

67236-3

67236-3

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

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 SEP 14 PM 3:08

---

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.

---

**BRIEF OF RESPONDENT/CROSS-APPELLANT  
CITY OF MOUNT VERNON**

---

Kevin Lee Rogerson, WSBA No. 31664  
City Attorney for City of Mount Vernon  
910 Cleveland Avenue  
Mount Vernon, WA 98273  
T (360) 336-6203 F (360) 336-6267  
Attorney for Respondent/Cross-Appellant Mount Vernon

Susan Elizabeth Drummond, WSBA No. 30689  
Law Offices of Susan Elizabeth Drummond, PLLC  
1200 Fifth Avenue, Suite 1650  
Seattle, WA 98101  
T (206) 682-0767 F (206) 654-0011  
Attorney for Respondent/Cross-Appellant Mount Vernon

**TABLE OF CONTENTS**

I. INTRODUCTION .....1

II. ASSIGNMENTS OF ERROR .....3

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....4

    A. RESTATEMENT OF ISSUES RELATING TO APPELLANT’S ASSIGNMENTS OF ERROR 1-5 .....4

    B. ISSUE PERTAINING TO CITY’S ASSIGNMENT OF ERROR ON CROSS-APPEAL .....5

IV. STATEMENT OF THE CASE.....5

    A. CITY’S 100 YEAR OLD SEWER SYSTEM .....5

    B. COST TO EXTEND SEWER: \$14 MILLION .....7

    C. UGA IS OVERSIZED .....8

    D. INADEQUATE COMMERCIAL/INDUSTRIAL LAND .....9

    E. SKAGIT D06 DID NOT INITIATE ANNEXATION .....11

    F. COUNTY CODE PHASES DEVELOPMENT .....13

    G. CITY CAPITAL FACILITIES PLANS PHASE SEWER .....15

    H. THE CITY REPEALED ITS INTERIM ORDINANCES .....16

    I. STATE LAW PROVIDES FOR CONDITIONING SEWER SERVICE ON ANNEXATION.....16

    J. POLICIES MIRROR ANNEXATION STATUTES.....17

V. LEGAL ANALYSIS.....17

    A. STANDARD OF REVIEW .....17

    B. THERE IS NO MORATORIUM.....20

        1. Skagit D06 Did Not Appeal the Interim Legislation ...20

        2. The Two Policies Are Not a De Facto Moratorium.....21

3.	Skagit D06 Concedes Making Sewer Service Contingent on Annexation is Not a Moratorium .....	24
4.	Infrastructure Adequacy and Use Mix Must be Considered in an Annexation.....	25
5.	GMA Provides for Phasing Infrastructure .....	29
C.	RCW 36.70A.110(1) AND (2) DO NOT GOVERN THE ORDINANCES.....	30
1.	RCW 36.70A.110(1) and (2) Govern UGA Sizing.....	30
2.	GMA Provides for Phasing Growth within the UGA..	32
3.	The City is Encouraging Urban Growth .....	33
D.	ORDINANCES CONSISTENT WITH GOALS 1 AND 2.....	34
1.	GMA Goals Support Phasing Infrastructure .....	34
2.	City Balanced Goals 1 and 2 with 12 Other Goals .....	37
3.	Skagit D06’s Collateral Attack on County Zoning is Inconsistent with GMA’s Goals.....	38
4.	Skagit D06 Advocates for a “Bright-Line” Rule, not the Board.....	41
E.	JURISDICTIONAL ARGUMENT IN SUPPORT OF CROSS-APPEAL .....	42
1.	GMA Board Jurisdiction is Narrowly Construed .....	42
2.	GMA Does Not Govern Conditioning Utility Service on Annexation.....	43
3.	GMA Does Not Govern Annexation Policies.....	46
VI.	CONCLUSION.....	47

Appendix 1	Maps
Appendix 2	Board Decision
Appendix 3	Ordinances 3473 and 3472
Appendix 4	Excerpts from Board Decisions

## Table of Authorities

### Cases

<i>City of Seattle v. King County</i> , 52 Wn.App. 628, 762 P.2d 1152 (1988) .....	25, 37
<i>Futurewise v. WWGMHB</i> , 164 Wn.2d 242, 189 P.3d 161 (2008).....	19
<i>Goehle v. Fred Hutchinson Cancer Research Center</i> , 100 Wn. App. 609, 1 P.3d 579 (2000).....	41
<i>Harberd v Kettle Falls</i> , 120 Wn.App. 498, 84 P.3d 1241 (2004).....	44
<i>Montlake Community Club v. Hearings Board</i> , 110 Wn. App. 731, 43 P.3d 57 (2002).....	29, 40
<i>Citizens for Mount Vernon v. City of Mount Vernon</i> , 133 Wn.2d 861, 947 P.2d 1208 (1997).....	22
<i>People for the Preserv. &amp; Dev. Of Five Mile Prairie v. Spokane</i> , 51 Wn.App. 816, 755 P.2d 836 (1988).....	43, 44
<i>Quadrant Corp. v. CPSGMHB</i> , 154 Wn.2d 224, 110 P.3d 1132 (2005).....	18, 19, 34
<i>Skagit Surveyors v. Friends of Skagit County</i> , 135 Wn.2d 542, 958 P.2d 962 (1998).....	42
<i>Swinomish Indian Tribal Community v. WWGMHB</i> , 161 Wn.2d 415, 425, 166 P.3d 1198 (2007).....	5
<i>Thurston County v. WWGMHB</i> , 164 Wn.2d 329, 190 P.3d 38 (2008).....	18, 19, 42
<i>Viking Properties, Inc. v. Holm</i> , 155 Wn.2d 112, 118 P.3d 322 (2005).....	19, 28, 33

*Whatcom County Fire District No. 21 v. Whatcom County*, 171 Wn.2d 421, 256 P.3d 295 (2011).....23

*Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2005).....42

*Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 858 P.2d 245 (1993).....17, 24, 44, 46

**Board Decisions**

*City of Sedro-Woolley v. Skagit County*, WWGMHB #03-2-0013c, Compliance Order (July 13th, 2005).....34, 37

*City of Sedro-Woolley v. Skagit County*, WWGMHB #03-2-0013c, Compliance Order (June 18th, 2004) .....13, 14, 29, 34, 36, 40, 45

*FOSC v. Skagit County*, WWGMHB Case No. 00-2-0050c, FDO (February 6, 2001) .....13

*Happy Valley Associates v. King County*, CPSGMHB #93-3-0008, Order (October 25, 1993) .....45

*Harader v. Napavine*, WWGMHB #04-2-0017c, FDO (February 2, 2005)...45

*Kaleas v. City of Normandy Park*, CPSGMHB #05-3-0007c, Final Decision and Order (July 19, 2005) .....33, 34

*Kaleas v. City of Normandy Park*, CPSGMHB #05-3-0007c, Order on Remand (July 31, 006) .....33

*Master Builders Ass'n v. City of Arlington*, CPSGMHB #04-3-0001, FDO (July 14, 2004) .....24, 37

*MBA/Camwest v. City of Sammamish*, CPSGMHB #05-3-0027, FDO (August 4, 2005) .....25

*1000 Trails v. Skagit County*, WWGMHB #07-2-0022, Order on Motions (April 3, 2008) .....45

*Pirie Second Family Limited Partnership, LP v. Lynnwood*, CPSGMHB #06-3-0029, FDO (April 9, 2007) .....25

## Statutes

RCW 34.05.570.....	19, 20, 42
RCW 35.63.200.....	16, 20
Ch. 35.67 RCW.....	43
RCW 35.67.310.....	17, 24, 44
RCW 35.13.005.....	46
Ch. 35A.14 RCW.....	46
RCW 35A.14.001.....	46
RCW 35A.14.010.....	46
RCW 35A.14.040.....	46
RCW 35A.14.200.....	17, 30, 46, 47
RCW 35A.21.150.....	17, 24, 44
RCW 36.70A.010.....	28
RCW 36.70A.020.....	4, 34, 35, 37, 38
RCW 36.70A.070.....	26, 32, 39
RCW 36.70A.110.....	2, 4, 10, 20, 27, 28, 30, 31, 32, 34, 35, 39, 41, 46, 47
RCW 36.70A.130.....	29
RCW 36.70A.280.....	42
RCW 36.70A.290.....	29
RCW 36.70A.115.....	28
RCW 36.70A.320.....	17, 18, 34
RCW 36.70A.390.....	1, 4, 16, 20, 21, 25, 47
RCW 36.70A.3201.....	18, 19
RCW 36.93.090.....	46
Ch. 43.21C RCW.....	42
RCW 47.01.440.....	10, 28
Ch. 70.235 RCW.....	28
RCW 70.235.020.....	10, 28
Ch. 90.58 RCW.....	42
RCW 90.58.030.....	19
RCW 90.58.900.....	19

## Regulations

WAC 365-196-330.....	30, 35, 36
----------------------	------------

## GLOSSARY

Board	Washington State Growth Management Hearings Board
BRB	Boundary Review Board
City	City of Mount Vernon
County	Skagit County
GMA	Growth Management Act, Ch. 36.70A RCW
Mount Vernon	City of Mount Vernon
Property	Skagit D06's 200 Acre Vacant Property located in unincorporated Skagit County
Skagit D06	Plaintiff/Appellant
UGA	Urban Growth Area

## I. INTRODUCTION

This case is about **timing**. The Growth Management Act (“GMA”)<sup>1</sup> does not require a city utility to guarantee owners of vacant property, located in the unincorporated urban growth area (“UGA”) **immediate** sewer service. Under GMA, property located closer to the main sewer lines, and characterized by urban development, is served first.

Appellant (“Skagit D06”) owns 200 acres of vacant property (“the Property”) in the outermost portion of Mount Vernon’s unincorporated East UGA, one of the City’s four County designated UGAs. Through this appeal, Skagit D06 asks this Court to allow it and similarly situated property owners to “cut in line” and receive sewer service first.

The City’s unchallenged Capital Facilities Plan provides for the Property to receive sewer service at the end of GMA’s 20-year planning period. The reason: **sewer lines are built in increments, with the closest part of the line being constructed first. The Property is located at the farthest end of the proposed line.** Extending sewer immediately would exceed \$14 million in infrastructure improvements, in 2003 dollars. Fiscally, immediate extension is not an option, and violates GMA.

---

<sup>1</sup> Specifically, RCW 36.70A.390, .110(1) and (2), and .020(1) and (2), the only sections Skagit D06 relies on.

County (not City) zoning establishes allowable densities based on infrastructure availability. Four dwelling unit per acre densities require sewer service. The County adopted this zoning to resolve years of litigation between the County and its cities. The appeal periods for the County's zoning and City's capital facilities planning has run.

Skagit D06 (having conceded utility service may be contingent on annexation) devotes just two pages of its brief to describing the two annexation policies upon which it premises its appeal. This is because Skagit D06 is not really challenging the policies (they mirror requirements in state annexation statutes), but is, in reality, making an impermissible back door attack on the County zoning and City capital facilities plans.

The Board Decision is consistent with a key GMA purpose: to ensure urban areas are supported by adequate infrastructure and discourage inadequately supported, leap-frog development:

Urban growth should be located first in areas already characterized by urban growth that have adequate existing public facility and service capacities to serve such development, second in areas already characterized by urban growth that will be served adequately ... and third in the remaining portions of the urban growth areas.<sup>2</sup>

The two ordinances, one making sewer service contingent on annexation (which Skagit D06 concedes the City may do), and the two policies, are

---

<sup>2</sup> RCW 36.70A.110(3), emphasis added. .

consistent. In fact, the policies address the same issues the City is **required** to consider during annexation; use mix and municipal service availability. To obscure the legal analysis, Skagit D06 makes extensive misrepresentations of the Record, regarding both the City's land and sewer capacity. However, the UGA is over-sized and the City's treatment plant lacks organic capacity to serve the Property immediately.

The Board and Court decisions upholding Ordinances 3472 and 3473 are consistent with the GMA. The City cross-appeals on jurisdictional grounds, because GMA has limited reach over annexation and utility service issues. However, should the Court find it has jurisdiction, the City asks the Court to affirm the Board, which properly found the two ordinances were not clear error.

## **II. ASSIGNMENTS OF ERROR**

### **City's Cross-Appeal on Jurisdiction**

1. The Board erred in determining it had GMA jurisdiction over Ordinances 3472 and 3473.<sup>3</sup>

---

<sup>3</sup> AR 676-683 (Board's Order Denying City's Motion to Dismiss for Lack of Board Jurisdiction), AR 2244:11-13 (Board's Final Decision and Order). Citations are to Administrative Record, "AR", and to Clerk's Papers, "CP".

### III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

#### A. Restatement of Issues Relating to Appellant's Assignments of Error 1-5

1. Must this Court defer to the Board's determination that the City did not clearly err in enacting Ordinance 3473, which conditions sewer service on annexation, as GMA does not govern this issue, but the Ordinance is nevertheless consistent?
2. Must this Court defer to the Board's determination that the City Council did not clearly err in enacting Ordinance 3472, which adopts policies that require the City Council to consider municipal service adequacy and land use mix when initiating an annexation, consistent with the three GMA provisions Skagit D06 identifies when:
  - (a) RCW 36.70A.390 addresses moratorium procedures, not land use mix or municipal service adequacy policies;
  - (b) RCW 36.70A.020(1) and (2) encourage urban development that is adequately supported by urban infrastructure; and
  - (c) RCW 36.70A.110(1) and (2) govern not annexation, but UGA sizing decisions, and provide for UGA's to have adequate capacity for residential, industrial, and commercial growth?

**B. Issue Pertaining To City’s Assignment of Error On Cross-Appeal**

1. Ordinance 3473 makes sewer service contingent on annexation. Because GMA does not govern this issue, did the Board err in assuming jurisdiction?
2. Ordinance 3473 adopts annexation policies for use in Council initiated annexations. Because GMA does not govern annexation, did the Board err in assuming jurisdiction?

**IV. STATEMENT OF THE CASE**

**A. City’s 100 Year Old Sewer System**

Mount Vernon rests beside the Skagit River, which is part of the most significant watershed for salmon recovery.<sup>4</sup> The City's 100-year old sewer system empties into the River.<sup>5</sup> Insufficiently treated outflows jeopardize City Clean Water Act compliance. In the City’s older areas, the same pipes collect rainwater runoff and sewage.<sup>6</sup> Mount Vernon’s sewer system, like other systems constructed in the early 1900s, was originally designed to collect sewage and stormwater for discharge “directly into the nearest body of water.”<sup>7</sup> Before 1999, untreated sewage flow into the Skagit River was constant.

---

<sup>4</sup> AR 1185 (Skagit River is identified as a Class A receiving water); *Swinomish Indian Tribal Community v. WWGMHB*, 161 Wn.2d 415, 425, 166 P.3d 1198 (2007).

<sup>5</sup> AR 910 (Sewer Plan).

<sup>6</sup> AR 977 (Sewer Plan).

<sup>7</sup> AR 910 (Sewer Plan).

The City is working aggressively toward reducing untreated combined sewer overflows to the Skagit River to one event or less per year. As evidence, the number of untreated CSO events to the Skagit River has been reduced from 90 per year to less than 10 per year since the beginning of 1999. This reduction in untreated CSO events is a direct result of the City's commitment to maintain water quality in the Skagit River. ... The WWTP [wastewater treatment plant] improvement upgrade plan we will present ... should allow us to make another 90% reduction in overflows, bringing the City into compliance with the consent order, perhaps earlier than the 2015 timeframe.<sup>8</sup>

These efforts to reduce untreated sewage overflow have enabled the City to achieve Clean Water Act compliance. However, the City is subject to increasingly restrictive conditions.<sup>9</sup> The City's National Pollution Discharge Elimination System Waste Discharge Permit sets organic capacity through biological oxygen demand and total suspended solids levels.<sup>10</sup> The City's recent physical capacity upgrade did not significantly increase organic capacity.<sup>11</sup> There is capacity to service existing development within the City, and a large portion of future in-fill, but not to serve the unincorporated UGA concurrent with development.<sup>12</sup>

Failure to adequately plan for improvements can result in excess demand on treatment plant capacity, which can cause "unregulated discharges of insufficiently-treated wastewater into the environment

---

<sup>8</sup> AR 902 (Sewer Plan). Improvements in addition to the 2009 upgrade will be required.

<sup>9</sup> AR 235-38 (Staff Report).

<sup>10</sup> AR 235-236 (Staff Report).

<sup>11</sup> AR 235-38 (Staff Report). Organic capacity is the ability to treat and remove contaminants; *i.e.*, materials which transmit disease, endanger aquatic organisms, and impair the soil or overall environment.

<sup>12</sup> AR 238 (Staff Report).

including the aquifer, surface waters or waters of statewide significance....”<sup>13</sup> This can mean “noncompliance with state and federal discharge permits resulting in fines and other enforcement measures including ... emergency capital improvements.”<sup>14</sup> The City treatment facility lacks capacity to immediately serve Skagit D06.<sup>15</sup>

### **B. Cost to Extend Sewer: \$14 Million**

The Property “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.”<sup>16</sup>

The cost estimate for these sewer lines along with the pump station equal \$14,300,000.00 ... These costs estimates **do not** include land acquisition or easements .... Moreover, these are **2003** cost estimates that would need to be adjusted to 2009 dollars .... [O]ther improvements to the existing sanitary sewer infrastructure ... (*i.e.*, pipe upsizing, new or expanded pump stations, or other similar upgrades) may be necessary to accommodate the increased flows from the ... the east UGA through the City to the WWTP. ... Ecology has not approved any proposed facility plans to build sewer improvements within the East UGA or the subject site. In addition to the enormous costs that Skagit D06 would be burdened with in extending the sanitary sewer lines to the project site; there are issues with regard to the WWTP capacity....<sup>17</sup>

Immediate service extension is neither planned for nor fiscally possible.

---

<sup>13</sup> AR 1658 (Ordinance 3445, Finding 7).

<sup>14</sup> AR 1658 (Ordinance 3445, Finding 6); AR 238 (Staff Report).

<sup>15</sup> AR 238 (Staff Report).

<sup>16</sup> AR 231 (Staff Report).

<sup>17</sup> AR 232 (Staff Report).

### C. UGA Is Oversized

The City's four UGA's have almost twice the capacity needed to accommodate residential growth through 2025. The UGA's are tasked with accommodating 16,711 people by 2025.<sup>18</sup> 30,816 can be accommodated.<sup>19</sup>

Skagit D06 misrepresents City land capacity. Skagit D06 states the City needs 7,115 new housing units to accommodate planned growth,<sup>20</sup> **but fails to disclose how many units are already constructed.** As of 2009, only 4,688 more housing units were needed.<sup>21</sup> Within the City, there is capacity for 2,395-4,192 units.<sup>22</sup> In other words, the City alone (without the unincorporated UGA), can accommodate 51%-89% of all residential growth expected through 2025.

The 89% figure is more accurate, as the City's land capacity analysis is conservative. The analysis did not account for the City's planned unit developments and transfer of development rights program; densities in three commercial zones (C-1, C-3, and C-4) authorizing multi-family development; 155 residentially zoned acres previously assumed to be for public use; and 200-400 residences planned for a downtown master

---

<sup>18</sup> AR 809 (2005 Buildable Lands Analysis, p. 1); AR 227 (Staff Report).

<sup>19</sup> AR 819 (2005 Buildable Lands Analysis, Table 1.3). This figure is conservative. Even if 30% of those expected to subdivide do not, the UGA is still over-sized. AR 228 (Staff Report).

<sup>20</sup> Appellant's Opening Brief, p. 7.

<sup>21</sup> AR 228 (Staff Report, 1<sup>st</sup> paragraph).

<sup>22</sup> AR 228 (Staff Report, 2<sup>nd</sup> and 3<sup>rd</sup> paragraphs). The lower figure results from wetland size increases coupled with a 30% market factor.

planned project.<sup>23</sup> Further capacity is in the “pipeline,” including eight subdivisions with preliminary, but not final plat approval, and two applications allowing 805 single-family residences.<sup>24</sup> And, growth rates are less than planned for.<sup>25</sup> Because the land capacity analysis was so conservative, the City updated it.<sup>26</sup> Skagit D06 opposed Record supplementation before the Board,<sup>27</sup> so the update was not added.<sup>28</sup> However, whether assessed through the original analysis or update, the UGA’s are over-sized for residential growth.

#### **D. Inadequate Commercial/Industrial Land**

The City has a jobs-housing imbalance. 63% of the City is zoned for residential use, while only 11% is zoned for commercial and industrial use.<sup>29</sup> To provide for its projected growth by 2025, the City requires an additional 809 gross acres of commercial/industrial lands.<sup>30</sup>

When residents must commute outside the City due to a poor commercial/industrial land inventory, this increases transportation system

---

<sup>23</sup> AR 228 (Staff Report).

<sup>24</sup> AR 238. The eight plats could accommodate 797 lots. *See also* AR 239.

<sup>25</sup> From 2004-2009, 217 housing units were created. AR 228. From 2000-2008, 267 housing units were created annually. AR 238-239. City infill capacity for 2,395-4,192 units is met 8-19 years from 2009, or between 2017 and 2027.

<sup>26</sup> AR 1845-1918 (2010 Buildable Lands and Land Capacity Analysis Report).

<sup>27</sup> AR 755-757; AR 1949. The update implements the work plan. AR 1662.

<sup>28</sup> AR 2242 (Board Decision). The City Council has since adopted the update into the Comprehensive Plan through Ordinance 3503, which the Court may take notice. CP 478-481 (Ordinance 3503). The fact of adoption is readily confirmed and cannot be questioned. ER 201(b).

<sup>29</sup> AR 239 (Staff Report).

<sup>30</sup> AR 1381 and 1399 (Commercial and Industrial Land Needs Analysis).

costs, commute times, and vehicle emissions;<sup>31</sup> and, impedes economic development:

[P]ast population growth ... has outpaced employment growth, eroding its [the city's] jobs housing balance and ability to support services for its growing residential base. ... The result has been inadequate growth of jobs and services to support Mount Vernon's rapidly growing residential population.<sup>32</sup>

Correcting this imbalance is a key Comprehensive Plan objective.<sup>33</sup> Skagit D06's assertion that "the City has no plan to either annex or rezone any commercial or industrial properties" is false.<sup>34</sup> The City Comprehensive Plan identifies eight areas with potential for commercial and industrial growth.<sup>35</sup> One of the primary reasons these areas are listed is due to their potential for rezoning for commercial/industrial growth.

The City has limited options for addressing this imbalance through UGA expansion, as flood plains surround it on three sides. The Legislature imposed a UGA expansion prohibition on the City's North, South, and West sides to protect flood-prone agricultural lands.<sup>36</sup>

---

<sup>31</sup> AR 1395 (Commercial & Industrial Land Needs Analysis) ("A declining jobs-housing balance indicates that households are growing more rapidly than jobs, leading to increased out-commuting, regional traffic congestion and decreased revenue to support" City public services.) See also RCW 47.01.440 and RCW 70.235.020.

<sup>32</sup> AR 1410 (Commercial & Industrial Land Needs Analysis).

<sup>33</sup> AR 1395; AR 796-797, Objective LU-25.1 ("Balance residential, commercial, industrial and public land uses within the City"), Policy LU-25.1.3 ("[P]rovide enough commercial/industrial areas within the City to balance residential growth.").

<sup>34</sup> Appellant's Opening Brief, p. 15.

<sup>35</sup> AR 800 and 761 (Comprehensive Plan, Land Use Element).

<sup>36</sup> RCW 36.70A.110(8).

Particularly given these restrictions, the City Council must consider use balance in deciding whether to initiate an annexation.

#### **E. Skagit D06 Did not Initiate Annexation**

Skagit D06 never initiated the annexation process. Skagit D06 scheduled a pre-application meeting, and was provided staff comments,<sup>37</sup> a copy of the Notice of Intent to Commence Annexation Proceedings, and an annexation checklist. Staff told Skagit D06 while it would be difficult to support annexation, this was a City Council decision. Skagit D06's statement that "[f]ollowing rejection of its annexation application...." is false.<sup>38</sup> Skagit D06 never completed the paperwork necessary to initiate annexation. Below is the sequence of events, culminating in legal counsel's concession that sewer service is dependent on availability:

- **10/2006:** Skagit D06 states it would like to annex 200 acres to the City.<sup>39</sup>
- **10/2008:** Pre-application meeting.<sup>40</sup>
- **11/2008:** Skagit D06 requests staff meeting to discuss sewer questions.<sup>41</sup>

---

<sup>37</sup> AR 1991-1997 (pre-application memo); AR 1987-1990 (pre-application meeting request form).

<sup>38</sup> Appellant's Opening Brief, pgs. 10-11.

<sup>39</sup> AR 208 (Staff Report).

<sup>40</sup> AR 209.

<sup>41</sup> AR 209.

- **1/2009:** City staff schedule Council meeting to address Council position on sewer service. Skagit D06’s legal counsel cancels the meeting.
- **1/2009:** Skagit D06’s legal counsel states Skagit D06 is **not seeking an agreement** but may seek confirmation on sewer service.<sup>42</sup>
- **3/2009:** Skagit D06 states: “Skagit D06 is NOT asking the City to confirm that sewer service will necessarily be made available to this site. **On the contrary, we recognize that prior to approval of actual sewer service, the City will need to evaluate the capacity of its sewer system ....**”<sup>43</sup>
- **3/2009:** Skagit D06’s attorney presents to the City Council, but does not request City action.<sup>44</sup>

Instead of requesting service, Skagit D06 requested a sewer availability “letter.” Staff recommended against it because: (1) the letter would not comply with Skagit County Code; (2) service is inconsistent with the City’s capital facilities planning, and would undercut capacity needed for development planned for earlier service; (3) lack of sewer facility capacity; and (4) lack of funding for needed infrastructure.<sup>45</sup> Skagit D06 did not attempt to resolve these issues and request a decision on sewer availability, and did not apply for annexation. Also, Skagit D06’s assertions regarding other sewer providers are incorrect.<sup>46</sup> Another

---

<sup>42</sup> AR 209.

<sup>43</sup> AR 1573.

<sup>44</sup> AR 210 (Staff Report).

<sup>45</sup> AR 240 (Staff Report).

<sup>46</sup> Appellant’s Opening Brief, p. 42; AR 239(Staff Report, para. 6).

public sewer system is proximate to the site.<sup>47</sup> However, instead of resolving these issues, Skagit D06 filed this appeal.

#### **F. County Code Phases Development**

The Board originally found the County's regulatory structure non-compliant.<sup>48</sup> This was because the County had failed to adopt development regulations to address GMA requirements for phasing urban infrastructure within the UGAs.<sup>49</sup> Following coordination with its cities to ensure service to existing development was not undercut, and years of litigation, the County achieved compliance.<sup>50</sup> The adopted regulations zone the unincorporated UGAs around Anacortes, Burlington, Concrete, Mount Vernon and Sedro-Woolley.<sup>51</sup> This County zoning governs the Property, with allowed densities based on service levels.

- **Urban Services Available:** Urban densities, ranging from 3.23-4.54 dwelling units per net acre.<sup>52</sup>

---

<sup>47</sup> 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.")

<sup>48</sup> *FOSC v. Skagit County*, WWGMHB #00-2-0050c, FDO (February 6, 2001), p. 5; *City of Sedro- Woolley v. Skagit County*, WWGMHB #03-2-0013c, Compliance Order (June 18th, 2004), p. 29.

<sup>49</sup> *Id.*

<sup>50</sup> *City of Sedro-Woolley v. Skagit County*, WWGMHB #03-2-0013c, Compliance Order (July 13<sup>th</sup>, 2005).

<sup>51</sup> AR 1704-1706 (Skagit County Ordinance 020050007).

<sup>52</sup> AR 1694-1698 (SCC 14.16.910).

- **Urban Services Available in the Near Term - One Acre Lots with a “Shadow Plat”:** Subdivision into one acre lots, with ‘shadow plat,’ ensuring the lot is configured so it can be redeveloped to greater densities once urban services are available.<sup>53</sup>
- **Urban Services Not Available - 5 Acre Lots:** Property may be subdivided into five acre lots, without sewer.<sup>54</sup>

This phased approach ensures urban services and utilities are constructed concurrent with development, consistent with *Sedro-Woolley*,<sup>55</sup> which **required** this type of phasing. The City adopted consistent Comprehensive Plan policies:

- Policy CF 17.1.1. Adequate sewer service capacity should be assured prior to the approval of any new development application.
- Policy CF-17.1.2. Development should be conditioned on the orderly and timely provision of sanitary sewers.
- Policy U-1.1.6. Identify utility capacity needed to accommodate growth prior to annexation. Do not annex areas where adequate utility capacity cannot be provided.
- Policy LU-29.1.1. The first priority of the City shall be to annex and provide urban services ... on a priority basis to those areas immediately adjacent to the City where available services can most easily and economically be extended.<sup>56</sup>

The City planning policies and County zoning are unchallenged.

