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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.

**CITY OF MOUNT VERNON'S REPLY BRIEF
 ON CITY'S CROSS-APPEAL ON JURISDICTION**

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I. INTRODUCTION

Skagit D06 does not address the City's central argument: **GMA does not govern the subject matter.** Skagit D06 bases its appeal on three GMA provisions: RCW 36.70A.110(1) and (2), .020(1) and (2), and .390. These provisions contain UGA designation requirements; encourage cities to plan for urban growth which is adequately supported with infrastructure and services; and outline moratoria adoption procedures. They do not govern a decision to condition sewer service on annexation or two policies requiring city council consideration of use mix and municipal service adequacy when initiating an annexation. Consequently, GMA does not govern the subject matter of the appeal.

II. ARGUMENT

A. The Three GMA Provisions Do Not Govern the Ordinances

GMA jurisdiction is determined by whether GMA governs the subject matter. The City could have adopted the two ordinances under an expedited non-GMA process, which would have minimized public notice, and under Skagit D06's argument, eliminated GMA Board jurisdiction. However, the City elected to follow GMA's more open and transparent process, which includes notice requirements, opportunities for comment, hearings before the Planning Commission and Council, and findings on

GMA consistency.¹ While the City used the process providing for greater public input, it is not the process used which invokes Board jurisdiction.² The question is whether GMA governs the subject matter?³ Here, the three GMA provisions Skagit D06 identifies do not govern the code provision making utility service contingent on annexation or the two annexation policies requiring city council consideration of use mix and utility service adequacy when initiating an annexation. Because Skagit D06 fails to identify a GMA provision governing the enactments, there is no subject matter jurisdiction.

1. GMA's UGA Designation Provisions Do Not Govern the Enactments

RCW 36.70A.110(1) and (2) apply to county UGA designation decisions. The City's three sentence regulation conditioning sewer service on annexation does not alter UGA boundaries and RCW 36.70A.110 clarifies the section does not govern annexation. "An urban growth area designated in accordance with this section **may** include within its boundaries urban service areas or **potential annexation areas** designated

¹ AR 1675; AR 1681 ; AR 1665; AR 1670. These pages from the two ordinances are also at Appendix 3 of Brief of Respondent/Cross-Appellant City of Mount Vernon.

² AR 1665-1671 (Ordinance 3472); AR 1675-1684 (Ordinance 3473).

³ RCW 36.70A.280 and .290; *see also Happy Valley Associates v. City of Issaquah*, Order Granting Motion to Dismiss, CPSGMHB 93-3-0008 (October 25, 1993) (despite references to GMA, where provision was not adopted to meet a GMA requirement, Board lacked jurisdiction).

for specific cities or towns within the county.”⁴ Such areas need not be identified, much less annexed or immediately served with urban services. The appellate courts have addressed transfer of government under RCW 36.70A.110, and determined the Board lacks **authority** to decide transference of governance issues:

RCW 36.70A.110's plain language addresses requirements and recommendations for urban growth areas. It requires counties to designate urban growth areas in areas with densities sufficient to permit urban growth. RCW 36.70A.110(1),(2). The statute also requires counties to include those designations in its comprehensive plan. RCW 36.70A.110(6). Finally, it recommends where urban growth areas should be located and who should provide governmental services to those areas. RCW 36.70A.110(3), (4).

But the language of RCW 36.70A.110(4) does not require strategies for transferring government. It merely indicates that cities should provide governmental services to urban growth areas (as opposed to rural areas): ... This subsection contains only recommendations, not requirements. In other words, the language suggests that the legislature intended a specific end - that cities provide urban governmental services and not rural governmental services. It does not imply that the legislature intended counties to adopt a preferred means to accomplish that end. RCW 36.70A.110(4) does not require that the County establish a strategy for the transformation of government. ... The Hearings Board's final decision and order was outside its statutory authority.⁵

Consequently, RCW 36.70A.110(1) and (2) do not govern (and certainly do not preclude) a City decision to condition sewer service on annexation.

