

No. 73608-6-I

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents.

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**BRIEF OF RESPONDENT  
COSTCO WHOLESALE CORPORATION**

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## **I. INTRODUCTION & SUMMARY OF ARGUMENT**

As part of the construction of a new consumer warehouse in the City of Burlington, Respondent Costco Wholesale Corporation (“Costco”) spent \$1.7 million on the installation of traffic improvements to the intersection of Interstate 5 and George Hopper Road. Prior to these improvements, the intersection had a failing level of service. Because the improvements would add substantial traffic capacity that created a benefit beyond the impact of Costco’s warehouse project, the City agreed that Costco could potentially recover \$850,000 of its costs under a latecomers agreement. Latecomers agreements are statutory creations that allow a developer to seek reimbursement for sewer or road infrastructure built by the developer that creates additional benefit beyond what is needed to mitigate the impacts of the immediate development. Ch. 35.72 RCW; *see also* ch. 35.91 RCW (concerning water and sewer facilities).

Plaintiff-Appellants own property that would potentially be subject to the Costco latecomers agreement, should Appellants develop their property with a more intense use during the time that the agreement is in effect. In 2007, Appellants received notice of the proposed latecomers agreement and were advised that their property was within the proposed assessment reimbursement area. Appellants objected and requested a hearing before the City Council, which was held on August 23, 2007, and

October 8, 2009. Appellants' attorney was present at both hearings and presented testimony and legal argument. At the end of the second hearing, the City Council voted 6-1 to deny Appellants' appeal.

*Fourteen months later*, in February 2011, Appellants' attorney appeared at a City Council meeting and demanded another hearing. The Council denied the request and instead voted to adopt finding of facts memorializing its earlier decision. Fifty-seven days after the Council meeting, and eighteen months after the vote denying their appeal, Appellants filed this lawsuit.

Rather than file under the Land Use Petition Act, ch. 36.70C RCW ("LUPA"), Appellants based their claims on theories of declaratory judgment, constitutional writ, and statutory writ. Under any applicable legal standard, Appellants' lawsuit is an untimely attack on the City Council's decision to deny Appellants' appeal. The superior court properly found that Appellants' claims should have been filed under LUPA and were subject to dismissal because they were not brought within 21 days of the Council's October 8, 2009 vote denying their appeal. Even giving Appellants every benefit of every doubt and concluding that the proper triggering event is the Council's February 2011 meeting, Appellants' suit is still untimely because it was filed on April 8, 2011—57 days later.

And, even assuming, *arguendo*, that Appellants had properly brought claims for writ of review or declaratory judgment, these claims were also untimely. Like LUPA petitions, writs and declaratory judgment actions must be filed in a timely manner. In land use cases, the “reasonable time” for filing a writ or declaratory judgment action is a matter of days, not months or years. *E.g. Summit-Waller Citizens Ass’n v. Pierce County*, 77 Wn. App. 384, 392, 895 P.2d 405 (1995) (“[T]ime limits are short. Thirty days is typical.”). Appellants’ 18-month delay from the October 2009 hearing does not comport with any possibly applicable standard.<sup>1</sup>

Appellants spend much of their brief complaining about fairness, but the delay in this case has been largely caused by Appellants’ litigious conduct and their ten-year campaign to stop the Costco latecomers agreement. Since filing their lawsuit, Appellants have challenged virtually every aspect of the City’s latecomers process—filing four motions for partial

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<sup>1</sup> Appellants’ claims were also subject to dismissal on numerous grounds not reached by the superior court. Their writ claims were ripe for dismissal because Appellants did not meet the standard for a constitutional writ—demonstration of arbitrary and capricious government conduct. *See Coballes v. Spokane County*, 167 Wn. App. 857, 866-67, 274 P.3d 1102 (2012). Similarly, Appellants’ request for declaratory judgment was subject to dismissal because Appellants had other avenues of relief available, and a declaratory judgment cannot be used to make an “as applied challenge” to a government action. *See City of Federal Way v. King County*, 62 Wn. App. 530, 535 n.3, 815 P.2d 790 (1991); *Seattle-King County Council of Camp Fire v. Dept. of Revenue*, 105 Wn.2d 55, 58, 711 P.2d 300 (1985).

summary judgment. After careful consideration by the Honorable Bruce I. Weiss, each of Appellants' motions was denied.

It is beyond dispute in this case that Costco invested \$1.7 million to create infrastructure that continues to benefit other property owners and the citizens of Burlington. Costco acted in good faith and followed the process prescribed by the City. Instead of being able to implement its latecomers agreement, Costco has been forced to incur the time and expense of this litigation.

Appellants' case is untimely and their numerous motions for summary judgment were not supported by applicable law. For these reasons, Respondent Costco respectfully requests that this Court affirm the well-reasoned decisions of the superior court and deny Appellants' appeal.

## **II. RESTATEMENT OF ISSUES ON APPEAL**

Although Appellants make several assignments of error on appeal, consideration of only two issues is necessary to resolve this case:

(1) A "land use decision" under LUPA includes a final determination regarding the application of rules regulating property development to a specific property. RCW 36.70C.020(2); *see, e.g., James v. County of Kitsap*, 154 Wn.2d 574, 115 P.3d 286 (2005) (impact fees); *City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 252 P.3d 382 (2011) (traffic mitigation fees). The assessment

reimbursement area and latecomers agreement approved by the City of Burlington would impose fees on individual parcels of property developed during the agreement's effective period as a condition on future development. Was the City Council's vote to deny Appellants' appeal of Resolution 13-2006, following two formal hearings before the Council that included introduction of exhibits, witness testimony, and legal argument by Appellants' attorney a "land use decision" subject to LUPA?

(2) LUPA provides the exclusive means for judicial review of a land use decision. RCW 36.70C.030(1). A LUPA petition must be filed within 21 days of the decision, or the petition is barred and the court has no jurisdiction. RCW 36.70C.040; *Knight v. City of Yelm*, 173 Wn.2d 325, 337, 267 P.3d 973 (2011). Here, the City Council's final decision was made by a vote in the presence of Appellants' counsel at the October 2009 hearing and was published in the City's meeting minutes. Was Appellants' complaint—filed 18 months after the City Council's decision—untimely?

(3) Assuming, *arguendo*, that the court finds that Appellants' case was not subject to LUPA, should the case be dismissed because it was not timely filed under the applicable limitations periods for land use declaratory judgment and writ actions?

### III. STATEMENT OF THE CASE

#### A. The City Requires Improvements To George Hopper Road As A Condition Of Costco's Development.

As part of the permit review process for Costco's new consumer warehouse, the City of Burlington evaluated the project for consistency with the City's comprehensive plan and development regulations pursuant to the State Environmental Policy Act, ch. 43.21C RCW ("SEPA"). *See* Burlington Municipal Code ("BMC") 15.12.010(C). Following SEPA review, the City issued a Mitigated Determination of Non-Significance ("MDNS") that required Costco to complete a number of traffic mitigation measures over the next two years to the interchange of George Hopper Road and Interstate 5.<sup>2</sup> App'x 1. These improvements were a condition of project approval and created additional traffic capacity beyond what was necessary to mitigate the impact of Costco's development. *Id.*; CP 382 (¶ 2), 226 (¶ 3), 231-32.

Pursuant to chapter 35.72 RCW, the City agreed that Costco could pursue a latecomers agreement that would provide Costco the possibility

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<sup>2</sup> Mitigation measures included a new traffic signal at the southbound I-5 on- and off-ramps, a traffic signal at the northbound off-ramp, more storage lanes on the southbound off-ramps, channelizing the south leg of the northbound off-ramp for separate right and left turn lanes, and adding an eastbound left turn lane at the northbound on-ramp. CP 386-88 (MDNS condition #14). A copy of the City's MDNS is attached as Appendix 1. Additional facts concerning the statutory requirement that Costco construct the improvements pursuant to an ordinance are contained in Section VI.C, below.

of obtaining reimbursement from future developing properties that utilized the traffic improvements Costco constructed. App'x 1 at 388 (discussing payback agreement); CP 252-53. Costco agreed to complete the improvements with that understanding. CP 252-53. Of the \$1.7 million that Costco paid for the improvements, Costco sought approximately \$850,000 for the additional benefit created. CP 253, 382.

**B. The Proposed Assessment Reimbursement Area And Latecomers Agreement Are Prepared.**

As the basis for a latecomers agreement, Transportation Solutions, Inc. ("TSI"), prepared and forwarded to Costco and the City a draft traffic analysis. CP 225-26 (¶¶ 1, 5), 231-37. The proposed assessment reimbursement area (or "benefit area") is specifically designed to apply to those properties benefiting from Costco's improvements. CP 226 (¶ 5). As is typical of latecomers agreements, the actual assessment that would apply to future development on a property in the benefit area relates to the number of PM peak (afternoon rush hour) trips that the property would send to the George Hopper Road improvements. CP 227 (¶ 6).