---

<sup>53</sup> AR 1694-1698 (SCC 14.16.910)

<sup>54</sup> AR 1692 (SCC 14.16.370(5)) and AR 1689 (SCC 14.16.195(5)).

<sup>55</sup> *City of Sedro-Woolley v. Skagit County*, WWGMHB #03-02-0013c, Compliance Order (June 18, 2004).

<sup>56</sup> AR 230-231.

### **G. City Capital Facilities Plans Phase Sewer**

To plan for urban infrastructure over a twenty year planning horizon, the City has adopted GMA-required utility service plans. The City's 2004 Sewer Plan Update<sup>57</sup> recognizes system improvements will be required to extend sewer service beyond current City limits, and notes the City initiated study to determine and develop necessary improvements.<sup>58</sup>

The City's 2003 Urban Growth Area Service Study identifies the facilities required to provide sewer service to the unincorporated UGA.<sup>59</sup> The Study identifies needed engineering, including potential trunk sewers and interceptor locations; pump station locations; linear feet of system improvements; and estimated construction costs.<sup>60</sup> "In the model the flows from the drainage basin or portions of the drainage basin are routed into the upstream end of pipe segments."<sup>61</sup> The sewer main stem is extended in increments, along a planned route, and consistent with gravity flow, to minimize expense. Under this planning, the Property is the last area served in the City's East UGA.<sup>62</sup>

---

<sup>57</sup> AR 857-1326.

<sup>58</sup> AR 913.

<sup>59</sup> AR 1337, AR 1335-1376 (Urban Growth Area Sewer Service Study).

<sup>60</sup> AR 1335-1376.

<sup>61</sup> AR 1340.

<sup>62</sup> AR 208 and 231 (Staff Report).

The City's GMA required 2008 Capital Improvement Plan (CIP) provides a six-year schedule of improvements (including wastewater) and projected means of financing them.<sup>63</sup> The CIP is based on extensive analysis of expected development.<sup>64</sup> The CIP does not plan for Property service within GMA's six-year planning horizon for funding capital facilities. Skagit D06 did not appeal.

#### **H. The City Repealed its Interim Ordinances**

The City engaged in extensive planning before adopting the two Ordinances appealed here. This included adopting emergency interim ordinances pursuant to RCW 36.70A.390 and RCW 35.63.200.<sup>65</sup> These ordinances were never challenged, and were repealed<sup>66</sup> when the City adopted Ordinances 3473 and 3472, which enacted permanent regulations and policies.

#### **I. State Law Provides for Conditioning Sewer Service on Annexation**

Ordinance 3473 adopts three sentences, stating sewer service is contingent on annexation:

---

<sup>63</sup> AR 1638-1639 (Ordinance 3418 adopts the CIP); the complete CIP is at AR 1414-1537.

<sup>64</sup> Although not required, the City completed a buildable lands inventory in 2006 to identify land potentially available for development. AR 807-37. Later that year, though again not required, the City adopted a Commercial and Industrial Land Needs Analysis, which forecast commercial and industrial needs through 2025. AR 1378-1413.

<sup>65</sup> AR 261-267 (Ordinance 3445); AR 254-259 (Ordinance 3442).

<sup>66</sup> AR 1679 (Ordinance 3473).

Sewer connections shall not be allowed outside the city limits of Mount Vernon. Only after property is annexed into the City may a sewer connection be made in accordance with this Chapter. This ordinance shall not apply to any sewer connection outside the City limits that exists or any sewer connection agreement between the City and property owner in effect prior to the effective date of this ordinance.<sup>67</sup>

As Skagit D06 concedes,<sup>68</sup> and consistent with state law,<sup>69</sup> the City may make sewer service contingent on annexation.

#### **J. Policies Mirror Annexation Statutes**

Ordinance 3472 adopts policies for the City Council to consider when initiating an annexation. Skagit D06 challenges only two policies, which provide for: (1) adequate municipal services; and (2) a balance between residential and commercial uses. The policies mirror non-GMA requirements for reviewing an annexation proposal.<sup>70</sup>

### **V. LEGAL ANALYSIS**

#### **A. Standard of Review**

Skagit D06 has the burden of proof.<sup>71</sup> The Legislature has directed that “[t]he board **shall find compliance** unless it determines that

---

<sup>67</sup> AR 1679 (Ordinance 3473), codified at Mount Vernon Municipal Code 13.08.060.

<sup>68</sup> 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...”). While Skagit D06 contends it is entitled to immediate service, it cites no case holding service cannot be conditioned on annexation.

<sup>69</sup> RCW 35.67.310; RCW 35A.21.150; *Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 382, 858 P.2d 245 (1993). See also Section V-E of this Brief.

<sup>70</sup> RCW 35A.14.200.

<sup>71</sup> RCW 36.70A.320.

the action by the state agency, county, or city is **clearly erroneous** in view of the entire record before the board and in light of the goals and requirements of this chapter.”<sup>72</sup> “Clearly erroneous” means the Board must have a “firm and definite conviction that a mistake has been committed.”<sup>73</sup> In applying this standard, the Legislature accords “great deference” to local planning.<sup>74</sup>

[T]he legislature intends for the board to grant deference to ... cities in how they plan for growth.... Local comprehensive plans and development regulations require ... cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, **the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a ... city's future rests with that community.**<sup>75</sup>

Skagit D06 does not reference GMA’s “clearly erroneous” review standard, RCW 36.70A.320(3), or RCW 36.70A.3201, which includes the legislative findings quoted above. These were enacted into law.

Skagit D06 does reference the APA standard the Court uses in reviewing whether the Board appropriately deferred to the City. Under the APA, Skagit D06 has the burden of proof to show that the Board, in light of GMA’s high standard of review, erroneously interpreted the law, lacked

---

<sup>72</sup> RCW 36.70A.320.

<sup>73</sup> *Quadrant Corp. v. CPSGMHB*, 154 Wn.2d 224, 237, 110 P.3d 1132 (2005).

<sup>74</sup> RCW 36.70A.3201; *Thurston County v. WWGMHB*, 164 Wn.2d 329, 336, 190 P.3d 38 (2008).

<sup>75</sup> RCW 36.70A.3201, emphasis added.

substantial evidence, or made an arbitrary and capricious ruling.<sup>76</sup> But, Skagit D06 does not mention GMA's "clearly erroneous" standard. This is significant, because unlike APA appeals involving other statutes, such as the Shoreline Management Act,<sup>77</sup> GMA is not liberally construed.

[F]rom the beginning the GMA was riddled with politically necessary omissions, internal inconsistencies, and vague language. The GMA was spawned by controversy, not consensus and, as a result, it is not to be liberally construed.<sup>78</sup>

The Legislature has not hesitated to act when the Board overstepped jurisdictional boundaries. For example, the Legislature increased the standard of review to clear error and took the unusual step of enacted findings into law explaining the deference afforded local jurisdictions.<sup>79</sup> And, the Legislature took just four months after a Board conflated GMA and SMA requirements to correct the interpretation.<sup>80</sup> Similarly, when litigants have attempted to create mandates not found in GMA, or pushed the Board to impermissibly create public policy, the State Supreme Court and has not hesitated to confirm the local discretion GMA requires.<sup>81</sup>

---

<sup>76</sup> RCW 34.05.570(3).

<sup>77</sup> RCW 90.58.900.

<sup>78</sup> *Thurston County v. WWGMHB*, 164 Wn.2d 329, 342, 190 P.3d 38 (2008).

<sup>79</sup> RCW 36.70A.3201.

<sup>80</sup> *Futurewise v. WWGMHB*, 164 Wn.2d 242, 244 and 246, 189 P.3d 161 (2008)

("legislature acted the next session by enacting a law explicitly rejecting that board's interpretation"); see also legislative findings codified at RCW 90.58.030.

<sup>81</sup> *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 129-130, 118 P.3d 322 (2005)

("GMA creates a general 'framework' to guide local jurisdictions instead of 'bright line' rules."); see also *Quadrant Corporation v. CPSGMHB*, 154 Wn.2d 224, 246, 110 P.3d 1132 (2005) (GMA's goals do not create independent, substantive requirements).

The Board properly deferred to the City. Skagit D06 has no right under GMA to sewer service on demand. GMA Goals 1 and 2, and RCW 36.70A.110(1) and (2), do not provide for urban development until adequate infrastructure can be provided concurrent with development. RCW 36.70A.110(3), which Skagit D06 does not reference, specifically provides for phasing urban development within a UGA. GMA and non-GMA statutes alike provide for the City to consider capital facility adequacy and use mix in making annexation decisions. The Board's Decision correctly interprets GMA, is supported by substantial evidence, and is not arbitrary and capricious.<sup>82</sup> The City asks it be upheld.

**B. There is No Moratorium**

**1. Skagit D06 Did Not Appeal the Interim Legislation**

The City previously enacted interim legislation pursuant to RCW 36.70A.390 and RCW 35.63.200, which was repealed.<sup>83</sup> This interim legislation was not challenged, and is not before this Court. What Skagit D06 now appeals are the **permanent** regulations and policies. Because Skagit D06 failed to appeal the ordinances enacted under RCW 36.70A.390, the statute is irrelevant. But, even if relevant, the City did

---

<sup>82</sup> RCW 34.05.570.

<sup>83</sup> AR 254-259 (Ordinance 3442); AR 261-267 (Ordinance 3445). These two ordinances were repealed by Ordinance 3473, *see* AR 1679.

follow RCW 36.70A.390 procedures, which provide for drafting findings and adopting a work plan:

If the governing body does not adopt findings of fact justifying its action before this hearing, then the governing body shall do so immediately after .... A moratorium ... may be effective for up to one year if a work plan is developed .... A moratorium ... may be renewed for one or more six-month periods if a ... public hearing is held and findings of fact are made ....<sup>84</sup>

Skagit D06 does not challenge any findings, so cannot meet its burden of proof.<sup>85</sup> And, the City did adopt a work plan<sup>86</sup> which it is implementing. For example, the City has adopted an updated Buildable Lands Analysis,<sup>87</sup> although Skagit D06 opposed the City's motion to add it.<sup>88</sup> Given the Ordinance's findings, City's hearings, and work plan implementation, the City has acted consistently with RCW 36.70A.390, although without a timely appeal of the interim legislation, .390 does not apply.

## **2. The Two Policies Are Not a De Facto Moratorium**

Skagit D06 concedes sewer service may be conditioned on annexation.<sup>89</sup> Such action does not morph into a "moratorium" when

---

<sup>84</sup> RCW 36.70A.390.

<sup>85</sup> AR 1665-1671(Ordinance 3472); AR 1675-1684 (Ordinance 3473).

<sup>86</sup> AR 266-267 (Ordinance 3445).

<sup>87</sup> AR 1845-1918 (2010 Buildable Lands and Land Capacity Analysis Report).

<sup>88</sup> See Section IV-C, above.

<sup>89</sup> 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..."). While Skagit D06 contends it is

coupled with two policies providing for consideration of infrastructure adequacy and use mix during a City Council initiated annexation. Even if the dubious proposition that two comprehensive plan policies can ever constitute a moratorium is accepted at face value,<sup>90</sup> the policies, (which Skagit D06 fails to examine in argument) do not meet Skagit D06's moratorium definition. Skagit D06 describes a moratorium as occurring "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."<sup>91</sup> The two policies are not a moratorium.

The City has not and could not bar development application submission under the existing zoning, because the applicable zoning is the County's. Skagit D06's reliance on *Biggers*<sup>92</sup> is misplaced. In *Biggers*, in a decision issued by a divided Court through a plurality opinion, there was no dispute that Bainbridge had adopted a multi-year, rolling moratoria, denying previously authorized shoreline development. The issue was not whether there was a moratorium, but whether the SMA (not

---

entitled to immediate service, it cites no case holding service cannot be conditioned on annexation.

<sup>90</sup> *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861; 947 P.2d 1208 (1997) (zoning code governs authorized development).

<sup>91</sup> Appellant's Opening Brief, p. 21.

<sup>92</sup> *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 169 P.3d 14 (2007).

GMA) authorized it. Here, the County Code authorizes residential development, but the highest densities depend on sewer service. The County Code creates no “right” to the higher densities. Consistent with GMA concurrency requirements, the County Code provides that to develop at the highest densities, sewer must be available. This is the case with any development project. Development is always contingent on meeting code defined concurrency requirements.<sup>93</sup>

Conditioning utility service on annexation and considering infrastructure availability and use mix in a discretionary decision on annexation do not deny a property owner a “right” to develop. Neither Skagit D06 nor similarly situated property owners have an automatic and immediate right to sewer or annexation.<sup>94</sup> Even if there were such right, the City has not denied it. No decision was ever made on this issue, and Skagit D06 never submitted an application requesting annexation.<sup>95</sup> As for Skagit D06’s implication that there are property owners willing to

---

<sup>93</sup> See e.g. *Whatcom County Fire District No. 21 v. Whatcom County*, 171 Wn.2d 421, 256 P.3d 295 (2011) (development could not be approved without meeting concurrency requirements).

<sup>94</sup> If Skagit D06 were specifically entitled to sewer service, this would not be determined through a challenge to two plan policies but by challenging a sewer service decision.

<sup>95</sup> See Section IV-E, above.

front \$14.3 million plus for sewer service,<sup>96</sup> the Record contains no evidence of such offers.

### **3. Skagit D06 Concedes Making Sewer Service Contingent on Annexation is Not a Moratorium**

Ordinance 3473 makes sewer utility service contingent on annexation, which Skagit D06 concedes is permissible.<sup>97</sup> Even without the concession, conditioning service on annexation is not a moratorium. Both state law<sup>98</sup> and the Growth Board have so held:

Here, the City is requiring annexation as a condition of providing sewer service within the UGA. The City is responsible for providing urban services to development within the UGA at the time such development is available for use and occupancy, and within the twenty year horizon of the City's plan for the UGA. The approach the City has chosen to managing growth, specifically the provision of sewer service, is a valid option which the City may choose in order to transform governance and phase development within the UGA. **It is not a denial of sewer service or de facto moratorium on development within the UGA. As such, the premise upon which MBA builds its case – the amendment is a denial of services and a moratorium – is false.**<sup>99</sup>

This Board decision was issued over seven years ago. Had the Legislature disagreed with the interpretation, it could have revised GMA. It chose not

---

<sup>96</sup> Appellant's Opening Brief, p. 22.

<sup>97</sup> 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..."). While Skagit D06 contends it is entitled to immediate service, it cites no case suggesting service cannot be conditioned on annexation.

<sup>98</sup> RCW 35.67.310; RCW 35A.21.150; *Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 382, 858 P.2d 245 (1993). See also Section V-E of this Brief.

<sup>99</sup> *Master Builders Ass'n v. City of Arlington*, CPSGMHB #04-3-0001, FDO (July 14, 2004), p. 11, emphasis added.

to, (indeed, it left in place RCW 36.70A.110(3), which dictates the result), and as such, the Board, as the agency charged with interpreting GMA, must be deferred to.<sup>100</sup> This is not the only Board decision taking this position. The Board has long recognized a moratorium is not created simply because there are preconditions to achieving higher densities.

[The Ordinance] does not adopt a moratorium, de facto or otherwise. It permits development within the City Center Area, but imposes conditions and requirements for such development to proceed. Therefore, the Board concludes that RCW 36.70A.390 is not applicable....<sup>101</sup>

If the law were otherwise, it would not possible to ensure development was supported by adequate infrastructure.<sup>102</sup>

#### **4. Infrastructure Adequacy and Use Mix Must be Considered in an Annexation**

The City is not obligated to initiate annexation proceedings to immediately place all property within the UGA under its jurisdiction. This is a discretionary decision.<sup>103</sup> And, it may adopt “annexation policies” to guide this decision. The two policies mirror statutory annexation requirement and are consistent with GMA.

---

<sup>100</sup> *City of Seattle v. King County*, 52 Wn.App. 628, 633, 762 P.2d 1152 (1988) (“The persuasive force of such an interpretation is strengthened when the legislature, by its failure to amend a statute, “silently acquiesces” in the administrative interpretation.”).

<sup>101</sup> *Pirie Second Family Limited Partnership, LP v. Lynnwood*, CPSGMHB #06-3-0029, FDO (April 9, 2007), p. 34. .

<sup>102</sup> Skagit D06’s reliance on a Board decision in *MBA/Camwest v. City of Sammamish*, CPSGMHB #05-3-0027, FDO (August 4, 2005) is misplaced. Even a lottery **capping** the annual number of development applications was not a moratorium.

<sup>103</sup> See Section V-E of this Brief.

*Annexation Policy F – Municipal Service Adequacy.* Annexation Policy F provides for the City to find “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.”<sup>104</sup> The policy is consistent with GMA, and non-GMA annexation statutes, which **require** consideration of “[m]unicipal services; need for municipal services ... **cost and adequacy of governmental services....**”<sup>105</sup>

For the City to have “capacity,” does not mean sanitary sewer must be in place or ‘pipes in the ground’ on site prior to annexation. Skagit D06 provides no Record support for such an interpretation. Nowhere in the City Code does “adequate municipal services exist to serve the area” equate to “pipes in the ground.” Rather, what is required, consistent with GMA, is a determination that services can be provided concurrent with development, or within six years.<sup>106</sup> Skagit D06 **ignores** Annexation Policy LU 29.3.1 which provides for infrastructure extensions with annexation if consistent with the City’s six year plan and cost efficient:

Policy LU 29.3.1 Annex areas into the City based on the premises of limiting sprawl, providing for efficient provision of public services and facilities, **servicing areas where the cost of extending infrastructure consistent with adopted capital improvement plans [i.e., six year capital improvement plan]**

---

<sup>104</sup> AR 1668 (Ordinance 3472).

<sup>105</sup> RCW 36.93.170(2). Similarly, the county-wide planning policies require service adequacy be confirmed, consistent with GMA. AR 1818-1843 generally, AR 1841 specifically (CPP’s, see CPP’s 12, 12.1, 12.5, 12.6, and 12.7).

<sup>106</sup> RCW 36.70A.070(3); AR 776 (Comprehensive Plan); AR 1420 (Capital Improvements Plan) (using GMA’s six-year measurement for concurrency).

**is the most cost efficient,** and avoiding “leap-frog” development and annexation.<sup>107</sup>

Policy F is consistent with the City’s definition of municipal service adequacy and GMA’s approach to concurrency, as well as non-GMA annexation requirements.

*Annexation Policy B – Use Mix.* Annexation Policy B provides for annexation of residentially zoned property to “not occur until additional areas zoned for commercial/industrial are officially designated such that a balance between residential commercial/industrial uses can be achieved within the City.<sup>108</sup> To achieve a balance, this does not mean all planned commercial/industrial acres need be supplied, but that the Council considers whether or not a balance **can be** achieved within the City. As GMA requires,<sup>109</sup> the City Comprehensive Plan’s sets a target of 809 acres of commercial/industrial land over the 20-year planning period to correct the current imbalance.<sup>110</sup>

When a UGA is established (and in future planning decisions), cities are required to accommodate not only the next 20-years of

---

<sup>107</sup> AR 1669 (Ordinance 3472), Policy LU-29.3.1, emphasis added.

<sup>108</sup> AR 1668 (Ordinance 3472).

<sup>109</sup> Under RCW 36.70A.110(2), when a UGA is established, it must be sized to accommodate not only the next 20-years of population

<sup>110</sup> Skagit D06 erroneously asserts there is no plan to annex or rezone property to achieve these goals. Appellant’s Opening Brief, p. 15. The assertion is incorrect. See Section IV-D of this Brief. Skagit D06 has not appealed the adequacy of planning in the City’s Comprehensive Plan and Capital Facilities Plan.

“residential growth,” but also, commercial and industrial growth.<sup>111</sup> It is undisputed that the City has an imbalance of residential and non-residential uses.<sup>112</sup> This inadequate employment base contributes to long commutes, and increases vehicle miles and emissions.<sup>113</sup> This imbalance, an inheritance of traditional Euclidean development patterns in which uses are separated, forcing people into their cars and stymieing neighborhood self-sufficiency, thwarts GMA’s primary objective – to achieve economically sustainable development patterns.<sup>114</sup> To address these issues, the City plans for commercial and industrial growth.

For Mount Vernon to annex residential properties at levels far in excess of what is necessary to achieve allocated population targets, without addressing use balance, or considering infrastructure issues, thwarts GMA. Sound planning is not simply a question of blindly installing Skagit D06’s “bright-line four dwelling unit/per acre” residential densities<sup>115</sup> in all locations within the UGA and bringing them into the City. It is a more nuanced question of timing utility service with development of divergent uses, to build a resilient urban community

---

<sup>111</sup> RCW 36.70A.110(2); RCW 36.70A.115.

<sup>112</sup> See Section IV-D of this Brief.

<sup>113</sup> Ch. 70.235 RCW; RCW 70.235.020; RCW 47.01.440.

<sup>114</sup> RCW 36.70A.010.

<sup>115</sup> The *Viking* Court rejected the notion that urban densities are defined with a “bright line” four-dwelling unit per acre default rule. *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 129-130, 118 P.3d 322 (2005).

which is adequately served with urban infrastructure. The City and County have completed this planning, consistent with GMA. Skagit D06 has not and could not appeal the County zoning or City's capital facilities plans,<sup>116</sup> and is precluded from doing so now through this back-door appeal.<sup>117</sup>

### 5. GMA Provides for Phasing Infrastructure

GMA was adopted to address “doughnut-holes;” a phenomenon in which urban dwellers continuously move out to an ever-expanding urban fringe, with urban infrastructure decaying in the wake. Consistent with GMA, the Board and Department of Commerce identify phasing as key for sustainable growth patterns:

**We have held that efficient phasing of urban infrastructure is the key component to transformance of governance from a county to a city. Assurance of annexation should occur before urban infrastructure is extended within the unincorporated portions of a UGA....<sup>118</sup>**

**The comprehensive plan must identify those facilities needed to achieve and maintain adopted levels of service over the twenty-year planning period, but only requires a six-year financing plan. Development phasing is a tool to address those areas for which capital facility needs have**

---

<sup>116</sup> Through the GMA update process, the City confirms GMA planning is on track. RCW 36.70A.130 (GMA update schedule).

<sup>117</sup> *Montlake Community Club v. Hearings Board*, 110 Wn. App. 731, 43 P.3d 57 (2002) (challenge to a plan could be used to belatedly challenge policies the city had earlier adopted); RCW 36.70A.290.

<sup>118</sup> *City of Sedro-Woolley v. Skagit County*, WWGMHB #03-02-0013c, Compliance Order (June 18, 2004), p. 17, emphasis added.

**been identified in the twenty-year plan, but financing has not yet been identified.**<sup>119</sup>

The cost of extending sewer to a property before annexing it (\$14 million plus dollars here) is a valid and statutorily required consideration.<sup>120</sup> Use balance is similarly a valid and statutorily required consideration before proceeding with annexation. The failure to consider these issues results in a failure to achieve GMA and City planning objectives to address use imbalance and adequately support urban development.

Skagit D06 asks the Court to ignore the fact that the City does not have the capacity to serve the entire City and UGA now.<sup>121</sup> However, extending sewer outside the City while failing to consider capacity will create a far more insidious result – dead pockets where infill does not develop due to inadequate urban infrastructure. The Legislature requires the City to consider whether an annexation is within the public interest and welfare, including its effect on economical and social interests.<sup>122</sup> The Court should reject Skagit D06’s invitation to misconstrue sound planning as moratoria. This is not a case about moratoria, but timing.

**C. RCW 36.70A.110(1) and (2) Do not Govern the Ordinances**

**1. RCW 36.70A.110(1) and (2) Govern UGA Sizing**

RCW 36.70A.110(1) and (2) do not apply to development regulations or annexation policies addressing use mix and infrastructure adequacy.

---

<sup>119</sup> WAC 365-196-330(1)(b), emphasis added.

<sup>120</sup> RCW 35A.14.200; AR 232 (Staff Report).

<sup>121</sup> The City is not the only sewer purveyor in the area. AR 914 (City Sewer Plan).

<sup>122</sup> RCW 35A.14.200.

They provide for counties to designate UGA's in their comprehensive plans which are sufficient (due to size and allowed development) to accommodate planned growth.

**Each county ... shall designate an urban growth area or areas within which urban growth shall be encouraged....**

Based upon the growth management population projection made for the county ..., the county and each city within the county **shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period....** As part of this planning process, each city within the county must include areas sufficient to accommodate the broad range of needs and uses that will accompany the projected urban growth including, as appropriate, medical, governmental, institutional, commercial, service, retail, and other nonresidential uses. Each urban growth area shall permit urban densities and shall include greenbelt and open space areas. ... **An urban growth area determination ... shall permit a range of urban densities and uses. ... Cities and counties have discretion in their comprehensive plans to make many choices about accommodating growth.**<sup>123</sup>

Skagit County and its cities have done this, and these decisions are unchallenged. RCW 36.70A.110, as the Board held (and Skagit D06 does not challenge), does not apply to development regulations.

The City points out RCW 36.70A.110 does not apply to development regulations, and therefore is inapplicable to Ordinance 3473 which amended City Code 13.08.060. The Board agrees with this assessment  
....<sup>124</sup>

---

<sup>123</sup> RCW 36.70A.110(1) and (2). UGA designations are made in the comprehensive plan. RCW 36.70A.110(6).

<sup>124</sup> AR 2259.

Because this section of GMA does not govern the City's regulation making sewer service contingent on annexation, at most, it only applies to the two policies. Nevertheless, both Ordinances are consistent.

## **2. GMA Provides for Phasing Growth within the UGA**

RCW 36.70A.110(1) and (2) do not address how growth and utility service is phased within the UGA. This is left to .110(3), which Skagit D06 does not address.<sup>125</sup>

Urban growth should be located first in areas already characterized by urban growth that have adequate existing public facility and service capacities to serve such development, second in areas already characterized by urban growth that will be served adequately by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources, and **third in the remaining portions of the urban growth areas.** ...

This language is coupled with GMA's capital facilities planning requirements.<sup>126</sup> Consistent with County zoning, under the City's Capital Facilities Plan, the Skagit D06 property (and those similarly situated) is planned for service. That service is not immediate, but comes at the end of GMA's 20-year planning period.<sup>127</sup> This planning was not appealed.

---

<sup>125</sup> See Appellant's Opening Brief, pgs. 36-43. RCW 36.70A.110(3) is not referenced.

<sup>126</sup> See e.g., RCW 36.70A.070(3).

<sup>127</sup> AR 208 and 231 (Staff Report). See also Section IV-G of this Brief.

### 3. The City is Encouraging Urban Growth

Mount Vernon is doing precisely what GMA contemplates. It is encouraging infill development within its borders and planning for infrastructure development consistent with its adopted capital facilities plans.

It is not clear why Skagit D06 references the *Normandy Park* decision given the City's zoning code is not appealed.<sup>128</sup> Also, the case was overruled. The Board decided the case a month before the Supreme Court issued the *Viking* decision, which did away with *Normandy Park's* "bright-line densities."<sup>129</sup> In light of *Viking*, King County Superior Court reversed the *Normandy Park* decision, and *Normandy Park's* zoning was upheld on remand.<sup>130</sup> But, even if the decision had not been reversed, *Normandy Park* and Mount Vernon are not comparable. In *Normandy Park*, according to the Board, 74% of the City was zoned for what the Board referred to as low-density development.<sup>131</sup> That is not the case in Mount Vernon. When the City adopted its Comprehensive Plan's Land Use Element in 2006, 71% of the zoning for primarily residential uses

---

<sup>128</sup> Appellant's Opening Brief, pgs. 37-38.

<sup>129</sup> *Viking Properties v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005).

<sup>130</sup> *Kaleas v. City of Normandy Park*, CPSGMHB #05-3-0007c, Order on Remand (July 31, 2006).

