

73608-6

73608-9

No. 73608-6-1

Skagit County Superior Court No. 11-2-00651-7

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

VERN F. SIMS FAMILY LIMITED PARTNERSHIP I., GILBERT
FAMILY PROPERTIES, LLC, AND LDV BURLINGTON
PROPERTIES, LLC,

Plaintiff/Appellants,

v.

CITY OF BURLINGTON, a municipal corporation in Washington, and
COSTCO WHOLESALE CORPORATION, a Washington Corporation,

Defendant/Respondents.

APPELLANTS' BRIEF

C. Thomas Moser, WSBA #7287
Attorney at Law
1204 Cleveland Avenue
Mount Vernon, WA 98273
360-428-7900

E
SUPERIOR COURT
STATE OF WASHINGTON
2015 NOV 25 AM 11:14

TABLE OF CONTENTS

INTRODUCTION1

ASSIGNMENT OF ERROR 2

STATEMENT OF FACTS 5

ARGUMENT13

 STANDARD OF REVIEW13

 LUPA DOES NOT APPLY13

 THE CITY MAY NOT IMPOSE A
 REIMBURSEMENT CONTRACT 15 YEARS
 AFTER THE IMPROVEMENTS 21

 THE CITY HAD NO ORDINANCE THAT
 REQUIRED THE IMPROVEMENTS 23

 THE CITY’S DELAY HAS PREJUDICED THE
 GILBERTS 26

CONCLUSION 29

TABLE OF AUTHORITIES

Cases

Habitat Watch v. Skagit County., 155 Wn. 2d 397, 120 P.3d 56 (2005)
..... 19, 20

Harris v. State, Dep't of Labor & Indus., 120 Wn.2d 461, 468, 843
P.2d 1056 (1993)16

United Dev. Corp. v. City of Mill Creek, 106 Wash. App. 681,
26 P.3d 943 (2001) 17, 18

Woods View II, LLC v. Kitsap Cty., 188 Wn.App. 1, 18, 352 P.3d 807
(2015)13

Woodcreek Land Ltd, Partnerships I, II, III and IV v. City of Puyallup, 69
Wash.App. 1, 847 P.2d 501 (1993)15, 22, 24, 25

Statutes

RCW 35.72.010 4, 12, 14, 23, 24, 25, 26

RCW 35.72.020 12

RCW 35.72.020(1) 4, 22, 23

RCW 35.72.030 12, 12, 21, 27

RCW 35.72.040 1, 12, 14, 15, 21

RCW 35.72.040(2) 3, 15

RCW 36.70C.020(1)(b) 14

RCW 36.70C.020(2) 3

RCW 36.70C.020(2)(b) 16

RCW 36.70C.040 (3)	19
RCW 36.70C.040(4)	19, 20
RCW 36.70C.040(4)(a)	20
RCW 36.70C.040(4)(c)	21

Rules

RAP 2.5(a)	15
------------------	----

Other Authorities

Burlington Municipal Code 12.28.010	6, 7, 24, 26
Burlington Municipal Code 12.28.101(A)	6, 7
Burlington Municipal Code 12.28.010(C)	25
Burlington Municipal Code 12.28.010(D)	6

INTRODUCTION

This appeal concerns latecomer's agreements, also known as assessment reimbursement contracts under RCW 35.72.040. In August 2000, Respondent Costco Wholesale Corporation built its store in Burlington, Washington and improved the freeway exits from Interstate 5 to George Hopper Road. Respondent City of Burlington pledged to create a latecomer's agreement to reimburse Costco for some of the traffic improvements.

Fifteen years later, the parties still have not entered into a contract. Appellants Vern F. Sims Family Partnership I, Gilbert Family Properties, LLC, and LDV Burlington Properties LLC ("the Gilberts") own 20 acres of farmland west of I-5 and slightly to the north of Costco. They have watched as neighboring farms along George Hopper Road have turned into big box retail stores. While these major developments increased traffic exponentially, none have paid latecomer's fees.

The Gilberts filed this lawsuit on April 8, 2011, seeking a declaratory judgment that the City has waited too long and permitted too much development to impose a belated assessment reimbursement contract. After denying a series of summary judgment motions, on June 12, 2015, visiting Snohomish County Superior Court Bruce Weiss

dismissed the Gilberts' suit, ruling it time-barred under the Land Use Petition Act, RCW Ch. 36.70C.

The Gilberts now appeal on four grounds. First, the trial court erred by applying LUPA prematurely -- before the Gilberts sought a permit to develop their property. Second, more than 15 years have passed from Costco's improvements, barring a reimbursement contract. Third, the City failed to comply with the statutory requirements for a valid contract. And fourth, the City's delay in executing an agreement materially prejudiced the Gilberts.