⁴ RCW 36.70A.110(7), emphasis added.

⁵ *Spokane County v. City of Spokane*, 148 Wn.App. 120, 130-31, 197 P.3d 1228 (2009), emphasis added.

In addition, as the Board held, RCW 36.70A.110 only applies to comprehensive plan policies, so is inapplicable to the code requirement making sewer service contingent on annexation. “RCW 36.70A.110 does not apply to development regulations, and therefore is inapplicable to Ordinance 3473 which amended City Code 13.08.060.”⁶ Skagit D06 did not appeal this holding.

Similar to the code provision, the two annexation policies Skagit D06 appeals do not address UGA designation. Rather, they address the later annexation decisions.

The only provision in RCW 36.70A.110 that does address the timing of development within the UGA is RCW 36.70A.110(3). And, even it does not address **jurisdictional** transfer from county to city. RCW 36.70A.110(3) addresses the phasing of urban growth and services.

With the Skagit D06 approach, RCW 36.70A.110(3) would be written out of GMA, which reflects a fundamental misconception of how GMA works. There is no GMA guarantee for immediate sewer within a UGA. Nor is there a GMA guaranty of immediate annexation. To the contrary, GMA provides that urban growth inside a UGA should occur first where adequate public facilities and service capacity exist, second in areas

⁶ AR 2259. *See also* RCW 36.70A.110(6) (UGA sizing decisions made through comprehensive plan).

characterized by urban growth that will be serviced, and **third in the remaining areas.**⁷ However, even this provision does not govern transfer of governance. RCW 36.70A.110(1) and (2) do not govern, much less prohibit, conditioning utility service on annexation or requiring Council consideration of use mix and utility service adequacy during annexation.

2. GMA's Two Goals Lack Specific Requirements

GMA's two goals encourage urban growth which is adequately supported by urban facilities and services. The goals do not specify how this is to be accomplished.⁸ Nor do they address annexation. Consequently, lacking any detail as to implementation, they do not govern, and certainly are not inconsistent with a requirement making sewer service conditional on annexation or the City's annexation policies.

3. GMA Moratoria Procedures do Not Apply

GMA outlines procedures for adopting a moratorium in situations where no public hearing is held and for renewing that moratorium in RCW 36.70A.390. (There are other approaches to enacting moratoria, but

⁷ RCW 36.70A.110(3).

⁸ Even more specific requirements do not prescribe exact approaches. "GMA does not prescribe a single approach to growth management." *Phoenix Development, Inc. v. City of Woodinville*, 171 Wn.2d 820, 830, 256 P.3d 1150 (2011).

compliance with these statutes is not at issue).⁹ Here, the City adopted the two challenged ordinances after holding several public hearings, including before the Planning Commission and City Council.¹⁰ The process the City used to adopt the ordinances was not RCW 36.70A.390's truncated process for enacting moratoria without a hearing. Nor were the ordinances adopted pursuant to RCW 36.70A.390's renewal procedures. Rather, the two ordinances were permanent ordinances adopted under the City's usual adoption procedures; not under RCW 36.70A.390. Consequently, RCW 36.70A.390 does not govern the City's adoption of the Ordinances.¹¹

B. City Capital Facilities Plans are not Before the Court

The City has adopted capital facilities plans, which plan for utility service throughout the City's four UGA's. These plans comply with GMA's capital facilities planning requirements, and were never appealed. The plans include the Six-Year Plan, which Skagit D06 failed to appeal although it does not identify their Property for service;¹² and the City's 20-

⁹ See e.g., AR 255. A previous City ordinance, not challenged here, was adopted pursuant to both RCW 36.70A.390 and RCW 35.63.200.

¹⁰ See Ordinance 3472 at AR 1665-1671 and Ordinance 3473 at AR 1675-1684. The Ordinances describe the Planning Commission and Council review processes, which is the process used for the permanent adoption of ordinances.

¹¹ The City did use the above procedures to adopt earlier ordinances, which have since been rescinded. Skagit D06 did not appeal these earlier ordinances for compliance with RCW 36.70A.390.