<sup>131</sup> *Kaleas v. City of Normandy Park*, CPSGMHB #05-3-0007c, FDO (July 19, 2005), p. 1.

allowed net densities of 4.54 dwelling units or more per acre.<sup>132</sup> The City is doing its part to accommodate urban development. The City does not zone outside its borders, but even if it had, the County’s zoning and plan designations are presumed compliant under GMA.<sup>133</sup>

The two annexation policies are not referenced in Skagit D06’s briefing on RCW 36.70A.110(1) and (2), even though this is the **single substantive GMA requirement Skagit D06 rests its entire case upon**. Skagit D06 cannot meet its burden of proof by failing to tie its unsupported assertions on sewer service to the actual City action, and ignoring GMA’s provisions on phasing infrastructure and development.

#### **D. Ordinances Consistent with Goals 1 and 2**

##### **1. GMA Goals Support Phasing Infrastructure**

GMA’s 14 goals<sup>134</sup> are used only “to guide the development and adoption of comprehensive plans and development regulations...”<sup>135</sup> “[W]hile the GMA goals collectively convey some conceptual guidance for growth management the GMA explicitly denies any order of priority” and “some are mutually competitive.”<sup>136</sup> Mount Vernon was guided by

---

<sup>132</sup> AR 766.

<sup>133</sup> RCW 36.70A.320; *City of Sedro-Woolley v. Skagit County*, WWGMHB #03-2-0013c, Compliance Order (July 13th, 2005).

<sup>134</sup> RCW 36.70A.020 lists thirteen goals. However, the Legislature has added a 14<sup>th</sup> goal addressing shoreline planning. RCW 36.70A.480.

<sup>135</sup> RCW 36.70A.020; RCW 36.70A.480.

<sup>136</sup> *Quadrant v. GMHB*, 154 Wn.2d 224, 246, 110 P.3d 1132 (2005).

Goals 1 and 2 in enacting the two Ordinances, and balanced them with GMA's 12 other goals. The Board properly found no clear error.

Goal 1 provides, “[e]ncourage development in urban areas **where adequate public facilities and services exist or can be provided in an efficient manner.**”<sup>137</sup> Goal 2 states, “[r]educe the inappropriate conversion of undeveloped land **into sprawling, low-density development.**”<sup>138</sup>

To achieve these goals, GMA provides for cities to phase UGA development, so development is adequately planned for and supported. Urban growth within a UGA is located first where there are adequate existing public facilities; second in areas which will be adequately served, **“third in the remaining portions of the urban growth areas.”**<sup>139</sup> It is this phasing of growth, with attendant urban facilities and services, which prevents the sprawl the goals reference.

Development phasing is the sequencing of development subareas within a city or urban growth area over the course of the twenty-year planning period. Development phasing ... [is] a way to achieve one or more of the following: (a) Orderly development pursuant to RCW 36.70A.110(3), ... (c) Preventing a pattern of sprawling low density development from occurring or vesting in these areas prior to the ability to support urban densities. Once this pattern has occurred, it is more difficult to serve with urban services and less likely to ultimately achieve urban densities; (d) Serving as a means of developing more

---

<sup>137</sup> RCW 36.70A.020(1), emphasis added.

<sup>138</sup> RCW 36.70A.020(2), emphasis added.

<sup>139</sup> RCW 36.70A.110(3), emphasis added; *see also* WAC 365-196-330.

detailed intergovernmental agreements or other plans to facilitate the orderly transition of governance and public services.<sup>140</sup>

Board case law is consistent. In fact, **the Skagit County phasing the**

**City follows was developed from Board litigation requiring it:**

We have dealt with a similar issue regarding the BOCC [Board of County Commissioners] concern that it is not fair for small property owners on the periphery of the UGA who want to divide and develop their land to have to wait years for a large developer or the City to extend sewer services. In ... [a previous decision] we stated:

“There are parameters to the City’s obligation to see that infrastructure is provided within the UGA. By creating the UGA boundaries that it has the City (in partnership with the County) has committed to public facilities necessary to support the planned development within the UGA. **However, the time-frame for providing those facilities is the twenty-year horizon of the Comprehensive Plan, not the six-year horizon of the Capital Improvements Plan.**”

We repeat that finding here. If the land owners on the periphery of the UGA had not been included in the UGA, they could not have subdivided their property into lots smaller than five acres at any time. **Therefore, it is not unreasonable for those property owners on the periphery to wait to the end of the 20-year planning period to subdivide their property into lots smaller than five-acres.**<sup>141</sup>

---

<sup>140</sup> WAC 365-196-330(1), emphasis added.

<sup>141</sup> *City of Sedro Woolley v. Skagit County*, WWGMHB #03-2-0013c, Compliance Order (June 18, 2004), p. 14, emphasis added; *see also City of Sedro-Woolley v. Skagit County*, WWGMHB #03-2-0013c, Compliance Order (July 13th, 2005) (County achieves compliance through zoning currently in place).

Skagit County is not the only county to have dealt with these issues. The Board similarly rejected arguments that conditioning sewer service on annexation is inconsistent with GMA's goals.

Again Petitioner's assertions that Ordinance No. 1304 conflicts with planning goals 1 and 4 in RCW 36.70A.020 are based on the premise that the requirement of annexation to the City as a condition of sewer service by the City is the same as a denial of sewer service to the unincorporated part of the UGA. The Board has addressed this premise ... and found this premise to be faulty.<sup>142</sup>

The Legislature could have enacted legislation addressing these decisions, but has not. The Board's interpretation must be deferred to.<sup>143</sup>

## **2. City Balanced Goals 1 and 2 with 12 Other Goals**

Skagit D06 abandoned its arguments of non-compliance with GMA's housing, economic development, property rights, and concurrency goals (Goals 4, 5, 6, and 12).<sup>144</sup> Consequently, the Ordinances must be deemed consistent. This creates an impossible hurdle for the Skagit D06, because these other goals support the Ordinances, emphasizing that development must not over-extend public service and facility capacity:

---

<sup>142</sup> *Master Builders Ass'n v. City of Arlington*, CPSGMHB #04-3-0001, FDO (July 14, 2004), p. 20.

<sup>143</sup> *City of Seattle v. King County*, 52 Wash.App. 628, 633, 762 P.2d 1152 (1988) ("The persuasive force of such an interpretation is strengthened when the legislature, by its failure to amend a statute, "silently acquiesces" in the administrative interpretation.").

<sup>144</sup> "The Board concludes Petitioner has failed to carry its burden of proof in demonstrating the City's adoption of Ordinance 3472 and 3473 violated RCW 36.70A.020(1), (2), (4), (5), (6) or (12)." AR 2257. Except for 1 and 2, Skagit D06 has abandoned arguments on the goals.

Encourage economic development throughout the state that is consistent with adopted comprehensive plans, ... promote the retention and expansion of existing businesses and recruitment of new businesses, ... **all within the capacities of the state's natural resources, public services, and public facilities.**<sup>145</sup>

The City has far more capacity for residential growth than GMA requires, and inadequate infrastructure capacity to service the Property immediately. Immediate utility service is inconsistent with the above language, as well as with Goal 12, which provides for local governments to “ensure” necessary public facilities and services will “be adequate to serve development when development is available for occupancy and use **without decreasing current service levels below locally established minimum standards.**”<sup>146</sup> This language contains two key objectives: (1) developing mechanisms so new development is adequately serviced; and (2) not undercutting service to existing development. Contrary to these GMA goals, Skagit D06 insists it be served first, without regard to existing City planning, wastewater treatment capacity, or expense.

### **3. Skagit D06’s Collateral Attack on County Zoning is Inconsistent with GMA’s Goals**

Skagit D06 also attacks the County zoning, which is not even before the Court. The Skagit County Code allows densities compatible with currently available infrastructure, and provides for denser development as the UGA is built out over the 20-year planning period. The zoning reserves “the remainder of the land for more intensive urban

---

<sup>145</sup> RCW 36.70A.020(5), emphasis added.

<sup>146</sup> RCW 36.70A.020(12), emphasis added.

residential development in the future.”<sup>147</sup> To ensure this future development can occur, future right-of-ways for urban transportation infrastructure and utilities must be noted on the face of the plat.<sup>148</sup> The appeal period for this zoning is long past, but even if it had been timely appealed, Skagit D06 has no basis for challenging it.

The City is not required to accommodate these greater densities the second a property owner requests them. The Skagit D06 Property is not already characterized by urban growth: it is 200 vacant acres.<sup>149</sup> Urban public facilities and services are not available.<sup>150</sup> Under RCW 36.70A.110(3), such a property is last served and developed. GMA consistency is achieved if planning has been carried out to provide public facilities and services for future denser occupancy, over GMA’s 20-year planning period, as has occurred here.<sup>151</sup>

The City’s capital facilities plans recognize improvements will be required to extend sewer service to the unincorporated UGA; the City initiated a study to determine the improvements needed; and the City has a phased approach to service.<sup>152</sup> The study includes proposed trunk sewers and interceptor locations, pump stations locations, estimated linear feet

---

<sup>147</sup> AR 1691 (SCC 14.16.370(1)).

<sup>148</sup> AR 1693 (SCC 14.16.370(6)(c)); AR 1697 (SCC 14.16.910(3)).

<sup>149</sup> AR 217; *see also* AR 219.

<sup>150</sup> AR 231-232, *see also* Section IV-E of this Brief.

<sup>151</sup> RCW 36.70A.070(3).

<sup>152</sup> AR 857-1326 (Sewer Plan), *see specifically* AR 912-913; AR 1335-1376 (UGA Sewer Service Study). *See generally* AR 1414-1537 (Capital Improvement Plan).

needed, and construction cost estimates.<sup>153</sup> According to the study, the Property would be the last to be served in the East UGA Service Area at the end of the City's twenty year plan.<sup>154</sup> Skagit D06 failed to appeal this planning and may not do so here.<sup>155</sup>

Even if it could challenge this planning through a back-door appeal, Skagit D06 still would not meet its burden of proof. GMA does not require a utility to extend sewer service to every property in the unincorporated UGA, without considering impacts. Such an approach would create chaotic, leap-frog development; unplanned expenditures; wastewater treatment plant overflows and failures; Clean Water Act violations and penalties, etc.<sup>156</sup> If cities were subject to the demands of any property owner desiring service, regardless of capacity and funding, they could not plan responsibly and provide reliable service to properties already serviced. Considering the adequacy of capital facilities and use mix during annexation is consistent with state law requirements. Skagit D06 cannot meet its burden of proof when it does not examine how a single policy is inconsistent with Goals 1 and 2.

---

<sup>153</sup> AR 1335-1376 (UGA Sewer Service Study).

<sup>154</sup> AR 857-1326 (Sewer Plan; AR 1355-1376, *see specifically* 1355 (UGA Sewer Service Study); AR 231 (Staff Report).

<sup>155</sup> *Montlake Community Club v. Hearings Board*, 110 Wn. App. 731, 43 P.3d 57 (2002).

<sup>156</sup> *See* Sections IV-A – IV-D of this Brief; *see also See City of Sedro Woolley v. Skagit County*, WWGMHB # 03-2-0013c, Compliance Order (June 18, 2004).

#### **4. Skagit D06 Advocates for a “Bright-Line” Rule, not the Board**

The Board Decision does not utilize any “bright-line rules.” Skagit D06 impermissibly raises a new argument, which it failed to raise earlier, and so many not raise here.<sup>157</sup> But, even if Skagit D06 could raise this argument, the Board’s analysis is not based on a “bright-line rule.” The Board understood that the City’s capital facilities planning provides for the Property to receive service at the end of GMA’s 20-year planning period. This is consistent with GMA.<sup>158</sup> It is not the Board, but Skagit D06 which advocates for a “bright-line” rule.

The Skagit D06 approach would allow a property owner in the unincorporated UGA to cut-in-line, ahead of other property owners waiting for urban infrastructure. This approach is not consistent with RCW 36.70A.110(3). The Board properly found the two Ordinances were not clear error.

---

<sup>157</sup> *Goehle v. Fred Hutchinson Cancer Research Center*, 100 Wn. App. 609, 616, 1 P.3d 579 (2000).

<sup>158</sup> See Section IV-G of this Brief.

## **E. Jurisdictional Argument in Support of Cross-Appeal**

### **1. GMA Board Jurisdiction is Narrowly Construed**

Administrative agencies are Legislative creatures. They lack inherent power, and may exercise only power conferred by statute, expressly or by necessary implication.<sup>159</sup> GMA limits Board authority to determining plan and development regulation<sup>160</sup> compliance with GMA.<sup>161</sup> Without a GMA requirement addressing a development regulation or plan policy, the Board lacks jurisdiction.<sup>162</sup> GMA jurisdiction is not liberally construed.<sup>163</sup>

Skagit D06 failed to identify a GMA provision governing the City's code making sewer service contingent on annexation, or policies requiring use mix and municipal service availability consideration during a Council initiated annexation. Consequently, Board assumption of jurisdiction was legal error.<sup>164</sup>

---

<sup>159</sup> *Skagit Surveyors v. Friends of Skagit County*, 135 Wn.2d 542, 558, 958 P.2d 962, 970 (1998).

<sup>160</sup> RCW 36.70A.030(9)(development regulation “means the controls placed on development or land use activities by a county or city.”)

<sup>161</sup> RCW 36.70A.280; *Woods v. Kittitas County*, 162 Wn.2d 597, 614, 174 P.3d 25 (2005) (site-specific rezone cannot be challenged for GMA compliance). Note, that compliance with Ch. 90.58 RCW and Ch. 43.21C RCW can be raised, but that these statutes are not at issue.

<sup>162</sup> *Thurston County v. WWGMHB*, 164 Wn.2d 329, 344, 190 P.3d 38 (2008).

<sup>163</sup> *Id.* at 342.

<sup>164</sup> RCW 34.05.570.

## **2. GMA Does Not Govern Conditioning Utility Service on Annexation**

The Board lacks GMA jurisdiction over a code provision conditioning utility service on annexation. Generally, a municipality acts in either a governmental or proprietary capacity. When making utility related decisions over extending sewer service beyond city limits, the City does not function as a regulatory agency exercising its police powers over the unincorporated UGA. Rather, it is acting in a proprietary capacity.

**[A] city is under no obligation to sell or furnish water or sewer services to anyone outside its corporate limits, but, if it elects to do so, it acts in a proprietary capacity, and the relationship entered into between a city as a supplier and such users is purely contractual.**<sup>165</sup>

The code provision is not a GMA “development regulation,” as the City lacks regulatory authority in the unincorporated UGA. Further, GMA imposes no requirements over when a city should extend its sewer utility beyond corporate boundaries. Rather, it is Chapter 35.67 RCW which addresses the issue. Under this statute, the decision is permissive.

Every city or town **may** permit connections with any of its sewers, either directly or indirectly, from property beyond its limits, upon such terms, conditions and payments as may be prescribed by ordinance, which may be required by the city or town to be evidenced by a written agreement

---

<sup>165</sup> *People for the Preserv. & Dev. Of Five Mile Prairie v. Spokane*, 51 Wn.App. 816, 821-822, 755 P.2d 836 (1988), emphasis added.

between the city or town and the owner of the property to be served by the connecting sewer.<sup>166</sup>

The Washington State Supreme Court concurs:

Under RCW 35.67.310, which provides that a city “*may* permit connections with any of its sewers ... from property beyond its limits”, the City has authority to provide service outside its borders. (Italics ours.) The use of “*may*” in RCW 35.67.310 supports the City's argument that the power granted by RCW 35.67.310 is discretionary and that the City is not bound to provide sewer service to persons residing outside its boundaries.<sup>167</sup>

Unlike what was admitted by the city in *Nolte*<sup>168</sup> or through a formal four way agreement in *Yakima Fire District No. 12*,<sup>169</sup> Mount Vernon has never held itself out as the sole provider of sewerage service.<sup>170</sup> But even if it had, if capacity is inadequate, service cannot be provided.<sup>171</sup> When reviewing capacity, regulations governing operating permits are

---

<sup>166</sup> RCW 35.67.310, emphasis added; *see also* RCW 35A.21.150.

<sup>167</sup> *Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 381, 858 P.2d 245 (1993) (1993); *see also* *People for the Preserv. & Dev. Of Five Mile Prairie v. Spokane*, 51 Wn.App. 816, 821-822, 755 P.2d 836 (1988).

<sup>168</sup> *Nolte v. City of Olympia*, 96 Wn. App. 944, 982 P.2d 659 (1999).

<sup>169</sup> *Yakima County Fire Protection Dist. v. City of Yakima*, 122 Wn.2d 371, 858 P.2d 245 (1993).

<sup>170</sup> AR 1677 (Ordinance 3473), Finding 11; AR 239 (Staff Report, para. 6) (public sewer district adjacent to the Property).

<sup>171</sup> *Yakima County Fire Prot. Dist. No. 12*, 122 Wn.2d at 382; *see also* *Harberd v Kettle Falls*, 120 Wn.App. 498, 519, 84 P.3d 1241 (2004).

considered,<sup>172</sup> including the Ecology discharge permit. Mount Vernon cannot supply the desired service without violating it.<sup>173</sup>

Consistently, the Board has held in past cases that sewer and water utility policies are not subject to GMA.<sup>174</sup> In *Harader*, the City of Napavine adopted sewer and water service policies regarding service extensions outside the City, subject to certain conditions. The Board determined it lacked jurisdiction.<sup>175</sup> Even where a decision document is “replete with references to the GMA,” this is not dispositive.<sup>176</sup> The central question is substantive, *i.e.*, does GMA govern the issue? Here, it does not. Skagit County has exclusive GMA planning authority.

Here, the County [Skagit County] has designated UGAs, including unincorporated areas surrounding the four major cities in Skagit County, where urban growth is to occur. Since the County has jurisdiction over the unincorporated portions of the UGAs, it is up to the County to adopt development regulations to reach the GMA goals for containing urban growth and ensuring that urban levels of service can be provided within the unincorporated areas.<sup>177</sup>

---

<sup>172</sup> *Haber* at 519.

<sup>173</sup> AR 235-38 (Staff Report).

<sup>174</sup> *Harader et al. v. Napavine*, WWGMHB #04-2-0017c, FDO (February 2, 2005); *1000 Trails v. Skagit County*, WWGMHB #07-2-0022, Order on Motions (April 3, 2008) p. 9 (absent GMA requirement, no Board jurisdiction).

<sup>175</sup> *Id.* at 9-10.

<sup>176</sup> *Happy Valley Associates v. King County*, CPSGMHB #93-3-0008, Order (October 25, 1993), p. 14.

<sup>177</sup> *City of Sedro Woolley, v. Skagit County*, WWGMHB #03-2-0013c, Compliance Order, (June 18, 2004), p. 17, emphasis added.

The City's Ordinances relate not to development within City borders, but to the City's decision to condition sewer service on annexation. The City is authorized to so condition service.<sup>178</sup> GMA does not govern the issue.

### **3. GMA Does Not Govern Annexation Policies**

GMA does not govern annexation.<sup>179</sup> Once a UGA is designated, the decision to annex involves the policy choice of the local jurisdiction and potential boundary board review. There is no GMA authority over the annexation decision, and annexation requirements (there are generally seven methods)<sup>180</sup> are set forth in non-GMA statutes.<sup>181</sup> And, should a County form annexation review boards and/or boundary review board ("BRBs"), these agencies review annexation decisions.<sup>182</sup> Skagit County has established a BRB.<sup>183</sup> The BRB is to determine "whether the proposed annexation would be in the public interest and for the public welfare."<sup>184</sup> In making this assessment, the BRB examines statutory

---

<sup>178</sup> *Yakima County (West Valley) Fire Protection Dist No. 12 v. City of Yakima*, 122 Wn.2d 371, 382-383, 858 P.2d 245 (1993).

<sup>179</sup> Note prohibition on annexation of area outside UGA. RCW 35.13.005 ("No city or town located in a county in which urban growth areas have been designated under RCW 36.70A.110 may annex territory beyond an urban growth are.")

<sup>180</sup> (1) election method initiated by petition, (2) election method initiated by resolution; RCW 35A.14.015; (4) annexation for municipal purposes; (5) federally owned territory; (6) annexation of unincorporated islands; and (7) boundary line adjustments.

<sup>181</sup> See Ch. 35A.14 RCW, RCW 35A.14.010.

<sup>182</sup> RCW 35A.14.001; RCW 36.93.090(1).

<sup>183</sup> RCW 35A.14.040.

<sup>184</sup> RCW 35A.14.200.

annexation factors, including municipal service adequacy, land uses, zoning, area configuration, effect on economic and social structure, etc.<sup>185</sup>

For the Board to have jurisdiction over the annexation policies, Skagit D06 must identify a GMA provision which governs them. The identified provisions, RCW 36.70A.390, .110(1) and (2), and .020(1) and (2), do not. These provisions address moratoria and UGA sizing (as opposed to annexation). And, the two goals lack specific requirements.

The policies mirror what the City and BRB must consider in any annexation proceeding. Making sewer service contingent on annexation and adopting two policies which parallel non-GMA statutory requirements do not create GMA jurisdiction.

## **VI. CONCLUSION**

The flaw in Skagit D06's case is a misunderstanding of time. Under the City's unchallenged GMA capital facilities planning, Skagit D06's vacant Property, located at the outer edges of the unincorporated, East UGA, is served at the end of GMA's 20-year planning period. There is no GMA provision which allows Skagit D06 cut-in-line ahead of other property owners who are planned for service before Skagit D06. In fact, GMA states the opposite in RCW 36.70A.110(3).

---

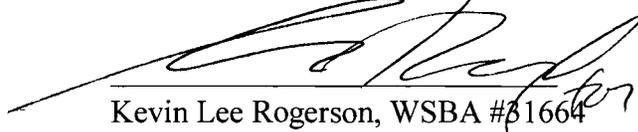
<sup>185</sup> RCW 35A.14.200.

Skagit D06 does not meet its burden of proof to show the Board erred in finding Ordinances 3472 and 3473 were not clear error. The City may make sewer service contingent on annexation, and may consider land use mix and capital facilities adequacy when initiating an annexation. In fact, the policies mirror non-GMA statutes governing annexation.

The Board rejected all 15 issues Skagit D06 raised,<sup>186</sup> and the Superior Court affirmed. Should the Court find it has jurisdiction, the City asks the Court to affirm the Board.

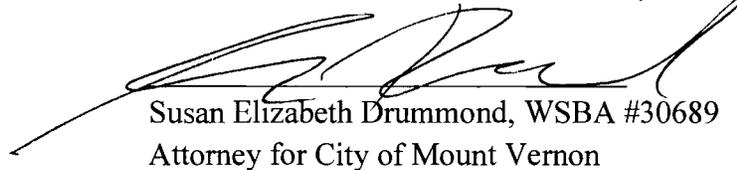
DATED this 14th day of September, 2011.

MOUNT VERNON CITY ATTORNEY



Kevin Lee Rogerson, WSBA #61664  
City Attorney

LAW OFFICES OF  
SUSAN ELIZABETH DRUMMOND, PLLC



Susan Elizabeth Drummond, WSBA #30689  
Attorney for City of Mount Vernon

---

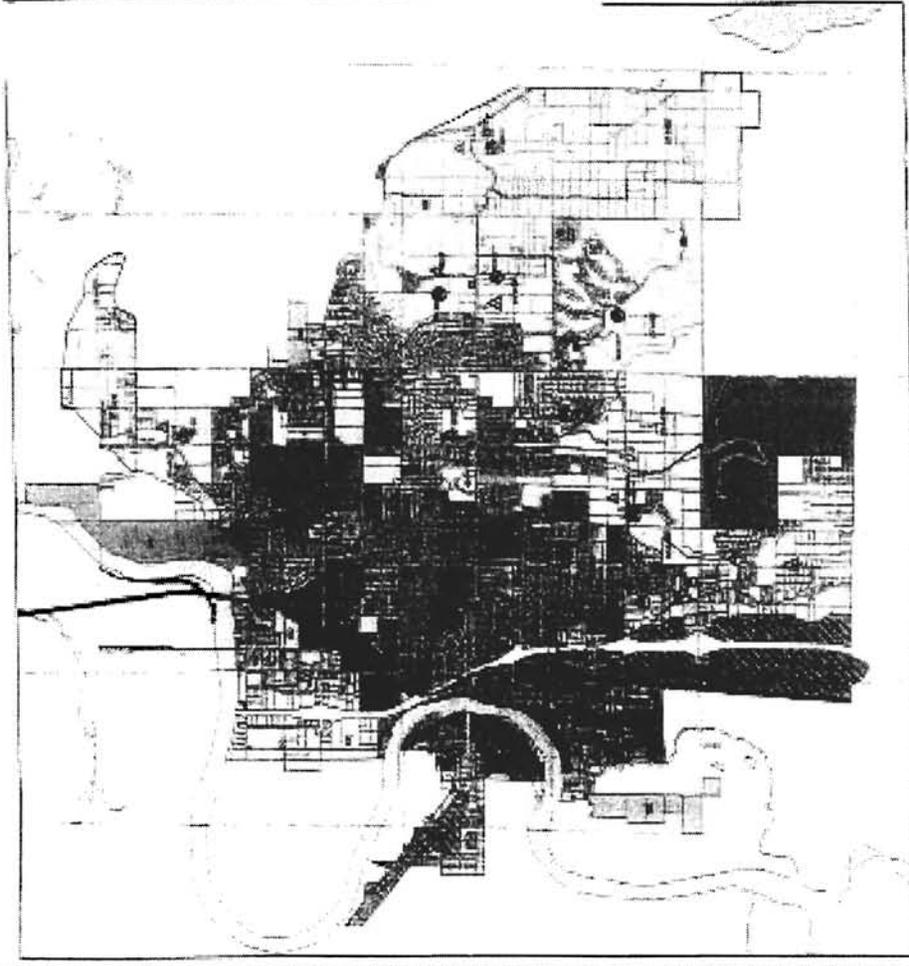
<sup>186</sup> AR 2241-72. Skagit D06 raised ten issues, with one composed of six sub-issues. AR 2249.

# **Appendix 1**

## **Maps**

CITY OF MOUNT VERNON COMPREHENSIVE PLAN  
LAND USE COLOR KEY  
AND ASSOCIATED ZONING DESIGNATIONS

AG	AGRICULTURAL (R-4)
SF-MED	MEDIUM DENSITY SF (R-3, 3.0 or 4.0)
SF-HI	HIGH DENSITY SF (R-1, 5.0 or 7.0)
MF-LD	LOW DENSITY MF (R-2)
MF-MH	MEDIUM-HIGH DENSITY MF (R-3 or R-4)
HOPO	RESIDENTIAL OFFICE (PROFESSIONAL, OFFICE (R) or (P))
NR	NEIGHBORHOOD RETAIL MIXED USE CENTER (C-6)
CR	COMMUNITY RETAIL MIXED USE CENTER (C-3)
RMGC	RETAIL MALLS AND GENERAL COMMERCIAL (C-2)
HD	HEALTHCARE DEVELOPMENT (HEALTHCARE DEVELOPMENT (H))
DT/SP	DOWNTOWN RETAIL/SUPPORT COMMERCIAL (C-1)
CI	COMMERCIAL/INDUSTRIAL (M-1 or M-2)(C-2)
CL	COMMERCIAL/UNLIMITED INDUSTRIAL (C-1)
G	GOVERNMENT CENTER (P)
CHCC/S	CHURCHES, COMMUNITY COLLEGE, SCHOOL (P)
CP	COMMUNITY PARK, NEIGHBORHOOD PARK (P)
OS	OPEN SPACE/CEMETERY (P or F-1)



THE FOLLOWING ARE THE SYMBOLS USED TO IDENTIFY LAND USES ON THIS MAP. THE CITY OF MOUNT VERNON HAS A ZONING ORDINANCE THAT GOVERNS THE DEVELOPMENT OF LAND IN THE CITY. THE ZONING ORDINANCE IS A LEGAL DOCUMENT THAT IS ENFORCED BY THE CITY. THE ZONING ORDINANCE IS A LEGAL DOCUMENT THAT IS ENFORCED BY THE CITY.