Appellants respectfully request the Court to reverse the trial court's dismissal and remand for entry of judgment in the Gilberts' favor. The City does not have authority to impose a latecomer's agreement long after the traffic improvement's excess capacity and useful life has expired.

I. ASSIGNMENTS OF ERROR

The Gilberts assign error to five orders from the trial court:

A. The court's Order Denying Plaintiffs' [First] Motion for Partial Summary Judgment on Declaratory Judgment is an error of law. (Order Denying First Motion; CP 11-12).

B. The court's Order Denying Plaintiffs' Second Motion for Partial Summary Judgment on Declaratory Judgment Re: Statute of

Limitations is an error of law. (Order Denying Second Motion; CP 15-17).

C. The court's Order on Plaintiff's Third Motion for Summary Judgment is an error of law. (Order Denying Third Motion; CP 18).

D. The court's Order Denying Plaintiffs' Fourth Motion for Partial Summary Judgment on Declaratory Judgment re: Benefit and Apportionment is an error of law. (Order Denying Fourth Motion; CP 13-14).

E. The court's Order on Defendant's Motion to Dismiss Plaintiffs' Claims and Objecting to Note for Trial Assignment is an error of law. (Order Dismissing Claims; CP 8-10).

Issues pertaining to these Assignments of Error are:

F. The Land Use Petition Act provides appellate review of "land use decisions" as defined in RCW 36.70C.020(2). However, the statute governing assessment reimbursement contracts, RCW 35.72.040(2), mandates that the legislative body's ruling on area boundaries and assessments "is determinative and final." Did the trial court err by ruling that LUPA nonetheless applied to the City's ruling?

G. On Costco's motion to dismiss, the trial court ruled that under LUPA, the final decision was City Council's oral vote in October 2009 to deny the Gilbert's appeal. (Order Dismissing Claims at 2; CP 8-

10). Yet the minutes from the City Council meeting state: “Following a decision by Council [the City Attorney] will prepare Conclusions of Law and Findings of Fact and bring it to Council at the next regular meeting.” (October 2009 Minutes; Exhibit B to 2/20/15 Mullaney Dec.; CP 451-492). Did the trial court err by concluding an oral decision preceding written findings and conclusions was a “final” decision under LUPA?

H. Under RCW 35.72.020(1), the reimbursement contract “may provide for the partial reimbursement to the owner or the owner's assigns for a period not to exceed fifteen years of a portion of the costs of the project...” Costco completed the traffic improvements in 2000, and 15 years later, new development has absorbed all extra traffic capacity from the work. Did the trial court err by ruling the City may still impose a reimbursement contract for an additional 15 years?

I. To qualify for a latecomer’s agreement, Costco must make street improvements “which the owners elect to install as a result of *ordinances* that require the projects as a prerequisite to further property development.” RCW 35.72.010 (emphasis added). Here, the City relied on a State statute, SEPA, not a municipal ordinance to require Costco to improve the I-5 exit ramps. Did the trial court err by upholding Costco’s eligibility for a statutory reimbursement contract?

J. In his 2004 letter justifying reimbursement, Costco's traffic engineer concludes: "Since Costco would use 256 trips of the 685 trip capacity added by the improvements, the Latecomers Agreement *terminates* when the remaining 429 trip capacity is used by future developments." (1/23/04 TSI Letter at 2; Exhibit A to Markley Dec.; CP 206-224) (emphasis added). From 2000 to the present, permitted development has created more than 429 additional trips. May the City require the Gilberts to reimburse Costco despite this?

II. STATEMENT OF FACTS

A. Costco Improves The Exit Ramps in 2000 As A SEPA Requirement

This dispute began in 1999 when Costco Wholesale Corporation filed its application with the City of Burlington to build a 154,762 square foot store near I-5 at George Hopper Road. (Procedural History; Exhibit B to 6/9/14 Mullaney Dec.; CP 256-380). On November 24, 1999, the City issued a Mitigated Determination of Non-Significance for the project under the State Environmental Policy Act. (11/24/99 MDNS; Exhibit D to 6/9/14 Mullaney Dec.; CP 256-380). To avoid preparing an environmental impact statement, Costco had to mitigate adverse environmental impacts, including those on traffic. Condition number 14 of the MDNS required that "traffic mitigation measures shall be completed

through an agreed upon process over the next two years.” (11/24/99 MDNS ¶ 14; CP 256-380). What this process entailed was left undefined.

The MDNS did not require Costco to construct the improvements or fund them. Instead it suggested that,

the applicant *may* elect to pay for the required mitigation up front and the City *may* be able to initiate a pay back agreement based on legal requirements, so that as new projects come in, each project will be required to compensate COSTCO directly based on peak hour trip generation for a fifteen year period.

