3473 Violated the GMA's Moratorium Requirements and Limitations.

²¹ *DR 001335 ff.*, 2003 Urban Growth Area Sewer Service Study.

²² *DR 001337.*

²³ In fact, it would be inappropriate to select a particular route for providing sewer service to Skagit D06's property until SEPA review of alternatives had been completed. The City's assumption that one particular route for sewer service is already determined violates its obligation under SEPA to review alternatives. Any challenge by Skagit D06 to such a decision would, of course, occur in a forum other than before this Court or the Growth Board.

The Board's decision that Ordinances 3472 and 3473 do not result in a moratorium was erroneous. Ordinances 3472 and 3473 indefinitely prohibit **urban** residential development in the **Urban** Growth Area. Ordinances 3472 and 3473 operate as a moratorium on otherwise permitted urban residential development.

The GMA, the Skagit County Code, Skagit County Comprehensive Plan policies and City of Mount Vernon Comprehensive Plan policies all designate the UGA as the appropriate location for urban density development, i.e., development with urban services, including sewer service. RCW 36.70A.020(18). However, the net result of application of Ordinances 3472 and 3473 is the following:

- The only residential development allowed in the UGA will be five-acre lots relying on private septic systems. Five-acre lots on septic system is not urban growth with urban services. Moreover, as even the City recognizes, development of the UGA with five acre lots on septic systems will, in many circumstances, preclude future urban development.²⁴
- Based on the City's own analysis, the City will not be able to accommodate the GMA-mandated residential population allocation for year 2025 (the "2025 growth target"). After adoption of Ordinances 3472 and 3473, the City can rely only on infill residential development within City limits to meet its population targets. There is not enough land capacity inside the City to provide the number of housing units required by the City's GMA-mandated 2025 growth target.²⁵

²⁴ As noted previously, the City recognized in its Buildable Lands Report that once property owners have built on their property, at least 30% are likely not to redevelop or subdivide in the future. *DR 000816*.

²⁵ *DR 000816-000819*, Buildable Lands Analysis page 8 and Table 1.3.

- i. *Ordinances 3472 and 3473 do much more than simply condition sewer service on annexation; the Ordinances do not merely phase urban development.*

The Board failed to recognize the full effect of Ordinances 3472 and 3473 when it concluded that the Ordinances simply require annexation as a condition of sewer service. The Ordinances go far beyond merely requiring annexation as a condition of sewer service. Instead, the Ordinances (a) make annexation a prerequisite to service, and (b) make annexation contingent upon factors which are impossible to achieve and factors which are totally beyond a property owner's control and may never occur.

Policy LU-29.1.3(F), in Ordinance 3472, only allows annexation of areas which will not require major upgrades to City services, including sewer service. Since a substantial part of the unincorporated UGA lacks sewer service, the effect of this policy is to prohibit annexation, wholesale, of large portions of the unincorporated UGA.²⁶ Ironically, as noted above, this restriction would equally stop development of commercial and industrial uses, despite the City's rationales.

Policy LU-29.1.3(B), in Ordinance 3472, also acts as an ongoing moratorium on residential annexations by stopping annexations until the City re-designates an un-quantified amount of land for commercial/industrial use. The City has no plan to re-designate any commercial or industrial properties and is not bound to any timeframe or criteria to do so. The owner of

²⁶ DR 001353-1356: maps of proposed sewer service expansions into the unincorporated UGA.

residentially-zoned land in the unincorporated UGA has no ability to address this situation: that owner has no power to rezone its own or other land to commercial or industrial. The net effect is this owner is now prohibited from developing the land for that very development otherwise allowed under the County's zoning. Ordinances 3472 and 3473 stop urban residential development in the unincorporated Urban Growth Area for the indefinite future with no criteria or timeline for relief.