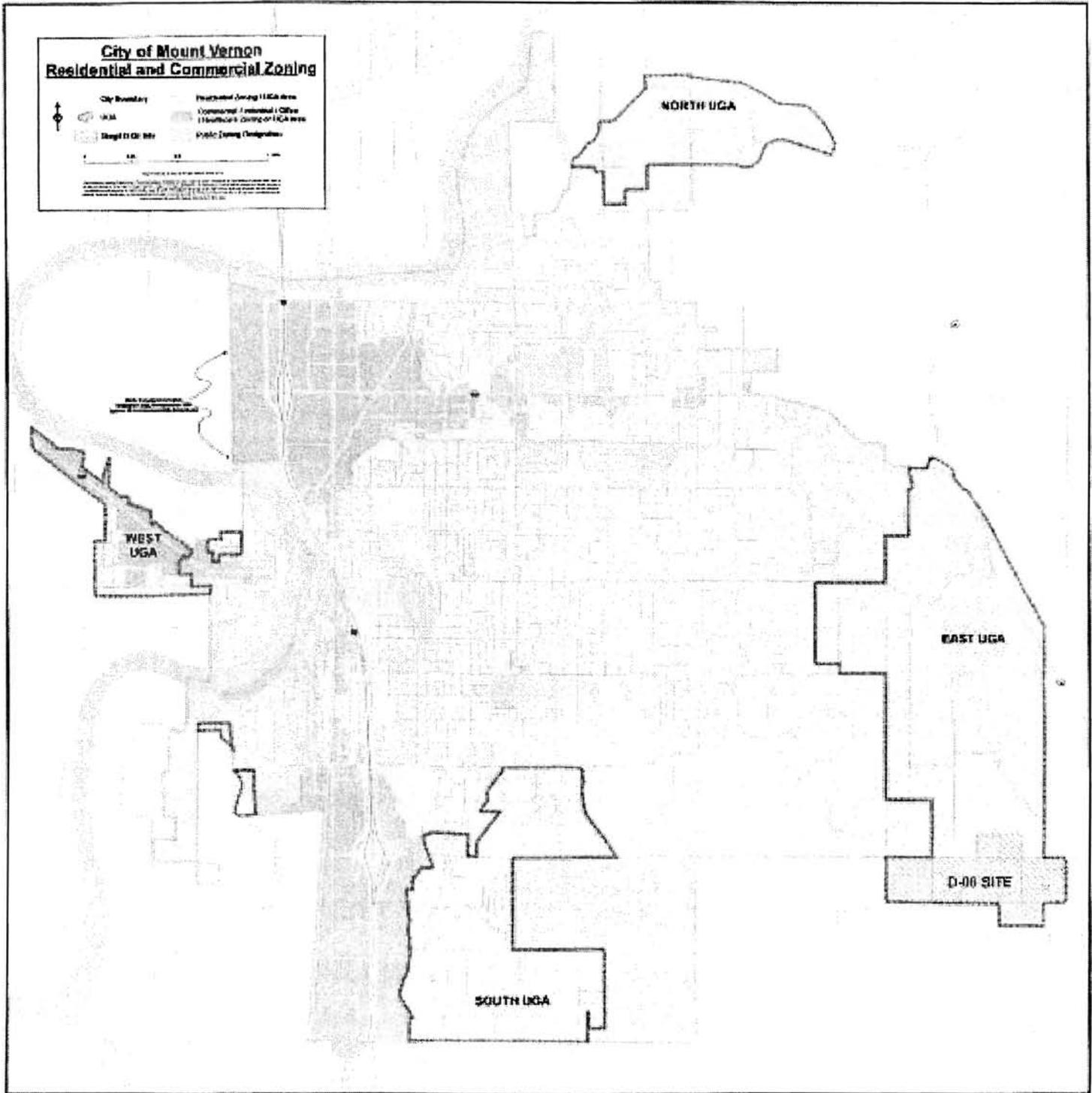
NEIGHBORHOOD RETAIL  
 COMMUNITY RETAIL  
 RETAIL MALLS AND GENERAL COMMERCIAL

EXHIBIT 86

MAP LU-3

000220

R-6



# **Appendix 2**

## **Board Decision**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
WESTERN WASHINGTON REGION  
STATE OF WASHINGTON

SKAGIT D06, LLC,

Petitioner,

v.

CITY OF MOUNT VERNON,

Respondent.

Case No. 10-2-0011

**FINAL DECISION AND ORDER**

**I. PROCEDURAL BACKGROUND**

*Petition for Review*

On February 16, 2010, Skagit D06, LLC (Petitioner) filed a Petition for Review (PFR). The PFR challenges the City of Mount Vernon's (City) adoption of Ordinance Nos. 3472 and 3473 which amended the City's Comprehensive Plan and Development Regulations. Ordinance 3473 amended Mount Vernon Municipal Code (MVMC) 13.08.060 to require annexation before the City extends sewer service. Ordinance 3472 adopted several annexation policies.

*Motions*

On April 19, 2010 the Board granted Petitioner's Motion to revise Issue 6(e) in the form set forth elsewhere in this order.<sup>1</sup>

Petitioner's Motion to Supplement the Record with the Final Report, Wastewater Connection Charge, July 2008, prepared by HDR Engineering, was granted on the basis that it might be

<sup>1</sup> Order on Skagit D06's Motion to Revise Issue 6(E) and City's Motion for Clarification of Issue 7(E).

1 necessary for the Board to consider in reaching its decision as it appears to contain  
2 information relating to sewer capacity in the UGA, a matter at issue in this appeal. However,  
3 Petitioner's Motion to Supplement the Record with Skagit County Ordinance No. 020050007  
4 was denied, as that exhibit is already in the record.<sup>2</sup>

5  
6 The City's Motion to Dismiss this appeal based on a lack of Board jurisdiction was denied by  
7 the Board on May 20, 2010.<sup>3</sup> The Board held that both ordinances under appeal were  
8 adopted pursuant to the GMA, giving the Board jurisdiction to hear the appeal.  
9

10 The City's Motion to Supplement the Record, or In the Alternative, Take Official Notice of  
11 the City's updated Buildable Lands Analysis (BLA) was denied at the Hearing on the Merits  
12 (HOM). As the City noted in its motion, the BLA was completed June 16, 2010, after the  
13 adoption of Ordinance Nos. 3472 and 3473. In addition, the City stated at the HOM the BLA  
14 had yet to be reviewed by the City's Planning Commission or City Council.  
15

16  
17 *Hearing on the Merits*

18 The Hearing on the Merits (HOM) was held on June 30, 2010, in Mount Vernon,  
19 Washington. Board members Nina Carter, William Roehl and James McNamara were  
20 present; Board Member James McNamara presiding. Petitioner was represented by Robert  
21 Johns; the City of Mount Vernon was represented by Kevin Rogerson.  
22

23 **II. BURDEN OF PROOF AND JURISDICTION**

24  
25 *Burden of Proof*

26 Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations, and  
27 amendments of them, are presumed valid upon adoption.<sup>4</sup> This presumption creates a  
28  
29

30  
31 <sup>2</sup> Order on Petitioner's Motion to Supplement the Record, May 6, 2010.

32 <sup>3</sup> Order Denying City's Motion to Dismiss for Lack of Board Jurisdiction, May 20, 2010.

<sup>4</sup> RCW 36.70A.320(1) provides: [Except for the shoreline element of a comprehensive plan and applicable development regulations] comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.

1 high threshold for challengers as the burden is on the Petitioner to demonstrate that any  
2 action taken by the City of Mount Vernon was not in compliance with the GMA.<sup>5</sup>

3  
4 The Board is charged with adjudicating GMA compliance and, when necessary, invalidating  
5 noncompliant plans and development regulations.<sup>6</sup> The scope of the Board's review is  
6 limited to determining whether the City of Mount Vernon has complied with the GMA only  
7 with respect to those issues presented in a timely petition for review.<sup>7</sup> The GMA directs that  
8 the Board, after full consideration of the petition, shall determine whether there is  
9 compliance with the requirements of the GMA.<sup>8</sup> The Board shall find compliance unless it  
10 determines the City's action is clearly erroneous in view of the entire record before the  
11 Board and in light of the goals and requirements of the GMA.<sup>9</sup> In order to find the City of  
12 Mount Vernon's action clearly erroneous, the Board must be "left with the firm and definite  
13 conviction that a mistake has been committed."<sup>10</sup>

14  
15  
16 In reviewing the planning decisions of cities and counties, the Board is instructed to  
17 recognize "the broad range of discretion that may be exercised by counties and cities" and  
18 to "grant deference to counties and cities in how they plan for growth."<sup>11</sup> However, the City  
19  
20

21  
22 <sup>5</sup> RCW 36.70A.320(2) provides: [Except when city or county is subject to a Determination of Invalidity] the  
23 burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this  
24 chapter is not in compliance with the requirements of this chapter.

25 <sup>6</sup> RCW 36.70A.280, RCW 36.70A.302

26 <sup>7</sup> RCW 36.70A.290(1)

27 <sup>8</sup> RCW 36.70A.320(3)

28 <sup>9</sup> RCW 36.70A.320(3)

29 <sup>10</sup> *City of Arlington v. CPSGMHB*, 162 Wn.2d 768, 778, 193 P.3d 1077 (2008)(Citing to *Dept. of Ecology v.*  
30 *PUD District No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 1993); See also, *Swinomish Tribe,*  
31 *et al v. WWGMHB*, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007); *Lewis County v. WWGMHB*, 157 Wn.2d  
32 488, 497-98, 139 P.3d 1096 (2006).

<sup>11</sup> RCW 36.70A.3201 provides, in relevant part: In recognition of the broad range of discretion that may be  
exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the  
boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements  
and goals of this chapter. Local comprehensive plans and development regulations require counties and cities  
to balance priorities and options for action in full consideration of local circumstances. The legislature finds that  
while this chapter requires local planning to take place within a framework of state goals and requirements, the  
ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and  
implementing a county's or city's future rests with that community.

FINAL DECISION AND ORDER

Case No. 10-2-0011

August 4, 2010

Page 3 of 31

Growth Management Hearings Board  
319 7<sup>th</sup> Avenue SE, Suite 103  
P.O. Box 40953  
Olympia, Washington 98504-C953  
Phone: 360-586-0260  
Fax: 360-664-8975

1 of Mount Vernon's actions are not boundless; its actions must be consistent with the goals  
2 and requirements of the GMA.<sup>12</sup>

3  
4 Thus, the burden is on Petitioner to overcome the presumption of validity and demonstrate  
5 the challenged action taken by the City of Mount Vernon is clearly erroneous in light of the  
6 goals and requirements of the GMA.

7  
8 *Jurisdiction*

9 The Board finds the Petition for Review was timely filed, pursuant to RCW 36.70A.290(2).  
10 The Board finds Petitioner has standing to appear before the Board, pursuant to RCW  
11 36.70A.280(2). The Board finds it has jurisdiction over the subject matter of the petition  
12 pursuant to RCW 36.70A.280(1).<sup>13</sup>

13  
14 **III. ISSUES AND DISCUSSION**

15  
16 *The Challenged Actions*<sup>14</sup>

17 In response to required upgrades to its century old sewer system so as to protect water  
18 quality within the Skagit River, the City of Mount Vernon began a review of how it could  
19 adequately plan for improvements within the Mount Vernon Urban Growth Area (UGA) in  
20 order to meet the area's development needs as demonstrated by its allocated population,  
21 land capacity analysis, and buildable lands analysis. As part of this process, though not  
22 under challenge in these proceedings, the City adopted two moratoria and interim controls  
23 related to the extension of sewer service outside of the City's municipal boundaries. Then,  
24 on December 16, 2009, after conducting two public hearings, one before the Planning  
25

26  
27  
28 <sup>12</sup> *King County v. CPSGMHB*, 142 Wn.2d 543, 561, 14 P.2d 133 (2000)(Local discretion is bounded by the  
29 goals and requirements of the GMA). See also, *Swinomish*, 161 Wn.2d at 423-24. In *Swinomish*, as to the  
30 degree of deference to be granted under the clearly erroneous standard, the Supreme Court has stated: The  
31 amount [of deference] is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give  
32 the [jurisdiction's] actions a "critical review" and is a "more intense standard of review" than the arbitrary and  
capricious standard. *Id.* at 435, Fn.8.

<sup>13</sup> This finding is supported by the Board's May 20, 2010 Order Denying City's Motion to Dismiss for Lack of  
Board Jurisdiction.

<sup>14</sup> This section was developed based on factual information presented in both the Petitioner's and the City's  
Briefs.

1 Commission and the other before the City Council, the City adopted Ordinance Nos. 3472  
2 and 3473.

3  
4 Ordinance No. 3472 adopts new objectives and policies for the City's Comprehensive Plan  
5 Land Use Element relating to annexations under Goal LU-29. Specifically, Policy LU-29.1.3  
6 sets forth nine criteria which must be met before an annexation will be initiated and  
7 municipal/public services will be provided.  
8

9 Ordinance No. 3743 repealed the prior moratorium and interim regulations and enacted  
10 development regulations regarding the regulation of sewer connections outside of the City's  
11 municipal boundaries. These regulations are found at MVMC 13.08.060.  
12

13 **A. Are the challenged Ordinances a de facto moratorium?**

14 Issues 1 through 5 are premised upon the argument that the City imposed a *de facto*  
15 moratorium in violation of RCW 36.70A.390. They will be discussed together. As set forth in  
16 the Board's Pre-Hearing Order, these issues are:  
17

18 **Issue 1:** Whether Ordinance Nos. 3472 and 3473 violate RCW 36.70A.390 by  
19 imposing a *de facto* moratorium on residential development within the Urban Growth  
20 Area without complying with the requirement of RCW 36.70A.390 that the City must  
21 adopt findings of fact which justify a moratorium?

22 **Issue 2:** Whether Ordinance Nos. 3472 and 3473 violate RCW 36.70A.390 by  
23 imposing a *de facto* permanent moratorium on residential development within the  
24 Urban Growth Area without complying with the requirement of RCW 36.70A.390 that  
25 the City must limit the time period during which a moratorium is in effect to six months?

26 **Issue 3:** Whether Ordinance Nos. 3472 and 3473 violate RCW 36.70A.390 by  
27 imposing a *de facto* moratorium on residential development within the Urban Growth  
28 Area for a time period exceeding six months without complying with the requirement of  
29 RCW 36.70A.390 that the City adopt a work plan to resolve the issues which  
30 purportedly justify the moratorium?

31 **Issue 4:** Whether Ordinance Nos. 3472 and 3473 violate RCW 36.70A.390 by not  
32 being based on completion of the City's work plan adopted in Ordinance No. 3445 as a  
condition of the prior moratorium?

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

**Issue 5:** Whether the City failed to act to complete its work plan under Ordinance No. 3445 within one year or before adoption of comprehensive plan amendments?

Applicable Law

RCW 36.70A.390 provides, in relevant part:

A county or city governing body that adopts a moratorium, interim zoning map, interim zoning ordinance, or interim official control without holding a public hearing on the proposed moratorium, interim zoning map, interim zoning ordinance, or interim official control, shall hold a public hearing on the adopted moratorium, interim zoning map, interim zoning ordinance, or interim official control within at least sixty days of its adoption, whether or not the governing body received a recommendation on the matter from the planning commission or department. If the governing body does not adopt findings of fact justifying its action before this hearing, then the governing body shall do so immediately after this public hearing. A moratorium, interim zoning map, interim zoning ordinance, or interim official control adopted under this section may be effective for not longer than six months, but may be effective for up to one year if a work plan is developed for related studies providing for such a longer period. A moratorium, interim zoning map, interim zoning ordinance, or interim official control may be renewed for one or more six-month periods if a subsequent public hearing is held and findings of fact are made prior to each renewal.

\* \* \*

Board Analysis and Findings

Petitioner argues that Ordinances 3472 and 3473 operate to create a *de facto* multi-year moratorium, yet the City failed to adopt findings of fact to justify a moratorium. Petitioner asserts that while RCW 36.70A.390 provides for six month or one year moratoria, the City ordinances under appeal create a permanent moratorium because they bar property owners from obtaining public sewer service in the unincorporated UGA indefinitely, even if they are willing to pay for the extension of sewer service.<sup>15</sup>

Petitioner further contends the City justified the adoption of a moratorium by Ordinance Nos. 3442 and 3445 based on its commitment to complete the work plan described in Ordinance

<sup>15</sup> Petitioner's Prehearing Brief at 12-14.

1 3444, yet it did not complete that work plan prior to the adoption of Ordinances 3472 and  
2 3473. Thus, Petitioner asserts the City failed to complete the analysis of its buildable land  
3 capacity or update the analysis of its wastewater treatment capacity, both of which were  
4 necessary to evaluate policies or regulations restricting new sewer connections in the  
5 UGA.<sup>16</sup>  
6

7 Conditioning sewer service on annexation does not transform the challenged Ordinances  
8 into moratoria, the City argues.<sup>17</sup> The City notes it cannot exert regulatory control over the  
9 unincorporated UGA and it is Skagit County zoning that governs development. It states  
10 land owners in the unincorporated UGA may still submit land use applications to the County  
11 and develop in accordance with the Skagit County Code.<sup>18</sup> Because the Ordinances do not  
12 establish a moratorium, the City contends, findings of fact and a work plan were not  
13 needed.<sup>19</sup>  
14

15  
16 The Board finds that Ordinance Nos. 3472 and 3473 do not establish a moratorium, or  
17 even a *de facto* moratorium, within the meaning of RCW 36.70A.390. As Petitioner itself  
18 states, "a moratorium exists where a city denies a property owner the ability to submit an  
19 application for an otherwise permissible use or activity under the governing zoning even if  
20 other uses are not barred."<sup>20</sup> Yet, under the City's current regulations, "Sewer connections  
21 shall not be allowed outside the city limits of Mount Vernon. Only after property is annexed  
22 into the City may a sewer connection be made in accordance with this Chapter."<sup>21</sup> Contrast  
23 this language with the language in place prior to the amendment under appeal; "Connection  
24 to the public sewer shall be allowed to those properties situated within the unincorporated  
25 areas of the City's urban growth areas, as adopted and amended. . . ." While landowners  
26 once had the ability to "submit an application for an otherwise permissible use or activity",  
27  
28

29  
30 <sup>16</sup> *Id.* at 14.

31 <sup>17</sup> City's Pre-Hearing Brief at 9-10.

32 <sup>18</sup> *Id.* at 11.

<sup>19</sup> *Id.* at 14.

<sup>20</sup> Petitioner's Pre-Hearing Brief at 11.

<sup>21</sup> MVMC 13.08.160

1 that activity (connection to public sewer outside the city limits) is no longer permissible.  
2 *Prior* to the amendment of MVMC 13.08.060, a right to sewer connections outside the City  
3 limits existed. The City could not refuse to accept such applications except by adopting a  
4 moratorium, which it did via former Ordinances 3442 and 3445. However, Ordinances 3442  
5 and 3445 have been repealed.<sup>22</sup> Following the adoption of Ordinance Nos. 3472 and 3473,  
6 no such right to City sewer service extension exists. The City amended its comprehensive  
7 plan and development regulations, apparently permanently. Thus, it cannot be said that the  
8 City is operating under a moratorium. It is instead operating under new, permanent  
9 regulations which do not provide for the extension of sewer outside the City limits and,  
10 therefore, RCW 36.70A.390 does not apply.  
11

12  
13 In addition, it is agreed by the parties that landowners in the non-municipal UGA may  
14 develop their property in accordance with the current zoning.<sup>23</sup> The impact of the  
15 challenged ordinances is they are not able to develop at a density that Petitioner argues is  
16 more appropriate in a UGA. The Board addresses the question of whether Ordinance Nos.  
17 3472 and 3473 violate other provisions of the GMA by impeding urban development  
18 elsewhere in this Order. However, for the purposes of Issues 1 through 5, it cannot be said  
19 that property that can be developed consistent with its present zoning is under a  
20 moratorium.  
21

22  
23 Because the Board finds the City did not adopt a moratorium, it follows that the  
24 requirements associated with a moratorium under RCW 36.70.390 do not apply, and the  
25 City has not violated them. Thus, the City had no obligation to adopt a work plan or findings  
26 of fact justifying its action.  
27

28 **Conclusion**

29 The Board concludes Petitioner has failed to carry its burden of proof in demonstrating the  
30 City's adoption of Ordinance Nos. 3472 and 3473 violated RCW 36.70A.390.  
31

32

<sup>22</sup> See Ordinance 3473, Section 3.  
<sup>23</sup> See, Petitioner's Pre-Hearing Brief at 12; City's Pre-Hearing Brief at 10.  
FINAL DECISION AND ORDER  
Case No. 10-2-0011  
August 4, 2010  
Page 8 of 31

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

**B. Did the City fail to be guided by the GMA's Goals?**

As set forth in the Board's Prehearing Order and revised by its April 19 Order, Issue 6 provides:<sup>24</sup>

**Issue 6:** Whether the City failed to be guided by the goals contained in RCW 36.70A.020, for the following reasons:

- a. Ordinance Nos. 3472 and 3473 fail to encourage urban growth with the UGA in violation of the Goal contained in RCW 36.70A.020(1) because the net effect of Ordinance Nos. 3472 and 3473 interferes with and prevents residential development within the Urban Growth Area at urban densities.
- b. Ordinance Nos. 3472 and 3473 fail to encourage urban growth with the UGA in violation of the Goal contained in RCW 36.70A.020(1) because the net effect of Ordinance Nos. 3472 and 3473 interferes with and prevents residential development within the Urban Growth Area in locations where adequate public facilities and services exist or can be provided in an efficient manner.
- c. Ordinance Nos. 3472 and 3473 fail to prevent urban sprawl in violation of the Goal contained in RCW 36.70A.020(2) because the Ordinances not only fail to reduce the inappropriate conversion of undeveloped land into sprawling, low-density development, the Ordinances actually encourage the inappropriate conversion of undeveloped land into sprawling, low-density development.
- d. Ordinance Nos. 3472 and 3473 fail to encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types in violation of the goal contained in RCW 36.70A.020(4) because the Ordinances substantially restrict the availability of an adequate supply of housing in the Urban Growth Areas adjacent to the City of Mount Vernon.
- e. Ordinance Nos. 3472 and 3473 fail to promote economic development that is consistent with: (1) Chapter 2 the Plan which set population targets and allocate anticipated growth to various parts of the City and the UGA's; (2) Sections 3.5.1 and 3.5.3 of the Plan to the extent that Ordinance Nos. 3472 and 3473 are inconsistent with the population targets and allocate anticipated growth to various parts of the City and the UGA's and interfere with the City's goal of providing a range of housing types; and (3) Policies HO 1.1.1, 1.1.2, 1.1.3, and 2.2.2 in Chapter 3 of the Plan, in violation of the Goal contained in RCW 36.70A.020(5).
- f. Ordinance Nos. 3472 and 3473 fail to protect private property rights in violation of the Goal contained in RCW 36.70A.020(6).

---

<sup>24</sup> On April 19, 2010 the Board granted Petitioner's Motion to revise Issue 6(e). Order on Skagit D06's Motion to Revise Issue 6(E).

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

g. Ordinance Nos. 3472 and 3473 violate the goal contained in RCW 36.70A.020(12) because the City has failed to assure that public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

Applicable Law

RCW 36.70A.020, which sets forth the goals of the GMA, initially states:

The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040. The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations.

The goals which have been explicitly noted by the Petitioner in their issue statement are:

(1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.

(2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

(4) Housing. Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock.

(5) Economic development. Encourage economic development throughout the state that is consistent with adopted comprehensive plans, promote economic opportunity for all citizens of this state, especially for unemployed and for disadvantaged persons, promote the retention and expansion of existing businesses and recruitment of new businesses, recognize regional differences impacting economic development opportunities, and encourage growth in areas experiencing insufficient economic growth, all within the capacities of the state's natural resources, public services, and public facilities.

(6) Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

(12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

Board Analysis and Findings

- Goals 1 and 2 – Urban Growth and Reducing Sprawl

Petitioner argues that the ordinances requiring annexation prior to the provision of sewer service eliminate the possibility of meaningful urban development in the unincorporated portion of the UGA, contrary to Goal 1 of the GMA. Consequently, Petitioner asserts, there is no alternative for residential property owners but to develop five acre rural-style lots on septic systems, thwarting Goal 2's anti-sprawl focus.<sup>25</sup>

In response, the City argues that in order to "encourage development in urban areas where adequate public facilities exist or can be provided in an efficient manner" as stated in Goal 1, and to follow Goal 2's guidance to "reduce the inappropriate conversion of undeveloped land into sprawling, low-density development", the GMA requires cities to phase UGA development so that it can be adequately planned for and supported.<sup>26</sup>

As noted *supra*, Goals 1 and 2 seek to locate urban growth in areas served by adequate facilities and reduce sprawling, low-density development. It appears to the Board that Petitioner is taking the position that not allowing property owners within the unincorporated portion of the UGA to be annexed and developed on City supplied sewer based on their own timeframe, rather than when the City is prepared to extend service, violates the stated GMA goals. However, there is no support for this position in the GMA or Board and court decisions. The GMA envisions a hierarchy of development within the UGA – first in areas already characterized by urban growth which have adequate existing public facilities/services, second in areas characterized by urban growth, but that will be served by both existing and additionally needed facilities, and lastly in the remaining areas of the

<sup>25</sup> Petitioner's Prehearing Brief at 16.

<sup>26</sup> City's Prehearing Brief at 15.

1 UGA.<sup>27</sup> As the City correctly points out, "If a City were required to extend sewer service to  
2 every property in the unincorporated UGA, this would create chaotic, leap-frog  
3 development".<sup>28</sup>  
4

5 In the Central Board case of *Master Builders Association of King and Snohomish Counties*  
6 *v. Arlington*, the Board dealt with the assertion that a requirement of annexation to Arlington  
7 as a condition of city sewer service is the same as a denial of sewer service to the  
8 unincorporated part of the Urban Growth Area (UGA). The Central Board found:  
9

10 The approach the City has chosen to managing growth, specifically the  
11 provision of sewer service, is a valid option which the City may choose in order  
12 to transform governance and phase development within the UGA.<sup>29</sup>

13 This Board has previously noted, in response to allegations similar to those of Petitioner that  
14 "[I]t is not unreasonable for those property owners on the periphery to wait to the end of the  
15 20-year planning period to subdivide their property into lots smaller than five acres."<sup>30</sup> The  
16 Board finds orderly development within the UGA is called for by RCW 36.70A.110 and  
17 Ordinance Nos. 3472 and 3473 are consistent with GMA Goals 1 and 2.  
18

19 In addition, an analysis of the City's process for determining when and how sewer service  
20 will be extended to the non-incorporated UGA is contained in a City of Mount Vernon Staff  
21 Report from the Community and Economic Development Department.<sup>31</sup> While that staff  
22 report was prepared in response to Skagit DO6's request for sewer service, the analysis is  
23 germane to the issue of the timeframe for extending sewer service within the UGA. In its  
24 report, the City noted the subject site was at the end of a twenty year plan to extend sewer  
25 inside the East Service Area of the UGA. It further notes that the City's' adopted  
26 Comprehensive Sewer Plan Update contains the City's plans for sanitary sewer extension to  
27  
28

29  
30 <sup>27</sup> RCW 36.76.70A.110(3), in part.

31 <sup>28</sup> City's Prehearing Brief at 17.

32 <sup>29</sup> *Master Builders Association of King and Snohomish Counties v. Arlington*, CPSGMHB No. 04-3-0001, FDO  
at 11 (7/14/04).

<sup>30</sup> *City of Sedro-Woolley v. Skagit County*, WWGMHB No. 03-2-0013c, CO (6/18/04).

<sup>31</sup> See, City's Prehearing Brief, Tab 15, Staff Report in Response to a Request for an Agreement to Provide  
Sanitary Sewer Service Outside the City Limits.

1 the area and that extending sewer earlier than planned would "leap frog" other infill  
2 development by transferring available sewer capacity outside the City. Such factors are  
3 valid considerations to be taken into account by a local jurisdiction. Efficient phasing of  
4 urban infrastructure is a key component to transformance of governance and is consistent  
5 with Goals 1 and 2.  
6

7 • Goal 4 – Housing

8 Petitioner alleges the ordinances are contrary to Goal 4 because they restrict residential  
9 development in the UGA to five-acre lot developments, encouraging mega-mansion style  
10 housing and little else.<sup>32</sup> In response, the City states ensuring urban facilities and services  
11 are supplied to residential development, without decreasing current service levels, promotes  
12 the GMA's housing goal.<sup>33</sup> It notes that over half of the east UGA is already developed with  
13 homes averaging just over 2,000 square feet.  
14

15  
16 Goal 4 seeks to ensure not only housing affordable to all economic sectors but also a  
17 variety of residential densities and types. The Board does not find that refusing to extend  
18 sewer service to an area outside the city limits thwarts Goal 4. As noted above, properties  
19 on the periphery of the UGA may not be developed until late in the 20 year planning period,  
20 but, once sewer is extended, more intensive levels of development can occur. Further,  
21 asserting the City's policies with regard to property at the margin of the UGA runs contrary  
22 to Goal 4 fails to consider the City's zoning code as a whole and the opportunities the City  
23 provides for affordable housing within its municipal boundaries. The GMA goals are to be  
24 used "exclusively for the purpose of guiding the development of comprehensive plans and  
25 development regulations."<sup>34</sup> However, while the GMA goals "collectively convey some  
26 conceptual guidance for growth management," the GMA "explicitly denies any order of  
27 priority among the thirteen goals" and it is evident that "some of them are mutually  
28  
29  
30  
31

32 <sup>32</sup> Petitioner's Prehearing Brief at 17.

