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NO. 68079-0-I

**COURT OF APPEALS FOR DIVISION 1  
STATE OF WASHINGTON**

GOVERNOR'S POINT DEVELOPMENT COMPANY,  
Appellant,

vs.

CITY OF BELLINGHAM, a Washington municipal corporation, and  
THOMAS L. ROSENBERG, its Director of Public Works,  
Respondents/Defendants, and  
FRIENDS OF CHUCKANUT,  
Respondent/Intervenor.

**CITY OF BELLINGHAM'S AND FRIENDS OF CHUCKANUT'S  
CROSS-APPEAL REPLY BRIEF**

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## I. ARGUMENT

GPDC claims that the City violated RCW 43.20.260 and virtually identical WAC 246-290-106 when it refused to provide contract water services to GPDC's proposed 141-lot subdivision. (CP 1270-1280).

RCW 43.20.260 states:

A municipal water supplier . . . has a duty to provide retail water service within its retail service area if . . . (4) it is consistent with the requirements of any comprehensive plans or development regulations adopted under chapter 36.70A RCW [Growth Management Act] or any other applicable comprehensive plan, land use plan, or development regulation adopted by a city, town, or county for the service area and, for water service by the water utility of a city or town, with the utility service extension ordinances of the city or town. (Emphasis added).

Thus, the City owes a duty to provide retail water service if all three statutory criteria are met:

1. Governor's Point is within the City's "retail service area;"
2. GPDC applied for "retail water service" direct to consumers; and
3. Providing water service to GPDC is consistent with applicable plans, regulations, and ordinances.

The trial court granted the City summary judgment on criteria #3, concluding "[t]hat denying water service to GPDC did not violate the RCW [43.20.260] or WAC [246-290-106] because the City was acting consistently with its plans, regulations, and ordinances, including its 'utility service extension' ordinance 2006-03-026." (CP 7).

The trial court declined to grant summary judgment on criteria #1 and #2, and the City has cross appealed the trial court's refusal to conclude as a matter of law:

1. "That denying water to Governors Point did not violate RCW 43.20.260 or WAC 246-290-106 because Governors Point is not in the City's 'Retail Service Area.'"
2. "That denying water service to GPDC did not violate RCW 43.20.260 or WAC 246-290-106 because GPDC applied for a bulk water contract for re-sale of water to consumers and not 'retail water service' direct to consumers."

(CP 6-7; 11/18/11 VRP, p. 34 and 38).

**1. GOVERNOR'S POINT IS NOT LOCATED IN THE CITY'S "RETAIL SERVICE AREA."**

To support its claim that Governor's Point is located within the City's "retail service area," GPDC relies on a draft 2008 water system plan that contained a retail service area map that included Governor's Point. The 2008 draft water service plan was exactly that, a draft. The plan was entitled "Preliminary Draft Water System Plan" and stamped "DRAFT REVIEW NOT FOR DISTRIBUTION". (CP 659). CH2MHILL, an outside consultant, prepared the draft water system plan and erroneously included Governor's Point on the draft retail service area map even though the City had always excluded Governor's Point from its existing service area. (CP 275, 659).

Prior to CH2MHILL'S preparation of the draft, the Washington State Department of Health (DOH) had suspended the City's construction waiver privileges based on its determination that the City had made inadequate progress in preparing a new water system plan. (CP 10, 158, 168-169). This suspension meant that future City water system construction projects would be subject to review by DOH staff. (CP 10). DOH took the preparation of the draft and the City's commitment to finalize the plan by June 2009 as showing that the City was making adequate progress to warrant reinstatement of the City's construction waiver privileges. (CP 10-11, 158, 170).

There is no indication that DOH's decision to reinstate the City's construction waiver privileges based on the preparation of the draft and the City's commitment to finalize the plan by June 2009 had anything to do with the inclusion or exclusion of Governor's Point in the City's retail service area. *Id.* To the contrary, DOH subsequently approved a revised water system plan that excluded Governor's Point from the City's retail service area, as described below.