¹² AR 1414-1537.

year Capital Facilities Plan, which plans for service of the Skagit D06 Property at the end of GMA's twenty year planning period.¹³

The subject site owned by Skagit D06 is at the end of a twenty year plan to extend sewer inside the East Service Area of the UGA. No agreement currently exists to extend sewer to the area, no funding is present, and no sewer line to the property from the City currently exists. Attached to this staff report, labeled as Exhibit 11 is a copy of Map CF-1 that identifies the existing sewer facilities within the City. From this map it is evident that sanitary sewer lines are not available to serve the project site. The sanitary sewer lines that may eventually serve this site under currently planning would extend from the vicinity of East College Way to the south in the proximity of this site. Also contained within Exhibit 11 is a copy of the Comprehensive Sewer Plan Update, prepared by HDR Engineering dated February 2003. It is important to summarize this adopted plan because it is the document that contains the City's future plans about how sanitary sewer will be extended to an area that this document has labeled the 'East UGA.' The subject site is located in the East UGA.¹⁴

Skagit D06 did not appeal the ordinances based on inconsistency with this planning, and in fact concedes: **"Skagit D06 accepts the validity of the previously adopted Plans and development regulations."**¹⁵ It is these very plans which provide for the Skagit D06 Property to receive sewer service at the end of GMA's 20-year planning period.

Skagit D06 may not now appeal based on arguments that service at the end of this period is somehow inconsistent with GMA. Skagit D06's

¹³ See AR 912-914, and generally AR 857-1326 (Sewer Plan).

¹⁴ AR 231 (Staff Report), *see also* AR 208 (Staff Report, top paragraph), AR 233 and 244.

¹⁵ Appellant's Brief In Response To Cross Appeal, p. 4, emphasis added.

position is at odds with the Board cases they rely on and even their own analysis in their brief, which states:

A city's comprehensive plan must contain a "capital facilities element that ensures that, over the twenty-year life of the plan, needed public facilities and services will be available and provided throughout the jurisdiction's UGA."¹⁶

And, the *Benaroya* case Skagit D06 references emphasizes that "GMA creates multiple duties which are sometimes in tension if not outright conflict" and "[i]t is neither necessary nor timely for the Board to articulate a general rule, or exceptions thereto, regarding what cities must do in order to meet a duty to 'encourage' urban growth."¹⁷ The County zoning and City capital facilities planning has been adopted and may not now be challenged.

The appellate courts have ruled "back-door appeals" are impermissible. In *Montlake*¹⁸ this Division of the Court of Appeals, refused to revisit transportation concurrency issues, which although re-adopted into a subarea plan, were not revised. Here, the County zoning and City's capital facilities plans were not amended, so may not be revisited through this appeal. Yet, this is precisely what Skagit D06 is

¹⁶ Appellant's Brief In Response To Cross Appeal, p. 15, with language in quotation from *Hensley v. City of Woodinville*, CPSGMHB #96-3-0031, FDO (February 25, 1997).

¹⁷ *Benaroya v. City of Redmond*, CPSGMHB #95-3-0072c, Finding of Compliance (March 13, 1997). pgs. 8-9.

¹⁸ *Montlake Community Club v. Hearings Board*, 110 Wn. App. 731, 43 P.3d 57 (2002).

attempting to do, with its arguments that it should receive sewer service immediately, rather than consistent with the City's unappealed capital facilities plans.

On reply, Skagit D06 contends the two ordinances are inconsistent with City plans and regulations,¹⁹ although this is not an issue before the Court. Also, because the issue was not raised before the Board, this alone precludes it.²⁰ But, even if the issue could be raised, Skagit D06 fails to point to a single policy or regulation the ordinances are inconsistent with.

Because Skagit D06 is advocating for immediate sewer service, although City capital facilities planning provides for service towards the end of the GMA planning period, it is Skagit D06's position which is inconsistent with City planning. And, Skagit D06's back-door attempt to subvert this prior, unappealed planning is impermissible under *Montlake*.