(11/24/99 MDNS ¶ 14; CP 256-380).

When it issued this MDNS, the City’s SEPA ordinance, BMC 12.28.010, did not require a permit applicant to construct or pay for traffic improvements. (Ordinance 1419; Exhibit C to 6/9/14 Mullaney Dec.; CP 256-380). Under BMC 12.28.010(A), the City Engineer could only require a traffic study. (Ordinance 1419; CP 256-380) (“traffic study...may be required to identify required right-of-way improvements”). And under BMC 12.28.010(D),

if a traffic study meeting the specifications of the City Engineer is prepared that demonstrates that the development causes the level of service to decline below the adopted standards, then *transportation improvements or strategies* to accommodate the impacts of development are required to be made concurrent with the development, or the development permit application will be denied.

These strategies may include increased public transportation service, ride sharing programs, demand

management, and other transportation systems management strategies.

(Ordinance 1419; CP 256-380) (emphasis added).

Not until December 9, 1999 – after Costco’s completed permit application and MDNS – did the City require developers to construct traffic improvements as a condition of permit approval. Ordinance 1419, adopted on December 9, 1999, amended BMC 12.28.010 to add two key provisions. First, under BMC 12.28.010(A), the City Engineer could now “require the right-of-way improvements as a prerequisite to further property development, and establish a timeline for those improvements which may include completion prior to occupancy.” (Ordinance 1419; CP 256-380).

Second, the Ordinance added section E that authorized the City to “contract with owners of real estate for the construction or improvement of street projects which the owners elect to install as a result of the requirements of this code as a prerequisite to further property development.” (Ordinance 1419 at 2; CP 256-380).

These amendments took effect after Costco filed a vested project application and received SEPA approval.

Construction did not begin immediately, however. A resident appealed the MDNS and eventually signed a settlement agreement with Costco and the City.

The agreement provided, inter alia, that a post-occupancy traffic study would be performed by Costco to determine if the Burlington Boulevard/George Hopper Road intersection Level of service declined from a LOS “D” to “F”; if so, Costco agreed to fund its proportionate share of traffic mitigation to raise the intersection back to LOS D (“the Latecomer’s Agreement Study”). The MDNS for the Costco project was clarified pursuant to the Agreement to provide that the MDNS condition requiring the City to enter into a latecomer’s agreement with Costco would be modified, to provide that Costco could seek a latecomer’s agreement with the City.

(6/9/11 City Procedural History ¶ 3; Exhibit B to 6/9/14 Mullaney Dec.; CP 256-380).

Costco built its store – and the traffic improvements – in 2000, receiving its temporary certificate of occupancy on August 1, 2000. (6/9/11 City Procedural History ¶ 5; CP 256-380) Costco spent approximately \$1.7 million on the improvements to the exit ramps, with \$850,000 attributable to creating excess capacity for nearby development.

B. During The Next 15 Years, the City Fails To Execute A Timely Latecomer’s Agreement

The City and Costco have yet to sign and record a reimbursement contract, despite having 15 years to complete one. For the first six years, nothing happened with regard to the reimbursement contract, but the area

surrounding Costco experienced rapid commercial development. The City allowed and permitted an additional 513,278 square feet of commercial development on the south side of George Hopper Road, across the street from Costco. (Plaintiffs' Fourth Motion, Exhibit I, CP 108-154) None of these new developments were required to pay any latecomer fee assessment to Costco because Respondents had not signed a reimbursement contract.

On an undisclosed date in 2006, the Burlington City Council adopted Resolution 13-2006, authorizing the City and Costco to enter into an assessment reimbursement contract. (Resolution 13-2006; Exhibit A to 6/9/14 Mullaney Dec.; CP256-380). The Resolution relied on Costco's traffic consultant, Transportation Solutions, Inc., for both the traffic count at the intersections and "a methodology to distribute costs incurred..." (Resolution 13-2006; CP 256-380).

This methodology in turn depended on Costco creating excess capacity. Once the exits were full again, the benefit was gone. In a 2004 Memorandum to Costco, David Markley at TSI described the formula for reimbursement.

The easiest way to measure the costs and benefits related to the improvement is by looking at the number of new afternoon rush-hour trips that the improved interchange can handle. The Latecomers Agreement study shows that the

improvements allow 685 more vehicles to use the interchange during the afternoon rush-hour.

(1/23/04 TSI Memo; Exhibit A to Markley Dec.; CP 206-224).

According to TSI, the benefits from the improvements terminate when new development uses up the excess rush-hour trips.