The number of trips depends on two factors: (1) the location of the property with respect to the improvements and (2) the land use to be developed on the property. *Id.* The assessment amount is based on the

proposed use of the property at the time of development and the property's proximity to the improvements. *Id.*

The proposed latecomers agreement here has 34 different traffic analysis zones and 27 different land use categories. *Id.*; CP 231-37. To determine the rate paid by any individual property owner, one would identify the zone in which the property is located and then find the type of use to which the property would be developed. CP 227 (§ 6).

No fees are assessed until the latecomers agreement has been executed and recorded with the county auditor and the property owner within the benefit area is issued a development permit that triggers a latecomers fee. RCW 35.72.020, .040; *see Woodcreek Land Ltd. P'ships I, II, III & IV v. City of Puyallup*, 69 Wn. App. 1, 9-10, 847 P.2d 501 (1993).

**C. Appellants Receive Notice Of The Latecomers Agreement And Request A Hearing.**

In 2006, the Burlington City Council passed Resolution 13-2006. CP 390-91 (attached as Appendix 2). This resolution established the preliminary assessment reimbursement area based on TSI's analysis; directed notice to affected property owners, including Appellants; and authorized the mayor to execute the latecomers agreement in substantially the form of the proposed agreement on file. *Id.*

Appellants each received notice in March 2007. CP 104-07. Consistent with RCW 35.72.040, the notice informed Appellants that their property was located within a latecomers benefit area and that there was a preliminary assessment determined for the property, although the actual amount of the assessment would depend on the proposed development. *Id.* The notice stated that, in the event that Appellants decided to redevelop their property during the term of the latecomers agreement, any fee would be due upon issuance of a building permit for that new use. *Id.* Finally, the notice informed Appellants that they had a right to request a hearing on the latecomers agreement. *Id.*

Within two weeks, Appellants retained land use counsel and requested a hearing, as did certain other landowners whose properties were also part of the benefit area and potentially subject to latecomers fees. CP 407-10, 500. As part of the hearing request, Appellants' counsel requested copies of several documents to prepare for the hearing. CP 500.

**D. After Two Hearings, The City Council Votes To Deny Appellants' Appeal.**

The City Council held two hearings on the property owner appeals: one on August 23, 2007 and one on October 8, 2009. CP 227-28 (¶ 8), 383 (¶ 6). Counsel for Appellants appeared at both hearings and presented argument and testimony against the latecomers agreement and proposed

benefit area. *Id.*; CP 409. As a result of Appellants' counsel's testimony regarding the extension of Goldenrod Road that occurred after the City traffic analysis used to establish the benefit area, Costco and the City agreed to modify the traffic analysis zone for Appellants' property, thereby lowering their potential assessment rates. CP 227-28 (¶ 8), 239-43, 383 (¶ 6), 402 (¶ 4).

At the conclusion of the October 8, 2009 hearing, the City Council voted 6-1 to deny Appellants' appeal and affirm Resolution 13-2006. CP 4 (¶ 2.10), 458-60. A detailed summary of the proceedings was printed in the City Council's meeting minutes. CP 458-60 (attached as Appendix 3).

Sixteen months later, on February 10, 2011, Appellants' counsel appeared at a City Council meeting and demanded a new hearing in the Costco matter. CP 464 (attached as Appendix 4). The City Council denied the request for a third hearing and voted unanimously to adopt findings memorializing their October 2009 decision denying Appellants' appeal. *Id.* The City's findings were later published by the City. CP 470-79 (attached as Appendix 5). Appellants have never identified any discrepancy or error between the vote at the 2009 hearing and the subsequently adopted findings memorializing that decision.

**E. Appellants File This Lawsuit.**

Appellants filed their complaint in Skagit County Superior Court on April 8, 2011. CP 1-7. The entire case was heard by visiting Snohomish County Superior Court Judge Bruce I. Weiss.

Appellants' lawsuit was filed more than four years after the City Council passed Resolution 13-2006; eighteen months after the City Council denied Appellants' appeal in October 2009; and fifty-seven days after the February 10, 2011 City Council meeting. *See* Appendices 2-4.

During the ensuing four years of litigation, Appellants filed four motions for partial summary judgment, challenging essentially every aspect of the latecomers agreement process. CP 99-107, 19-33, 55-66, 108-54. Appellants disputed the City's latecomers agreement notice procedures; argued that a statute of limitations barred the agreement; asserted that no ordinance required Costco's improvements; and claimed that there was no benefit remaining from the improvements. *Id.* After thorough consideration of the briefing and oral arguments, Judge Weiss denied each of the Appellants' motions. CP 11-18.

Costco subsequently moved to dismiss Appellants' complaint as untimely under both LUPA and the applicable limitations periods for land use declaratory judgment and writ actions. Simultaneously, Appellants filed a fifth motion for summary judgment. CP 67-98, 665-83. Argument

for both motions was heard on the same day. At the hearing, Judge Weiss ruled that Appellants' lawsuit was untimely under LUPA and granted Costco's motion to dismiss. Thus, the court did not reach Appellants' fifth summary judgment motion. CP 8-10. This appeal followed.

**F. No Latecomers Agreement Has Been Executed.**

It is undisputed that no final latecomers agreement has been executed by the City. Because an executed latecomers agreement has not been recorded with Skagit County, the City has not (and cannot, under RCW 35.72.040) sought to collect any assessments from Appellants. It is also undisputed that Appellants have never filed a development permit application or been assessed any latecomers fee.

**IV. STANDARD OF REVIEW**

An appellate court reviews a superior court's decisions on motions to dismiss and motions for summary judgment *de novo*. *Eugster v. State*, 171 Wn.2d 839, 843, 259 P.3d 146 (2011); *see also Becker v. Cmty. Health Sys.*, 184 Wn.2d 252, 359 P.3d 746 (2015). In reviewing the rulings on Appellants' four summary judgment motions, the court views all facts and inferences in the light most favorable to the nonmoving party—here, Costco. *Eugster*, 171 Wn.2d at 843. Summary judgment should only be granted to the moving party when no genuine issue of

material fact exists and the party is entitled to judgment as a matter of law. *Id.*; CR 56(c).

Additionally, when a superior court is sitting in an appellate capacity (as it was in this case), the court “has only the jurisdiction as conferred by law.” *Conom v. Snohomish County*, 155 Wn.2d 154, 157, 118 P.3d 344 (2005). A court that lacks jurisdiction due to a party’s failure to follow statutory procedural requirements must enter an order of dismissal. *Id.* Whether a court may exercise jurisdiction and questions of statutory construction are questions of law subject to *de novo* review. *Id.*

**V. APPELLANTS’ CLAIMS WERE PROPERLY DISMISSED AS UNTIMELY**

**A. The City Council’s Decision Was A Land Use Decision.**

The City Council’s 2006 resolution establishing the assessment reimbursement area and its subsequent denial of Appellants’ appeal after hearings before the City Council are indistinguishable from other municipal actions courts routinely scrutinize under LUPA. Resolution 13-2006 established an assessment reimbursement area and allowed Costco to potentially recover its street improvement project costs from benefitted parcels if those properties are developed in the future. Like other land use decisions subject to LUPA, the assessment reimbursement area had a specific, identifiable impact on individual properties.

LUPA provides the exclusive means to obtain judicial review of land use decisions. RCW 36.70C.030(1). A “land use decision” is defined as “a final determination by a local jurisdiction’s body or officer with the highest level of authority to make the determination, including those with authority to hear appeals,” and includes the following decisions:

(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; [or]

(c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property . . . .

RCW 36.70C.020(2)(b)-(c).

The imposition of fees and building and zoning restrictions are reviewable only under LUPA. *See, e.g., Asche v. Bloomquist*, 132 Wn. App. 784, 791, 133 P.3d 475 (2006) (“LUPA applies to interpretative decisions regarding application of zoning ordinances to specific property”); *accord Coffey v. City of Walla Walla*, 145 Wn. App. 435, 439, 187 P.3d 272 (2008) (“Challenges to zoning ordinances and other actions affecting specific pieces of property [are] to be filed in superior court under a land use petition.”).

Consistent with this rule, impact and mitigation fees imposed on multiple parcels have been reviewed by Washington courts under the

LUPA framework. For example, in *James v. County of Kitsap*, the Washington Supreme Court reiterated its prior holdings that the imposition of impact fees as a condition on the issuance of building permits was a “land use decision” subject to LUPA’s filing requirements. 154 Wn.2d 574, 586, 115 P.3d 286 (2005); *see also Sundquist Homes Inc. v. Snohomish County*, 166 F. App’x 903, 906 (9th Cir. 2006) (citing *James* and rejecting plaintiffs’ argument that the imposition of impact fees is not a land use decision subject to LUPA).