C. The City Does not Zone Outside its Borders

The City of Mount Vernon does not zone land outside its borders. As with all unincorporated property in Skagit County, Skagit County zoning applies to the Skagit D06 Property. The City has made this point

¹⁹ Appellant's Brief in Response to Cross Appeal, p. 3.

²⁰ RCW 36.70A.290(1) ("All requests for review to the growth management hearings board shall be initiated by filing a petition that includes a detailed statement of issues presented for resolution by the board. ... The board shall not issue advisory opinions on issues not presented to the board in the statement of issues, as modified by any prehearing order.")

throughout this litigation.²¹ Making sewer service contingent on annexation is not a GMA development regulation.²² Rather, the requirement springs from the City's proprietary functioning as a utility.²³ Consequently, there is no Board jurisdiction. The Board recognized in *Harader* that the procedures of adoption are not necessarily determinative; the Board looks to what was in fact adopted.²⁴ Here, the adopted requirement makes sewer service contingent on annexation. It is County zoning which establishes uses, their intensity (*i.e.*, density), and concurrency requirements.

The County zoning for the Skagit D06 Property is Urban Reserve Residential (URR). The URR zoning contains a provision that allows a property owner to apply for an Urban Reserve Development Permit (URDP). The County's URDP process includes concurrency requirements.²⁵ Because the County is not a sewer provider, these concurrency requirements provide for property owner/city agreement regarding sewer service for development to occur at certain densities, and

²¹ See *e.g.*, Brief of Respondent/Cross-Appellant City of Mount Vernon, pgs. 43-45.

²² RCW 36.70A.030(7).

²³ See *e.g.*, Brief of Respondent/Cross-Appellant City of Mount Vernon, pgs. 43-45.

²⁴ *Harader v. City of Napavine*, WWGMHB #04-2-0017c, FDO (February 2, 2005), p. 8.

²⁵ See *e.g.*, *Whatcom County Fire Dist. 21 v. Whatcom County*, 171 Wn.2d 421, 428, 256 P.3d 295 (2011) ("Concurrency" is the concept that an adequate level of service should "be available concurrently with the impacts of the development or within a reasonable time thereafter.")

state the City determines whether sewer service shall be conditioned on annexation.²⁶ As earlier briefed, the County and its cities litigated these zoning/concurrency requirements for several years, before the County finally adopted GMA-compliant zoning in 2005.²⁷

The City, as one of the sewer utility providers proximate to the Skagit D06 property,²⁸ prepares and adopts capital facilities plans on sewer service and determines whether it has capacity to serve development. The City is authorized by statute, should it choose to do so, to provide sewer service outside its borders, but decision related to such service are not GMA decisions.

Skagit D06 appears to reference the County's Mount Vernon UGA Urban Development District (MV-UD) zone,²⁹ although the County's MV-UD zone does not apply to the Skagit D06 Property. Also, while there is a County Code reference in the MV-UD zoning to City development standards, the City does not have a corresponding MV-UD zone. And, there is no relevant "interlocal agreement" as Skagit D06

²⁶ AR 1775 (Skagit County Code 14.16.910(2)(a)(i), emphasis added.

²⁷ AR 1700-01 (County Ordinance 2005007). The Ordinance attaches the adopted zoning.

²⁸ AR 914 (City Sewer Plan) ("A significant portion of the Eastern UGA is tributary to the Big Lake Sewer System (Skagit Public Utility District No. 2). The City of Mount Vernon will coordinate with the PUD No. 2, and other stakeholders to identify and implement an efficient sewer service plan. ... Development of the Eastern UGA will require construction of regional pumping facilities.").