[T]he Burlington Costco warehouse adds 256 new trips to the interchange during the afternoon rush-hour. Costco's fair share toward the interchange improvements is:

$(\$2494.60 \text{ per New Trip}) \times (256 \text{ New Trips}) = \$638,617.60$

To be fair, the rest of the improvement costs should be paid for by new developments. Since Costco would use 256 trips of the 685 trip capacity added by the improvements, the Latecomers Agreement *terminates* when the remaining 429 trip capacity is used by future developments.

(1/23/04 TSI Memo at 2; CP 206-224) (emphasis added).

The City adopted this methodology and reimbursement formula as a whole. (Resolution 13-2006; CP 256-380) (6/9/11 City Findings ¶ 8; CP 256-380) The City finding stated that “the balance of the cost of the improvements (429 vehicle trips) may be allocated to other developments to be paid through the Latecomer Agreement.”

In 2007 the City notified real property owners within a large area around the Costco store that the City intended to assess property owners pursuant to a purported latecomer fee agreement with Costco. The notice stated that property owners had the right to appeal. (Plaintiffs' [First]

Motion, Exhibit A; CP 99-107) Appellants filed a timely appeal to the City Council. The Council conducted a public hearing on August 23, 2007, but made no decision and continued the matter to the next Council meeting. (Plaintiffs' Fifth Motion, Exhibit A; CP 67-98) In fact the appeal was not on the agenda for the next meeting and it was not until October 8, 2009, over two years later, when the Council again considered the appeals filed by several land owners, including the Appellants' appeal.

In 2009 the City Attorney advised the Council that they were to make a decision and then "he would prepare Conclusions of Law and Findings of Fact and bring it to the Council at the next regular meeting. Following that the Council could consider the latecomer's agreement." (Plaintiffs' Fifth Motion, Exhibit B; CP 67-98)

After discussion the Mayor announced they were going into executive session regarding possible litigation. Subsequently the council voted 6 to 1 to deny the appeals. (Plaintiffs' Fifth Motion, Exhibit B; CP 67-98) No further action was taken and nothing was signed at the next council meeting.

On February 10, 2011, three and one-half years after the first public hearing, the council met and reviewed Findings and Conclusions drafted by the City Attorney and voted to approve the document.

(Plaintiffs' Fifth Motion, Exhibit C; CP 67-98) They were not signed until June 9, 2011. (Plaintiffs' Fifth Motion, Exhibit D; CP 67-98)

C. After Eleven Years of Concern, The Gilberts File Suit

On April 8, 2011 Appellants filed the Complaint (CP 1-7) challenging the City's decision, before the Findings and Conclusions were entered into the record by the City. Appellants' claims were for writ of certiorari, declaratory judgment and injunctive relief. The trial court issued a writ to the City (CP 175) and the record of proceedings was filed with the trial court. (Certified Appeal Board Record CP 27.100)

After initial discovery Gilberts filed five summary judgment motions challenging the process by which the City made the determination to enter into a reimbursement contract with Costco, for violation of the statute of limitations and the subsequent delay that prejudiced Appellants.

The first motion challenged the failure to give proper notice to property owners pursuant to RCW 35.72.030 and .040. (CP 99-107)

The second motion was based on violation of the 15 year statute of limitations in RCW 35.72.020. (CP 19-33)

The third motion was based upon the City's failure to pass ordinances requiring the traffic improvement projects as required by RCW 35.72.010. (CP 55-66)

The fourth motion addressed the City's failure to provide any benefit to other property owners as required by RCW 35.72.030. (CP 108-154)

And the last motion sought judicial relief for the City's conduct of an illegal executive session and then allowing members of the council to vote who had not participated in the prior public hearing. (CP 67-98)

The first four motions for summary judgment were denied by the trial court. The last motion was set for hearing on the same day Costco argued its motion to dismiss based on the Land Use Petition Act, RCW Ch. 36.70C. (CP 665-683)

On June 12, 2015 the trial court dismissed the Appellants' Complaint based on the Land Use Petition Act statute of limitations. (CP 8-10) The Gilberts now appeal.

ARGUMENT

III. STANDARD OF REVIEW

This Court reviews the trial court's summary judgment rulings and order of dismissal *de novo*. *Woods View II, LLC v. Kitsap Cty.*, 188 Wn. App. 1, 18, 352 P.3d 807 (2015) ("grant of summary judgment is reviewed *de novo*")

IV. LUPA DOES NOT APPLY

The Land Use Petition Act, RCW Ch. 36.70C, grants appellate review over site-specific, final land use decisions. RCW 36.70C.020(1)(b) (“application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property”). Here, a final land use decision for the Gilberts would exist only after they sought permits to develop their property. The trial court erred by applying LUPA to the City’s hearing on the formula for a potential reimbursement contract. The contract itself is not a land use decision and not subject to LUPA.