But for Ordinances 3472 and 3473, three types of development could have occurred in the UGA based on Skagit County zoning: (1) urban development with public sewer service (ranging between 3.23-4.54 units per acre), (2) development of one-acre lots if public sewer will be available within six years, and (3) development of five-acre lots with private septic systems.²⁷ Ordinances 3472 and 3473 prohibit development in the UGA under both scenarios (1) and (2). As a result of these Ordinances, no urban growth can occur: **only rural, five-acre lots based on septic can develop despite being in the Urban Growth Area.** This is a moratorium on urban development that is otherwise expressly contemplated under both the County and City Comprehensive Plans and allowed under Skagit County zoning.

The City's re-characterization of Ordinance 3472 to merely provide criteria the City should 'consider' before annexation is inconsistent with the Ordinance's express language: "The City Council **shall not initiate an**

²⁷ *City's Response and Cross-Appeal Brief*, pages 13-14.

annexation unless the following criteria can be met.”²⁸ Compliance with each vague and un-quantified policy is mandatory, barring the City from annexing any property in the unincorporated UGA and putting a total halt on urban residential development otherwise allowed by Skagit County Code.

ii. The City’s adoption of Ordinances 3472 and 3473 as permanent policies and regulations does not change their nature as a moratorium in violation of RCW 36.70A.390.

The Board’s conclusion that there is no moratorium on urban development simply because the City adopted permanent, instead of temporary regulations, is illogical and unsupported by the GMA.²⁹ The Board ruled that a temporary prohibition on development is a moratorium must meet strict procedural and substantive requirements in RCW 36.70A.390, but a comparable permanent prohibition on development is not a moratorium and does not need to meet that same statute. The Board cited no authority for this illogical conclusion.

It is not necessary to label an ordinance as a moratorium for the ordinance to operate as a moratorium and be subject to RCW 36.70A.390.³⁰ The question is whether the Ordinances function as a moratorium, i.e., a prohibition on otherwise permitted development. Any other result would allow local governments to avoid compliance with RCW 36.70A.390 by simply omitting the word “moratorium.”

²⁸ DR 001672, Ordinance 3472 (emphasis added).

²⁹ DR 002248, Final Decision and Order, page 8 of 31.

³⁰ The City’s argument also ignores the obvious fact that Ordinances 3442 and 3445, which were replaced by Ordinances 3472 and 3473, were expressly adopted as moratoria pursuant to RCW 36.70A.390. Changing labels does not change the nature of the ordinance.

iii. *Ordinances 3472 and 3473 constitute a moratorium despite the potential for rural development in the UGA.*

The Board erroneously concluded the Ordinances are not a moratorium because property owners in the unincorporated UGA can still develop their property with five-acre lots on septic systems.³¹ A moratorium exists where a city denies a property owner the ability to submit an application for an otherwise permissible use or activity under the governing zoning even if other uses are not barred. *See e.g. Biggers v. City of Bainbridge*, 162 Wn.2d 683, 169 P.3d 14 (2007). *Biggers* is consistent with the definition of a moratorium as being the “suspension of specific activity.” *Black’s Law Dictionary*, 1031 (8th Ed, 2004). The specific activity that is indefinitely suspended under Ordinances 3472 and 3473 is **urban** residential development in the **Urban** Growth Area.

The City references the growth phasing lottery adopted by the City of Sammamish, which the Board found unlawful. *Master Builders Association of King and Snohomish Counties et al. v. City of Sammamish*, CPSGMHB Case No. 05-3-0041, Final Decision and Order (February 21, 2006). In that case, the City of Sammamish imposed a lottery to allocate the number of units that would be allowed in any given year. Therein, the Board did not need to find that Sammamish’s lottery was a moratorium because the Board concluded that Sammamish’s lottery violated RCW 36.70A.110, regardless of whether it was or was not a moratorium. Ordinances 3472 and 3473 go much further than Sammamish’s lottery, which at least allowed a limited amount urban

³¹ *DR 002248*, Final Decision and Order, page 8 of 31.

development to occur each year. Ordinances 3472 and 3473 do not allow any urban residential development in the unincorporated UGA, i.e. a moratorium.