Similarly, traffic mitigation fees are reviewed under LUPA. *City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 35, 252 P.3d 382 (2011) (challenge of hearing examiner’s decision to strike traffic impact mitigation payment properly brought under LUPA); *United Dev. Corp. v. City of Mill Creek*, 106 Wn. App. 681, 687, 26 P.3d 943 (2001) (challenge of imposition of traffic mitigation fees, impact fees, and drainage improvement requirements prior to development of property was properly pursued under LUPA).

When plaintiffs fail to challenge generally applicable fees and development agreements under LUPA, subsequent challenges are barred. *See Tapps Brewing Inc. v. City of Sumner*, 482 F. Supp. 2d 1218, 1232-33 (W.D. Wash. 2007) (plaintiffs’ challenge under RCW 82.02.020 to city’s imposition of general facilities charge on landowners’ developments to

pay for reconstruction of city's storm drainage system not reviewable because it was not brought pursuant to LUPA).

Appellants argue that latecomers fees based on the assessment reimbursement area are not analogous to the assessment of other types of land use fees because such fees are not made as a condition of obtaining a development permit. But Appellants overlook the fact that reimbursement under the latecomers agreement is collected as a condition to permit issuance from property owners who “subsequently develop their property within the period of time that the contract is effective . . . .” RCW 35.72.020(1)(d). Like other fee assessments subject to LUPA, the latecomers assessments apply as a condition on future development of property within the designated benefit area.<sup>3</sup>

Moreover, Appellants cite no authority suggesting that the judicial review procedures for analogous land development impact and mitigation fees should not be instructive here. Nor do they identify any authority that appeals of latecomers fees are exempt from LUPA. To the contrary, because latecomers fees impact the development of property—a point Appellants repeatedly make in their pleadings—LUPA’s policies of

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<sup>3</sup> Despite Appellants’ attempt to distinguish *United Development* (which involved a preliminary plat approval conditioned on the payment of traffic and other impact fees), that case is nevertheless an example showing that such fees are within the LUPA framework.

certainty and finality are served by treating appeals of such fees in the same manner as other land use decisions.

In fact, the parties have long treated the latecomers agreement as a land use matter. After receiving notice of the agreement, Appellants immediately hired experienced land use counsel to represent them. *See* CP 494 (¶ 3), 500-01. The City Attorney and the City Council expressly treated the property owners' appeals as "a land use issue," and at least four land use attorneys presented testimony and legal argument at the hearing, further evidencing the quasi-judicial nature of the proceedings. App'x 3 at 458-59. As Appellants acknowledged in their complaint, "*[t]he City Council was at that time acting in a quasi-judicial capacity.*" CP 4 (¶ 2.10) (emphasis added).

The latecomers agreement assesses fees upon individual parcels within the designated benefit area as part of the development permit process, just like park, traffic, and other infrastructure fees that are routinely included as permit conditions. Because the latecomers agreement and benefit area have an individualized effect on particular property (here, Appellants' property), the hearing on Appellants' latecomers appeal constituted a "land use decision" by the City Council that was subject to LUPA.

**B. RCW 35.72.040 And LUPA Do Not Conflict.**

Appellants assert a new argument not presented below that RCW 35.72.040 and LUPA conflict. Appellate courts generally will not consider an argument or issue raised for the first time on appeal. RAP 2.5(a); *Washburn v. Beat Equip. Co.*, 120 Wn.2d 246, 290, 840 P.2d 860 (1992); *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 81, 322 P.3d 6 (2014). Even if considered, however, their argument fails.

Appellants' entire conflicts argument rests on the last sentence of RCW 35.72.040(2), which states that the legislative body's ruling after a hearing on a latecomers agreement "is determinative and final." This sentence does not conflict with LUPA; to the contrary, it evidences consistency with LUPA's statutory scheme of requiring a final decision as a prerequisite to LUPA review.

A land use decision is reviewable under LUPA only if it is a final determination by the local body or officer with the highest level of authority to make the determination. RCW 36.70C.020(2). Finality means that the decision is determinative and fixes the legal relationship of the parties. *See WCHS, Inc. v. City of Lynnwood*, 120 Wn. App. 668, 679, 86 P.3d 1169 (2004). As this court has observed, LUPA does not apply to interlocutory decisions. *Id.* at 680; *accord* RCW 36.70C.060(2)(d)

(requiring exhaustion of administrative remedies); *Chelan County v. Nykreim*, 146 Wn.2d 904, 938, 52 P.3d 1 (2002).

RCW 35.72.040 makes clear that when the legislative body rules after a latecomers appeal hearing, the administrative process is concluded, with a final decision fixing the rights of the parties. This is wholly consistent with LUPA and should not be read to create a conflict. *See Am. Legion Post #149 v. Wash. State Dep't of Health*, 164 Wn.2d 570, 585, 192 P.3d 306 (2008) (courts should avoid interpreting statutes to create conflicts and instead interpret them harmoniously when possible).

Applying RCW 35.72.040(2) to the facts of this case, the Council's 6-1 vote at the close of the October 8, 2009 hearing to deny Appellants' appeal was a "determinative and final" adjudication of Appellants' rights for purposes of LUPA. Appellants' belated attempt to manufacture a conflict between RCW 35.72.040(2) and LUPA should be rejected.

**C. The City Council's Oral Decision At The October 2009 Hearing Was Final For Purposes Of LUPA.**

The time period for Appellants to file a petition under LUPA began when the City Council voted to deny Appellants' appeal on October 8, 2009. The vote was a final land use decision memorialized in the public record through the City Council meeting minutes. Because Appellants failed to

timely file a petition, the superior court did not have jurisdiction to hear the appeal, and it properly dismissed the case.

A LUPA petition must be filed within 21 days of the issuance of “a final determination” by the local jurisdiction. RCW 36.70C.020; RCW 36.70C.040(3). If a petition is not timely filed, it is barred and the court may not grant review. RCW 36.70C.040(2); *Nykreim*, 146 Wn.2d at 917. LUPA’s filing and service requirements are jurisdictional. *Knight v. City of Yelm*, 173 Wn.2d 325, 337, 267 P.3d 973 (2011). Strict compliance with the requirements is necessary because the superior court loses its authority to hear the case if the petition is not timely. *Id.*; see also *Overhulse Neighborhood Ass’n v. Thurston County*, 94 Wn. App. 593, 599, 972 P.2d 470 (1999) (“Because LUPA provides unequivocal directives, the doctrine of substantial compliance does not apply.”). The strict timeliness requirements of LUPA serve the important purpose of promoting the finality of local land use decisions. See *Knight*, 173 Wn.2d at 338.

A local jurisdiction has “issued” a final determination when one of the following occurs:

- (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.

RCW 36.70C.040(4).

The Washington Supreme Court has explained that subsection (c) likely applies when a decision is neither written (subsection (a)) nor made by ordinance or resolution (subsection (b)). *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 408 n.5, 120 P.3d 56 (2005). This includes a decision “made orally at a city council meeting,” which issues “when the minutes from the meeting are made open to the public or the decision is otherwise memorialized such that it is publicly accessible.” *Id.*

While *Habitat Watch* provides a helpful framework for analyzing RCW 36.70C.040(4), the efficacy of an oral decision was not at issue in that case. Subsequently, however, the court in *Northshore Investors, LLC v. City of Tacoma* addressed this very issue. There, the court held that the Tacoma City Council’s oral vote to deny Northshore’s appeal of a rezone modification was a final land use decision, triggering LUPA’s 21-day appeal period. *Northshore Investors*, 174 Wn. App. 678, 681-82, 695, 301 P.3d 1049 (2013), *review denied*, 178 Wn.2d 1015 (abrogated on other grounds involving attorneys’ fees). Mirroring the facts of this case, Northshore’s

counsel was present at the council meeting, and the council's decision was entered into the public record shortly after the vote. *Id.* at 685-86.

Here, the superior court properly determined that the 21-day period began to run on October 8, 2009, when the City Council voted to deny the appeal of Resolution 13-2006. As in *Northshore*, Appellants' attorney was present for the vote, and the City Council's decision was memorialized as a written public record by the meeting minutes. App'x 3 at 458-60; CP 439. The Council vote to deny Appellants' appeal was made shortly after the City Council returned from executive session, reinforcing the conclusion that the Council understood it was making a final determination that would commit it to a course of action. App'x 3 at 459-60.

The Council's ministerial act of adopting written findings in 2011, which were not required by the latecomers statute, did not change the date on which its decision was "issued" for purposes of LUPA, just as a similar subsequent memorialization did not do so in *Northshore*. The writing was created after the decision had been made—not prepared in advance and presented at the hearing. *See Northshore*, 174 Wn. App. at 690-91 (distinguishing *Hale v. Island County*, 88 Wn. App. 764, 946 P.2d 1192 (1997)). Nor was a written decision required. *See id.* at 695. The decision was made by the vote, not the subsequent written memorialization of the vote. *Cf. id.* at 694 (“[A]t the April 13 hearing, the Council voted to deny

Northshore's appeal. There was no ambiguity about the Council's decision."").