<sup>33</sup> City's Prehearing Brief at 18.

<sup>34</sup> RCW 36.70A.020

1 competitive."<sup>35</sup> The local jurisdiction is entitled to balance the goals of the GMA so long as  
2 in so doing it does not violate the goals. Here, the Petitioner has not demonstrated the  
3 City's decision to not extend sewer service and thereby delay more intense development of  
4 the UGA violates Goal 4.

5  
6 • Goal 5 – Economic Development

7 Next, Petitioner alleges the ordinances violate Goal 5, the economic development goal, by  
8 severely restricting the supply of housing for employees and customers of new businesses  
9 and redirecting potential new and existing businesses to other markets that have a growing  
10 population.<sup>36</sup> The City responds that economic development cannot responsibly occur if it  
11 is not within the capacity of the City's public services and facilities.<sup>37</sup> It notes Goal 5  
12 provides that the encouragement of economic development is to take place "within the  
13 capacities of the state's natural resources, public services, and public facilities".<sup>38</sup> The City  
14 argues, and the Board agrees, that merely because the Petitioner and those similarly  
15 situated cannot *presently* develop their properties to the extent they desire does not indicate  
16 the City is restricting the supply of housing for employees and customers of new  
17 businesses. There has been no showing that opportunities for development are so limited  
18 elsewhere in the City that the refusal to extend sewer beyond the City limits inhibits  
19 economic development.  
20  
21

22  
23 The Board does not find a policy that delays extension of sewer service to the periphery of  
24 the UGA until annexation violates Goal 5.  
25

26 • Goal 6 – Property Rights  
27  
28  
29

30 <sup>35</sup> REVISITING THE GROWTH MANAGEMENT ACT: Washington's Growth Management Revolution Goes to  
31 Court, Richard L. Settle, 23 Seattle Univ. L. R. 5, 11, quoted with approval in *Quadrant Corp. v. Hearings Bd.*,  
32 154 Wn.2d 224, 246 (2005).

<sup>36</sup> Petitioner's Prehearing Brief at 18.

<sup>37</sup> City's Prehearing Brief at 19.

<sup>38</sup> RCW 36.70A.020(5).

1 Petitioner argues the ordinances thwart Goal 6. In particular, it asserts the City has not  
2 given any consideration to the rights of those property-owners in the unincorporated  
3 portions of the UGA who have now been told they cannot apply for annexation and  
4 extension of sewer service needed to develop their properties at urban densities until the  
5 City either annexes more commercial and industrial land or rezones property for such uses.  
6 Restricting the development of such properties to five acre lots on septic is contrary to Goal  
7 6, Petitioner asserts.<sup>39</sup>  
8

9  
10 The City argues there is no property right to annexation or sewer service, and even without  
11 sewer service or annexation, property in the unincorporated UGA may develop under Skagit  
12 County zoning.<sup>40</sup>  
13

14 The Board has previously stated that in order for Petitioner to prevail in a challenge based  
15 on Goal 6, they must prove the action taken by a local jurisdiction is *both* arbitrary *and*  
16 discriminatory; showing only one is insufficient to overcome the presumption of validity  
17 accorded to local jurisdictions by the GMA. Additionally, the Petitioner must show the action  
18 has impacted a legally recognized right.<sup>41</sup>  
19

20 Petitioner appears to base its Goal 6 claim upon a right to annexation or to sewer extension.  
21 Neither of these are the types of rights the Legislature intended to be protected under Goal  
22 6.<sup>42</sup> Thus, since the "right" to annexation or to extension of sewer service outside city  
23 limits is not the type of "right" this Board or the courts has ever recognized as being a  
24 protected property right, Petitioner's contention as to Goal 6 fails. Since the Board finds no  
25 property right for which Goal 6 would warrant protection, the Board does not need to  
26 address whether the City's action was arbitrary and discriminatory.  
27  
28

29  
30 <sup>39</sup> Petitioner's Prehearing Brief at 19.

<sup>40</sup> City's Prehearing Brief at 20.

31 <sup>41</sup> *Pt. Roberts Registered Voters Assoc. v. Whatcom County*, WWGMHB Case No. 00-2-0052 at 4 (FDO, April  
32 6, 2001) (citing *Achen v. Clark County*, WWGMHB Case No. 95-2-0067 (FDO, Sept. 20, 1995)).

<sup>42</sup> See e.g. *See Achen v. Clark County*, WWGMHB Case No. 95-2-0067 FDO (holding the Legislature did not  
intend to protect unrecognized rights such as the right to subdivide or develop land for maximum personal  
financial gain but rather those which are legally recognized by statute, constitution, or court decision).

FINAL DECISION AND ORDER

Case No. 10-2-0011

August 4, 2010

Page 15 of 31

Growth Management Hearings Board  
319 7<sup>th</sup> Avenue SE, Suite 103  
P.O. Box 40953  
Olympia, Washington 98504-0953  
Phone: 360-586-0260  
Fax: 360-664-8975

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

- Goal 12 – Public Facilities and Services

Finally, with regard to alleged goal violations, Petitioner argues the ordinances ignore the premise of the City's Comprehensive Plan, Sewer Comprehensive Plan and sewer connection charges – that upgrades to the sewer system will be paid for by a combination of developer funded extensions and connection charges.<sup>43</sup> By banning applications which require future sewer system improvements, the City has created a system that guarantees the City cannot be the urban facilities and service provider for the UGA, in violation of Goal 12, Petitioner argues.

The City notes Goal 12 of the GMA provides for local governments to ensure public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use *without decreasing current service levels below locally established minimum standards.*<sup>44</sup> It argues that phasing of service does not amount to a ban on utility service.<sup>45</sup> The City further argues that it has the discretion to determine proper phasing of concurrency.

The Board finds Petitioner has not carried its burden to prove a violation of Goal 12. This Board has previously held it is sufficient to have plans in place to make such facilities available within the 20 year planning horizon.<sup>46</sup> The City has adequately demonstrated it has a plan to serve the UGA but, to the extent the plan relies on gravity flow in some areas, property owners situated in a manner such as Petitioner may find their property is served later than others, and near the end of the 20 year planning period. Such a scenario does not demonstrate a violation of Goal 12.

**Conclusion**

---

<sup>43</sup> Petitioner's Prehearing Brief at 19.  
<sup>44</sup> RCW 36.70A.020(12)  
<sup>45</sup> City's Prehearing Brief at 22.  
<sup>46</sup> *ICAN v. Jefferson County*, WWGMHB No. 07-2-0002 CO (8/12/07)

1 The Board concludes Petitioner has failed to carry its burden of proof in demonstrating the  
2 City's adoption of Ordinance Nos. 3472 and 3473 violated RCW 36.70A.020(1), (2), (4), (5),  
3 (6) or (12).  
4

5 **C. Is the City prevented from complying with its urban growth obligations?**

6 As set forth in the Board's Prehearing Order, Issue 7 provides:

7 **Issue 7:** Whether Ordinance Nos. 3472 and 3473 violate RCW 36.70A.110 for the  
8 following reasons:  
9

- 10 a. Ordinance Nos. 3472 and 3473 will, in violation of RCW 36.70A.110(2), prevent  
11 the City of Mount Vernon from complying with its obligation to permit the urban  
12 growth that is projected to occur in City for the succeeding twenty-year period.  
13 b. Ordinance Nos. 3472 and 3473 will, in violation of RCW 36.70A.110, preclude  
14 the provision of urban services within the Urban Growth Area and encourage  
15 low density development within the Urban Growth Area that is not served by  
16 urban services.

16 Applicable Law

17 The applicable portions of RCW 36.70A.110 are subsections (2) and (3):

18 (2) Based upon the growth management population projection made for the  
19 county by the office of financial management, the county and each city within the  
20 county shall include areas and densities sufficient to permit the urban growth that  
21 is projected to occur in the county or city for the succeeding twenty-year period,  
22 except for those urban growth areas contained totally within a national historical  
23 reserve. As part of this planning process, each city within the county must include  
24 areas sufficient to accommodate the broad range of needs and uses that will  
25 accompany the projected urban growth including, as appropriate, medical,  
26 governmental, institutional, commercial, service, retail, and other nonresidential  
27 uses.

28 Each urban growth area shall permit urban densities and shall include greenbelt  
29 and open space areas. In the case of urban growth areas contained totally within  
30 a national historical reserve, the city may restrict densities, intensities, and forms  
31 of urban growth as determined to be necessary and appropriate to protect the  
32 physical, cultural, or historic integrity of the reserve. An urban growth area  
determination may include a reasonable land market supply factor and shall  
permit a range of urban densities and uses. In determining this market factor,  
cities and counties may consider local circumstances. Cities and counties have

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

discretion in their comprehensive plans to make many choices about accommodating growth.

\* \* \*

(3) Urban growth should be located first in areas already characterized by urban growth that have adequate existing public facility and service capacities to serve such development, second in areas already characterized by urban growth that will be served adequately by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources, and third in the remaining portions of the urban growth areas. Urban growth may also be located in designated new fully contained communities as defined by RCW 36.70A.350.

Board Analysis and Findings

Petitioner asserts the City is failing in its GMA duty to encourage urban growth. Further, it argues, based on our Supreme Court's ruling in *Yakima County Fire Protection District 12 v. City of Yakima*<sup>47</sup>, that the City, as the exclusive provider of a utility such as sewer, has a duty to provide this service.

In particular, Petitioner argues that the ordinances will prevent the City from satisfying its duty to permit the urban growth projected to occur during the twenty-year growth target period.<sup>48</sup> Petitioner notes RCW 36.70A.110(2) requires the City and Skagit County to "include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period" and that the City is required to provide the necessary urban infrastructure to the UGA within that time period. Petitioner acknowledges the City has adopted a Comprehensive Plan, Sewer Comprehensive Plan, and Sewer Connection Charge all based on the premise the City would use a combination of developer-funded sewer extensions, and public construction of sewer facilities to develop a sewer system capable of serving the UGA., However, it argues that Ordinance Nos. 3472 and 3473 instead would halt all further urban residential development in the unincorporated

<sup>47</sup> 122 Wn.2d 371 (1993).  
<sup>48</sup> Petitioner's Prehearing Brief at 21.  
FINAL DECISION AND ORDER  
Case No. 10-2-0011  
August 4, 2010  
Page 18 of 31

1 UGA.<sup>49</sup> Shutting down development in this manner would fail to accommodate the City's  
2 2025 population target, Petitioner alleges.

3  
4 In addition, Petitioner argues Ordinance Nos. 3472 and 3473 preclude the provision of  
5 urban services while encouraging low density development within the UGA not served by  
6 urban services.<sup>50</sup> Noting RCW 36.70A.110(3) links the phasing of urban development to  
7 the availability of infrastructure, Petitioner argues the City has instead artificially prohibited  
8 urban development of residential lands until some unspecified amount of  
9 commercial/industrial land capacity is added within the City limits.<sup>51</sup> Petitioner characterizes  
10 this as a misguided effort by the City to increase its commercial tax base.  
11

12  
13 Turning to the issue of appropriate densities within the UGA, the City argues it has provided  
14 for urban densities, with plan provisions that call for net development densities between 4.0  
15 and 7.23 dwelling units per acre for standard subdivisions in the Single Family Residential  
16 neighborhoods. Outside the municipal borders, the City argues it has planned for  
17 transitioning to urban development.  
18

19 The City points out RCW 36.70A.110 does not apply to development regulations, and  
20 therefore is inapplicable to Ordinance 3473 which amended City Code 13.08.060.<sup>52</sup> The  
21 Board agrees with this assessment and further consideration of Issue 7 will be limited to  
22 consideration of the Comprehensive Plan amendments contained in Ordinance 3472.<sup>53</sup>  
23

24 The City argues Petitioner has failed to meet its burden of proof because it has not  
25 demonstrated how any of the annexation policies are not valid annexation decision  
26 considerations. The Board agrees. Newly adopted Mount Vernon Comprehensive Plan  
27  
28

29 \_\_\_\_\_  
30 <sup>49</sup> Id. at 22.

31 <sup>50</sup> Id.

32 <sup>51</sup> Id. at 23.

<sup>52</sup> City's Prehearing Brief at 23-24.

<sup>53</sup> RCW 36.70A.110 is entitled "Comprehensive Plan – Urban Growth Areas" and sets forth various requirements for the establishment of UGAs within comprehensive plans. The Board finds nothing in this provision related to development regulations.

1 Policy LU-29.1.3 provides nine criteria to be met before the City Council may initiate an  
2 annexation. Petitioner focuses on criteria contained in policies LU-29.1.3(B), (D) and (F):

3 Policy LU-29.1.3(B): The annexation of residentially zoned areas shall not occur  
4 until additional areas zoned for commercial/industrial are officially designated  
5 such that a balance between residential and commercial /industrial uses can be  
6 achieved within the City.

7 Policy LU-29.1.3(D): The City finds that adequate municipal services exist to  
8 serve the area, and that the factors outlined within RCW 36.93.170(2) are  
9 complied with.

10 Policy LU-29.1.3(F): The City finds that it has the capacity to provide City  
11 services within the existing City limits; and, those services to annexation areas  
12 without major upgrades to these services.

13 Petitioner argues that Policy LU-29.1.3(B) operates as a perpetual moratorium on residential  
14 annexations until the City either annexes some unknown commercial/industrial area or  
15 rezones some unidentified property within the City limits for this purpose.<sup>54</sup> However,  
16 nothing in this policy is demonstrably contrary to RCW 36.70A.110. To the contrary, RCW  
17 36.70A.110(2) mandates that the City "must include areas sufficient to accommodate the  
18 broad range of needs and uses that will accompany the projected urban growth including,  
19 as appropriate, medical, governmental, institutional, commercial, service, retail, and other  
20 nonresidential uses". As the City points out, "Planning for urban growth requires not just  
21 residential land, but land for the jobs and services urban residents require."<sup>55</sup> Deciding on  
22 the appropriate mix of land uses to be brought into the City via annexation is a matter  
23 clearly within the City's discretion.  
24  
25  
26

27 Policies LU-29.1.3(D) and (F) likewise establish criteria that make annexation contingent  
28 upon the availability of adequate municipal services. This too is consistent with the GMA, in  
29 particular, RCW 36.70A.110(3) which requires that :  
30  
31  
32

<sup>54</sup> Petitioner's Prehearing Brief at 7.

<sup>55</sup> City's Prehearing Brief at 24-25.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

Urban growth should be located first in areas already characterized by urban growth **that have adequate existing public facility and service capacities to serve such development**, second in areas already characterized by urban growth **that will be served adequately by a combination of both existing public facilities and services** and any additional needed public facilities and services that are provided by either public or private sources...

The Board disagrees with Petitioner's allegation that *Yakima County Fire Protection District 12 v. City of Yakima*<sup>56</sup> stands for the proposition that the City, as the exclusive provider of sewer, has a duty to provide this service to properties outside city limits. In *Yakima*, the Court held that "Under RCW 35.67.310, which provides that a city "may permit connections with any of its sewers . . . from property beyond its limits", the City has authority to provide service outside its borders. (Italics ours.) The use of "may" in RCW 35.67.310 supports the City's argument that the power granted by RCW 35.67.310 is discretionary and that the City is not bound to provide sewer service to persons residing outside its boundaries."<sup>57</sup> The *Yakima* Court recognized an exception to this "no duty" rule in circumstances where a city "holds itself out" as willing to supply sewer or water service to an area or where a city is the exclusive supplier of sewer or water service in a region extending beyond the borders of the city.<sup>58</sup> However, there is no evidence that Mount Vernon has held itself out as the sole source provider of sewer service. To the contrary, the City's May 18, 2009 "Staff Report in Response to a Request for an Agreement to Provide Sanitary Sewer Service Outside the City Limits" notes "[T]he City of Mount Vernon is not the exclusive provider or sanitary sewer service in the proximity of the project site".<sup>59</sup> Instead, referring to the Petitioner's property in the eastern UGA, the City stated, "The Big Lake sewer district is located directly to the east of the subject site. Staff does not believe the applicant has contacted the sewer district to see what steps would need to be taken to have the district provide sanitary sewer service to the site."<sup>60</sup> While the focus of the appeal is not the provision of sewer service to a site-

<sup>56</sup> *Yakima County Fire Protection District 12 v. City of Yakima*. 122 Wn.2d 371, 381 (1993).

<sup>58</sup> *Id.* at 382.

<sup>59</sup> Exhibit 15 to City's Prehearing Brief, at 2.

<sup>60</sup> *Id.* at 27.

1 specific parcel, this record does demonstrate that the City is not the sole source provider of  
2 sewer service, thus making *Yakima* distinguishable.

3  
4 **Conclusion**

5 The Board concludes Petitioner has failed to carry its burden of proof in demonstrating the  
6 City's adoption of Ordinance Nos. 3472 and 3473 violated RCW 36.70A.110.

7  
8 **D. Did the City fail to utilize the Attorney General's checklist?**

9 As provided in the Board's Prehearing Order, Issue 8 states:

10 **Issue 8:** Whether Ordinance Nos. 3472 and 3473 failed to be based on a checklist  
11 to ensure there is not an unconstitutional taking of private property in violation of  
12 RCW 36.70A.370?

13  
14 Petitioner indicates that it has abandoned Issue 8.<sup>61</sup>

15  
16 **Conclusion**

17 The Board concludes Petitioner has abandoned Legal Issue 8.

18  
19 **E. Were the City's actions inconsistent with the Skagit County CPPs?**

20 As set forth in the Board's Prehearing Order, Issue 9 states:

21 **Issue 9:** Whether Ordinance Nos. 3472 and 3473 fail to comply with RCW  
22 36.70A.100 and RCW 36.70A.210 by being inconsistent with the following adopted  
23 Skagit County Countywide Planning Policies: Policies 1.1, 1.2, 1.3, 1.7, 2.1, 2.2, 4.1,  
24 6.1, 12.5, 12.6, and 12.7?

25  
26  
27 **Applicable Law**

28 RCW 36.70A.100 provides:

29 The comprehensive plan of each county or city that is adopted pursuant to RCW  
30 36.70A.040 shall be coordinated with, and consistent with, the comprehensive  
31  
32

---

<sup>61</sup> Petitioner's Prehearing Brief at 10.  
FINAL DECISION AND ORDER  
Case No. 10-2-0011  
August 4, 2010  
Page 22 of 31

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

plans adopted pursuant to RCW 36.70A.040 of other counties or cities with which the county or city has, in part, common borders or related regional issues.

RCW 36.70A.210 provides, in relevant part:

(1)The legislature recognizes that counties are regional governments within their boundaries, and cities are primary providers of urban governmental services within urban growth areas. For the purposes of this section, a "countywide planning policy" is a written policy statement or statements used solely for establishing a countywide framework from which county and city comprehensive plans are developed and adopted pursuant to this chapter. This framework shall ensure that city and county comprehensive plans are consistent as required in RCW 36.70A.100 Nothing in this section shall be construed to alter the land-use powers of cities.

Board Analysis and Findings

Petitioner argues RCW 36.70A.210 requires Comprehensive Plan policies to be consistent with Countywide Planning Policies (CPPs) and the City is required to follow the CPPs applicable to its jurisdiction.<sup>62</sup> The City takes the position that only comprehensive plans are reviewed for consistency with CPPs, not development regulations. Therefore, because Ordinance 3473 adopts development regulations it is not appropriate to review it for consistency with the Skagit County CPPs.<sup>63</sup> The Board concurs and only Ordinance 3472 will be reviewed for consistency with Skagit County's CPPs.

- CPPs 1.1 and 1.2

Urban growth shall be allowed only within cities and towns, their designated Urban Growth Areas and within any non-municipal urban growth areas already characterized by urban growth, identified in the County Comprehensive Plan with a Capital Facilities Plan meeting urban standards. (CPP 1.1)

Cities and towns and their urban growth areas shall include areas and densities sufficient to accommodate as a target 80% of the county's 20-year population projection. (CPP 1.2)

<sup>62</sup> Petitioner's Prehearing Brief at 24.

<sup>63</sup> City's Prehearing Brief at 25.

1 Petitioner argues Ordinances 3472 and 3473 are inconsistent with CPPs 1.1 and 1.2, which  
2 require urban growth to be located in designated UGAs, "based on the same arguments set  
3 forth under Legal Issue 8, above."<sup>64</sup> However, Petitioner abandoned Legal Issue 8 and  
4 consequently provided no argument in support of that Issue. Therefore, this aspect of Issue  
5 9, in the absence of any supporting argument, must be considered abandoned as well.  
6

7 • CPPs 1.3, 2.1 and 12.5

8 Urban growth areas shall provide for urban densities of mixed uses and shall direct  
9 development of neighborhoods which provide adequate and accessible urban  
10 governmental services concurrent with development. The GMA defines urban  
11 governmental services as those governmental services historically and typically  
12 delivered by cities, and includes storm and sanitary sewer systems, domestic waster  
13 systems, street cleaning services, fire and police protection services, public transit  
14 services, and other public utilities associated with urban areas and normally not  
associated with non-urban areas. (CPP 1.3)

15 Contiguous and orderly development and provision of urban services to such  
16 development within urban growth boundaries shall be required. (CPP 2.1)

17 Lands designated for urban growth by this Comprehensive Plan shall have an urban  
18 level of regional public facilities prior to or concurrent with development. (CPP 12.5)  
19

20 Petitioner also argues Ordinances 3472 and 3473 are inconsistent with CPP 1.3 (UGAs to  
21 provide for urban densities and development concurrent with services), CPP 2.1 (contiguous  
22 and orderly development and provision of urban services with development with UGA  
23 boundaries) and CPP 12.5 (lands designated for urban growth to have an urban level of  
24 regional public facilities prior to or concurrent with development). Petitioner argues the  
25 ordinances make the provision of urban services contingent upon discretionary criteria  
26 based on factually unsupported assumptions, instead of conditioning approval of urban  
27 development on the adequacy of urban services concurrent with new development.<sup>65</sup>  
28

29 Petitioner suggests a potential developer of residential land will be required to develop five  
30 acre lots unless it can be shown that sewer service using existing sewer mains exists, and  
31

32 \_\_\_\_\_  
<sup>64</sup> Petitioner's Prehearing Brief at 25.

<sup>65</sup> Id.

1 even if that were possible, the City retains authority to "randomly deny sewer connections  
2 for any reason."<sup>66</sup>

3  
4 In response, the City points out the entire 2025 population allocation does not have to be  
5 accommodated in a single proposal and until the property is annexed and urban services  
6 are available, it is consistent with the GMA to develop as five acre lots. This, it argues, is  
7 consistent with CPP 2.1 which provides for "[c]ontiguous and orderly development and  
8 provision of urban services . . . "

9  
10 The annexation policies adopted by Ordinance No. 3472 were based upon a legislatively  
11 adopted Conclusion of Law that:

12  
13 Mount Vernon has expended considerable resources in planning for the orderly,  
14 timely and contiguous development and annexation of property situated in  
15 unincorporated urban growth areas and that development that is contrary to  
16 orderly, timely and contiguous development shall materially alter and cause  
17 harm to the City by impacting the level of essential government services such as  
18 police and fire services, as well as the capacity to provide municipal utility  
19 services such as sewer and storm water service within the City.<sup>67</sup>

20 Thus, this is consistent with CPP policies to "direct development of neighborhoods which  
21 provide adequate and accessible urban governmental services concurrent with  
22 development" (CPP 1.3), require contiguous and orderly development and provision of  
23 urban services (CPP 2.1), and that lands designated for urban growth have an urban level  
24 of regional public facilities prior to or concurrent with development. (CPP 12.5). It is also  
25 consistent with the City's own policies which require a finding that adequate municipal  
26 services exist to serve the area (Policy LU-29.1.3 D) and a finding that the boundaries of the  
27 proposed annexation are drawn in a manner that makes the provision of public services  
28 geographically and economically feasible (Policy LU-29.1.3 E). Taken together the City's  
29 annexation policies further serve to ensure the GMA provision that urban growth should be  
30 located first in areas already characterized by urban growth that have adequate existing  
31

32  

---

<sup>66</sup> Id. at 26.

<sup>67</sup> Ordinance 3472 at 2.

1 public facility and service capacities to serve such development, second in areas already  
2 characterized by urban growth that will be served adequately by a combination of both  
3 existing public facilities and services and any additional needed public facilities and services  
4 that are provided by either public or private sources, and third in the remaining portions of  
5 the urban growth areas.<sup>68</sup> The annexation policies adopted by the City are not inconsistent  
6 with these CPPs.

7  
8 • CPP 1.7

9 Development within established urban growth boundaries shall, as a minimum,  
10 conform to those urban development standards in effect within the respective  
11 municipality as of April, 1, 1999. Bayview Ridge UGA urban standards for roads,  
12 sewer, and storm water shall meet or exceed those in effect in the City of Burlington  
13 on April 1, 1999. UGAs with populations of over 1500 or a Commercial/Industrial  
14 land allocation (new) over 100 acres shall have, as a minimum, the following levels  
15 of urban law enforcement and fire service levels: [LOS for law enforcement and fire  
then follow] (CPP 1.)

16 Petitioner also argues Ordinances 3472 and 3473 are inconsistent with CPP 1.7 (requiring  
17 the development within UGAs to conform to urban development standards in effect as of  
18 April 1, 1999), by reducing urban densities to levels far below urban development standards  
19 in effect in 1999. Petitioner argues the Ordinances are inconsistent with CPP 1.7 because,  
20 prior to their adoption, areas of proposed urban residential development were not required  
21 to be annexed as a precondition of sewer service by the City.

22 In response, the City points out CPP 1.7 establishes minimum concurrency standards for  
23 law enforcement and fire, not density minimums, which are established in the County zoning  
24 code.<sup>69</sup>

25 While recognizing the thrust of CPP 1.7 appears to address LOS standards, it does also  
26 mention "urban development standards" in effect as of April 1, 1999. However, the effect of  
27 Ordinances 3472 and 3473 is not to change the zoning of land within the UGA and thereby  
28  
29  
30  
31  
32

---

<sup>68</sup> RCW 36.70A.110(3).

<sup>69</sup> City's Prehearing Brief at 27.

1 reduce urban densities as the zoning of those properties is a matter of County control. At  
2 most, it could be said the allowable density of property not yet served by sewer is restricted  
3 until such time as sewer is made available. Petitioner has not shown the density allowed on  
4 these unserved properties has been reduced by the City to a level below that allowed for  
5 unsewered properties, i.e. a reduction below the County-established standard. As to the  
6 imposition of the requirement that the properties must be annexed as a condition of sewer  
7 service, this CPP makes it clear the urban development standards in place as of April 1,  
8 1999 established "a minimum" for development within the UGA. Nothing in CPP 1.7  
9 prohibited the adoption of higher standards for all land within the UGA. The Board finds no  
10 inconsistency between Ordinances 3472 and 3473 and CPP 1.7.

11  
12 • CPP 2.2

13 Development within the urban growth area shall be coordinated and phased through  
14 interagency agreements. (CPP 2.2)

15  
16 Petitioner argues Ordinances 3472 and 3473 were adopted in the absence of any  
17 coordination with the County or interlocal agreements, and thus are in conflict with CPP 2.2  
18 which requires development within the UGA to be coordinated and phased through  
19 interagency agreements.<sup>70</sup>

20  
21 The City asserts the annexation policies are consistent with this policy because they ensure  
22 levels of service are addressed during annexation.<sup>71</sup> It further argues that no further  
23 agreements with the County are needed as the County Code defers to the City on whether  
24 to provide sewer service.

25  
26  
27 The Skagit County Code, SCC 14.16.910(2)(a)(ii),<sup>72</sup> provides that:

28 (ii) The terms of such agreement regarding provision of sewer shall be between  
29 the city and the property owner. This determination by the city shall be within the  
30 city's sole discretion, as the sewer service provider, and shall not be subject to

31  
32 <sup>70</sup> Petitioner's Prehearing Brief at 26.

<sup>71</sup> City's Prehearing Brief at 27.