GPDC's claim that this draft water service plan was "operative" is false. Under WAC 246-290-100 (8) and (9), both the City Council and DOH must approve the plan before it takes effect. The draft plan relied on by GPDC had received neither of these approvals. Before City Council

approved the new water system plan, the City corrected the error and excluded Governor's Point from the retail service area. (CP 159, 1153). The water system plan was then submitted to DOH for approval. The corrected 2008 water system plan was ultimately adopted as the City's 2009 Water System Plan and approved by DOH. (CP 159, 171).

The final water system plan approved by both the City Council and DOH excludes not only Governor's Point but the entire Chuckanut area from the City's "retail service area." *Id.* This plan is the only City water plan to use the term "retail water service" and define the City's "retail service area."

Whether a draft plan later corrected has any legal consequence is a legal question for the court, not a factual question for a jury. Inclusion in a never-adopted draft water system plan does not raise a question of material fact about whether Governor's Point is located within the City's "retail service area."

RCW 43.20.260, which imposed a duty on the City to provide "retail water service" within its "retail service area," was adopted by the State in 2003. WAC 246-290-100 (4) (iv) requires the City to define its "retail service area" in its water plan. The City's 2009 Water System Plan was the first City water plan to use the term "retail water service" and define the City's "retail water service area." Prior to its adoption of the

2009 Water System Plan, the City used different terminology such as "existing service area" or "designated service area" to describe the area it served with water. These terms are the functional equivalent of "retail service area" as that term is used in RCW 43.20.260.

The City's 2009 Water System Plan excludes Governor's Point from the City's "retail service area." Likewise, as described in the City's Response and Cross-Appeal Brief, all previously adopted City water plans and associated maps also excluded Governor's Point from the area served by City water. Because no City water plan has ever included Governor's Point in the City's "retail service area" or the functional equivalent of the City's "retail service area," no material fact is in dispute as to whether or not Governor's Point is located within the City's "retail service area."

**2. GPDC DID NOT APPLY FOR "RETAIL WATER SERVICE."**

GPDC's Reply Brief is not responsive to the City's second issue on cross appeal: whether summary judgment was appropriate on the issue of whether GPDC applied for a bulk water contract for re-sale of water to consumers and not 'retail water service' direct to consumers." (CP 6-7; 11/18/11 VRP, p. 38). The Reply Brief does not even attempt to explain why repeated, uncontradicted assertions by GPDC that it was applying for a bulk water resale contract are not sufficient for summary judgment on this issue.

From the outset, in its complaint, GPDC identified itself as requesting “contract services to sell water to a recognized water district or association to be formed by GPDC, which would in turn operate a Class A water system reselling and distributing the city water to residents of Governor’s Pointe Development.” (CP 1274).

The critical document in determining whether GPDC sought “retail water service” to individual homes, which would bring it under the ambit of RCW 43.20.260, or whether it instead sought a bulk water resell contract, which would remove it from the ambit of that statute, is GPDC’s February 11, 2009 application to the City: **“Re: Governor’s Pointe Development: Request for Formal Water Resale Contract.”** (CP 718; bold face original). Twice, the application asked that GPDC be allowed **“to Continue to Function as a Bulk Purchaser and Retailer of City Water.”** (CP 719 and 721; bold face original).

GPDC has done nothing to challenge the bold faced words on its own application. It has failed to present anything that could be taken as a factual dispute.

The application for water service that GPDC submitted to the City on February 11, 2009 is completely silent about "retail water service." The application asks specifically for a contract with the City as a bulk water purchaser:

Pursuant to Bellingham Municipal Code (BMC) 15.36.090 this letter, in conjunction with the attached technical application, serves as Triple R's formal request and application for Contract Service to a District or Association to the Director of Public Works.