- iv. *Skagit D06 did not need to appeal the earlier moratorium as a precondition to appealing Ordinances 3472 and 3473 as there was no cause of action until it was evident that the City had failed to complete its obligations under that earlier moratorium.*

The original moratorium which the City adopted in Ordinances 3442 and 3445 was adopted in compliance with the requirements of RCW 36.70A.390: under those Ordinances, the City adopted a one year moratorium based on the commitment that it would review, adopt and implement a Work Plan to address the original concerns justifying the moratorium. Had the City actually completed all the review items under its Work Plan, it would have provided a public review opportunity and actually adopted meaningful and quantifiable standards, phasing or strategy to address the City's concerns.³² Instead, **the City violated RCW 36.70A.390 by abandoning its Work Plan and simply using the prior moratorium as a shield to adopt Ordinances 3472 and 3473 without the necessary analysis and public review that otherwise would have been inherent under the Work Plan.** If the City had actually complied with its own Work Plan components, the City would have used that information to inform the public and the City Council regarding needs and options **before** adopting on Ordinances 3472 and 3473. The Board totally failed to address this issue.

³² DR 001666-1667, Ordinance 3445, attached Work Plan.

- v. *The City's claim that it has limited sewer capacity does not resolve the question of whether Ordinances 3472 and 3473 constitute an unlawful moratorium.*

The City's capacity to provide sewer service to any given property is a distinct issue from whether Ordinances 3472 and 3473 violate RCW 36.70A.390. If the question of compliance with the GMA could be decided simply by determining whether sewer capacity exists, the City would not have needed to adopt policies forcing urban development to be contingent on vague requirements that the City first achieve a 'balance' between residential and commercial/industrial land. The City has separate powers under RCW ch. 35.67 to solve sewer system capacity limitations. Instead, the City chose to adopt GMA-based ordinances which indefinitely halt urban residential development without regard to whether it actually has sufficient sewer capacity.

Further, the City's attempt to justify Ordinances 3472 and 3473 based on an unsubstantiated argument of limited sewer capacity creates a Catch-22 situation. The City now will not annex property unless the capacity to provide City sewer service already exists "without major upgrades to these services."³³ However, the City Sewer Plan is based on the premise that major upgrades to the City's sewer system capacity will be funded by new development through connection charges, developer constructed improvements and local improvement districts.³⁴ The combination of the two Ordinances creates an impossible

³³ DR 001672, Ordinance 3472, Land Use Policy LU-29.1.3 (F).

³⁴ DR 000913-914, Sewer Plan (readopted in 2006 under Ordinance 3313), also in DR at 001956-1957.

situation for both the City and any property owner in the unincorporated UGA: there cannot be any further extension of sewer into the unincorporated UGA, therefore no annexation, without any recourse by either the City or a property owner, resulting in a permanent moratorium on urban development, not just residential, but also commercial and industrial.

B. The Ordinances are Inconsistent with Goals (1), Urban Growth, and (2), Reduce Sprawl, of RCW 36.70A.020.

- i. The Board's simplistic approach to RCW 36.70A.020 is unsupportable.*

The City incorrectly asserts that Skagit D06 cannot argue that the Board has created a new bright-line rule under RCW 36.70A.020(1) and (2). The City cited to authority where the Court refused to consider a new argument first made in reply. *Groehle v. Fred Hutchinson Cancer Research Center*, 100 Wn. App. 609, 616, 1 P.3d 579 (2000). This case is inapplicable as Skagit D06 raised this argument in its Opening Brief, pages 32-34.

The City did not respond substantially to Skagit D06's argument regarding RCW 36.70A.020. In the face of Ordinances 3472 and 3473, it seems impossible for the City to argue that it is fostering and stimulating urban growth by encouraging urban growth in the UGA. The City itself has now belied the faults in the Board's decision: the Board found that Ordinances 3472 and 3473 comply with RCW 36.70A.020(1) and (2) because it is theoretically possible that the City could meet its twenty-year growth target (ignoring the statute's plain language). Yet even the City now admits that it will not be able to meet the twenty year growth target, whether by a measure of thousands or hundreds of

residential units.³⁵ Even in the City's absolute best scenario, the City still needs to accommodate at least 11% of the growth target with development in the unincorporated UGA. Ordinances 3472 and 3473 provide no mechanism or planning to do this.