A. LUPA and RCW 35.72.010 Conflict

The trial court ruled that LUPA applied to the City’s decision on the assessment area and reimbursement formula *and* foreclosed the Gilbert’s challenge to the contract as a whole. (Order Dismissing Claims; CP 8-10). This was error for three reasons.

First, RCW 35.72.040 forecloses appellate review after the City’s hearing.

The preliminary determination of area boundaries and assessments, along with a description of the property owners’ rights and options, shall be forwarded by certified mail to the property owners of record within the proposed assessment area. If any property owner requests a hearing in writing within twenty days of the mailing of the preliminary determination, a hearing shall be held before the legislative body, notice of which shall be given to all affected property

owners. *The legislative body's ruling is determinative and final.*

RCW 35.72.040(2).

No Washington court has interpreted or ruled on the meaning of this italicized phrase.

Adopting Costco's argument, the trial court ruled that landowners potentially subject to a reimbursement contract have one opportunity to challenge it: on a LUPA appeal from this hearing. Yet RCW 35.72.040 expressly contradicts this. On two issues – the assessment area and reimbursement formula – the City's decision is final and determinative. Another avenue must exist to challenge the underlying legality of a reimbursement contract and whether a right to reimbursement still exists when the useful life and excess capacity of the improvements has expired. As described below, that avenue of review is a writ for certiorari and declaratory judgment action under *Woodcreek Land Ltd. Partnerships I, II, III & IV v. City of Puyallup*, 69 Wn. App. 1, 847 P.2d 501 (1993).

Costco may assert that the conflict between LUPA and RCW 35.72.040(2) is a new argument on appeal. Under RAP 2.5(a), this Court may review an issue not raised below. Because the parties raised both statutes at trial – and this is a purely legal issue of statutory construction -- the Court appropriately addresses the conflict on appeal. “This court does,

however, have discretion to consider issues not raised at the trial court.”
Harris v. State, Dep't of Labor & Indus., 120 Wn.2d 461, 468, 843 P.2d
1056 (1993).

B. LUPA Does Not Apply To Reimbursement Contracts

The trial court’s second error was applying LUPA before the City had made a final land use decision specifically related to the Gilberts’ property. Land use decisions were made with regard to the granting of various permits in 1999 and 2000 to Costco for the project and those could have been challenged by Costco or others under LUPA. What Costco is now arguing, and what the trial judge determined, is that assessing fees on adjacent or other property owners in the city to reimburse Costco, 15 years after the fact, is “an interpretative or declaratory decision regarding the application to a specific property” and therefore is a land use decision.

There is no authority for this position, but that is apparently what the trial judge determined. This new interpretation of LUPA also ignores the remainder of the sentence in RCW 36.70C.020(2)(b). If the “property” that Costco is referencing is Appellants’ property as they argued in the trial court, then the entire sentence needs to be considered, which reads as follows:

(b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement,

development, modification, maintenance, or use of real property;

The statute upon which Costco relies cannot be applied to adjacent property owners who are not seeking any land use permit, but are the owners benefited by the traffic improvements constructed by another landowner. They are taxed by the assessment because they benefit from the improvements. Latecomer fee assessments are contracts between the municipality and the developer making traffic improvement. They are not “interpretative or declaratory decisions” about “zoning or other ordinances or rules” about specific property. In the instant case the assessment fee agreement decision is made more than a decade after the land use permits were issued to Costco.

In support of its motion to dismiss Costco cited a case decided by this court, *United Dev. Corp. v. City of Mill Creek*, 106 Wn. App. 681, 26 P.3d 943 (2001). Costco argued that latecomer assessment fees are similar to traffic impact fees imposed on a developer. In *United, supra*, the developer, referred to as “UDC” was assessed impact and mitigation fees as part of the preliminary plat approval. The developer challenged the assessment by LUPA appeal:

UDC appealed these mitigation requirements to the Mill Creek Planning Commission. The Commission recommended that the City Council approve the

development with the conditions. UDC appealed to the City Council, which upheld the requirements.

UDC filed a further appeal in superior court under the Land Use Petition Act (LUPA). The superior court affirmed the park and traffic mitigation requirements.

United Dev. Corp. v. City of Mill Creek, 106 Wn. App. 681, 686-87, 26 P.3d 943 (2001).

The difference is that the assessment of mitigation fees was upon the land owner as a condition of obtaining a development permit. In the present matter the decision under appeal was made independent of any development permit issued by the City and was an assessment on uninvolved property owners throughout the City to accommodate and benefit Costco. No “land use decision” was made by Burlington that would in any manner implicate LUPA.