It is important to emphasize that we are not applying for an extension of water service. [Emphasis in original] . . . We are simply seeking to formalize an implied contract with the City that would allow the Governors Point Development Company to continue to function as a bulk water purchaser and reseller to the Governors Pointe Development.

(CP 719).

As the quote demonstrates, the application was made pursuant to BMC 15.36.090. (CP 116). This code section governs only "requests for contract services or enlargement of service zones," not requests for retail service. *Id.*

GPDC's statement that it "felt constrained by the several-decade history of the City serving the Governors Point property through GPDC as an intermediary to ask for formalization of that contract" (GPDC's Reply Brief, p. 33) is an admission that it applied for a formal water resell contract as a bulk purchaser and retailer of City water and not for "retail water service." This admission is reinforced by the fact that GPDC's application specifically avoided applying for an extension of retail water service because such an extension would have been contrary to Bellingham Ordinance 2006-03-026 prohibiting new retail service in the Chuckanut area. (CP 1124). The application was careful to avoid the

prohibition on extension of retail service by applying only for a bulk resale contract.

In arguing that "the trial court properly refused summary judgment that the City had no duty to provide service because GPDC had not applied for 'retail water service,'" (GPDC's Reply Brief, p. 32) GPDC makes two points, neither of which is relevant to the question of whether GPDC applied for retail water service.

First, GPDC quotes the definition of "retail service area" from WAC 246-290-010 (215) in an attempt to avoid the plain statutory language of RCW 43.20.260 that a duty is imposed only for "retail water service." This definition of "retail service area" as "the specific area defined by the municipal water supplier [City] where the municipal water supplier [City] has a duty to provide service to all new service connections . . ." does not define "retail water service." It does not answer the question at issue here whether GPDC applied for retail water service and thus met one of the statutory criteria for imposing on the City a duty to supply water service to Governor's Point. The definition merely says that those areas, as defined by the City, where the City has a duty to provide water constitute the retail service area. If the City has a duty to supply water service there, then Governor's Point can be considered within the retail service area. The definition says nothing about how to determine whether the City has such a duty. The three criteria in RCW 43.20.260

determine whether the City has such a duty, not the WAC definition of “retail service area.”

RCW 43.20.260 imposes a duty only with regard to retail water service, not bulk service as requested by GPDC. The critical word in "retail water service" is “retail.” GPDC’s analysis ignores the meaning of the term “retail.” Because the term “retail” is not defined by the statute or WAC, it must be given its “plain and ordinary meaning.”

Our Supreme Court described as an axiom of statutory interpretation that where a term is not defined in a statute or regulation, “it [will] be given its plain and ordinary meaning.” *United States v. Hoffman*, 154 Wn.2d 730, 741, 116 P.3d 999 (2005). Under these circumstances, it is appropriate to turn to a dictionary for common usage of the term. The Merriam Webster Dictionary defines retail as “the sale of goods in small amounts to ultimate consumers.”

This is how the term “retail” is commonly used, how it is used by the City of Bellingham in describing its provision of water services (BMC 15.36.010 and .040; CP 112-113), and how it was used by GPDC in its application to the City where it asked to be a “bulk water purchaser and reseller.” Retail service direct to the ultimate consumer contrasts with bulk or wholesale service to water districts and associations which then resell the water to ultimate consumers. (Compare BMC 15.36.010 and .040 for direct retail service with BMC 15.36.060, .080, and .090 for bulk or wholesale

service to water districts and associations; CP 112-116). GPDC applied for bulk, not retail water service.

Second, GPDC asserts that "the proposal GPDC put forward was clearly presented in the alternative." (GPDC's Reply Brief, p. 33). While GPDC never identifies what that alternative is, one must assume that it is referring to retail water service. Assuming the alternative is retail water service, GPDC's claim that it presented that as an alternative in its proposal is false. GPDC presented only one proposal, the February 11, 2009 "Request for Formal Water Resale Contract." which requests only bulk water service and is silent about retail water service. (CP 718). As that letter states, GPDC was "simply seeking to formalize an implied contract with the City that will allow the Governors Point Development Company to continue to function as a bulk water purchaser and reseller to the Governors Pointe Development." (CP 719). Nowhere does the letter mention an alternative.