In fact, Costco was unaware of the Council meeting where the findings were adopted. The action was not noticed by the City as affecting its 2009 decision, and Costco was not present or represented at the 2011 Council meeting. *See* App'x 4. Appellants learned that the Council was voting to adopt written findings and sent their attorney to ask the Council for a new hearing. The Council refused Appellants' request and voted to adopt a document memorializing its prior decision. *Id.*

Appellants cannot collaterally attack the 2009 decision by latching onto an event that occurred sixteen months after the fact. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 173, 181-82, 4 P.3d. 123 (2000) (barring later collateral attack when no LUPA appeal filed in the first instance). And, even if the 2011 adoption of findings was the applicable LUPA trigger date, Appellants missed the appeal deadline by waiting 57 days after the February 10, 2011 meeting to file suit.

Appellants' 21-day window under LUPA began in October 2009 and expired long before this lawsuit was filed in April 2011. Appellants had actual notice of the Council's decision and ample opportunity to challenge it. They failed to do so within the clear time limits set by LUPA, and the superior court properly dismissed their claims.

**D. Even Under A Writ Or Declaratory Judgment Theory, Appellants Claims Were Untimely.**

While this case involves a “land use decision” that is properly addressed under LUPA, Appellants’ claims are untimely even if considered under a writ or declaratory judgment framework. This court may affirm the superior court’s dismissal on any grounds adequately supported by the record. *Fulton v. Dep’t of Soc. & Health Servs.*, 169 Wn. App. 137, 147, 279 P.3d 500 (2012). Even assuming, *arguendo*, that the superior court improperly dismissed Appellants’ claims as untimely under LUPA, their claims are still an untimely writ and declaratory judgment action.

Before LUPA was enacted, writ petitions concerning land use decisions were subject to stringent timeliness requirements. *See Habitat Watch*, 155 Wn.2d at 407 (“LUPA embodies the same idea expressed by this court in pre-LUPA decisions—that even illegal decisions must be challenged in a timely, appropriate manner.”). Although there is no formal statute of limitations on statutory or constitutional writ actions, such cases must be filed within a “reasonable time after the act complained of has been done.” *Akada v. Park 12-01 Corp.*, 103 Wn.2d 717, 718, 695 P.2d 994 (1985); *accord Summit-Waller Citizens Ass’n v. Pierce County*, 77 Wn. App. 384, 393-94, 895 P.2d 405 (1995) (regarding constitutional writ actions). This

often correlates to the time for appeal prescribed by statute or court rule. *See Pierce v. King County*, 62 Wn.2d 324, 333, 382 P.2d 628 (1963).

Because neither state law nor the Burlington Municipal Code addresses writ limitations periods,<sup>4</sup> the court must “determine by analogy what constitutes the appropriate time for filing of the writ.” *Akada*, 103 Wn.2d at 719. The most appropriate analogy is LUPA’s 21-day period for land use decisions. RCW 36.70C.040(3). By comparison, pre-LUPA cases barred land-related writ and declaratory judgment actions as untimely for not being filed within as little as 10 days. *E.g.*, *Deschenes v. King County*, 83 Wn.2d 714, 521 P.2d 1181 (1974); *see also City of Federal Way v. King County*, 62 Wn. App. 530, 538-39, 815 P.2d 790 (1991) (applying 20-day statute of limitations). At most, some pre-LUPA cases employed a 30-day period. *E.g.*, *Brutche v. City of Kent*, 78 Wn. App. 370, 380, 898 P.2d 319 (1995); *Summit-Waller Citizen’s Ass’n*, 77 Wn. App. at 392 (“[T]ime limits are short. Thirty days is typical.”). A 30-day period is

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<sup>4</sup> The absence of controlling language in the municipal code suggests that the City anticipated such challenges to be brought under LUPA.

also found in the Administrative Procedure Act for appeal of agency actions.<sup>5</sup> RCW 34.05.542.

Like writ actions, a declaratory judgment action must be filed within a “reasonable” time. *City of Federal Way*, 62 Wn. App. at 537. (“[T]he same time limitation would govern whether this action was brought as a writ proceeding or as a declaratory judgment.”).

Here, even applying the most generous time period of 30 days, Appellants’ writ and declaratory claims are clearly untimely. Appellants were fully aware of the City’s decision at the October 8, 2009 hearing. App’x 3 at 458-60. The subsequent adoption of a writing memorializing the City’s decision did not change that decision. Even if Appellants had been anticipating written findings, waiting to file until 18 months after the decision and 57 days after adoption of the written findings is not acting within a reasonable time period.

Because Appellants’ lawsuit was not filed within 21 days of the decision under LUPA, or within a reasonable time period, their claims are subject to dismissal on multiple, independently sufficient grounds.

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<sup>5</sup> When this matter was heard by the superior court, the Burlington Municipal Code established a 20-day statute of limitations for appeals by writ from City Council decisions on school district impact fees, under BMC 15.18.070(F). Although the City repealed the entirety of chapter 15.18 in June 2015 (Ordinance No. 1817), this former provision nevertheless provides another useful comparison.

**VI. THE SUPERIOR COURT PROPERLY DENIED APPELLANTS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT**

**A. Appellants Provide No Argument Or Authority Supporting Reversal Of The Order Denying Their First Motion For Summary Judgment.**

As a preliminary matter, this court should not even consider Appellants' first assignment of error, appealing the superior court's order denying their first motion for partial summary judgment. This motion challenged the notice received by property owners regarding the latecomers agreement. CP 99-107. Appellants' brief fails to identify any issue pertaining to this assignment of error and provides no argument or legal authority regarding any alleged error.

RAP 10.3(a)(6) requires an appellant's brief to contain "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." Assignments of error that are not supported by arguments and citations to legal authority are deemed abandoned. *Prostov v. State, Dep't of Licensing*, 186 Wn. App. 795, 823, 349 P.3d 874 (2015). By failing to provide any supporting argument or authority regarding their first assignment of error, Appellants have abandoned any appeal of the superior

court's order denying their first motion for partial summary judgment, and the court should not consider this assignment of error.<sup>6</sup>

**B. The Superior Court Properly Rejected Appellants' Limitations Argument.**

After unsuccessfully challenging the City's notice procedures, Appellants filed a second summary judgment motion that asserted the latecomers agreement was barred by a purported 15-year "statute of limitations." The superior court correctly rejected this argument. There is no statute of limitations for latecomers agreements. There are statutory limits on the duration of such contracts once executed—an event that has not occurred here. Seeking to avoid this obstacle, Appellants propose their own limitations period based on completion of the improvements, which has no basis in the statutory language.

When a statute is clear on its face, its meaning is derived from the statutory language alone. *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d

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<sup>6</sup> Even if reviewed on appeal, the superior court's order should be affirmed. The City's notice to Appellants met all statutory requirements of RCW 35.72.040, allowed Appellants to fully inform themselves about the latecomers agreement and prepare for the City's hearings, and provided actual notice to Appellants. See RCW 35.72.040; *Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d 720, 727, 696 P.2d 1222 (1985) (defective notice upheld where no party was actually misled and petitioners were able to prepare for the hearing); *Prekeges v. King County*, 98 Wn. App. 275, 280-81, 990 P.2d 405 (1999) (defective notice upheld where plaintiff had actual notice and opportunity to participate in administrative review process); CP 104-07, 409, 500-01; App'x 3 & 4. The trial court specifically determined that the City's notice was adequate, and Appellants present no basis for reversing the court's order denying summary judgment.

638 (2002). The Washington Supreme Court “has repeatedly held that an unambiguous statute is not subject to judicial construction and has declined to add language to an unambiguous statute even if it believes the Legislature intended something else but did not adequately express it.” *Id.* Courts may not read into a statute matters that are not in it or create legislation under the guise of statutory interpretation. *Id.* at 21; *accord Coughlin v. City of Seattle*, 18 Wn. App. 285, 289, 567 P.2d 262 (1977).

The applicable statutes do not require a city to enter into a latecomers agreement. Instead, they provide the requirements for such contracts if executed. RCW 35.72.020 (“Contract Requirements”); *see Woodcreek*, 69 Wn. App. at 8-9 (describing an 11-step process); *see also* RCW 35.72.010 (stating that any city “*may* contract with owners of real estate for the construction or improvement of street projects” (emphasis added)); RCW 35.72.020(1) (stating that the contract “*may* provide for the partial reimbursement to the owner” (emphasis added)).

One of these statutory requirements is that the contract runs for a period not to exceed 15 years. RCW 35.72.020(1). Appellants try to create an issue by observing that the *Woodcreek* case “assumes without discussion” that the 15-year period begins when the contract is executed. Appellants’ Br. 22. But the reason the *Woodcreek* opinion does not discuss this is because it is obvious from the statute:

[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 . . . subsequently develop their property *within the period of time that the contract is effective* . . . .