C. The LUPA Statute of Limitations Begins With The Written Decision.

The other issue to be resolved is when the time begins to run for appeal, if LUPA applies. The trial court concluded that the date was “2009 when the oral decision was rendered.” (Order CP 8-10) The 2009 date was the City Council meeting where the Council voted to deny Appellants’ appeal. There was no written decision until 2011.

The issue of when the appeal time starts to run is really about whether an oral decision commences the statute of limitations under

LUPA. It does not. The time begins from the written decision. The applicable statute is RCW 36.70C.040(4) which states:

(4) For the purposes of this section, the date on which a land use decision is issued is:

(a) Three days after a written decision is mailed by the local jurisdiction or, if not mailed, the date on which the local jurisdiction provides notice that a written decision is publicly available;

(b) If the land use decision is made by ordinance or resolution by a legislative body sitting in a quasi-judicial capacity, the date the body passes the ordinance or resolution; or

(c) If neither (a) nor (b) of this subsection applies, the date the decision is entered into the public record.

The commencement of the LUPA appeal deadline is twenty-one days, RCW 36.70C.040(3), but it is three days after that if the written decision is mailed. If it is not mailed then the date commences when the written decision is publicly available.

Costco urged the trial court that an oral decision is appealable under LUPA and cited a footnote in *Habitat Watch v. Skagit County.*, 155 Wn. 2d 397, 120 P.3d 56 (2005) which involves an unclear fact pattern about special use permit extensions granted by the hearing examiner in 1997 and 1998 without notice or public hearing. The Supreme Court found that it was not clear when the extensions were granted and when they were “entered” into the public record:

Here, it is not clear from the record or the briefing when the final two permit extensions were issued within the meaning of RCW 36.70C.040(4). There is nothing in the record that shows the extension decisions were mailed to all parties of record, or otherwise made publicly known, or passed by ordinance or resolution. It is also unclear if and when the decisions were “entered” into the public record.⁵

Habitat Watch v. Skagit Cnty., 155 Wn. 2d 397, 408, 120 P.3d 56, 61 (2005)

Footnote 5 of the decision is analysis of the possible meanings of the subsections in RCW 36.70C.040(4) concerning when a decision is issued by a municipality. The footnote does not state, as Costco suggested to the trial court, that an oral decision triggers the appeal deadline in land use matters. At the end of the analysis the Supreme Court pointed out that the 1997 and 1998 written decisions to extend the special use permit were made public by the County in 2002 after the appealing party, Habitat Watch, made a public disclosure request four years after issuance. The Court stated:

At the very latest, the written decisions were issued when the county made them available on June 24, 2002, in response to Habitat Watch's public disclosure request. By the date of the county's response to Habitat Watch's public disclosure request, the county had provided “notice that a written decision is publicly available” pursuant to RCW 36.70C.040(4)(a).⁶

Habitat Watch v. Skagit Cnty., 155 Wn. 2d 397, 409, 120 P.3d 56, 62 (2005)

Footnote 6 concludes the discussion by stating that Habitat Watch failed to appeal within 21 days after receiving the written extensions in 2002.

The trial judge apparently relied upon Costco's flawed analysis of the *Habitat, supra*, case in concluding that the oral vote in 2009 commenced the appeal period under RCW 36.70C.040(4)(c). The flaw is that there was a written decision in the instant matter which was issued by the City in 2011. (Plaintiffs' Fifth Motion, Exhibit D; CP 67-98) If there had been no written decision from the City then a discussion about when and how an oral decision is appealed might be productive. But, since the written decision was entered by the City and is before the Court, the analysis is not useful.

V. The City May Not Impose A Reimbursement Contract 15 Years After The Improvements

Reimbursement contracts have a statutory limit of 15 years.

[T]he contract may provide for the partial reimbursement to the owner or the owner's assigns for *a period not to exceed fifteen years* of a portion of the costs of the project by other property owners who:

- (a) Are determined to be within the assessment reimbursement area pursuant to RCW 35.72.040;
- (b) Are determined to have a reimbursement share based upon a benefit to the property owner pursuant to RCW 35.72.030;
- (c) Did not contribute to the original cost of the street project; and

(d) Subsequently develop their property within the period of time that the contract is effective and at the time of development were not required to install similar street projects because they were already provided for by the contract.

RCW 35.72.020(1) (emphasis added).

No Washington opinion has determined when the 15-year term begins. In *Woodcreek Land Ltd. Partnerships I, II, III & IV v. City of Puyallup*, 69 Wn. App. 1, 847 P.2d 501 (1993), the Court assumes without discussion that the period begins when the parties execute the contract. *Woodcreek*, 69 Wn. App. at 10 (“when owners of other parcels choose to develop their property within 15 years”). The City of Puyallup completed the contract before it completed the improvements. Here, however, Costco and the City – if they signed the contract today – would have 30 years from completion of the improvements to the end of the contract term.