<sup>72</sup> Ex. 35

1 appeal by or to the County under any circumstances. **Each city shall establish**  
2 **its own procedures** and criteria for reviewing and deciding these requests for  
3 determination **regarding sewer service in the unincorporated UGA,**  
4 **including, but not limited to, whether the city will agree to any extensions**  
5 **outside of the city limits without annexation.** (emphasis added)

6 Thus, the County has considered the issue of sewer extension and has agreed to defer  
7 to the City's discretion on this matter. Nothing in CPP 2.2 requires the City to seek  
8 County approval prior to the adoption of annexation policies.

9  
10 • CPP 4.1

11 Local governments shall allow for an adequate supply of land use options to provide  
12 housing for a wide range of incomes, housing types and densities. (CPP 4.1)

13  
14 Finally, with regard to this CPP, Petitioner argues Ordinances 3472 and 3473 disregard  
15 CPP 4.1 by permanently restricting development in the unincorporated UGA to five acre  
16 lots.

17  
18 The City responds that it can accommodate all residential growth allocated through 2025  
19 and the land designated for housing is adequate. It argues five acre lot sizes in the  
20 unincorporated UGA, where utility service is not yet available, is consistent with the GMA.

21  
22 The Board finds nothing in Ordinances 3472 and 3473 is contrary to CPP 4.1. This CPP is  
23 one of a number of *County-Wide* Planning Policies. That housing densities will be limited  
24 until such time as sewer is available to a particular area of the unincorporated UGA is *not* to  
25 say that an adequate supply of land use options are not provided for elsewhere, county-  
26 wide. Nor does it demonstrate the City failed to allow for an adequate supply of land use  
27 options overall in its comprehensive plan.

28  
29  
30 • CPPs 6.1, 12.6 and 12.7

31  
32

1 Petitioner has not presented any argument with regard to CPPs 6.1, 12.6 or 12.7 and  
2 therefore that portion of Issue 9 will be deemed abandoned.<sup>73</sup>

3  
4 **Conclusion**

5 The Board concludes Petitioner has failed to carry its burden of proof in demonstrating the  
6 City's adoption of Ordinance Nos. 3472 and 3473 violated RCW 36.70A.100 and RCW  
7 36.70A.210.

8  
9 **F. Do the challenged ordinances preclude EPFs?**

10 As set forth in the Board's PHO, Issue 10 provides:

11 **Issue 10:** Whether Ordinance Nos. 3472 and 3473 fail to comply with RCW  
12 36.70A.200 by creating a scheme that would act to preclude the siting of essential  
13 public facilities such as group homes?  
14

15 **Applicable Law**

16 RCW 36.70A.200(5) provides;

17  
18 No local comprehensive plan or development regulation may preclude the  
19 siting of essential public facilities."

20 **Board Analysis and Findings**

21  
22 Petitioner notes RCW 36.70A.200 specifically includes group homes as essential public  
23 facilities (EPFs) and, while the City can impose reasonable permitting and mitigation  
24 requirements, it cannot preclude group homes.<sup>74</sup> Petitioner further argues the preclusion of  
25 sewer service to group homes makes the siting of such essential public facilities "incapable  
26 of being accomplished" in the unincorporated UGA since extension of sewer would be  
27 conditioned on meeting the standards for annexation.<sup>75</sup>  
28  
29  
30

31 <sup>73</sup> *WEC v. Whatcom County*, WWGMHB Case No. 95-2-0071, FDO, (12/20/95); *OEC v. Jefferson County*,  
32 WWGMHB Case No. 94-2-0017, FDO (2/16/95). Fairness requires that an issue must be addressed in the  
petitioner's opening briefing or the respondent will not have an opportunity to respond to it.

<sup>74</sup> Petitioner's Prehearing Brief at 27.

<sup>75</sup> *Id.*

1 In response, the City argues Skagit County, not the City, regulates EPFs in the  
2 unincorporated portions of the county and the County's regulations do allow for EPFs, such  
3 as group homes.<sup>76</sup> The City points out that a jurisdiction does not have a duty to allow  
4 EPFs on every site but, instead, EPFs such as group homes may be dispersed throughout a  
5 jurisdiction.<sup>77</sup>  
6

7 The Board finds Petitioner has not demonstrated Ordinance Nos. 3472 and 3473 preclude  
8 the siting of EPFs. In fact, MVMC 17.15.030(B) specifically provides that group homes "*are*  
9 *permitted as a matter of right in the R-1 district*". While Petitioner's property, located within  
10 the County, is presently precluded from being annexed into the City due to the City's  
11 annexation policies, this is not to say the City, in and of itself, is precluding the siting of  
12 group homes within the area under the City's planning authority.  
13

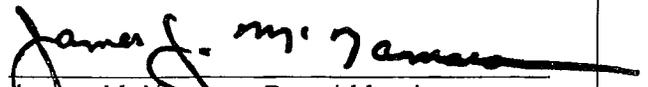
14  
15 **Conclusion**

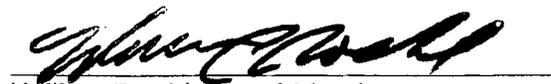
16 The Board concludes Petitioner has failed to carry its burden of proof in demonstrating the  
17 City's adoption of Ordinance Nos. 3472 and 3473 violated RCW 36.70A.200.  
18

19 **V. ORDER**

20 The Board having concluded that Petitioner has failed to demonstrate that Ordinance Nos.  
21 3472 and 3473 are a clearly erroneous violations of RCW 36.70A, the Growth Management  
22 Act, this appeal is denied and case No. 10-2-0011 is dismissed.  
23

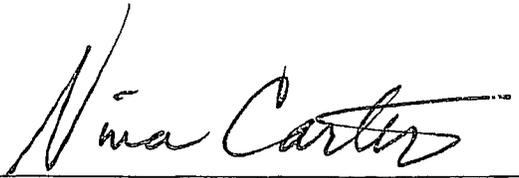
24 So ORDERED this 4th day of August, 2010.  
25

26   
27 James McNamara, Board Member

28   
29 William Roehl, Board Member  
30  
31  
32

<sup>76</sup> City's Prehearing Brief at 28.

<sup>77</sup> *Id.*

  
Nina Carter, Board Member

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior Court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior Court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate Court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

**Appendix 3**  
**Ordinances 3473**  
**and 3472**

**ORDINANCE NO. 3473**

**AN ORDINANCE OF THE CITY OF MOUNT VERNON, WASHINGTON, RELATING TO LAND USE, PLANNING AND UTILITY EXTENSIONS; REPEALING ORDINANCE 3442 and 3445; AND, AMENDING MOUNT VERNON MUNICIPAL CODE TITLE 13 SEWERS; CHAPTER 13.08; AND SECTION 13.08.060 REGARDING THE REGULATION OF SANITARY SEWER CONNECTIONS OUTSIDE THE CITY LIMITS.**

**WHEREAS**, the Mount Vernon Comprehensive Plan has consistently been maintained in compliance with the Washington State Growth Management Act, as amended, since its initial adoption in 1995; and

**WHEREAS**, the Washington State Growth Management Act (GMA) requires the City of Mount Vernon to take legislative action to review and, if needed, revise its Comprehensive Plan and development regulations on a regular basis; and

**WHEREAS**, following extensive public process the City Council adopted an updated and revised Comprehensive Plan and associated development regulations in January of 2006; and

**WHEREAS**, the City conducted hearings of November 17<sup>th</sup> and December 16<sup>th</sup> 2009, preceded with appropriate notice, published in the Skagit Valley Herald on October 20, 2009, regarding amendments to the City Comprehensive Plan and development regulations; and,

**WHEREAS**, the notice of adoption of the proposed amendments has been duly transmitted in compliance with RCW 36.70A.106(1); and,

**WHEREAS**, the SEPA Threshold Determination of Non-significance, non-project action, was published on October 20, 2009.

**NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF MOUNT VERNON, WASHINGTON, DOES HEREBY ORDAIN AS FOLLOWS:**

**SECTION 1. FINDINGS OF FACT.**

The Mount Vernon City Council makes the following findings of fact:

1. The City has followed SEPA requirements and those requirements for public participation under the Growth Management Act (GMA) and adopted by the City of Mount Vernon in Resolution No. 491.
2. A planning goal of the GMA [RCW 36.70A.020(12)], is for local jurisdictions to adopt planning policies in their Comprehensive Plan and development regulations to ensure the orderly and planned development of public facilities and services at the time when such development would be needed without decreasing current service levels.

3. Although the GMA contemplates that a city is the appropriate provider of utility services within its urban growth areas, a city is not obligated by the GMA to so provide such services at any particular time.
4. RCW 35.67.310, and RCW 35A.080.010 provides that a city "may" permit or provide connections with any of its sewers or utility service from property beyond its limits and that the Washington State Supreme Court has held that the use of "may" grants a power that is purely discretionary and that a City is not bound to provide municipal utility services to persons residing outside its boundaries.
5. The Countywide Planning Policies (CPPs), at Policy 12.6, states that "Development shall be allowed only when and where all public facilities are adequate, and only when and where such development can be adequately served by regional public services without reducing services elsewhere; and, at Policy 12.7, that "Public Facilities and services needed to support development shall be available concurrent with the impacts of development." The City Council finds that it is within the best interests of the City, and promotes the public safety, health and general welfare of the public, to control how and when urban growth occurs within the City as well as within unincorporated Urban Growth Areas; and, that the availability and provision of urban services is a basic tool of this control and consist with the CPPs. The City's Planning Policy LU-25.1.6 states that the City should encourage infill development on vacant properties with existing public services and public utilities.
6. The City has adopted into its Comprehensive Plan Annexation Planning Policy Goal LU-29 stating that the City annex properties into the City only when the City Council finds such annexation is justified.
7. The City has adopted into its Comprehensive Plan Objective LU-29.1 to encourage development and re-development within the existing City limits before additional lands are annexed into the City.
8. The City has conducted and adopted into its Comprehensive Plan a buildable lands analysis and is considering the capacity of its utility systems and, without more, concludes that it is uncertain that it may be able to accommodate the additional service demands beyond that needed to meet new development and redevelopment within the current City limits.
9. The City has adopted into its Comprehensive Plan Policy LU- 29.1.4 that sets forth annexation criteria which includes the City should find that it has capacity to provide City services within existing City limits; and those services to annexation areas without major upgrades to these services prior to annexation.

10. The City's Comprehensive Sewer Plan identified as one of the City's goals, "to minimize water quality degradation and to maintain compliance with the requirements of the City's Washington Department of Ecology Wastewater Discharge Permit. An ongoing program of sewer system repair and replacement, and enforcement of development standards, will contribute to the reduction of combined sewer overflows, sewer system infiltration and exfiltration. These efforts will promote health and safety of the public, protection of the environment, and enhance the economic vitality of the City."
11. The City has carefully planned for growth and development with supporting utility systems, including wastewater services. The City cannot hold and has not held itself out as a supplier of municipal utility services to all who request such services in the absence of controlling law and policy, and particularly in the absence of available capacity. Unlike some cities, the City of Mount Vernon has not contracted for or committed to limit its discretion and control regarding extension of utility services. See, in contrast, *Nolte v. City of Olympia*, 96 Wn. App. 944 (1999).
12. On April 15, 2009, the City Council met at a regularly scheduled meeting and discussed the nature of applications relating to the City's expansion or extension of municipal utilities, including expansion of storm water and sewer into Urban Growth Areas and its effects and impacts upon the public health safety and welfare, the City's ability to provide effective levels of service over the twenty year planning horizon, capacity needs, infill development requirements, and the need for measured, planned, phased and incremental development of its municipal utilities. On February 25, 2009, the City Council adopted Ordinance 3442 declaring an emergency and enacting an interim regulation and official control governing requests to extend municipal utilities into unincorporated urban growth areas. On April 15, 2009, the City Council allowed and received public testimony regarding the continuation of Ordinance 3442; and adopted Ordinance 3445 that confirmed and continued Ordinance 3442.
13. The City's NPDES for discharges from its Wastewater Treatment Plant (WWTP) expires in November 2010. The Washington Department of Ecology by correspondence of March 17, 2009, states that the City should immediately begin evaluation of the WWTP and to seek renewal of the NPDES. The City is in that process, but does not expect in the near term that WWTP capacity will assure capacity for other than existing development, redevelopment and new development within the City.
14. To serve the wastewater treatment needs of the City of Mount Vernon the City has previously invested considerable resources in improvements to its WWTP and other facilities.

15. Failure to adequately plan and serve needs of the City through measured and planned growth may result in noncompliance with State and Federal discharge permits resulting in fines and other enforcement measures including requiring the City to expend further funds to provide for emergency capital improvements to its WWTP and related facilities.
16. Conditions resulting in excess demand on the City's wastewater treatment capacity may result in unregulated discharges of insufficiently-treated wastewater into the environment including the aquifer, surface waters or waters of statewide significance which endangers the public safety, health and welfare.
17. Mount Vernon has expended considerable resources in planning for the orderly, timely and contiguous development *and* annexation of property situated in unincorporated urban growth areas; and that development that is contrary to orderly, timely and contiguous development shall materially alter and cause harm to the City by impacting the level of essential government services such as police and fire services, as well as the capacity of municipal utility services such as sewer and storm water service to serve planned development within the City.

## SECTION 2. CONCLUSIONS OF LAW.

The Mount Vernon City Council makes the following conclusions of law:

1. The repealing of Ordinance 3442 and Ordinance 3445 and the amendments to MVMC 13.08.060 ensure that the City's development regulations are consistent with the City's Comprehensive Plan.
2. The requirements for public participation in the development of this amendment as required by the State Growth Management Act (GMA) and by the provisions of City of Mount Vernon Resolution No. 491 have all been met.
3. The proposed amendments are found to be in compliance with the State Growth Management Act.
4. It is within the best interests of the City, and promotes the safety, health and general welfare of the public, to control how and when urban growth occurs within the City and within unincorporated Urban Growth Areas.
5. A proliferation of acceptance of requests to extend sewer without a comprehensive examination of the cumulative impacts to City utilities and other public services will likely result in the creation of capacity issues, lack of coordinated development, unplanned utility rate increases, and hazards for unregulated discharges and violations of the City's discharge permits which jeopardize the safety, health and general welfare of the public.

**SECTION 3. REPEALER.** The following are hereby repealed in their entirety:

A. Ordinance No. 3442, enacted February 25, 2009.

Entitled:

AN ORDINANCE ADOPTING IMMEDIATE INTERIM OFFICIAL CONTROLS, REGULATIONS AND POLICY REGARDING THE EXTENSION OF MUNICIPAL UTILITIES TO UNINCORPORATED URBAN GROWTH AREAS PROVIDING FOR SEVERABILITY; DECLARING AN EMERGENCY AND ESTABLISHING AN IMMEDIATE EFFECTIVE DATE.

B. Ordinance No. 3445, adopted on April 15, 2009.

Entitled:

AN ORDINANCE OF THE CITY OF MOUNT VERNON, WASHINGTON RELATING TO LAND USE PLANNING; ADOPTING FINDINGS OF FACT AND CONCLUSIONS; RATIFYING, CONFIRMING AND CONTINUING ORDINANCE 3442 ADOPTED ON FEBRUARY 25, 2009; PROCLAIMING AN EMERGENCY; AND, ADOPTING INTERIM REGULATION AND CONTROLS FOR APPLICATIONS OR REQUESTS TO THE CITY TO EXTEND MUNICIPAL UTILITIES TO UNINCORPORATED URBAN GROWTH AREAS.

C. Repeal shall not revive ordinances.

The repeal of an ordinance shall not repeal the repealing clause of an ordinance or revive any ordinances which have been repealed thereby.

**SECTION 4. AMENDED SECTION 13.08.160.** Section 13.08.060 of the Mount Vernon Municipal Code is hereby amended to read as follows:

**13.08.060 Outside City Limit Connections.**

Sewer connections shall not be allowed outside the city limits of Mount Vernon. Only after property is annexed into the City may a sewer connection be made in accordance with this Chapter. This ordinance shall not apply to any sewer connection outside the City limits that exists or any sewer connection agreement between the City and property owner in effect prior to the effective date of this ordinance.

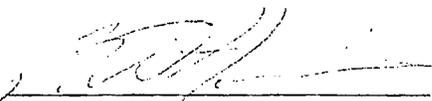
**SECTION 5. CITY CODE AND REVISIONS.** City staff are hereby directed to complete preparation of the final ordinance, including correction of any typographical or editorial edits.

**SECTION 6. SEVERABILITY.** In the event any term or condition of this ordinance or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other terms, conditions, or applications of this ordinance which can be given effect without the invalid term, condition, or application. To this end, the terms and conditions of this ordinance are declared severable. In the event this ordinance or application thereof to any person or circumstances is held invalid, it shall not serve to repeal the repealing clause of any ordinance or revive any ordinances which have been repealed thereby.

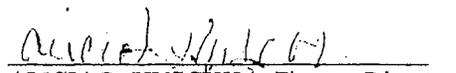
**SECTION 7. SAVINGS.** Ordinance No. 3442 and Ordinance No. 3445, which is repealed by this ordinance, shall remain in force and effect until the effective date of this ordinance.

**SECTION 8. EFFECTIVE DATE.** This ordinance shall be in full force and effect five days after its passage, approval and publication as provided by law.

PASSED AND ADOPTED this 16<sup>th</sup> day of December, 2009.

  
BUD NORRIS, Mayor

SIGNED AND APPROVED this 16<sup>th</sup> day of December, 2009.

  
ALICIA D. HUSCHKA, Finance Director

Approved as to form:

  
Kevin Rogerson, City Attorney

Published December 22, 2009

**CITY OF MOUNT VERNON  
PLANNING COMMISSION & CITY COUNCIL  
PROPOSED AMENDMENTS TO DEVELOPMENT CODE**

**FINDINGS OF FACT, CONCLUSIONS OF LAW and RECOMMENDATION**

On November 17, 2009 the City of Mount Vernon Planning Commission held a public hearing to consider amendments to the City's development code; and on December 16, 2009 the City Council held a public hearing to consider the same amendments.

All persons present at the hearings wishing to speak were heard and all written comments were considered, along with the written staff report submitted by Rebecca Lowell. Based on the testimony and other evidence, the Planning Commission and City Council hereby adopt the following:

**A. FINDINGS OF FACT**

1. The City has followed SEPA requirements and those requirements for public participation under the Growth Management Act (GMA) and adopted by the City of Mount Vernon in Resolution No. 491.
2. A planning goal of the GMA [RCW 36.70A.020(12)], is for local jurisdictions to adopt planning policies in their Comprehensive Plan and development regulations to ensure the orderly and planned development of public facilities and services at the time when such development would be needed without decreasing current service levels.
3. Although the GMA contemplates that a city is the appropriate provider of utility services within its urban growth areas, a city is not obligated by the GMA to so provide such services at any particular time.
4. RCW 35.67.310, and RCW 35A.080.010 provides that a city "may" permit or provide connections with any of its sewers or utility service from property beyond its limits and that the Washington State Supreme Court has held that the use of "may" grants a power that is purely discretionary and that a City is not bound to provide municipal utility services to persons residing outside its boundaries.

5. The Countywide Planning Policies (CPPs), at Policy 12.6, states that "Development shall be allowed only when and where all public facilities are adequate, and only when and where such development can be adequately served by regional public services without reducing services elsewhere; and, at Policy 12.7, that "Public Facilities and services needed to support development shall be available concurrent with the impacts of development." The City Council finds that it is within the best interests of the City, and promotes the public safety, health and general welfare of the public, to control how and when urban growth occurs within the City as well as within unincorporated Urban Growth Areas; and, that the availability and provision of urban services is a basic tool of this control and consist with the CPPs. The City's Planning Policy LU-25.1.6 states that the City should encourage infill development on vacant properties with existing public services and public utilities.
6. The City has adopted into its Comprehensive Plan Annexation Planning Policy Goal LU-29 stating that the City annex properties into the City when the City Council finds such annexation is justified.
7. The City has adopted into its Comprehensive Plan Objective LU-29.1 to encourage development and re-development within the existing City limits before additional lands are annexed into the City.
8. The City has conducted and adopted into its Comprehensive Plan a buildable lands analysis and is considering the capacity of its utility systems and, without more, concludes that it is uncertain that it may be able to accommodate the additional service demands beyond that needed to meet new development and redevelopment within the current City limits.
9. The City it has adopted into its Comprehensive Plan Policy LU- 29.1.4 that sets forth annexation criteria which includes the City should find that it has capacity to provide City services within existing City limits; and those services to annexation areas without major upgrades to these services prior to annexation.
10. The City's Comprehensive Sewer Plan identified it is the City's goal, "to minimize water quality degradation and to maintain compliance with the requirements of the City's Washington Department of Ecology Wastewater Discharge Permit. An ongoing program of sewer system repair and replacement, and enforcement of development standards, will contribute to the reduction of combined sewer overflows, sewer system infiltration and exfiltration. These efforts will promote health and safety of the public, protection of the environment, and enhance the economic vitality of the City".

11. The City has carefully planned for growth and development with supporting utility systems, including wastewater services. The City cannot hold and has not held itself out as a supplier of municipal utility services to all who request such services in the absence of controlling law and policy, and particularly in the absence of available capacity. Unlike some cities, the City of Mount Vernon has not contracted for or committed to limit its discretion and control regarding extension of utility services. See, in contrast, *Nolte v. City of Olympia*, 96 Wn. App. 944 (1999).
12. On April 15, 2009, the City Council met at a regularly scheduled meeting and discussed the nature of applications relating to the City's expansion or extension of municipal utilities, including expansion of storm water and sewer into Urban Growth Areas and its effects and impacts upon the public health safety and welfare, the City's ability to provide effective levels of service over the twenty year planning horizon, capacity needs, infill development requirements, and the need for measured, planned, phased and incremental development of its municipal utilities. On April 15, 2009, the City Council allowed and received public testimony regarding the continuation of Ordinance 3442. On February 25, 2009, the City Council adopted Ordinance 3442 declaring an emergency and enacting an interim regulation and official control governing requests to extend municipal utilities into unincorporated urban growth areas
13. The City's NPDES for discharges from its Wastewater Treatment Plant (WWTP) expires in November 2010. The Washington Department of Ecology by correspondence of March 17, 2009, states that the City should immediately begin evaluation of the WWTP and to seek renewal of the NPDES. The City is in that process, but does not expect in the near term that WWTP capacity will assure capacity for other than existing development, redevelopment and new development within the City.
14. To serve the wastewater treatment needs of the City of Mount Vernon the City has previously invested considerable resources in improvements to its WWTP and other facilities.
15. Failure to adequately plan and serve needs of the City through measured and planned growth may result in noncompliance with State and Federal discharge permits resulting in fines and other enforcement measures including requiring the City to expend further funds to provide for emergency capital improvements to its WWTP and related facilities.
16. Conditions resulting in excess demand on the City's wastewater treatment capacity may result in unregulated discharges of insufficiently-treated wastewater into the environment including the aquifer, surface waters or waters of statewide significance which endangers the public safety, health and welfare.

17. Mount Vernon has expended considerable resources in planning for the orderly, timely and contiguous development *and* annexation of property situated in unincorporated urban growth areas; and that development that is contrary to orderly, timely and contiguous development shall materially alter and cause harm to the City by impacting the level of essential government services such as police and fire services, as well as the capacity of municipal utility services such as sewer and storm water service to serve planned development within the City.

Based on the foregoing Findings of Fact, the Planning Commission and City Council hereby makes the following:

**B. CONCLUSIONS OF LAW**

1. The proposed repealing of Ordinance 3442 and Ordinance 3445 and the amendments to MVMC 13.08.060 ensure that the City's development regulations are consistent with the City's Comprehensive Plan.
2. The requirements for public participation in the development of this amendment as required by the State Growth Management Act (GMA) and by the provisions of City of Mount Vernon Resolution No. 491 have all been met.
3. The proposed amendments are found to be in compliance with the State Growth Management Act.
4. It is within the best interests of the City, promoting the safety, health and general welfare of the public, to control how and when urban growth occurs within the City and within unincorporated Urban Growth Areas.
5. A proliferation of acceptance of requests to extend sewer without a comprehensive examination of the cumulative impacts to City utilities and other public services will likely result in the creation of capacity issues, lack of coordinated development, unplanned utility rate increases, and hazards for unregulated discharges and violations of the City's discharge permits which jeopardize the safety, health and general welfare of the public.

**ORDINANCE NO. 3472**

**AN ORDINANCE OF THE CITY OF MOUNT VERNON, WASHINGTON RELATING TO LAND USE AND PLANNING; ADOPTING NEW OBJECTIVES AND POLICIES IN THE LAND USE ELEMENT OF THE CITY COMPREHENSIVE PLAN RELATING TO ANNEXATIONS.**

**WHEREAS**, the Mount Vernon Comprehensive Plan has consistently been maintained in compliance with the Washington State Growth Management Act, as amended, since its initial adoption in 1995; and

**WHEREAS**, the Washington State Growth Management Act (GMA) requires the City of Mount Vernon to take legislative action to review and, if needed, revise its Comprehensive Plan and development regulations on a regular basis; and, following extensive public process the City Council adopted an updated and revised Comprehensive Plan and associated development regulations in January of 2006; and

**WHEREAS**, hearings were conducted on November 17<sup>th</sup> and December 16<sup>th</sup> 2009, preceded with appropriate notice published in the Skagit Valley Herald on October 20, 2009, concerning proposed amendments to the Comprehensive Plan; and,

**WHEREAS**, the notice of adoption of the proposed amendments has been duly transmitted in compliance with RCW 36.70A.106(1); and,

**WHEREAS**, the SEPA Threshold Determination of Non-significance, non-project action, was published on October 20, 2009; and,

**WHEREAS** the City Council finds that the attached revised Comprehensive Plan reflects the best interests of the citizens of the City of Mount Vernon, Washington; and,

**WHEREAS**, it is the intent of the City Council that the attached revised Comprehensive Plan shall serve as a future guide for anticipating and influencing the orderly and coordinated development of land and building uses within the City of Mount Vernon.

**NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF MOUNT VERNON, WASHINGTON, DOES HEREBY ORDAIN AS FOLLOWS:**

**Section 1. FINDINGS OF FACT.**

The Mount Vernon City Council makes the following findings:

- A. The City has followed SEPA requirements and those requirements for public participation under the Growth Management Act (GMA) and adopted by the City of Mount Vernon in Resolution No. 491.

**Section 2. CONCLUSIONS OF LAW.**

The Mount Vernon City Council makes the following conclusions of law:

- A. The proposed additions to the Land Use Element of the Comprehensive Plan regarding annexations ensure that the City's development regulations are consistent with the City's Comprehensive Plan.
- B. It is within the best interests of the City, promoting the safety, health and general welfare of the public, to control how and when urban growth occurs within the City and unincorporated Urban Growth Areas.
- C. Mount Vernon has expended considerable resources in planning for the orderly, timely and contiguous development and annexation of property situated in unincorporated urban growth areas and that development that is contrary to orderly, timely and contiguous development shall materially alter and cause harm to the City by impacting the level of essential government services such as police and fire services, as well as the capacity to provide municipal utility services such as sewer and storm water service within the City.

**Section 3. PLANNING COMMISSION RECOMMENDATION ADOPTED.** The City Council adopts the Planning Commission's findings of fact and conclusions of law attached in their entirety.

**Section 4. COMPREHENSIVE PLAN AMENDED.** Exhibit A attached hereto and incorporated herein in its entirety by this reference is hereby adopted and the proposed changes shall be included in the Land Use Element of the Comprehensive Plan of the City of Mount Vernon.

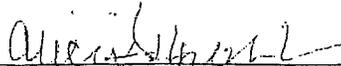
**Section 5. SEVERABILITY.** In the event any term or condition of this ordinance or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other terms, conditions, or applications of this ordinance which can be given effect without the invalid term, condition, or application. To this end, the terms and conditions of this ordinance are declared severable.

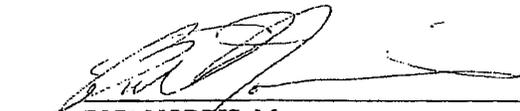
**Section 6. PLAN UPDATED.** City staff are hereby directed to complete preparation of the final Comprehensive Plan Document, including correction of any typographical or OTHER edits consistent herewith.

**Section 7. EFFECTIVE DATE.** This ordinance shall be in full force and effect five days after its passage, approval and publication as provided by law.

PASSED AND ADOPTED this 16<sup>th</sup> day of December, 2009.