RCW 35.72.020(1) (emphasis added).<sup>7</sup>

There is no language in the latecomers agreement statutes suggesting that the 15-year period is measured from the date of completion of the improvements. Appellants simply read that language into the statute to suit their situation. This court should reject Appellants' attempt to rewrite statutory language. *See Kilian*, 147 Wn.2d at 20.

Moreover, Appellants' unsupported assertion that the statutes recognize the average useful life of traffic improvements to be 15 years is refuted by the statutes themselves.<sup>8</sup> RCW 35.72.020 actually allows the parties to extend the contract's effective period *beyond* 15 years under certain circumstances:

The contract may provide for an extension of the fifteen-year reimbursement period for a time not to exceed the duration of any moratorium, phasing ordinance, concurrency designation, or other governmental action that prevents making applications for, or the approval of, any new development within the benefit area for a period of six months or more.

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<sup>7</sup> For the court's reference, a copy of the latecomers agreement statutes is attached as Appendix 6.

<sup>8</sup> Costco further addresses Appellants' unsupported and incorrect assertions regarding the benefits conferred by Costco's improvements in Section VI.D.

RCW 35.72.020(2)(a). The statutes do not state or assume the lifespan of infrastructure improvements.

Appellants offer no statutory basis for arbitrarily designating the “completion of the improvements” as triggering a 15-year limitations period. At best, Appellants seek equitable relief, which is a mixed question of law and fact that would be inappropriate for summary judgment. *Cf. Hanson v. Estell*, 100 Wn. App. 281, 287-89, 997 P.2d 426 (2000) (balancing equities in the injunction context involves numerous factual determinations).

**C. The Superior Court Properly Held That Costco’s Street Improvements Were Required By Ordinance.**

The superior court also properly rejected Appellants’ argument that the traffic improvements were not required by ordinance.

**1. Appellants’ Focus On The MDNS Is Misplaced.**

Appellants repeatedly emphasize that it was the City’s SEPA MDNS that required Costco’s improvements and not an ordinance. While it is true that the MDNS was the City’s permitting mechanism that conditioned Costco’s development on completing the off-site improvements, that is not the whole picture.

Chapter 12.28 of the Burlington Municipal Code addresses construction of streets, sidewalks, and drains within the City. The specific

code provision at issue is BMC 12.28.010, which, like other city code provisions, was adopted by ordinance. *See* BMC 12.28.010 (citing Ordinance 1536 § 1, 2004; Ordinance 1474 § 1, 2001; Ordinance 1419 § 1, 1999; Ordinance 1401 § 1, 1999; Ordinance 1188 § 1, 1991; Ordinance 959 § 1, 1980).

Appellants argue that because BMC 12.28.010 was amended a few days after the amended MDNS was issued, Costco's improvements could not have been required by the ordinance. Their argument fails for at least two reasons.

First, Appellants ignore the context of the amendment, which was done contemporaneously with the permitting and review process for the Costco warehouse. The amended ordinance was in place before Costco began construction of the improvements, before the assessment reimbursement area was created, and before initiation of the City's latecomers process.

The facts here comply with RCW 35.72.010:

The legislative authority of any city . . . 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.

(Emphasis added). Appellants are putting undue emphasis on a specific date that is not compelled by the statute or *Woodcreek*.<sup>9</sup>

Second, even as written before its amendment, BMC 12.28.010 met the statutory requirements, particularly when considered in conjunction with the City’s Comprehensive Transportation Plan. As previously written, BMC 12.28.010 contained the following language:

- A. ***Improved right-of-way is required for access to all new construction projects.*** A traffic study prepared to the specifications of the city engineer may be required to identify required right-of-way improvements. . . .
  
- D. The City of Burlington Comprehensive Transportation Plan has adopted Level of Service “C” for all streets except Burlington Boulevard, for which a Level of Service “E” is adopted. 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 shall be denied.***

CP 273 (emphases added) (copy attached as Appendix 7); *see also* App’x 5 at 269 (City’s findings).

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<sup>9</sup> In fact, the *Woodcreek* court considered several subsequent events in its analysis of whether the improvements were required by ordinance, and finding none, voiced additional concern about a lack of notice to potential purchasers of property that may be subject to assessments. 69 Wn. App. at 6-7. For the reasons discussed below, lack of notice is simply not an issue under the current scheme of land use planning under the Growth Management Act and SEPA.

Importantly, this provision references the City's Comprehensive Transportation Plan ("CTP"), which is part of the City's Comprehensive Plan, also adopted by ordinance.<sup>10</sup> The CTP sets forth City policies to ensure the continued ability of the City's transportation system to function at a reasonable level of service, consistent with the requirements of the Growth Management Act ("GMA"), chapter 36.70A RCW.<sup>11</sup> CP 283-84.

The CTP effective when Costco applied for a permit was the 1999 Update. *See* CP 280-304 (excerpts attached as Appendix 8). This CTP specifically identified improvements to the George Hopper Road interchange, such as a "5-lane widening of the Hopper Interchange Road"; "signals at I-5 ramps with George Hopper overpass"; and "widen[ing], curb & gutter, sidewalks, [and] drainage." App'x 8 at 287, 300, 303.

When the City subsequently conducted its SEPA review for Costco's project, it reviewed the proposal for consistency with these City comprehensive plans and development regulations, as required BMC 15.12.010(C). The SEPA MDNS was the City's vehicle by which

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<sup>10</sup> *See, e.g.*, CP 313-79 (Ordinance 1260 (adopting and implementing the 1994 Comprehensive Plan); Ordinance 1396 (updating the Comprehensive Plan); Ordinance 1378 (showing consistency of development regulations with the Comprehensive Plan); Ordinance 1587 (adopting 2005 Comprehensive Plan)).

<sup>11</sup> The GMA requires consistency between comprehensive plans and development regulations, *i.e.*, the development regulations must implement the comprehensive plan. Here, BMC 12.28.010 is an implementing ordinance for the City's Comprehensive Plan as it related to the mitigation for Costco's project, as well as a concurrency ordinance under the GMA, as discussed in the next section.

the City applied its comprehensive plan and enabling development regulations to Costco's specific project.

Appellants mischaracterize the circumstances in asserting that the only thing requiring Costco's road improvements was the MDNS. As explained in the City's findings, the source of authority was actually BMC 12.28.010, which (amended or not) set forth the City's level of service requirements, referred to the City's CTP, and specified that projects not meeting City requirements must mitigate concurrent with the development or "*or the development permit application shall be denied.*" App'x 5 at 269-70 (emphasis added). The fact that the City also acted through an MDNS does not change the conclusion that Costco's road improvements were ultimately required by ordinance.

## **2. *Woodcreek* Is Not Controlling.**

Appellants do not directly address Costco's arguments and the superior court's decision that Division II's *Woodcreek* decision is no longer controlling on this issue.<sup>12</sup> *Woodcreek* was decided more than twenty years ago, based on events occurring before the State's enactment of the GMA. The GMA dramatically changed the landscape of planning in this State and leaves the cited portion of *Woodcreek* obsolete. The

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<sup>12</sup> *Woodcreek* appears to be the only Washington appellate decision interpreting chapter 35.72 RCW.

GMA imposed substantial new requirements on local governments, and it requires communities to coordinate land use planning through the adoption of consistent comprehensive land use plans and development regulations in accordance with the GMA. *City of Bellevue v. E. Bellevue Cmty. Mun. Corp.*, 119 Wn. App. 405, 410, 81 P.3d 148 (2003), *review denied*, 152 Wn.2d 1004 (2004).

With respect to transportation, the GMA requires cities to include in their comprehensive plans a transportation element that, among other things, specifies “level of service”<sup>13</sup> standards for local streets and roads and requires concurrency between development and public infrastructure to ensure that new development does not decrease current service levels below locally established minimum standards. RCW 36.70A.020(12). RCW 36.70A.070(6)(a)(iii)(B); *City of Bellevue*, 119 Wn. App. at 411.<sup>14</sup>

Here, the City of Burlington has established its level of service standards, with different maximum levels throughout the city. These

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<sup>13</sup> As this court explained in *City of Bellevue*: “A level of service standard measures the degree of intersection saturation, expressed as the ratio of the peak traffic volume at the intersection to the capacity of the intersection to handle traffic.” 119 Wn. App. at 411; *see* WAC 365-196.210(19) (“level of service”).

<sup>14</sup> Regarding traffic concurrency, the GMA provides: “[L]ocal jurisdictions **must adopt and enforce ordinances which prohibit development approval** if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan, **unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development.**” RCW 36.70A.070(6)(b) (emphasis added).

levels are set forth in BMC 12.28.010 and described in detail in the City's CTP, which is referenced in BMC 12.28.010. *See* Appendices 7-8.