The trial court erred by accepting this result. First, new development has already used the additional 429 rush-hour trips created by the improvements. (Brad Furlong dated October 7, 2009; CP 108-154). Under Costco’s original analysis, the rationale for the agreement *terminates*. (1/23/04 TSI Memo at 2; CP 206-224) (“Latecomers Agreement terminates when the remaining 429 trip capacity is used by future developments”). Costco changed its rationale in the trial court,

arguing that the interchange still has capacity for additional trips before the Level of Service becomes unacceptable. But this was not the City's formula for reimbursement.

Second, the useful life of the improvements has expired. The legislature in RCW 35.72.020(1) recognized that the average useful life for traffic improvements was 15 years. Beyond that an improvement becomes part of the public infrastructure. Furthermore, as described below, development between 2000 and 2015 has brought George Hopper Road to LOS D – a level of congestion *worse* than before Costco improved the I-5 exits.

The statutory scheme in RCW Ch. 35.72 presumes that a property owner will require an executed reimbursement agreement before or at the same time it invests millions in improvements. By allowing the City of Burlington to take more than 15 years to complete an agreement, Costco has lost its statutory opportunity for reimbursement.

VI. The City Had No Ordinance That Required The Improvements

Under RCW 35.72.010, the City must have an ordinance requiring street improvements in effect *before* it can create a valid reimbursement contract.

The legislative authority of any city, town, or county may contract with owners of real estate for the construction or

improvement of street projects which the owners elect to install as a result of ordinances that require the projects as a prerequisite to further property development.

RCW 35.72.010. Here, the City of Burlington passed its ordinance *after* Costco submitted its application. The trial court erred by concluding this was sufficient.

The Costco traffic project was required by the MDNS, not an ordinance. The City confirmed that the traffic project was required as part of the State Environmental Policy Act (SEPA) review and to mitigate the impacts Costco was to have on the City. Thus the MDNS was issued to Costco requiring off-site traffic improvements. The MDNS and the City's answers to interrogatories were attached to Appellants' motion. (CP 55-66, Exhibits B and C).

When it denied the Gilberts' summary judgment motion, the trial court entered the following conclusions:

The facts of this case are distinguishable from *Woodcreek* and *Woodcreek* predates the GMA, (3) Under BMC 12.28.010, GMA, SEPA and the MDNS Costco was required to make the improvements as a prerequisite to further property development and the requirements of RCW 35.72.010 have been satisfied.

(Order Denying Third Motion for Summary Judgment; CP 18). Of these citations, only BMC 12.28.010 is an ordinance, and as described above, not until December 1999 did it require improvements.

In *Woodcreek, supra*, the City of Puyallup sought reimbursement from property owners for traffic improvements, and a number of citizens objected and filed for declaratory relief. The trial court ruled that adoption of an ordinance requiring the project was jurisdictional, ordering the City to refund latecomers fees. The Court of Appeals affirmed, ruling:

RCW 35.72.010 describes the party with whom the City may contract as a property owner who “elects to install [improvements] as a result of ordinances that require the projects as a prerequisite to further property development.” The City argued below and at oral argument that Title 21 of the Puyallup Municipal Code, which set up the City's environmental policy and which adopted the City's Comprehensive Plan, provided the necessary showing under RCW 35.72.010. We disagree.

Woodcreek, 69 Wn. App. at 6.

Costco persuaded the trial court that *Woodcreek* no longer applied because “its initial ordinance discussion fails to account for the planning scheme that has developed under the GMA.” (CP 630-647). Costco also argued that “BMC § 12.28.010(C) provided that the City Engineer determines what improvements are required at the time of development.” (CP 630-647).

There are a number of flaws with this argument. First, the City admitted in discovery traffic improvements were required by the MDNS, not the ordinance. (CP 55-66, Exhibit B). Second, the MDNS was issued November 24, 1999 and revised by addendum on December 2, 1999. (CP

256-380, Exhibit D). Third, the traffic requirements in BMC 12.28.010 were adopted by Ordinance 1419 on December 9, 1999, after the MDNS was issued. The code provision could not have been the basis upon which the city required the traffic improvements. (CP 256-380, Exhibit C).

Finally, the City's Findings and Conclusions, signed more than a dozen years after the MDNS, do not retroactively amend the ordinance. Costco argued below that the City's Findings and Conclusions reference the same City Code, BMC 12.28.010. The argument asserted that the 2011 Findings and Conclusions incorporate the ordinance and thus satisfy RCW 35.72.010. While the Findings and Conclusions signed in 2011 do reference the ordinance, they also clearly state the history begins with the 1999 MDNS. (CP 256-380, Exhibit B). A document signed a dozen years after the fact does not change what caused the City's requirement for traffic improvements. The trial court erred by refusing to enforce the 15-year limit on Costco's opportunity to recover reimbursement.