²⁹ Appellant's Brief In Response To Cross Appeal, p. 4, see in particular footnote three.

asserts.³⁰ In fact, the County Code recognizes County zoning applies **before** annexation and City zoning **after** annexation:

The city comprehensive plan has also identified the appropriate city land use designation and development regulations **that should be applied to those areas upon annexation.**³¹

This is not the *MT Development*³² situation, where a local jurisdiction required property outside municipal borders to comply with its zoning to receive utility service, although it lacked jurisdictional authority to enforce that zoning. Mount Vernon has not zoned Skagit D06's property or enforced City zoning outside its boundaries. The City has made sewer service contingent on annexation, consistent with state utility laws, and adopted two annexation policies addressing annexation, which reflect considerations identified in annexation statutes. It is Skagit County zoning, which is not before this Court, which makes allowable densities contingent on urban service availability. Skagit D06 is six years too late to challenge the Skagit County Code.

³⁰ Appellant's Brief in Response to Cross Appeal, p. 3. Skagit D06 references the Skagit County's adoption of zoning in 2005. This is a County ordinance enacting zoning.

³¹ AR 1774 (SCC 14.16.230(1)). (Mount Vernon actually had not identified appropriate designations in 2005, although it did so later.)

³² *MT Development, LLC v. City of Renton*, 140 Wn. App. 422, 165 P.3d 427 (2007).

D. State Utility Law, not GMA, Address the Conditioning of Utility Service on Annexation

Before the Court is a GMA appeal. The appeal does not rely upon utility statutes addressing City authority to condition utility service on annexation,³³ but three GMA provisions. As addressed above, these provisions do not govern the issues presented. Washington cases on utility law do, and they hold that utility service may be conditioned on annexation, an issue Skagit D06 conceded throughout this litigation,³⁴ up until impermissibly taking a different tact when filing its reply.³⁵ In making this switch, Skagit D06 misrepresents the *Yakima* decision. The Supreme Court interpreted state utility law, at RCW 35.67.310, and determined that even where a city holds itself out as an exclusive supplier of sewer service (which is not the case here), it may condition sewer

³³ Appellant's Brief In Response To Cross Appeal, p. 6 ("Skagit D06 did not ask the Board (or this Court) to review compliance with annexation statutes such as RCW chapter 35A.14 (Annexation by Code Cities), Boundary Review board standards or regulations, private contract law, or any other non-GMA authority.")

³⁴ Appellant's Opening Brief, p. 14 (annexation prerequisite not challenged on its own, but in conjunction with two policies), and p. 41 ("general rule is that a city is not required to provide utility service outside their city limits...").

³⁵ *Goehle v. Fred Hutchinson Cancer Research Center*, 100 Wn. App. 609, 616, 1 P.3d 579 (2000).

service on annexation.³⁶ This case was subsequently interpreted by this

Division of the Court of Appeals:

An exclusive provider of sewer service may impose reasonable conditions upon its agreement to provide the service, and contrary to MT's contention, these conditions are not limited to those relating to the capacity of the utility to provide such service. **In *Yakima County (West Valley) Fire Protection District No. 12 v. City of Yakima*, the city was both the exclusive provider and held itself out as willing to provide sewer service. Nonetheless, the court held that Yakima could require property owners outside its borders to agree to annexation as a condition of receiving service.**³⁷

This holding is the exact opposite of Skagit D06's representation to the Court.³⁸ Consistent with the Washington State Supreme Court's decision in *Yakima, MT Development* recognizes that under RCW 35.67.310, sewer service may be conditioned on annexation.³⁹

Of course, RCW 35.67.310 is not before the Court. Three GMA provisions are. These provisions do not govern whether or not utility service may be conditioned on annexation. Because this issue is

³⁶ *Yakima County (West Valley) Fire Protection District No. 12 v. City of Yakima*, 122 Wn.2d 371, 382-83, 858 P.2d 245 (1993).

³⁷ *Mt. Development, LLC, v. City of Renton*, 140 Wn. App. 422, 428, 165 P.3d 427 (2007), emphasis added.

³⁸ Skagit D06 asserts "Yakima County Fire District most definitely does not stand for the proposition that the City can require actual annexation as a precondition to sewer service where the City is the exclusive provider or otherwise has held itself out as a service provider to the area." Appellant's Brief In Response To Cross Appeal, p. 19. This is precisely what the case holds, consistent with Skagit D06's previous concessions.