ii. *The Board failed to understand that the Ordinances go far beyond the Board's formerly simplistic ruling that cities can require properties seeking sewer service to annex.*

The Board and the City disregard pivotal distinctions in relying on a prior Board case where the Board held it was permissible for a City to condition utility service on annexation.³⁶ *Arlington* stood for the since-overturned proposition that Arlington could require annexation before providing sewer service to assure that urban development in and around the City met its development standards. *MT Development v. City of Renton*, 140 Wn. App. 422, 428, 165 P.3d 427 (2007). In comparison, the City of Mount Vernon and Skagit County have adopted zoning codes that impose the City's desired standards on all development in the UGA, within the city limits and in the unincorporated area. However, *Arlington* did not impose preconditions limiting annexation as in Ordinances 3472 and 3473.³⁷ Further, in contrast to the instant case, Arlington was able to show it could meet the 20-year growth target for its UGA based on a phased sequence of development adopted by Arlington in its Comprehensive

³⁵ *City's Response and Cross Appeal Brief*, page 8.

³⁶ *DR 002252*, Final Decision and Order, page 12 of 31; *Master Builders Association of King and Snohomish Counties v. City of Arlington*, CPSGMHB Case No. 04-3-0001, Final Decision and Order (July 14, 2004).

³⁷ *Arlington*, CPSGMHB Case No. 04-3-0001, Final Decision and Order, page 6 of 21.

Plan, specifically land use and capital facilities policies.³⁸ In the instant case, there is no such phasing reflected in the Mount Vernon Comprehensive Plan or elsewhere in adopted, or even informal documents.

iii. The City's justification of needing an un-quantified additional amount of commercial and industrial land does not justify the Ordinances under Goals (1) and (2) of RCW 36.70A.020.

The City argues that it needs more commercial and industrial development in order to achieve some undefined balance of uses in the City. The City also claims that its failure to provide more commercial zoning causes environmental problems by forcing people to drive farther to commute or shop. However, the City does not show how its decision to stand in the way of urban residential development and instead promote the development of the unincorporated UGA with low density five-acre lots either increases the amount of commercial and industrial land in the City or otherwise addresses its concerns. The City can designate additional commercial and industrial properties at any time without stopping urban residential development that it already agreed to allow when it designated the UGA with Skagit County. Ordinances 3472 and 3473 do not promote expansion of commercial and industrial uses.

To the contrary, the Ordinances encourage large lot sprawl: people will be increasingly forced to live farther and farther from the City core as areas in the UGA adjacent to the City are developed with five-acre-lots densities. As a result of these Ordinances, the UGA will ultimately have to be expanded to

³⁸ *Id.* at page 18 of 21.

accommodate the same number of people which the original UGA could have accommodated if the City had not precluded compact urban development. Ordinances 3472 and 3473 conflict with the GMA Goals of encouraging urban development in urban areas where public facilities can be provided (Goal 1) and decrease inappropriate conversion of undeveloped land to low-density development (Goal 2). RCW 36.70A.020.

C. The City’s Lack of a Phasing Plan Violates both Goals (1) and (2) of RCW 36.70A.020 and RCW 36.70A.110.

Efficient “phasing” of urban infrastructure is a key component of transforming governance from counties to cities and consistent with Goals (1), Urban Growth, and (2), Reduce Sprawl, of RCW 36.70A.020.³⁹

Under RCW 36.70A.110(3), the City is allowed to phase growth consistent with availability of public utilities and services. The Board has held that “providing urban infrastructure to the UGA within the twenty-year planning horizon is a required component of comprehensive plans.” *KCRP v. Kitsap County et al (KCRP VI)*, CPSGMHB Case No. 06-3-0007, Order Finding Partial Compliance (March 16, 2007) at 12 (*citations omitted*).

The Board erred in resolving this case by simplistically stating the City has the authority to phase development and hold off urban development of property at the “periphery” of the UGA until 2025.⁴⁰ The Board simply stated it would not be unreasonable for property owners on the edge of the UGA to wait to

³⁹ *DR 002253*, Final Decision and Order, page 13 of 31.