VII. The City's Delay Has Prejudiced The Gilberts

As a direct consequence of the City's failure to complete a timely assessment reimbursement contract, the Gilberts may have to pay for improvements that other developments have subsumed. A core requirement for a reimbursement contract is that neighboring properties

benefit disproportionately from street improvements. Under RCW

35.72.030:

The reimbursement shall be a pro rata share of construction and reimbursement of contract administration costs of the street project. A city, town, or county shall determine the reimbursement share by using a method of cost apportionment which is based on the *benefit to the property owner from such project*.

RCW 35.72.030 (emphasis added).

After more than 15 years, the traffic improvements made by Costco to I-5 ramps and George Hopper Road are now inadequate and need additional improvements to maintain an acceptable Level of Service (LOS) within the City. The supporting evidence was that in 2014 the City applied for and received a traffic improvement grant from the Skagit County of Governments (SCOG) for needed traffic improvements on a program entitled “*George Hopper/Interstate 5 – Phase 1 Interchange Modifications*.” (CP 108-154). The City told SCOG that “the existing PM peak hour level of service at the interchange on and off-ramps is ‘D’. This equates to long traffic delays (25 seconds per vehicle).”

To obtain the SCOG grant, the City referenced its 2010 Comprehensive Transportation Plan, including “*Chapter 3. Level of Service*” as the supporting document for the grant application. The

intersections, road segments and ramps to I-5 were described by the City as currently inadequate for the volume of traffic.

As of 2014 there was no benefit to Appellants from the antiquated traffic improvements made 14 to 15 years earlier. Although adjacent property owners benefited more than a decade ago, new commercial development has absorbed all created excess traffic capacity. The Level of Service (LOS) is at an unacceptable level and more traffic improvements are needed, according the City of Burlington.

To illustrate the scope of development, the Gilberts submitted aerial photographs of the Costco site and surrounding property in Burlington at the intersection of I-5 and George Hopper Road. First was a poor quality photograph taken sometime between 1999 and 2005 (after the Costco store was constructed) showing the entire undeveloped area south of George Hopper Road. Costco is to the north. (Plaintiffs' Fourth Motion, Exhibit G; CP 108-154) The second is a current aerial photograph of the same general area taken from the Washington State Department of Transportation GeoPortal website. (Plaintiffs' Fourth Motion, Exhibit H; CP 108-154). It shows the extensive build-out of the area surrounding Costco over the past 14 to 15 years.

Since Costco constructed the store more than 513,278 square feet of retail and commercial buildings were constructed, and that is just to the

south of George Hopper Road. At this late date there is no benefit to the Appellants' undeveloped farmland property. In fact, the traffic problems in this area around Costco and the other commercial developments require more modifications and improvements just to meet the level of service standards set by the City.

CONCLUSION

The trial court erred in denying Plaintiffs' several motions for summary judgment and granting Costco's motion to dismiss based on LUPA statute of limitations. This Court should reverse the trial court decision to dismiss and remand this matter with instructions to grant Plaintiffs' motions for summary judgment.

DATED this 24 day of November, 2015.


C. THOMAS MOSER, WSBA #7287
1204 Cleveland Avenue
Mount Vernon, WA 98273
360-428-7900

NO. 73608-6-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

VERN F. SIMS FAMILY LIMITED
PARTNERSHIP I, GILBERT
FAMILY PROPERTIES, LLC, and
LDV BURLINGTON
PROPERTIES, LLC,

Appellants,

Vs.

CITY OF BURLINGTON, a
municipal corporation in
Washington, and COSTCO
WHOLESALE CORPORATION, a
Washington Corporation

Respondents.

DECLARATION OF
SERVICE

2015 NOV 25 AM 11:15
COURT CLERK
STATE OF WASHINGTON

I certify under penalty of perjury under the laws of the state of Washington that I am over the age of eighteen years and not a party to this action. I certify that on November 24, 2015 I caused to be delivered, via First Class Mail, postage prepaid, a copy of Appellants' Brief to the parties listed below, at their addresses of record on the date listed below.

Leif Johnson, City Attorney
City of Burlington
833 S. Spruce Street
Burlington, WA 98233

Patrick Mullaney
Foster Pepper
1111 3rd Ave., Ste 3400
Seattle, WA 98101

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct and that this declaration was executed at Mount Vernon, Washington.

DATED this 24 day of November, 2015.



Toni Riedell