³⁹ The City utility could not interfere with first amendment rights, by for example, requiring a property owner to "promote" annexation, and could not zone outside its boundaries. But, it may condition service on annexation.

governed by non-GMA laws, and because the City’s requirement is not a GMA development regulation, there is no GMA jurisdiction over Ordinance 3473, which conditions utility service on annexation.

E. Two Policies Reflect State Annexation Requirements

The City adopted nine annexation policies and three objectives. Skagit D06 challenges two. The two policies are consistent with considerations the State Legislature has determined must be considered in an annexation:

<p>B. The annexation of residentially zoned areas shall not occur until additional areas zoned for commercial /industrial are officially designated such that a balance between residential and commercial/ industrial uses can be achieved within the City.</p>	<p>BRB “shall” consider: “The immediate and prospective population of the area proposed to be annexed, the configuration of the area, land use and land uses, comprehensive use plans and zoning.... The effect of the annexation proposal or alternatives on adjacent areas, on mutual economic and social interests, and on the local governmental structure of the county.”⁴⁰</p>
<p>F. The City finds that it has the capacity to provide City services within the existing City limits; and, those services to annexation areas without major upgrades to these services.</p>	<p>BRB “shall” consider: “The need for municipal services and the available municipal services, ... present cost and adequacy of governmental services ..., the probable future needs for such services ..., the probable effect of the annexation proposal or alternatives on cost and adequacy of services ... in area and adjacent area, the effect on the finances, debt structure....”⁴¹</p>

⁴⁰ RCW 35A.14.200(1) and (3). See also RCW 36.70A.115, emphasis added (Jurisdictions to accommodate “employment growth, including the accommodation of, as appropriate, the medical, governmental, educational, institutional, **commercial, and industrial facilities....**”).

⁴¹ RCW 35A.14.200(2). See also RCW 36.70A.110(3), providing for urban growth within a UGA to occur last where urban infrastructure is not yet available.

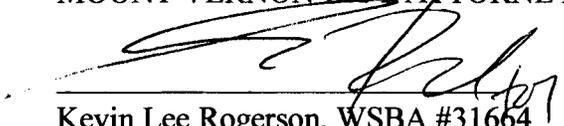
Unlike state annexation laws, the three GMA provisions Skagit D06 relies on do not address annexation. Skagit D06 chose GMA as the vehicle for its case,⁴² but GMA does not govern the issues raised.

III. CONCLUSION

The GMA provisions Skagit D06 relies upon (addressing moratoria, UGA sizing, and the two goals), do not govern the City's decision to condition sewer service on annexation or the two policies on use mix and municipal service adequacy. Skagit D06 seeks what it cannot obtain under existing, unchallenged City capital facilities plans and County zoning: immediate sewer service. Under *Montlake*, this back-door appeal is impermissible, and should be dismissed for lack of jurisdiction.

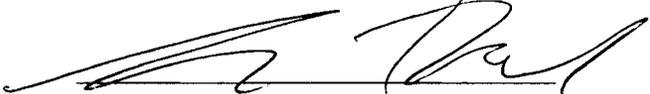
DATED this 14th day of November, 2011.

MOUNT VERNON CITY ATTORNEY



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⁴² Skagit D06 asserts it may have other claims against the City, but these are not raised here. Appellant's Brief In Response To Cross Appeal, p. 3.

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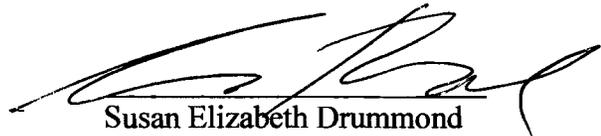
1. I am a citizen of the United States, over the age of 18 years of age, and am competent to testify to the facts herein.
2. On this date, I caused to be served via Legal Messenger Delivery, a true and correct copy of the following document *City of Mount Vernon's Reply Brief On City's Cross-Appeal On Jurisdiction* upon counsel as stated below:

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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 November, 2011. in Seattle, Washington.


Susan Elizabeth Drummond