⁴⁰ *DR 002252*, Final Decision and Order, page 12 of 31.

development property until the end of the twenty-year planning period, i.e. 2025.⁴¹

The Board assumed, and the City argues, that Ordinances 3472 and 3473 “phase” urban development, but did not explain what that phasing system is or where any such phasing plan is found in the record. Nothing in Ordinances 3472 and 3473 phases urban development or provides efficient phasing of urban infrastructure. The simplistic denial of sewer service for the foreseeable future is not a “phasing plan.”

The City presents no actual plan or mechanism despite its citations to the 2003 Sewer Study and the staff report supporting the City’s rejection of Skagit D06’s request for sewer service. First, the 2003 Sewer Study described what sewer extensions were possible for each portion of the unincorporated UGA.⁴² That Study did not propose any phasing plan for which portions of the unincorporated UGA the City should serve, when and to what extent. Second, the City’s staff report, opposing Skagit D06’s request for sewer service cites to no document, adopted or informal, that would support the assertion that Skagit D06’s property should be developed at the end of the 20-year growth period, i.e. by 2025. In fact, Ordinances 3472 and 3473 will preclude Skagit D06 and similarly situated properties from even developing at an urban density by 2025.

⁴¹ *Id.*

⁴² *DR 001335 ff*, 2003 Urban Growth Area Sewer Service Study.

Ordinances 3472 and 3473 do not allow any urban development in the unincorporated UGA *at all*, irrespective of where property is located. The City has no plan for promoting urban growth in the UGA despite the mandates of RCW 36.70A.110(2) and (3): **the City has never adopted any phasing plan showing how it will accommodate the 2025 growth targets in the face of the City’s own reports that it cannot accommodate that population within its city limits.** Nothing in the Ordinances show any City plan to provide orderly phasing of growth, implied in the statement that owners at the periphery or edge of the UGA must wait for service.⁴³ To the contrary, urban growth is not going to occur anywhere in the UGA under Ordinances 3472 and 3473. This is not a permitted “phasing plan.” It is simply a moratorium on any urban development.

D. The City Did Not Define or Quantify When A “Balance” Between Residential And Commercial/Industrial Uses Is Reached.

The City asserts it wishes to achieve a ‘balance’ between residential and commercial/industrial land.⁴⁴ Ordinance 3472 does not provide any definition of what this “balance” is or a quantification of when “balance” is achieved. Further, the Ordinance does not provide any standards for how the City will evaluate balance between these uses and whether a balance has been achieved,

⁴³ Although this case is not specific to Skagit D06’s property, the City’s claims about the Skagit D06 property make it clear that the City is not interested in requiring properties at the “periphery” of the UGA to develop last. Skagit D)6’s property is immediately adjacent to the City limits. Nevertheless, the City claims (without citation to any plan or ordinance) that Skagit D06’s property is scheduled to be developed at the very end of the planning period. This claim is the exact opposite of so-called phased development planning. Apparently the City’s unwritten phasing plan is that properties closest to the City limit will be developed last, not first.

⁴⁴ DR 001672, Ordinance 3472, Land Use Policy LU-29.1.3 (B).

what process will be used, when such evaluation must take place, and what the City will do if it fails to find some “balance” at the end of the 20-year target.

- Is this a City-wide determination or will the decision be based on whether there is a balance in, for example, the eastern portion of the City near the UGA where Skagit D06’s property is located?
- What does “commercial/industrial” entail: is it a balance of both or either, of an equal mix between residential, commercial and industrial, or something else?
- Do these determinations change as new council members are elected with different priorities for each type of use, i.e. creating a moving target?

The concept of requiring an applicant for annexation to demonstrate that a balance between residential and commercial/industrial uses can be achieved in the City is unlawfully vague, lacking any “effective or meaningful guidance.” *Anderson v. City of Issaquah*, 70 Wn. App. 64, 76, 851 P.2d 744 (1993). The City’s arguments fail to address these serious problems with the Ordinances which violate RCW 36.70A.020(1) and (2) and RCW 36.70A.110.