The City's concurrency ordinance, BMC 12.28.010(D), requires that where levels of service drop below adopted standards, then transportation improvements "***are required to be made concurrent with the development, or the development permit application shall be denied.***" (emphasis added). This language existed in BMC 12.28.010(D) even before the December 1999 amendments. App'x 7. On its face, this provision is an ordinance that requires the construction or improvement of street projects as a prerequisite to further property development. RCW 35.72.010; *see Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997) (when a statute is clear and unequivocal, a court is required to assume the Legislature meant exactly what it said and apply the statute as written). Further, the City's CTP specifically identifies improvements to George Hopper Road to accommodate future growth and property development. App'x 8 at 287, 300, 303. Thus, the City had ample ordinance-based support for conditioning Costco's development.

Comprehensive plans and enabling development regulations enacted pursuant to the GMA present a fundamentally different statutory scheme from the pre-GMA process found deficient in *Woodcreek*. Here, the City's comprehensive plan and concurrency ordinance not only meet

the plain requirements of RCW 35.72.010, they set forth specific conditions applicable to Costco's improvements to the George Hopper Road interchange, as articulated in the City's MDNS condition.

Another aspect of the GMA that distinguishes *Woodcreek* is the substantial notice and public participation that occurs throughout the comprehensive planning process. Specifically, the *Woodcreek* court was concerned that lack of an ordinance would fail to notify potential purchasers that property in the area may be subject to assessments. 69 Wn. App. at 7. The GMA, however, is structured to ensure public participation, and specifically requires notice for changes to comprehensive plans and development regulations. RCW 36.70A.140; RCW 36.70A.035(2)(a); RCW 36.70A.130(2)(a). The premise that Appellants (or Costco) would be blindsided by a lack of notice is simply not tenable under the scheme created under the GMA.<sup>15</sup>

While the *Woodcreek* decision remains relevant to interpreting the language and operation of chapter 35.72 RCW, its initial ordinance discussion fails to account for the planning scheme that has developed

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<sup>15</sup> Additionally, notice to adjacent property owners is a requirement of the City's development permit regulations. BMC 17.68.070(D)(4) (requiring posting of notice on site, publication in the City's monthly land use bulletin, and mailed notice to adjacent property owners within 600 feet of the project site for SEPA applications); *see also, e.g.*, CP 313 (describing public participation in adoption of Comprehensive Plan).

under the GMA. As the superior court held, the GMA has fundamentally changed the local planning process in this State, and the ordinances adopted by the City here and used to require Costco's improvements satisfy the plain requirements of RCW 35.72.010.

**3. The City's Substantive SEPA Authority Provides An Independent Basis For Upholding The Latecomers Agreement.**

The City's substantive SEPA authority provides another basis to uphold the latecomers agreement. This authority gives all levels of government the ability to condition or deny a proposal based on environmental impacts. WAC 197-11-660. Substantive authority is an essential part of SEPA and supplements the existing authority of all regulatory agencies. RCW 43.21C.060.

Here, the City has enacted policies and goals to exercise its substantive SEPA authority. BMC 15.12.160 (enacted by Ordinance 1309 §1 (1995)). Under subsection (D)(3), the City designated and adopted by reference other City policies, including the Burlington Municipal Code, as amended; the 1994 Burlington Comprehensive Plan, as amended; and the GMA, as amended. In addition, the City has adopted the State's GMA/SEPA integration procedures that require the City to use its comprehensive plan and development regulations to address environmental analysis and mitigation measures. BMC 15.12.010 (A).

GMA/SEPA integration, the adoption of GMA-mandated comprehensive plans, and GMA transportation concurrency requirements all post-dated the reimbursement agreement procedures at issue in *Woodcreek*. This GMA/SEPA integrated statutory scheme, which the City adopted by ordinance, provides an independent basis under the City's substantive SEPA authority for the conditions imposed in the Costco MDNS and satisfies the requirements of RCW 35.72.010.

**D. The Superior Court Properly Denied Summary Judgment When Appellants Did Not Prove There Is No Benefit From The Improvements.**

Finally, in a fourth motion for summary judgment, Appellants made the untenable assertion that there is zero benefit remaining from Costco's traffic improvements. Yet there can be no dispute that (1) Costco created increased traffic capacity at the interchange, and (2) the level of service at the interchange today is significantly above the level at the interchange prior to the Costco development. The only evidence Appellants identified in support of their motion was created years after the challenged City Council decision—and does not support their argument in any event. The superior court correctly denied summary judgment.

**1. Appellants Cannot Challenge The City's Decisions Regarding The Latecomers Agreement With Evidence That Did Not Exist When Those Decisions Were Made.**

In their fourth motion for summary judgment, Appellants point to excerpts from the City's 2010 Comprehensive Transportation Plan and a 2014 application to the Skagit Council of Governments for funding of additional improvements to the George Hopper Road/I-5 interchange. Appellants' Br. 27-28; CP 112, 135-46. Neither of these documents existed when the City adopted Resolution 13-2006 or held hearings on Appellants' appeal. Thus, they were not part of the record that was before the Council at the time it made its decision, and therefore they are not appropriately considered in this action.

Because Appellants sought review by writ, the trial court in this case was sitting in an appellate capacity. *Crosby v. County of Spokane*, 137 Wn.2d 296, 300-01, 971 P.2d 32 (1999); *KSLW ex rel. Wells v. City of Renton*, 47 Wn. App. 587, 595, 736 P.2d 664 (1986) ("In reviewing the action of an administrative body by writ of review, a trial court is acting in an appellate capacity, and has only such jurisdiction as is conferred by law." (citing *Deschenes*, 83 Wn.2d at 716)). The court's review was accordingly

limited to the record created before the administrative tribunal.<sup>16</sup> *Grader v. City of Lynnwood*, 45 Wn. App. 876, 879, 728 P.2d 1057 (1986) (citing *King County Water Dist. 54 v. King County Boundary Review Bd.*, 87 Wn.2d 536, 544, 554 P.2d 1060 (1976)); see also *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 788, 903 P.2d 986 (1995) (holding that, in reviewing a writ petition on a special use permit, “the superior court reviews only the administrative record below and takes no new evidence”) (also noting that such appeals must now be brought pursuant to LUPA<sup>17</sup>).

In addition to being outside the administrative record, the cited documents are not relevant. The last substantive City decision on the latecomers agreement occurred on October 8, 2009, when the City Council denied Appellants’ appeals. Subsequent events have no bearing on the Council’s prior determination. As explained by the court in *Abbenhaus v. City of Yakima*:

[T]he superior court should be considering the material presented to the city council and determining whether it adequately supports the action of the municipality. The superior court can perform this function properly and

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<sup>16</sup> Although there are limited exceptions where the writ petition “involves allegations of procedural irregularities or appearance of fairness, or raises constitutional questions,” *Responsible Urban Growth Grp. v. City of Kent*, 123 Wn.2d 376, 384, 868 P.2d 861 (1994), those exceptions do not apply here. Appellants’ allegations of such conduct were rejected by the superior court on Appellants’ first three motions for summary judgment.

<sup>17</sup> Indeed, the discovery provisions enacted in LUPA reflect this previous restriction applying to writs. See RCW 36.70C.120.

completely upon the basis of the record before the municipality. Review, therefore, is limited to the record of the proceedings before the municipality.

89 Wn.2d 855, 859, 576 P.2d 888 (1978).

The same is true here. The issue is whether the City acted within its authority in 2009, not whether circumstances have changed since then. From the time that notice of the proposed latecomers agreement was first delivered to Appellants in March 2007, to the first hearing in August 2007, to the second hearing in October 2009, Appellants had nearly two and half years to provide evidence and argument to the City Council on these issues. The development of other properties in the benefit area that Appellants complain of had already occurred by the 2009 hearing. *See* CP 149-53. The City heard the arguments and testimony of Appellants' counsel and even modified the benefit area to reduce Appellants' potential obligation for latecomers fees based upon that testimony. CP 227-28 (¶ 8), 239-43, 383 (¶ 6), 402 (¶ 4). Appellants should not be allowed now, several years later, to bring in new evidence that was not before the Council when it adopted Resolution 13-2006 or heard Appellants' appeal.

**2. The Undisputed Facts Demonstrate That Costco's Improvements Benefit The Properties Within The Assessment Reimbursement Area.**

Even considering their extra-record evidence, Appellants failed to meet their burden on summary judgment of proving there is no benefit

from Costco's traffic improvements. Appellants failed to present any testimony from a traffic expert, studies of current traffic conditions, or analysis of what the existing traffic conditions might be had Costco not completed the George Hopper Road interchange improvements.

Moreover, their "no benefit" theory was refuted by the testimony of Costco's traffic expert and supporting evidence. In short, Appellants failed to meet their burden of demonstrating the absence of a genuine issue of material fact. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 811, 828 P.2d 549 (1992).

(a) Costco's Improvements Continue To Benefit Appellants' Property And Other Properties In The Benefit Area As A Critical Component Of The City's Road Infrastructure.