SIGNED AND APPROVED THIS 16<sup>th</sup> day of December, 2009

  
ALICIA D. HUSCHKA, Finance Director

  
BUD NORRIS, Mayor

Approved as to form:

  
KEVIN ROGERSON, City Attorney

Published December 22, 2009

EXHIBIT A

MOUNT VERNON COMPREHENSIVE PLAN LAND USE ELEMENT GOAL, OBJECTIVE AND  
POLICIES WITH REGARD TO ANNEXATIONS. PROPOSED CHANGES IN TRACKING  
FORMAT:

Goal LU-29:	Annex properties into the City when the City Council finds the annexation is justified.
-------------	---

Objective LU-29.1 Encourage development and re-development within the existing City limits before additional lands are annexed into the City.

Policy LU-29.1.1 The first priority of the City shall be to annex and provide urban services (i.e., sewer, fire, transportation, drainage, parks, open space, schools and landscaping, etc.) on a priority basis to those areas immediately adjacent to the City where available services can most easily and economically be extended.

Policy LU-29.1.2 Work with Skagit County to establish procedures for the development of land within the Urban Growth Areas.

Policy LU-29.1.3 The City Council shall not initiate an annexation unless the following criteria can be met with a proposal. These criteria have been developed following the adoption of the City's Buildable Lands Analysis and E.D. Hovee's report entitled, "Commercial and Industrial Land Needs Analysis", dated September 2006. These reports show that the City does not have a balance between projected residential and commercial/industrial uses.

- A. The annexation area is determined to be necessary and appropriate to meet the population and/or employment targets.
- 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.
- C. The annexation is a logical extension of the City's boundaries.
- D. The City finds that adequate municipal services exist to serve the area, and that the factors outlined within RCW 36.93.170(2) are complied with.
- E. The City finds that the boundaries of the proposed annexation are drawn in a manner that makes the provision of public services geographically and economically feasible.
- 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.
- G. The City finds that there are not negative economic impacts to the City with the extension of services.
- H. The City finds that it can afford to provide City services without having to use funds that would otherwise be spent on already incorporated areas of the City.
- I. The City finds that the annexation will not create a financial stress on the City's ability to provide required services to the annexation area.

EXHIBIT A

Objective LU-29.2 Preservation of natural neighborhoods and communities.

Objective LU-29.3 Creation and preservation of logical service areas.

Policy LU-29.3.1 Annex areas into the City based on the premises of limiting sprawl, providing for efficient provision of public services and facilities, serving areas where the cost of extending infrastructure consistent with adopted capital improvement plans is the most cost efficient, and avoiding "leap-frog" development and annexations.

Objective LU-29.4 Prevent abnormally irregular boundaries.

**CITY OF MOUNT VERNON  
PLANNING COMMISSION & CITY COUNCIL  
PROPOSED ADDITIONS AND AMENDMENTS TO  
THE LAND USE ELEMENT OF THE COMPREHENSIVE PLAN**

**FINDINGS OF FACT, CONCLUSIONS OF LAW and RECOMMENDATION**

On November 17, 2009 the City of Mount Vernon Planning Commission held a public hearing to consider additions and amendments to the Land Use Element of the Comprehensive Plan; and on December 16, 2009 the City Council held a public hearing to consider the same additions and amendments to the Comprehensive Plan.

All persons present at the hearings wishing to speak were heard and all written comments were considered, along with the written staff report submitted by Rebecca Lowell. Based on the testimony and other evidence, the Planning Commission and City Council hereby adopt the following:

**A. FINDINGS OF FACT**

1. The hearings of November 17<sup>th</sup> and December 16<sup>th</sup> 2009 were preceded with appropriate notice, published in the Skagit Valley Herald on October 20, 2009.
2. Notice of adoption of the proposed amendments has been duly transmitted in compliance with RCW 36.70A.106(1).
3. A SEPA Threshold Determination of Non-significance, non-project action, was published on October 20, 2009.
4. The Mount Vernon Comprehensive Plan has consistently been maintained in compliance with the Washington State Growth Management Act, as amended, since its initial adoption in 1995.
5. The Washington State Growth Management Act (GMA) requires the City of Mount Vernon to take legislative action to review and, if needed, revise its Comprehensive Plan and development regulations on a regular basis and that following extensive public process the City Council adopted an updated and revised Comprehensive Plan and associated development regulations in January of 2006.

Based on the foregoing Findings of Fact, the Planning Commission and City Council hereby makes the following:

**B. CONCLUSIONS OF LAW**

1. The proposed additions to the Land Use Element of the Comprehensive Plan regarding annexations ensure that the City's development regulations are consistent with the City's Comprehensive Plan.
2. The requirements for public participation in the development of this amendment as required by the State Growth Management Act (GMA) and by the provisions of City of Mount Vernon Resolution No. 491 have all been met.
3. The proposed amendments are found to be in compliance with the State Growth Management Act.
4. It is within the best interests of the City, promoting the safety, health and general welfare of the public, to control how and when urban growth occurs within unincorporated Urban Growth Areas.
5. Mount Vernon has expended considerable resources in planning for the orderly, timely and contiguous development and annexation of property situated in unincorporated urban growth area and that development that is contrary to orderly, timely and contiguous development shall materially alter and cause harm to the City by impacting the level of essential government services such as police and fire services, as well as the capacity to provide municipal utility services such as sewer and storm water service within the City.

**Appendix 4**  
**Excerpts from**  
**Cited Board Decisions**

*City of Sedro-Woolley v. Skagit County.*

WWGMHB #03-02-0013c

Compliance Order (June 18, 2004)

**BEFORE THE WESTERN WASHINGTON GROWTH  
MANAGEMENT HEARINGS BOARD**

CITY OF SEDRO-WOOLLEY, FRIENDS OF SKAGIT  
COUNTY, et al.,

Petitioners,

v.

SKAGIT COUNTY,

Respondent,

NO. 03-02-0013c

**COMPLIANCE  
HEARING  
ORDER**

**I. SUMMARY**

Four years ago the local governments of Skagit County informed the Board that they had chosen a system of interlocal agreements which would require the County to adopt and implement the cities' development regulations within the cities' respective Urban Growth Areas (UGAs). This system, they argued, would comply with the Growth Management Act (GMA) requirements for urban development, efficient timing and phasing of urban infrastructure and transformance of governance within the municipal UGAs. The Board was not convinced that this proposed system would work, but gave the local governments the opportunity to update their interlocal agreements and show that the County would timely adopt City development regulations (DRs) and keep them current. Unfortunately, the local governments in Skagit County have been unable to put aside their differences and agree upon compliant development regulations applicable to lands within the municipal UGAs that are in the County's jurisdiction. We therefore conclude in this decision that we can wait no longer for the parties to agree upon the development regulations that will apply in the unincorporated portions of the County's UGAs; instead, in order to come into compliance, the County must adopt a set of development regulations which ensure development at urban

densities with concurrent urban infrastructure and transformance of governance within the unincorporated portions of the municipal UGAs.

In an earlier order in this case, dated May 17, 2004, we found that we do not have jurisdiction over the challenges to Resolution R20030160 raised by Sedro-Woolley in its Petition for Review regarding that Resolution (originally filed as WWGMHB Case No. 03-2-0013) because the Resolution is not a comprehensive plan, a development regulation or an amendment to either. However, we accept the resolution as evidence on the question of the County's compliance with the Board's prior orders.

## II. HISTORY

Since this consolidated case has a very complex history, we will attempt to present a brief framework of historical perspective before proceeding with the decision.

A number of earlier cases dealt with the issues of transformance of governance and timely provision of urban infrastructure in Skagit County UGAs. These have been consolidated over time into the instant case:

1. *Abenroth v. Skagit County*, WWGMHB No. 97-2-0060c ("*Abenroth*");
2. *Evergreen Islands v. Skagit County*, WWGMHB No. 00-2-0046c ("*Evergreen*");
3. *City of Anacortes v. Skagit County*, WWGMHB No. 00-2-0049c ("*Anacortes*"); and
4. *Friends of Skagit County v. Skagit County*, WWGMHB No. 00-2-0050c ("*FOSC*").

The earlier transformance of governance noncompliance issues in *Abenroth* were subsumed into *FOSC* (WWGMHB No. 00-2-0050c).

In the February 6, 2001 Final Decision and Order (FDO) in this case,<sup>1</sup> we stated:

---

<sup>1</sup> This case is a consolidation of *FOSC* (WWGMHB No. 00-2-0050c) with the new Petition for Review filed by the City in WWGMHB Case No. 03-2-0013. The consolidated case number containing both matters is WWGMHB Case No. 03-2-0013c.

The purpose of the Board's orders in *Abenroth* and the purpose for the GMA transformance of governance requirement is to assure that growth in the unincorporated UGAs will be at urban levels consistent and coordinated with the levels of the cities, since the UGAs will eventually become annexed into these cities. The County has chosen to assure this consistency and coordination through the adoption of the development regulations (DRs) of the cities, and the application of those DRs by the County in unincorporated UGAs.

WWGMHB Case No. 00-2-0050c, *FOSC v. Skagit County* (Final Decision and Order, February 6, 2001) at 4

Also consolidated into Case No. 00-50c was FOSC's petition for review re: City regulations, assigned Case No. 00-2-0038. In that petition for review, FOSC specifically raised the issue: "3.1.1. Whether Ordinance No. 17938 (relying on adoption of city regulations within municipal UGAs) allowed development in a leapfrog, sprawling manner without city annexation and city services, failing to comply with the Act?"

The proposed approach was a major concern to the Board because of the potential failure of the local governments to work together to make this approach effective and compliant. The cities joined the County in pleading that this would not be the case. We never found compliance on that issue, but we allowed the County and cities time to demonstrate that they could agree upon the appropriate development regulations within the unincorporated portions of the UGAs. We stressed that the mechanism of interlocal agreements, providing that the County would adopt City development regulations ("DRs"), could only be considered as an interim solution until the development regulations themselves were actually adopted. Further, this scheme could only comply with the Act's concurrency and transformance of governance requirements if the County imposed upon itself an ongoing obligation to timely adopt new or amended City DRs applicable to development within the unincorporated portions of the UGAs. In that regard, we stated:

Regarding the interim County implementation of City regulation, in order to achieve compliance the County must, within 30 days, adopt current City DRs and keep them current in the future.

WWGMHB Case No. 00-2-0050c, *FOSC v. Skagit County* (Final Decision and Order, February 6, 2001) at 6

The November 30, 2001 Compliance Order in *FOSC* held that the timely adoption of city regulations within the UGA still had not been achieved. Further, timely adoption of city development regulations alone would not bring the County into compliance. The County also needed to “negotiate and adopt updates to interlocal agreements to ensure that annexation will be facilitated to enable the required efficient timing and phasing of urban infrastructure extension and urban development within municipal UGAs. Also, the County must adopt provisions for urban development to occur when full urban infrastructure and services are available.” WWGMHB Case No. 00-2-0050c, *FOSC v. Skagit County* (Compliance Order, November 30, 2001) at 7-8.

The more general transformance of governance and concurrent urban infrastructure issues from *Evergreen* and *Anacortes* were also later subsumed into this case, WWGMHB Case No. 03-2-0013c.

(2) *Evergreen*

In the November 30, 2001 Compliance Order in this case at 19, the Board noted that it would “track County progress toward transformance of governance, timely annexations, and efficient phasing of urban infrastructure and development through the remands in Cases 00-2-0050c and 00-2-0049c.”

(3) *Anacortes*

In the July 25, 2003 Compliance and Lifting of Invalidity Order, the Board noted that the City of Anacortes’ ongoing concerns regarding transformance of governance and development within the UGA would be resolved in Case No. 00-2-0050c.

After all of the above were consolidated into *FOSC*, the compliance issues in *FOSC* were later consolidated with the new Petition for Review filed by Sedro Woolley (originally WWGMHB Case No. 03-2-0013) into the current case, 03-2-0013c, *City of Sedro-Woolley, et al. v. Skagit County*

### **III. STANDARD OF REVIEW, PRESUMPTION OF VALIDITY, BURDEN OF PROOF**

Ordinances and Resolutions adopted in response to a finding of noncompliance are presumed valid. RCW 36.70A.320:

The burden is on petitioners to demonstrate that the action taken by Skagit County is not in compliance with the requirements of the Growth Management Act (GMA, Act). RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), we “shall find compliance unless [we] determine that the action by [Skagit County] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” In order to find the County’s action clearly erroneous, we must be “left with the firm and definite conviction that a mistake has been made.” *Department of Ecology v. PUD 1*, 121 Wn.2d 19, 201 (1993).

### **IV. ISSUE RAISED REGARDING RESOLUTION R20030160**

In their Petition for Review filed in WWGMHB Case No. 03-2-0013c, Petitioners challenge Skagit County Resolution R20030160. Skagit County Resolution R20030160 was adopted on May 12, 2003. It sets forth the reasons that the Skagit County Board of County Commissioners decided not to adopt the City’s development regulations pertaining to sewer infrastructure in the unincorporated Sedro Woolley UGA. Index No. 1059. We have already held that Resolution R20030160 is not

subject to Board jurisdiction because it is neither a comprehensive plan amendment nor a development regulation or an amendment to it:

While we believe that the Resolution is pertinent to the question of compliance and the request for invalidity in *Friends of Skagit County v. Skagit County*, WWGMHB Case No. 00-2-0050c, we agree with the County that it does not form the basis for a new petition for review.

*Sedro Woolley v. Skagit County*, WWGMHB Case No. 03-2-0013c (Order Dismissing Issues Raised in the 2003 Petition for Review, May 17, 2004).

This opinion therefore deals with the County's compliance efforts in response to the Board's prior orders.

#### V. COMPLIANCE ISSUES

Compliance Issue 1: Has the County achieved compliance with its current approach to ensure transformance of governance, timely annexations, and efficient phasing of ~~urban infrastructure and development within the municipal UGAs?~~

The most pressing situation challenging Skagit County's compliance with its current approach comes from Sedro-Woolley's situation within its UGA outside its city limits. We will deal with the specifics of that predicament first.

#### **Sedro-Woolley's Position**

The City argues that the County's failure to adopt all of its development regulations for land outside the city limits but within the Sedro Woolley UGA fails to ensure the transformance of governance that the cities and the County have agreed will happen. The land in Sedro-Woolley's UGA outside its city limits is primarily residential, and has no infrastructure. The City points out that it will basically be annexing debt if development in that area is allowed to continue without the requirement for concurrent infrastructure. When ongoing development is allowed by short plat without requiring infrastructure improvements and is scattered throughout the municipal UGA, the City says there is, and will be, no way to finance GMA-required urban infrastructure

because the only feasible way for the City to fund sewers (which are the biggest concern and are needed to make urban densities possible) is through Utility Limited Improvement Districts (ULIDs). In order to use that method, 60% of the owners in the affected area must approve. Most of the land in the unincorporated Sedro-Woolley UGA is already divided into five-acre lots or smaller. The City contends that it will be impossible to put together enough critical mass for a successful sewer ULID without the participation of fairly major subdivisions. Further, according to the City, if a waiver of protest for a ULID is allowed in lieu of providing connection to the sewer at the time of development, it lasts only ten years. This makes it extremely difficult for the City (who has the responsibility for providing infrastructure in its UGA over a 20-year time frame) to be able to finance that infrastructure. The City points out that it found that its regulations in place prior to the adoption of Ordinance 1428-02 that allowed for shadow platting and resulted in one-acre lots made it almost impossible for the City to put together future ULIDs or annexations. The City also argues that it is not realistic to expect the ratepayers of a small city like Sedro Woolley to finance sewer extensions in the UGA.

The City acknowledges that street infrastructure can be done incrementally, but explains that the County, through its variance process, is not requiring developers of short plats to put in street improvements or any other incremental improvements as they develop. The County also refuses to adopt the City's impact fee ordinance to support infrastructure development, despite the interlocal agreement that requires the County to adopt the City's development regulations.

The City admits that Sedro-Woolley's interlocal agreement with the County currently allows shadow platting, but notes that it also requires that the County adopt City ordinances imposing impact fees and requiring incremental infrastructure improvements to guarantee concurrency and urban development within the UGA. The

City contends that its ordinances are GMA compliant since no one (including the County) appealed the City concurrency DRs to the Board.

Sedro-Woolley further complains about the County's variance procedures:

Every short plat, for which a variance from sanitary sewer and full street infrastructure is sought, will result in a hearing examiner deciding, between the City taxpayers and ratepayers or the developer, who will pay for urban infrastructure, and when they will pay for it. The decision is not based on a consistent, comprehensive development code which is measurable against a comprehensive plan adopted through a regulated process of public participation. Rather, every permit will involve a variance based on inconsistent City and County ordinances. Only the City ordinance will be supported by a compressive (sic) plan and infrastructure planning for the area at issue. Planning will be performed on a permit-by-permit basis, rather than by reference to DRs consistent with a GMA compliant comprehensive plan. This critical defect makes the County's failure to adopt Ordinance 1428-02 and its progeny a non-compliant decision.

Sedro-Woolley June 23, 2003 Memorandum for Compliance Hearing, etc. at 14

Sedro-Woolley argues that Exhibits 960 and 995 (the records of proceedings of the Skagit County Board of County Commissioners (BOCC) meetings of March 11 and March 25, 2003, (when the BOCC voted to not adopt Sedro-Woolley Ordinance 1428-02) and County Resolution R20030160 itself demonstrate that the goal of the BOCC is to not adopt GMA-compliant DRs requiring sanitary sewer and annexation as a condition for short plats in the unincorporated UGA. Sedro-Woolley claims that the BOCC has made it clear that subdivision by short plat will continue to be permitted in the unincorporated Sedro-Woolley UGA without provision for annexation, without urban infrastructure, and without sanitary sewer. The BOCC has also made it clear that they will not collect impact fees nor impose the stricter City DRs in the Sedro-

Woolley unincorporated UGA. Sedro-Woolley June 23, 2003 Reply Brief, Case No. 00-2-0050c at 3.

Sedro-Woolley contends that the County and Sedro-Woolley are at a total impasse. *Id.* at 6. After months of additional negotiations, in its March 9, 2004 Reply, Sedro-Woolley again pointed out the County's insistence on changing the provision that the City and the County had been negotiating, would have allowed development of a one-acre lot on a five-acre parcel through the use of the County's Conservation and Reserve Development regulations. The City says that although the language in the County's latest proposal is somewhat unclear, the County proposed shadow platting to a density of at least four units an acre, together with requiring a means for identifying the future location of infrastructure, instituting mechanisms for future participation of lot owners in ULIDs or other infrastructure financing methods, and allowed no more than one unit per acre to be constructed on these plats. Only development that was more intense than this would be required to annex to the City. The City maintains that the County's most recent proposal is not consistent with CP Policy 7A-2.2, nor compliant with the Board's previous orders or the GMA. Sedro-Woolley states:

It is going to be very difficult, as a practical matter, for the City of Sedro-Woolley to require annexation and finance infrastructure (sewer) if its unincorporated UGA is divided into 1 acre lots prior to annexation. Even Skagit County argues that short plats of small lots like these cannot afford to construct infrastructure as a condition of development. The fractured development patterns that will result from the County proposal will deprive the City of the financing options that larger developments provide, to help pay for a larger block of infrastructure. (Sewer in particular must by its nature be constructed as a system from the center out, and cannot be built in unconnected pieces. Loosing (sic) the impetus of extending sewer to larger developments will shift most of the cost to non-developers, as a practical matter.) If the Board allows Skagit County to scatter short

plats of 1 acre lots – without sewer and streets – throughout the unincorporated UGA, the new owners will have little incentive to annex on their own, and the primary means of financing sewer and street following annexation will be from increased utility rates and general tax revenue; it won't happen.

Sedro-Woolley March 9, 2004 Reply at 5-6

Sedro-Woolley further points out, even if it agreed to the County's proposal, the City's and the County's joint action would not render short plats without infrastructure GMA compliant.

#### **County's Position**

The County reminded us at the hearing that Sedro-Woolley defended the current approach of ensuring concurrency and transformance of governance before this Board. The problem is that there are greater funding problems than were anticipated ten years ago.

The County explains that on March 21, 2000, the BOCC made clear that it would adopt only those city development regulations that it believes are GMA compliant. (Ex. No. 1008, Sec. 6). The County has chosen not to adopt a few ordinances because it believes they are not in compliance with the GMA and would cause problems for transformance of governance within the unincorporated UGAs. June 16, 2003 Response Brief at 6. The County further explains that it will not adopt Sedro-Woolley's impact fee ordinance until Sedro-Woolley has agreed to an updated interlocal agreement since the most recent Sedro-Woolley Capital Facilities Plan is dated 1998 and fails to adequately show how Sedro-Woolley will extend infrastructure to the UGA to serve the growing population. *Id.* at 7. The County goes on to say:

It is the failure of the County and the City to achieve an updated Interlocal Agreement which has prevented the adoption of Sedro-Woolley's impact fee ordinance.

County's June 16, 2003 Response Brief at 8

As to the refusal to adopt Sedro-Woolley's Interim Ordinance 1428-02, the County argues that the City's ordinance amounts to a moratorium on short subdivisions, which actually discourages development within the Sedro-Woolley UGA. The County argues that this violates the affordable housing goal of the GMA (RCW 36.70A.020(4)) as well as the goal of encouraging urban development within the UGAs (RCW 36.70A.020(1)).

The County further points out that the City abandoned the shadow-platting strategy that had been agreed to between the City and County and did that unilaterally, without consulting the County. This, the County counters, means that the City was the one to abandon the interlocal agreement, not the County. County's June 16, 2003 Responding Brief for Compliance Hearing, Case No. 00-2-0050c, at 8-10.

If continued noncompliance is to be found, the County argues, it should not be blamed on the County alone, since success of the chosen process requires the cities to cooperate also. The County states, "The GMA does not empower this Board to find the County not in compliance for being unable to force Mount Vernon or Sedro-Woolley into agreements." *Id.* at 12.

The County contends that the solution is to relook at the boundaries of the Sedro-Woolley UGA in the 2005 update to see if those UGA boundaries need to be reduced.

#### **Board Discussion On Sedro-Woolley UGA Only**

On May 12, 2003, the BOCC formalized its rejection of Sedro-Woolley ordinances by adopting Resolution R20030160. In Skagit County Resolution R20030160, the County rejected the new Sedro-Woolley ordinance for a variety of reasons. The County found that the City's ordinance was unfair to small property owners, requiring them to absorb large infrastructure costs or wait twenty years to develop their property:

**Whereas** in July 2002, the City of Sedro-Woolley submitted for adoption Ordinance Nos. 1427-02 and 1428-02. Among other things, Interim Ordinance No. 1428-02 (as most recently renewed by Ordinance No. 1437-02) requires landowners or developers who create new lots, whether by short plat, subdivision, binding site plan, or Planned Unit Development, to install urban sewer and street infrastructure, or provide funding through bonding or payment for such installation; and

**Whereas**, the same infrastructure installation requirement currently exists in Sedro-Woolley Code for the creation of subdivisions of more than four lots. Ordinance No. 1428-02 would extend those requirements to short subdivisions, ~~the creation of between two and four lots.~~ Development on existing single lots of record is not subject to the infrastructure requirement. Ordinance No. 1428-02 already has been adopted by Sedro-Woolley for implementation within the city limits; adoption by the County would extend those requirements to the unincorporated Sedro-Woolley UGA; and

...

4. Ordinance No. 1428-02 only affects subdivisions of ~~four lots or fewer.~~ Larger subdivisions already are required to provide urban infrastructure. Because of their larger size, they have greater financial resources to do so. *The short subdivision process was originally created to allow small subdivisions to proceed without incurring major infrastructure costs.* According to testimony at the public hearing, between 1998 and the present (date of the hearing), there were only six short subdivisions completed in the Sedro-Woolley unincorporated UGA, accounting for only seven new buildable lots, for an average of 1.4 lots per year. A much larger amount of new development is caused by new single family residences on existing lots, which are exempt from the infrastructure extension requirements. If Ordinance No. 1428-02 is adopted, short plats will no longer be an option for landowners, developers, or new home buyers. The ordinance will become a defacto moratorium on small land divisions within the unincorporated portion of the UGA, and another factor leading to rising housing costs, contrary to the GMA goal

of providing affordable housing particularly within urban areas. The ordinance will also jeopardize Sedro-Woolley's commitment, along with the other urban areas, to accepting 80 percent of the County's new growth per Countywide Planning Policy 1.2.

5. It is simply unrealistic to expect landowners and small developers in the unincorporated UGA to pay to connect two- to four-lot subdivisions to the nearest urban infrastructure, which in some cases may be a half-mile away. Such extensions and hookups can cost into the hundreds of thousands of dollars, an amount which simply cannot be amortized across a four-lot subdivision.

6. The Ordinance could require *property owners in the outer portion of the unincorporated UGA to wait 20 years* before they are able to develop their property, if that is how long it takes the City to extend sewer to that portion of the UGA. That is unfair and unreasonable to those property owners. *They should at least have the option to develop their property now without installing urban infrastructure, provided they sign an agreement to meet the city standards when infrastructure has been extended by the city to their portion of the UGA.*

...

8. Since the 1999 Interlocal Agreement, the County has adopted City development regulations for application within the unincorporated UGA to assure that development in the unincorporated UGA would be consistent with that within the incorporated City limits. County residents living in the unincorporated UGA lack political representation within the City because it is the City that controls the regulations under which they develop. Such residents typically are not informed about or invited to comment on regulations adopted by the City. That leaves County Commissioners as the sole elected representatives of these residents. *If the City adopts an ordinance that is unreasonable, even if the County has previously pledged to adopt city ordinances generally, it is the Commissioners' responsibility not to approve that ordinance for*

*implementation within the unincorporated UGA. Because of the reasons set forth in these findings, in this case it is inappropriate for the County to adopt this Ordinance.*  
Resolution R20030160 at 1-5 (emphasis added)

We have dealt with a similar issue regarding the BOCC concern that it is not fair for small property owners on the periphery of the UGA who want to divide and develop their land to have to wait years for a large developer or the City to extend sewer services. In the March 28, 2003 Final Decision and Order in Case No. 02-2-0010, *Cedardale Property Owners v. City of Mount Vernon*, we stated:

There are parameters to the City's obligation to see that infrastructure is provided within the UGA. By creating the UGA boundaries that it has the City (in partnership with the County) has committed to public facilities necessary to support the planned development within the UGA. However, the time-frame for providing those facilities is the twenty-year horizon of the Comprehensive Plan, not the six-year horizon of the Capital Improvements Plan.

We repeat that finding here. If the land owners on the periphery of the UGA had not been included in the UGA, they could not have subdivided their property into lots smaller than five acres at any time. Therefore, it is not unreasonable for those property owners on the periphery to wait to the end of the 20-year planning period to subdivide their property into lots smaller than five-acre. The previous records in these cases indicate that there are a multitude of preexisting small lots within the Skagit County cities and their UGAs. If Sedro-Woolley cannot currently provide urban infrastructure to the periphery of its UGA, the development should go to another UGA where urban infrastructure is already available or can efficiently be provided. The County's position is not compliant with the GMA as to concurrency and transformance of governance within the Sedro-Woolley UGA because it would allow development through subdivisions at greater than rural densities but at less than urban densities, without annexation, without urban infrastructure, and without any realistic

certainty that urban infrastructure will soon be able to be provided, or if it ever could be.

We agree with the County that one solution is to re-examine the Sedro-Woolley UGA boundaries in light of the possibility that the City is unable to realistically meet its twenty-year goal of providing urban service levels within the UGA as the boundaries are currently drawn.

We also agree with the City that the current development regulations allow inappropriate urban development since there is inadequate provision for urban services in the unincorporated portions of the Sedro-Woolley UGA. If further short platting is allowed now creating more lots smaller than five acres without urban infrastructure, it could jeopardize the ability of the City and the County to revise those boundaries based on the work to be done during the 2005 updates. If that work shows that Sedro-Woolley cannot provide infrastructure needed for urban development within its UGA, even if the urban growth boundary is pulled back to the City limits, the creation of a plethora of new smaller lots outside the UGA would be contrary to RCW 36.70A.020(2), the GMA's sprawl reduction goal.

The record in this case also shows that the County's suggestion of returning to shadow platting without requiring infrastructure improvements or providing other methods for paying for them such as impact fees within the residential districts of the Sedro-Woolley UGA would not ensure that urban services can be provided concurrently with urban development and thus would not comply with RCW 36.70A.020(12). There may be situations where shadow platting with some required interim infrastructure or through a system that ensures infrastructure can be provided would comply with concurrency requirements. But that is not the case here.