E. Ordinance 3472 Will Prevent the City from Complying with its Obligations Under RCW 36.70A.110.

It is the combination of the Comprehensive Plan Policies in Ordinance 3472 and the development regulation in Ordinance 3473 that prevent the City from complying with its obligation under RCW 36.70A.110 to provide sufficient capacity for growth to accommodate the urban growth that is projected to occur by 2025 (the 2025 growth target). The City should not be allowed to avoid compliance with its obligations under RCW 36.70A.110 by using a combination of plan policies and development regulations.

The Board has previously applied RCW 36.70A.110 in combination with Goals (1) and (2) to invalidate the City of Sammamish's adoption of development regulations that imposed a lottery that randomly 'metered' growth. *Master Builders Association of King and Snohomish Counties v. City of Sammamish*, CPSGMHB Case No. 05-3-0041, Final Decision and Order (February 21, 2006), at 20. As in the *Sammamish* case, the Board should have invalidated Ordinances 3472 and 3473 because they tie urban residential development to factors unrelated to the provision of urban services (e.g. LU-29.1.3 (B) and in fact go farther to actually preclude the extension of urban services into the UGA (e.g. LU-29.1.3 (F)).

F. Ordinances 3472, Alone Or In Combination With Ordinance 3473, Prevents The City From Complying With Its Obligation To Permit Projected Urban Growth Based On The 2025 Growth Targets.

Contrary to the City's arguments, as shown above, the City's own studies admit the City cannot accommodate the 2025 growth target by relying only on infill within the City limits.⁴⁵ Under any scenario, the City **must** allow a significant amount urban residential development in the UGA.⁴⁶ Ordinance 3472 alone, and in combination with Ordinance 3473, directly conflicts with RCW 36.70A.110(2) by stopping the City from annexing residential land and allowing sufficient development in the UGA at urban densities to accommodate the 20-year growth target, i.e. by year 2025.

⁴⁵ *DR 000816*, Buildable Lands Report; *DR 000228*, Staff Report.

⁴⁶ This issue has no relationship to supply of commercial or industrial lands: if that amount of land is also unavailable, the City must also affirmatively act to zone land in its City limits for such uses and serve land in the unincorporated UGA with utilities.

IV. CONCLUSION

Based on the foregoing analysis, Appellant Skagit D06 respectfully requests Skagit D06 respectfully requests this Court to reverse the Board's decision and invalidate Ordinances 3472 and 3473 for being out of compliance with the GMA.

DATED this 14th of October, 2011.

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By



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

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

vs.

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

Defendants/Respondents.

AFFIDAVIT OF SERVICE

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ORIGINAL

STATE OF WASHINGTON)
)ss.
COUNTY OF KING)

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

1. I am a citizen of the United States, over the age of 18 years of age, and am competent to testify to the facts herein.

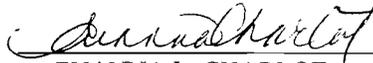
2. On this date, I caused to be served via Legal Messenger Delivery, a true and correct copy of the following documents: APPELLANT'S REPLY BRIEF upon counsel as stated below:

Kevin Rogerson, Esq. P. Stephen DiJulio, Esq. Mount Vernon City Attorney's Office 910 Cleveland Avenue Mount Vernon, WA 98273-4231 kevinr@mountvernonwa.gov <i>Attorneys for Resp. City of Mt. Vernon</i>	In Association with: Susan Elizabeth Drummond, Esq. Law Office of Susan Drummond 1200 5th Avenue Suite 1650 Seattle, WA 98101-3299 Tel: 206-682-0767 susan@susandrummond.com <i>Attorney for Resp. City of Mount Vernon</i>
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Pursuant to RCW 9A.72.085, I certify under penalty of perjury under the laws of the State of Washington that the foregoing statement is true and correct.

DATED this 14th day of October, 2011, in Bellevue, Washington.


EVANNA L. CHARLOT

STATE OF WASHINGTON)
)ss.
COUNTY OF KING)

SIGNED AND SWORN to (or affirmed) before me on Oct. 14, 2011 by
Evanna L. Charlot.


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