The road improvements built by Costco created excess traffic capacity at the George Hopper Road/I-5 interchange and provide ongoing benefits as part of the City's road infrastructure. CP 226, 228-29 (¶¶ 4, 10-12). Traffic engineer David Markley has been involved in the Burlington Costco development since the late 1990s and has prepared a number of studies and analyses of traffic conditions for the project. CP 225-26 (¶¶ 2-3). His testimony refutes Appellants' contention that the improvements confer no benefit on Appellants' property. CP 226 (¶ 4).

In evaluating the benefit created by Costco's improvements, it is important to consider the road infrastructure previously in place. CP 228 (¶ 10). The City's MDNS required a number of improvements to the interchange, such as new traffic signals, additional storage lanes, road channelization, and adding an eastbound left turn lane at the northbound on-ramp. App'x 1 (MDNS condition #14); CP 228 (¶ 10). None of these improvements existed before Costco completed them, and each provides a continuing benefit in expanding and improving the City's road infrastructure. CP 228 (¶ 10). Mr. Markley testified that traffic conditions at the interchange would be significantly degraded over current conditions if, for example, the intersection continued to be controlled by stop signs or if the off-ramps had not been widened and channelized. CP 226 (¶ 4).

Moreover, had the improvements not been made by Costco, they would have needed to be incorporated into the road projects the City is currently planning (or be required of other private developers). CP 228-29 (¶ 11). Those projects would therefore be larger in scope and likely more expensive overall for the City to construct, due to factors such as inflation, higher construction costs in the current market, and the additional costs associated with public, as opposed to private, projects. *Id.* The same improvements Costco constructed in the early 2000s might now cost anywhere from 25 percent more to double the cost. *Id.*

Costco's improvements also provide predictable and safe access that is superior to prior conditions at the interchange improvements. CP 226 (¶ 4). For example, traffic signals—unlike the stop signs that previously existed at the interchange—provide further benefit in the predictability they offer that drivers will be able to proceed safely through an intersection, even if that intersection is handling a higher volume of traffic. CP 228-29 (¶ 11).

Appellants ask the court to ignore the benefits that Costco's improvements provide as a significant improvement to the City's road infrastructure. But they did not analyze or otherwise address what traffic conditions at the George Hopper Road interchange would be like without Costco's improvements; nor did they provide any expert analysis showing that the infrastructure improvements provide no benefit. Even if the City plans to further improve the interchange, that fact does not detract from the benefits of having Costco's infrastructure already in place. Indeed, the City's additional improvements are intended in part to "maintain, preserve and extend the life and utility of prior investments" in the City's transportation services. CP 137. Given the significant improvements Costco made to the City's road infrastructure, Appellants' bare argument that they receive absolutely no benefit from them is untenable and does not establish the absence of a genuine issue of material fact on this issue.

(b) Costco's Improvements Continue To Provide A Level Of Service That Far Exceeds Prior Conditions.

Appellants continue to assert on appeal that the level of service (“LOS”) at the George Hopper Road interchange is now not “acceptable” per City standards (Appellants’ Br. 28-29) and that the LOS at the interchange is now “*worse* than before Costco improved the I-5 exits” (Appellants’ Br. 23 (emphasis in original)). These statements are false and flatly contradicted by the record and Appellants’ own evidence.

The City’s level of service policy, as set forth in the excerpts Appellants provided to the superior court, is that “[t]he planned Level of Service is *not to exceed* Level of Service D except for the Burlington Boulevard corridor, which is not to exceed Level of Service E.” CP 141 (§ 3.1). This policy does not state that LOS D is unacceptable. In fact, with respect to intersection level of service, the City concluded:

Of the 29 City arterial-arterial intersections, there are three intersections that are estimated to be operating at LOS D. The remainder are estimated to be operating at LOS C or better. ***Thus, there are no deficient intersection LOS conditions for the existing City arterial system per the current LOS policy.***

CP 144 (final paragraph of § 3.2) (emphasis added). And, of the three intersections involving the George Hopper Road/I-5 interchange, only the southbound ramps were operating at LOS D; the northbound on- and off-

ramps were operating at LOS A and LOS B, respectively. CP 143; *see also* CP 229 (¶ 12).

Appellants' assertion that the LOS at the interchange is now worse than it was before Costco made the improvements—a statement made without any citation—is likewise contradicted by the record. As set forth in the traffic study prepared for Costco's proposed development, the interchange was functioning at LOS F before the improvements. CP 413-14 (also Record 9 of the Certified Record on Review). Even assuming, for purposes of argument, Appellants' allegation that the interchange currently functions at LOS D, that LOS is *better* than the one that existed prior to the installation of Costco's traffic improvements. CP 226 (¶ 4). And, as noted above, without Costco's improvements, the levels of service would be worse than currently rated, with more expansive improvements being required to meet the same standards. CP 229 (¶ 12).

Finally, even assuming an LOS D, there is still capacity remaining and benefit to be derived from the Costco improvements. CP 229 (¶ 12). This remaining capacity was confirmed in a May 2011 memorandum prepared by TSI. CP 228 (¶ 9), 245-50.<sup>18</sup> TSI concluded that "capacity is currently available to accommodate additional traffic volumes generated

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<sup>18</sup> While review should be limited to the administrative record, if the court considers Appellants' additional evidence, it should consider Costco's as well.

by potential future development.” CP 246. This analysis was done after the City’s 2010 Comprehensive Transportation Plan was adopted.

Appellants did not meet their burden of establishing that they receive no benefit from Costco’s transportation improvements, and their fourth motion for summary judgment was properly denied.

## **VII. CONCLUSION**

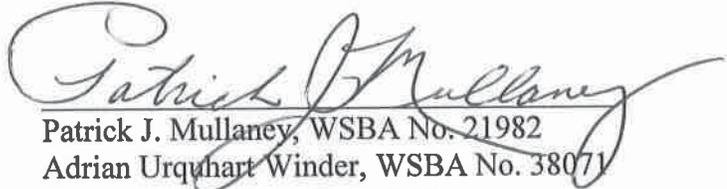
The City Council’s October 8, 2009 decision to deny Appellants’ appeal of the proposed latecomers agreement between the City and Costco was a determinative and final land use decision. Appellants’ belated lawsuit, filed in April 2011, was properly dismissed as untimely, whether considered under LUPA or under a writ or declaratory judgment framework.

While this court need not address Appellants’ four motions for partial summary judgment, each of those orders was likewise proper. Appellants failed to meet their burden of showing that the law and undisputed facts entitled them to judgment as a matter of law.

This court should affirm the orders of the superior court.

RESPECTFULLY SUBMITTED this 5th day of February, 2016.

FOSTER PEPPER PLLC

A handwritten signature in cursive script, reading "Patrick J. Mullaney", written over a horizontal line.

Patrick J. Mullaney, WSBA No. 21982

Adrian Urquhart Winder, WSBA No. 38071

1111 Third Avenue, Suite 3400

Seattle, Washington 98101

Telephone: (206) 447-4400

*Attorneys for Respondent Costco Wholesale  
Corporation*

# Appendix 1

## CITY OF BURLINGTON

### MITIGATED DETERMINATION OF NONSIGNIFICANCE

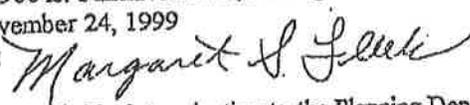
Description of Proposal: Construct 154,762 square foot Warehouse sales facility (including tire installation center), a vehicle fueling facility (members only), customer parking, and landscaping, on a site of 17+ acres.  
Proponent: COSTCO, Inc. , represented by Mulvanny Architects  
Location of Proposal: 1763 South Burlington Boulevard  
Lead agency: City of Burlington

The lead agency for this proposal has determined that it does not have a probable significant adverse impact on the environment. An environmental impact statement (EIS) is not required under RCW 43.21C.030(2)(c). This decision was made after review of a completed environmental checklist and other information on file with the lead agency. This information is available to the public on request. This determination is subject to the following conditions:

1. Comply with Title 14, surface water management standards for temporary construction and long term runoff quantity and quality.
2. A signalized intersection with left turn lane shall be provided at the entry drive from George Hopper Road prior to occupancy.
3. A right turn acceleration lane shall be constructed on George Hopper Road from the Costco entry westerly, if required by the City Engineer, prior to occupancy.
4. A new sidewalk shall be installed along the George Hopper Road frontage at the Skagit Transit Park and Ride lot, matching the Burlington Boulevard configuration and tied into the existing Burlington Boulevard sidewalk, prior to occupancy.
5. A signalized intersection shall be provided at the Costco drive from Burlington Boulevard generally aligned with the old McCorquedale intersection.
6. Deeded access easements shall be recorded at specific locations to all properties that abut the new drives (north-south and east-west), prior to occupancy.
7. The new Costco drives will not be required to be public road dedications. Access will be granted by easements as provided in #7 above, shown on plans submitted prior to permit issuance.
8. Costco will coordinate emergency vehicle access requirements to the south side of the Outlet Mall parking area with the City and the Outlet Mall, prior to obtaining a construction permit. An easement for emergency vehicle access between the two sites shall be executed, and a driveway access shall be constructed with adequate area and turning radii to preclude conflicts with loading access to the Outlet Mall stores.
9. Provide evidence of coordination with owner of Pet's-R-Us site on east side of Burlington Boulevard.
10. All new traffic signals shall be interconnected using overhead or underground lines with existing signal equipment.
11. Landscaping and maintenance standards shall be met.
12. Comply with recommendations of Design Review Board and Planning Commission.