Under the circumstances of this case where this issue has been before the Board for many years, the County must be aware that its actions in formally refusing to adopt the City's ordinances would affect its ability to achieve compliance here. The County has not brought forward an alternative plan for achieving compliance – it has simply rejected the City's ordinance. Under these circumstances, it is clear that agreement will not be reached and, indeed, that the original scheme to ensure transformance of governance and provision of concurrent infrastructure in the UGAs to be determined by interlocal agreements was flawed.

#### **Board Discussion On Compliance Countywide**

The provision of urban levels of service to urbanized areas is a central requirement of the GMA. RCW 36.70A.020(12) provides:

Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

UGAs are those areas of a county in which urban levels of development are expected to occur. Urban levels of densities are typically at least four dwelling units per acre. Rural densities are, as all three growth hearings boards have held, densities no greater than one dwelling unit per five acres. When higher than rural densities are allowed, they must be located either in a limited area of more intense rural development ("LAMIRD") or in an urban growth area.

Urban growth areas do not necessarily begin at urban levels of density, in part because they are often designed to include areas outside the incorporated cities and towns for future growth. The aim is to first direct growth to those parts of the UGA that have urban services or to which they can be provided, and to ensure that those parts of the

UGAs that do not have urban services or to which they can not be provided at the present time are eventually developed at urban densities and with urban standards of service. (RCW 36.70A. 110 (3)).

Here, the County has designated UGAs, including unincorporated areas surrounding the four major cities in Skagit county, where urban growth is to occur. Since the County has jurisdiction over the unincorporated portions of the UGAs, it is up to the County to adopt development regulations to reach the GMA goals for containing urban growth and ensuring that urban levels of service can be provided within the unincorporated areas. Because the County and cities have decided that each city will eventually annex all of the surrounding unincorporated area in its UGA, the original scheme had been for the County to adopt each city's development regulations for application within the unincorporated UGAs surrounding each city respectively,

We have held that efficient phasing of urban infrastructure is the key component to transference of governance from a county to a city. Assurance of annexation should occur before urban infrastructure is extended within the unincorporated portions of a UGA because the extension of services is the primary inducement that cities have to bring unincorporated areas within their jurisdiction into their cities. If land is not appropriate for urban development (due to the inability to provide for urban services), it should be left out of a UGA. *Abenroth v. Skagit County*, WWGMHB Case No. 97-2-0060 (Final Decision and Order, January 23, 1998).

We also believe we have made clear in our previous decisions that the County's current approach, which facilitates further subdivision within the UGAs without provisions for urban levels of infrastructure, fails to comply with the Act.

In its June 16, 2003 Response Brief on compliance, the County acknowledged that the Board's previous orders had required the County to (1) timely adopt current city DRs to be effective within UGAs and keep them current in the future and (2) accomplish transformance of governance and efficient phasing of urban infrastructure with UGAs via amendments to existing interlocal agreements with the cities. County's June 16, 2003 Response Brief at 1.

However, the County's decision to only adopt those City DRs it deems appropriate for application within the City UGAs makes the scheme unworkable for ensuring compliance with the Act. The Board has always had a serious concern as to whether this scheme would ever be workable. In this case, where the County has elected to pick and choose among the City's development regulations, it is clearly not going to work. Therefore, the Board must look at the actual development regulations in place in the unincorporated portions of the municipal UGAs and determine if these are compliant with the GMA.

We look first to the development regulations in the Sedro-Woolley UGA, because the City has challenged their adequacy. The City points out that there are no provisions for impact fees, no restrictions on the ability to develop commensurate with the provision of urban levels of service (especially sewer), and a variance system that allows development without meeting City requirements for roads and sidewalks. The Sedro Woolley development regulations adopted by the County as applicable in the unincorporated areas of the Sedro Woolley UGA do not adequately implement the County's and cities' choice of urban growth areas under the GMA because they do not assure that urban development densities occur in tandem with urban levels of service, and because the existing development regulations provide no incentive for property owners to agree to annexation or, indeed, for the City to be willing to take them. Skagit County Ordinance 18375. The development regulations adopted by the County

for that portion of the Sedro-Woolley UGA within its jurisdiction do not accomplish efficient phasing of infrastructure or facilitate annexation.

Until the County adopts development regulations that address these fundamental concerns, the Board is unable to find that the County has adopted development regulations to ensure that urban levels of growth and urban service levels are provided in the unincorporated portions of the Sedro-Woolley UGA. RCW 36.70A.110(2) and (3).

We must then look to the development regulations applicable to other UGAs within the County's jurisdiction to determine whether they are compliant with the GMA. The County adopted a different set of development regulations with respect to each UGA, depending upon which city is expected to eventually annex the unincorporated area. However, these regulations do not actually address the phasing of urban infrastructure for those regions, or the transformation of governance from county to city. The County's Proposed Permanent Development Regulations Within the Burlington, Concrete, Mount Vernon and Sedro-Woolley Unincorporated Urban Growth Areas (Ex. 1301) tacitly acknowledges this lack. The draft permanent development regulations envision an ordinance that will address the need to transition the urban growth areas from county jurisdiction to city jurisdiction as urban development occurs.<sup>2</sup> However, that draft has not been adopted and is not before us for review.

Anacortes argues persuasively that interlocal agreements that are not incorporated into the County's comprehensive plan or incorporated by reference into the County's development regulations cannot meet GMA requirements. The history of this case

---

<sup>2</sup> While the substance of the final permanent development regulations is not before the Board, the interlocal agreement between the County and the cities sets out the fundamental issues to be addressed in the ultimately adopted development regulations. These include minimum lot size, phasing of urban services, annexation agreements, infrastructure development standards, urban levels of service, annexation requirements, impact fees, and permit processing.

shows in grim detail just how a reliance upon interlocal agreements can lead to gaps in the regulatory framework. Some inherent drawbacks to the reliance upon interlocal agreements are that they are contracts among local governments that may or not be subject to public or board review; they are dependent on good relations among local governments; they are built on commitments between local elected officials that may not last from election to election; and they are not themselves regulations that apply to citizens in regulating land use without corresponding comprehensive plan policies or development regulations

Three years ago, FOSC argued that the interlocal agreement scheme could not ensure compliance with the Act. We have now given Skagit County and the cities more than three years to work together to make their chosen means of compliance work. It is obvious after considering all of the arguments presented above that FOSC was right; that the County needs to adopt new compliant DRs that it is willing to implement within the UGAs that ensure transformance of governance, development at urban densities, infrastructure to support that development, and prevention of sprawl to be compliant with RCW 36.70A.110, RCW 36.70A. 020(2) and RCW 36.70A. 020(12).

**Conclusion:** The County has failed to adopt development regulations within the municipal UGAs generally and the Sedro Woolley UGA in particular, which comply with the GMA requirements for transformance of governance and efficient phasing of urban infrastructure within the UGAs.

**Compliance Issue 2: Should Invalidity Be Found?**

Sedro-Woolley states that the County has failed to achieve any meaningful compliance with the GMA goals of urbanization, concurrency, and transformance of governance in the unincorporated UGA. "The position of the City of Sedro-Woolley is that the system of interlocal agreements is broken, cannot be repaired, and should be found

invalid on a county-wide basis, with the severest sanctions imposed on the County.”  
February 17, 2004 Memorandum of the City of Sedro-Woolley at 1.

Sedro-Woolley concludes its request for invalidity with a request that this Board impose invalidity if the County’s interim ordinance limiting subdivision to parcels of no greater density than one dwelling unit per five acres were to be repealed or allowed to expire. Sedro-Woolley March 9, 2004 Reply Memorandum at 11

The County, in its March 1, 2004 Reply Brief, responds that Sedro-Woolley has not presented evidence of substantial interference with the goals of the Act throughout all UGAs in the County. The County further argues that Sedro-Woolley’s request to invalidate all of the UGAs outside City limits, would encourage more development in rural areas and therefore causes more interference with the goals of the Act than leaving the current interim ordinance provisions in effect.

Sedro-Woolley has asked that we invalidate Chapter 7 of the County CP in its entirety and Policy 7A-2.2 in particular. At the hearing and on page 10 of the County’s March 31, 2004 supplemental brief, the County argues that we have no jurisdiction to invalidate provisions that were never challenged.

CP Chapter 7 restates CPP 12.7 which provides that public facilities needed to support development shall be available concurrent with impacts. It further states that the County shall coordinate with cities and have updated interlocal agreements. CP 7A-2.2 limits development to one dwelling unit per five acres without urban infrastructure.

In addition to the County’s concerns about the Board’s jurisdiction over them, Chapter 7 and CP 7A-2.2 do not appear to be the problem. The County’s failure to take actions consistent with the plan is the failing that might be seen as egregious.

However, the local governments in this case agreed to a stipulation that the County would temporarily limit subdivision in the contested areas to no smaller than five-acre lots while a GMA-compliant solution was being negotiated. Even though that negotiation has not been successful, the County has readopted those interim provisions.

At the hearing, we asked the parties to brief the question of what development regulations would be in place if the County allows this interim ordinance to expire. The parties agree that even though there is no reversionary clause, the previously adopted permanent Ordinance 18375 (adopted August 31, 2001) would govern. Sedro-Woolley points out that Ordinance 18375 would allow the short plat applications now waiting at the County's counter to vest in the Sedro-Woolley UGA under DRs which allow development without waivers of protest for future sanitary sewer and street infrastructure. This ordinance also does not adopt Sedro-Woolley's impact fee ordinance. That is why Sedro-Woolley requests that if the interim ordinance is not readopted and kept in effect, immediate invalidity should be imposed.

We share Sedro-Woolley's concern about the potential negative impact of short plat proposals already at the County's permit counter vesting if current interim provisions are allowed to lapse. However, we note that the County has readopted the interim ordinance and kept it in effect even though negotiations have failed. We also note that as long as the creation of new lots smaller than five acres is forbidden, there is no showing of substantial interference with the goals of the GMA such as to form a basis for a finding of invalidity under RCW 36.70A.302. We have no reason to believe that the County would show bad faith and allow such restrictions to lapse, creating a window of opportunity for more small short plats to vest while compliant DRs are being developed. We therefore decline to invoke invalidity at this time.

However, we are keenly aware that the interim ordinance does not achieve compliance in itself; it is temporary and it fails to address transformation of governance or to direct growth to the municipal UGAs instead of to rural and resource lands. We are concerned that the limited development regulations applicable in the Sedro-Woolley unincorporated UGA, if allowed to apply in place of the County's interim ordinance, would substantially interfere with Goals 1, 2, and 12 of the GMA. RCW 36.70A.020. Therefore, we are reluctant to set a compliance deadline beyond the date of the interim ordinance.

At the same time, the County proposes that the resolution of the conflict between the County and Sedro-Woolley lies in re-adjustment of the boundaries of the Sedro-Woolley UGA. The County suggests using the required update process of City and County comprehensive plans and development regulations pursuant to RCW 36.70A.130 as a mechanism for reconsidering the Sedro-Woolley UGA boundaries. The deadline for Skagit County and the cities in Skagit County to complete this process in December 1, 2005. (RCW 36.70A.130 (4)).

The County's compliance obligations are long overdue and it would not be appropriate to just postpone them because of the update deadline. Further, while the County now argues that the Sedro-Woolley UGA may be too large, it is of concern to the Board that Resolution R20030160 appears to reflect a different perspective – one that promotes higher densities without appropriate infrastructure in that same UGA. It is not at all clear, therefore, that the County has chosen to reduce the size of the Sedro-Woolley UGA as a way to manage development in the UGAs. In addition, the lack of compliant development regulations applies to the unincorporated portions of all the UGAs, not just the Sedro-Woolley UGA. We may well be back to the same dilemma regarding development regulations in the unincorporated UGAs after the update process. For these reasons, the County's obligation to achieve compliance with

respect to development regulations applicable in the unincorporated portions of the UGAs cannot be suspended pending the update process.

Whatever approach the County adopts, the Board needs assurance that sprawl will be prevented in the UGAs during the planning process. The interim ordinance is one method for assuring that sprawl does not occur while proper development regulations are being developed. The County may propose other ways. However, the Board must be assured that the County is utilizing either the interim ordinance or some other County action to prevent sprawl during the period needed to achieve compliance.

The Board will set a hearing schedule to monitor the County's progress in achieving compliance by developing a compliant set of development regulations that prevents sprawl, provides for concurrent infrastructure, and provides for the transformance of governance in the unincorporated portions of the UGAs. The hearing schedule will also allow the Board to monitor the extent to which the County maintains its interim protections against inappropriate sprawl.

## VI FINDINGS OF FACT

(1) Skagit County is a county located west of the crest of the Cascade Mountains that is required to plan pursuant to RCW 36.70A.040.

(2) This case is a consolidation of several previous cases, or parts of cases, regarding issues of transformance of governance and timely provision of urban infrastructure within UGAs outside of city limits. The previous cases are *Abenroth v. Skagit County*, WWGMHB Case No. 97-2-0060c; *Evergreen Islands v. Skagit County*, WWGMHB Case No. 00-2-0046c; *City of Anacortes v. Skagit County*, WWGMHB Case No. 00-2-0049c; and *Friends of Skagit County v. Skagit County*, WWGMHB Case No. 00-2-0050c.

(3) The current parties to this case all have achieved participatory standing by orally and/or in writing having expressed their views before the Planning Commissioner and/or Board of County Commissioners with respect to the issues discussed in this decision.

(4) The County was first found to be out of compliance with the GMA with respect to development regulations applicable in the unincorporated portions of the County's UGAs in the Final Decision and Order issued in this case on February 6, 2001. We held that:

The purpose of the Board's orders in *Abenroth* and the purpose for the GMA transformation of governance requirement is to assure that growth in the unincorporated UGAs will be at urban levels consistent and coordinated with the levels of the cities, since the UGAs will eventually become annexed into these cities. The County has chosen to assure this consistency and coordination through the adoption of the development regulations (DRs) of the cities, and the application of those DRs by the County in unincorporated UGAs.

WWGMHB Case No. 00-2-0050c, *FOSC v. Skagit County* (Final Decision and Order, February 6, 2001) at 4

(5) We further held in the same decision that the County and the cities' chosen interlocal agreement approach (relying on County adoption of City regulations within municipal UGAs:

- (a) could only be considered an interim solution, and
- (b) must require that the County impose upon itself an ongoing obligation to timely adopt the City DRs.

(6) The Board's November 30, 2001 compliance order in this case found that the County continued to be non-compliant with the GMA, although the Board allowed the County time to work with the cities in the County to develop regulations addressing

transformance of governance and appropriate urban levels of growth in the unincorporated portions of the Skagit County UGAs.

(7) In spite of interlocal agreements that require the adoption of city development regulations and keeping them current, several of the cities and the County have failed for three years to update their interlocal agreements to ensure transformance of governance and concurrent provision of urban infrastructure within the UGAs.

(8) By failing to incorporate interlocal agreements into the County's comprehensive plan or incorporating them by reference into the County's development regulations, the County has failed to implement their provisions.

(9) Further, the interlocal agreement scheme has failed to lead to compliant development regulations in the unincorporated portions of all of the municipal UGAs.

(10) Sedro-Woolley and the County are at odds over the type of development regulations that should apply in the Sedro-Woolley UGA. Sedro-Woolley enacted City Ordinance 1428-02 because it feels that development is occurring in the unincorporated portions of the City's UGA without reasonable assurance that the City will be able to provide sewer and water at urban levels of service to those developments. City Ordinance 1428-02 precludes development unless the developer pays for the extension of city services to the development. The ordinance is interim in nature while the City updates its capital facilities plan to determine the feasibility of providing urban infrastructure to the entire Sedro-Woolley UGA in the 20-year planning period.

(10) Skagit County made it clear in public meetings and in Resolution R20030160, that subdivision of lots in the unincorporated portion of the Sedro Woolley UGA will

be permitted to densities of one dwelling unit per acre without prior annexation and without sanitary sewer and other urban infrastructure. The BOCC also made it clear that it would not collect Sedro-Woolley's impact fees nor impose the stricter City DRs in the Sedro-Woolley unincorporated UGA. Resolution R20030160 states in part, "If the City adopts an ordinance that is unreasonable, even if the County has previously pledged to adopt city ordinances generally, it is the Commission's responsibility not to approve that ordinance for implementation within the unincorporated UGA."

(11) After several years of negotiation, Sedro-Woolley and Skagit County remain at an impasse as to the above issues.

(12) The land in Sedro-Woolley's UGA outside its City limits is primarily residential and has no infrastructure. When ongoing development is allowed by short plat and scattered throughout the municipal UGA to the outer edge without provision for urban levels of service, there is, and will be, no practical way to finance GMA-required urban infrastructure.

(13) Outside of the UGAs, residential development is allowed at rural densities. Densities of greater than one dwelling unit per five acres are not rural densities.

(14) The County allows subdivisions of land within the unincorporated UGAs to non-rural densities because the UGAs are expected to develop at urban density levels and urban levels of service.

(15) However, the County also permits such subdivisions without provision for sewer or water at urban levels of service such as the City of Sedro Woolley would require within its own boundaries.

(17) The County refuses to impose Sedro-Woolley's traffic impact mitigation fees as would be required by the City if the same development were to occur within the municipal boundaries.

(18) The County refuses to adopt the City's development regulations that impose traffic impact mitigation fees within the Sedro-Woolley UGA.

(19) The County has not adopted development regulations within the unincorporated Sedro Woolley UGA to address the need for urban levels of service in the UGA in place of the regulations adopted by the City.

(20) If further short platting is allowed now without concomitant provision for urban levels of service, more lots will be created within Sedro-Woolley's UGA that exceed rural densities and lack urban levels of service .

(21) If capital facilities planning for the 2005 updates shows that Sedro-Woolley cannot provide infrastructure needed for urban development within its UGA, the choice to retract the urban growth boundary to the City limits would be impaired by the creation of new, smaller lots within the UGA prior to revision of the UGA boundaries.

(22) Without development regulations to address the need for urban levels of service and the transformance of governance in the unincorporated areas of the Sedro Woolley UGA, inappropriate development will occur through subdivisions without provision for urban infrastructure and annexation, or any realistic certainty that urban infrastructure and annexation will be able to be provided as required within the UGAs within the twenty-year planning horizon.

(23) The County's decision to only adopt those City DRs it deems appropriate for application within the City UGAs makes the scheme of achieving transformance of governance by adopting city development regulations in the unincorporated UGAs unworkable.

## VII. CONCLUSIONS OF LAW

- A. This Board has jurisdiction over the parties in this case.
- B. The Board has subject matter jurisdiction over the compliance issues consolidated into this case.
- C. The County has failed to adopt development regulations within the municipal UGAs generally and the Sedro Woolley UGA in particular, which comply with the GMA requirements for transformance of governance and efficient phasing of urban infrastructure within the UGAs, as required by the Growth Management Act including RCW 36.70A.110, RCW 36.70A.020(2), and RCW 36.70A.020(12). The County's development regulations applicable to the unincorporated portions of its UGAs fail to comply with the GMA.

## VIII. ORDER

The County shall adopt development regulations in compliance with the GMA according to this Final Decision and Order within 180 days of the date of this order. These development regulations must facilitate the transformance of governance and phasing of infrastructure concurrently with development in the unincorporated portions of the County's UGAs.

Further, during the compliance period extended by this or subsequent order, the County shall continuously keep in place protections that prevent non-rural levels of development in the unincorporated portions of the Sedro-Woolley UGA until such time as this Board finds the permanent development regulations are compliant with the

GMA. The County shall report to the Board upon the measures it has adopted to ensure that such development does not occur in the interim according to the following schedule.

August 3, 2004	Compliance deadline for adoption of measures to prevent non-rural levels of development during the compliance period
August 16, 2004	Report due to Board on adopted protection measures
December 15, 2004	Compliance deadline for adoption of development regulations providing for transformance of governance and effective phasing of infrastructure within the unincorporated portions of the county UGAs.
January 6, 2005	Compliance Report due to the Board on development regulations adopted to effect transformance of governance and infrastructure phasing in UGAs.
January 27, 2005	Petitioners' Brief deadline (objections to a finding of compliance)
February 17, 2005	County's Response deadline
February 24, 2005	Petitioners' Reply deadline (optional)
March 10, 2005	Compliance Hearing

This is a Final Order under RCW 36.70A.300(5) for purposes of appeal.

Pursuant to WAC 242-02-832(1), a motion for reconsideration may be filed within ten days of issuance of this final decision.

So ORDERED this 18th day of June 2004.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

---

Nan A. Henriksen, Board Member

---

Holly Gadbaw, Board Member

---

Margery Hite, Board Member

*Master Builders Ass'n v. City of Arlington,*

CPSGMHB #04-3-0001

FDO (July 14, 2004)

(Excerpts)



- One purpose of both CPPs and UGAs is to achieve transformation of local governance within UGAs from counties to cities;<sup>18</sup>
- Designating a UGA adjacent to a city fosters the transformation of local governance;<sup>19</sup>
- Because cities are the primary providers of urban services, annexations and incorporations are logical occurrences;<sup>20</sup>
- CPPs cannot direct cities as to the methods of annexation.<sup>21</sup>
- A county plan may not condition or limit the exercise of a city's annexation land use power.<sup>22</sup>

### Conclusions

Here, the City is requiring annexation as a condition of providing sewer service within the UGA. The City is responsible for providing urban services to development within the UGA at the time such development is available for use and occupancy, and within the twenty year horizon of the City's plan for the UGA. The approach the City has chosen to managing growth, specifically the provision of sewer service, is a valid option which the City may choose in order to transform governance and phase development within the UGA. It is not a denial of sewer service or *de facto* moratorium on development within the UGA. As such, the premise upon which MBA builds its case – the amendment is a denial of services and a moratorium - is false. In fact, such a provision is consistent with, and complies with, the GMA as this Board has interpreted it.

The Board now proceeds to address Petitioner's individual issues within this context and understanding.

### B. LEGAL ISSUES NO. 2 THROUGH NO. 5

The Board's PHO sets forth Legal Issues No. 2 through No. 5 as follows:

---

<sup>17</sup> *City of Gig Harbor, et al., v. Pierce County (Gig Harbor)*, CPSGMHB Case No. 95-3-0016c (5316c), Final Decision and Order, (Oct. 31, 1995), at 13. *City of Gig Harbor, et al., v. Pierce County (Gig Harbor)*, CPSGMHB Case No. 95-3-0016c (5316c), Final Decision and Order, (Oct. 31, 1995), at 13.

<sup>18</sup> *Rural Residents, 3310*, FDO at 14.

<sup>19</sup> *Doreen Johnson, Christy Ellingson, Daniel Palmer, Gil and Marlene Bortelson and Friends of the Green v. King County [Plum Creek Timber Company, L.P. and Palmer Coking Coal Company – Intervenors] (Johnson II)*, CPSGMHB Case No. 97-3-0002 (7302), Final Decision and Order, (Jul. 23, 1997), at 7.

<sup>20</sup> *City of Poulsbo, City of Port Orchard and City of Bremerton v. Kitsap County (Poulsbo)*, CPSGPHB Case No. 92-3-0009c (2309c) Final Decision and Order, (Apr. 6, 1993), at 27.

<sup>21</sup> *Poulsbo, 2309c*, FDO at 27.

<sup>22</sup> *Bremerton/Alpine, 5339c/8332c*, FDO at 48.

1304 does not comply with the affordable housing goal and asks the Board to declines Petitioner's invitation to revisit the issue, noting RCW 36.70A.290(4)'s requirement that the Board's action be based on the record. City's Response, at 12-13.

### Board Discussion

Again Petitioner's assertions that Ordinance No. 1304 conflicts with planning goals 1 and 4 in RCW 36.70A.020 are based on the premise that the requirement of annexation to the City as a condition of sewer service by the City is the same as a denial of sewer service to the unincorporated part of the UGA. The Board has addressed this premise in Section IV-A, *supra*, at 5-12, and found this premise to be faulty. Further, the Board has concluded that Ordinance No. 1304 implements Arlington's Plan. *See* discussion of Legal Issue 6, *supra*. Absent reliance on the faulty premise, Petitioner offers no argument as to how the provisions of Ordinance No. 1304 thwart or contradict the guidance provided by Goal 1 or 4.

### Conclusions

Petitioner has failed to carry the burden of proof in demonstrating that Ordinance No. 1304 fails to comply with GMA Goals 1 and 4. The Board concludes that the City's adoption of Ordinance No. 1304 was guided by, and complies with, goals 1 and 4. Therefore the City's action was **not clearly erroneous** and **complies with** the goals of the Act [RCW 36.70A.020(1) and (4)].

### V. ORDER

Based upon review of the Petition for Review, the Briefs and Exhibits submitted by the parties, the GMA, prior Board Orders and case law, having considered the arguments of the parties, and having deliberated on the matter the Board ORDERS:

- Legal issues 2, 3, 4 and 5 are **dismissed with prejudice**.
- The City's adoption of Ordinance No.1304, amending AMC 13.20.60, was **not clearly erroneous**, and **complies with** the requirements of RCW 36.70A.040(3), .120 and .130(1)(b) [Legal Issue 6] and was guided by Goals 1 and 4 RCW 36.70A.020(T) and (4) [Legal Issue 1].

*Pirie Second Family Limited Partnership, LLP v. City of Lynnwood*

CPSGMHB #06-3-0029

FDO (April 9, 2007)

(Excerpts)



In reply, Pirie continued that "submitting an application as suggested by the City would be a meaningless application as the Pirie property and other parcels within the "rectangle" are designated for 'determining compliance with the comprehensive plan.'" Pirie Reply, at 35.

The Board notes that Petitioner's argument in reply is based upon the *application* of the Ordinance to a particular property and the potential submittal of an application to the City by the Petitioner, and its subsequent rejection. This scenario, although speculative, could occur. However, the Board reminds the parties that it has no jurisdiction to resolve project permit disputes. See *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 868 (1997) and *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 179 (2000).

This leaves the Board with the question of whether Ordinance No. 2625 complies with RCW 36.70A.390, as Petitioner has alleged in Legal Issue 8. As the Board noted above, Ordinance No. 2625 does not adopt a moratorium, *de facto* or otherwise. It permits development within the City Center Area, but imposes conditions and requirements for such development to proceed. Therefore, the Board concludes that RCW 36.70A.390 is not applicable to Ordinance No. 2625 and Petitioner's challenge is misplaced and without merit. Petitioner's challenge as stated in Legal Issue No. 8 is dismissed with prejudice.

#### Conclusion – Legal Issue 8

The Board concludes that Petitioner's challenge, as stated in Legal Issue No. 8, is misplaced and without merit. Legal Issue 8 is **dismissed with prejudice**.

#### F. LEGAL ISSUE NO. 9

The Board's PHO set forth Legal Issue No. 9 as follows:

9. *Do the development regulations at Section 3, D.1 of Ordinance 2625 requiring consistency with the "design of public streets and parks/plazas," in Exhibit A, including implementing Ordinances and Resolutions at Exhibits B through H, operate as a de facto and unlawful "spot zone," that operate as a downzone and are intended to devalue Petitioner's Property within a limited geographic area within the City Center Zoning District; or that operates as an impermissible adjudicative rezone, which misuse GMA comprehensive plan amendment and development regulation requirements to unfairly assist the City's acquisition of public parks properties?*

#### Applicable Law

Petitioner's framing of Legal Issue 9 does not allege noncompliance with any stated GMA provision. Instead, Petitioner asserts that the City of Lynnwood's adoption of Ordinance No. 2625 constitutes a "de facto" and unlawful "spot zone."

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**

---

Susan Elizabeth Drummond, WSBA No. 30689  
Law Offices of Susan Elizabeth Drummond, PLLC  
1200 Fifth Avenue, Suite 1650  
Seattle, WA 98101  
T (206) 682.0767 / F (206) 654.0011

Susan Elizabeth Drummond:

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: *Brief of Respondent/Cross-Appellant City of Mount Vernon* upon counsel as stated below:

Marc Worthy, Esq.  
Assistant Attorney General  
Robert M. McKenna  
Attorney General, State of WA  
800 5<sup>th</sup> Avenue, Suite 2000  
Seattle, WA 98104

Robert D. Johns  
Duana T. Kolouskova  
Johns Monroe Mitsunaga  
Kolouskova PLLC  
1601 114<sup>th</sup> Ave. S.E., Suite 110  
Bellevue, WA 98004-6969

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 September, 2011, in Seattle, Washington.



Susan Elizabeth Drummond