In support of its assertion that "the proposal that GPDC put forward was clearly presented in the alternative," GPDC cites to a single page in a water storage and distribution study which it submitted "in support of Governors Point Development Company's request to formalize its contractual relationship with the City of Bellingham for the provision of resale water. . . ." (CP 734). The page from the study describes two water storage and distribution alternatives, neither of which mentions "retail water service." (CP

746). Alternative A would have connected to the City's water system with an eight-inch pipe leading to a storage tank on Governor's Point property. *Id.* Alternative B would improve the City's water delivery system service so that GPDC would connect to it without the necessity of a storage tank. *Id.* Both alternatives envisioned a contract for bulk resale of water under BMC 15.36.090. (CP 734). This technical discussion raises no factual dispute regarding the emphatic and repeated intent of GPDC's 2009 application to request a bulk water resell contract, a request that does not qualify under the statute that imposes a duty on the City to supply "retail water service."

## II. CONCLUSION

The City disagrees with GPDC's statement that "this case needs to be tried." There are no material issues of fact that require resolution by a jury. Instead, there are questions of law that should be decided by this Court.

There is no need for a trial at which GPDC would present evidence that from 1935 to 1972 the City encouraged development along Chuckanut Drive by agreeing to provide water to residential users, including an agreement to provide water to the proposed 308 lot Chuckanut Pointe subdivision, which was later abandoned (CP 1026, 1047-1048).

There is no need for a trial at which the City would present evidence that since 1976 the City has consistently refused to provide water to Governor's Point, including GPDC's 1990 proposed short plat and its 1992 proposed 141 lot Governor's Point subdivision.

Once GPDC abandoned its proposed 308 unit Chuckanut Pointe subdivision in the early 1970s, it gave up any legal right to rely on City approval of water for that abandoned project or any new proposal in that location. Application of this legal rule does not require a trial to resolve any factual dispute.

The City requests this Court affirm all issues on which the trial court granted summary judgment and grant summary judgment on the two issues for which the trial court either denied summary judgment or did not rule.

DATED this 30<sup>th</sup> day of October 2012.

**CITY OF BELLINGHAM**

**FRIENDS OF CHUCKANUT**



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**Petitioner/Plaintiff,**

**vs.**

**CITY OF BELLINGHAM, a  
Washington municipal corporation, and  
Thomas L. Rosenberg, its Director of  
Public Works,**

**Respondent/Defendant,**

**and**

**FRIENDS OF CHUCKANUT,**

**Intervenor.**

**No. 68079-0**

**CERTIFICATE OF SERVICE**

2017 OCT 31 PM 2:35  
COURT OF APPEALS OF THE  
STATE OF WASHINGTON

I declare under the penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. I am an employee of the City of

1 Bellingham. My employment address is 210 Lottie Street, Bellingham, Washington  
2 98225.

3 On October 30, 2012, I served a true and correct copy of the following documents  
4 to be delivered as set forth below:  
5

- 6 1. **City of Bellingham's and Friends of Chuckanut's Cross-Appeal Reply**
- 7 2. **Certificate of Service.**

8 On the 30<sup>th</sup> day of October 2012, I addressed said documents and deposited them  
9 for delivery as follows:

10 Elaine Spencer [X] By United States Mail  
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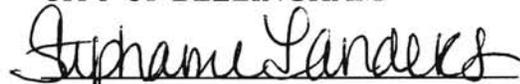
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DATED this 30<sup>th</sup> day of October 2012.

CITY OF BELLINGHAM



Stephanie Landers  
Legal Assistant