13. Costco will participate in the future work required to install a right turn lane from Burlington Boulevard onto George Hopper Road, based on a letter of understanding between Costco and the City of Burlington completed prior to building permit issuance. Completion of this requirement will not be linked to occupancy.
14. The following traffic mitigation measures shall be completed through an agreed upon process over the next two years. 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:
- Construct a new signal at the southbound I-5 on and off ramps.
  - Re-stripe to construct a short westbound left-turn pocket reinforcing the traveled portion on the shoulder as needed.
  - Provide more storage lanes on the southbound off ramps.
  - Channelize the south leg of the northbound off-ramp for separate right and left turn lanes.
  - Add an eastbound left-turn lane at the northbound on-ramp; use a short lane
  - Construct traffic signal at the northbound off-ramp.

This DNS is issued under 197-11-340(2); the lead agency will not act on this proposal for 14 days from the date below.

Responsible Official: Margaret Fleek  
Position/Title: Planning Director  
Address: 900 E. Fairhaven Ave., Burlington, Washington 98233  
Date: November 24, 1999  
Signature: 

You may appeal this determination to the Planning Department at 901 East Fairhaven Avenue, Burlington, WA 98233. Appeals must be in writing and filed no later than December 7, 1999. You should prepare to make specific factual objections. Contact the Planning Department to read or ask about the procedures for SEPA appeals.

DECEMBER 1, 1999 ADDENDUM TO

CITY OF BURLINGTON

MITIGATED DETERMINATION OF NONSIGNIFICANCE

The attached Mitigated Determination of Non-Significance dated November 24, 1999 for the construction of a 154,762 square foot COSTCO, Inc. facility, copy attached, is hereby clarified as follows:

The City of Burlington will initiate a payback agreement with COSTCO, Inc. to enable the applicant to design and complete the traffic mitigation measures described in Condition #14 in a timely manner.

The Washington State Department of Transportation has made a verbal commitment to assist in expediting the review and approval of the required improvements identified in Condition #14, in order to preclude any potential for traffic back-ups onto northbound I-5 during peak hours. Following consultation with WSDOT, the following plan of action is the required approach to achieve timely mitigation:

- Prior to moving forward with the detailed design, the applicant's design engineer shall hold a pre-design meeting with the Department of Transportation, to come to early agreement on the geometry of the improvements, which will facilitate the early ordering of signals and equipment.
- The fully engineered and complete design drawings, and the biological assessment (required for any work on the federal highway including signals, under the Endangered Species Act) shall be submitted as soon as possible to WSDOT for review and approval. The applicant is required to pay for WSDOT review time, through the WSDOT accounting system.
- All required installations including signals, additional lanes and related elements shall be complete and on line by the time of occupancy, unless delayed by the biological assessment or equipment delivery. If there are delays, interim measures shall be required to mitigate potential traffic back-ups onto I-5, such as providing temporary striping for a double lane at the northbound off-ramp, or a combination of measures to be determined by the City Engineer in consultation with WSDOT.

Responsible Official: Margaret Fleek  
Position/Title: Planning Director  
Address: 900 E. Fairhaven Ave., Burlington, Washington 98233  
Date: December 2, 1999  
Signature:

# Appendix 2

## RESOLUTION 13 - 2006

WHEREAS, COSTCO WHOLESALE CORPORATION (referred to hereinafter as "COSTCO") has constructed a wholesale consumer warehouse on Burlington Boulevard immediately north of George Hopper Road, and pursuant to the City's applicable development regulations, was required to install certain offsite road, sidewalk, lighting, and traffic control improvements at COSTCO's expense; and

WHEREAS, such improvements constructed by COSTCO included improvements to the I-5 on-ramps on George Hopper Road; the construction of a southbound right turn lane on Burlington Boulevard; and the installation of a traffic signal at the I-5 on ramps; and

WHEREAS, the improvements will benefit other property owners who subsequently develop their properties; and

WHEREAS, COSTCO retained Transportation Solutions, Inc., for the purpose of preparing an analysis of the traffic improvements constructed by COSTCO; the future traffic growth anticipated in southern Burlington; and a methodology to distribute costs incurred by COSTCO in constructing the improvements between COSTCO and future developments; and

WHEREAS, in accordance with Chapter 35.72 RCW, COSTCO has requested the City to establish a latecomers assessment reimbursement area so that COSTCO may recover costs incurred by COSTCO in excess of its proportionate share of the street improvements described hereinabove, and

WHEREAS, in reliance on the analysis prepared by Transportation Solutions, Inc., the Burlington City Council has formulated an Assessment Reimbursement Area pursuant to RCW 35.72.040, comprised of those parcels near the COSTCO improvements that would require similar street improvements upon development; Now, Therefore,

**BE IT RESOLVED BY THE COUNCIL OF THE CITY OF BURLINGTON:**

That pursuant to Chapter 35.72 RCW, a preliminary Assessment Reimbursement Area is hereby established consisting of those properties identified in the attached Exhibit "A," which

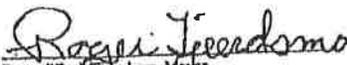
properties would require similar street improvements to the ones referenced above and installed by COSTCO upon development of the properties identified in Exhibit "A."

BE IT FURTHER RESOLVED that a preliminary determination of area boundaries and assessments, along with a description of the affected property owner's rights and options, shall be forwarded by certified mail to the property owners of record within the proposed assessment area. Such notice shall comply with the provisions of RCW 35.72.040 (2).

BE IT FURTHER RESOLVED that if any property owner requests in writing a hearing within twenty (20) days of the date on which such notice is mailed, then a hearing shall be held before the City Council on such challenge. Notice of such hearing shall be delivered by first class mail to all affected property owners. The City Council's determination shall be final.

BE IT FURTHER RESOLVED that the Mayor is hereby authorized to enter into an assessment reimbursement agreement with COSTCO, which agreement shall be substantially in the form of the proposed agreement on file in the office of the City Administrator. After execution by the City and COSTCO, the City Attorney is hereby authorized to record the document with the Skagit County Auditor.

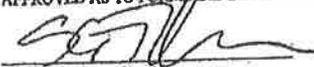
CITY OF BURLINGTON

  
Roger "Gus" Tjerdema, Mayor

ATTEST:

  
Richard Patrick, Finance Director

APPROVED AS TO FORM AND LEGALITY:

  
Scott G. Thomas, City Attorney

# Appendix 3

COUNCIL CHAMBERS

CITY HALL

BURLINGTON, WA

October 8, 2009

CALL TO ORDER:

Mayor Bruiz called the meeting to order at 7:00 p.m., with the Pledge of Allegiance. Council members present: Aslett, Bensen, Doyle, Edmundson, Loving, Montgomery and Valentine. Staff present: Buckholz, Cavanaugh, Fleck, Martin, Sheahan, Stafford, Thomas, Thramer, VanWieringen, Burwash, Jewett, Floyd and Blair.

APPROVAL OF MINUTES:

A motion was made by Councilors Loving/Valentine to approve the minutes of the September 24, 2009 Council meeting. All agreed. Motion carried.

AUDIT OF BILLS:

Councilor Aslett presented the bills. A motion was made by Councilors Aslett/Edmundson to approve vouchers 56449 - 56557 in the amount of \$137,696.64. All were in favor. Motion carried.

Current Expense	\$ 34,556.60
Current Expense Cumulative Reserve	224.00
Fire Equipment Cumulative Reserve	958.48
City Street	11,580.11
Hopper Construction Fund	740.00
Library	5,908.37
Cemetery Fund	264.61
Stadium Fund	18,601.19
Park & Recreation Reserve	4,186.27
Sewer Fund	21,109.19
Sewer Cumulative Reserve	26,531.15
Storm Drainage Utility	8,984.43
<b>Total</b>	<b>\$ 137,696.64</b>

PUBLIC COMMENTS:

There were no public comments.

OFFICER REPORTS:

Police Chief VanWieringen reported on the sale of surplus cars. All five vehicles have been sold, the city will receive about 70% of sale price from the auction company.

Planning Director Fleek reported that the Planning staff is continuing to review the sign code and expect to bring it back to council next month for consideration.

Councillor Aslett asked Planning Director Fleek to check the location of a wayfinding sign located on Fairhaven near the Canton Restaurant. He indicated the sign may not be close enough to the intersection to be clearly understood.

Chris Loving asked to be excused from the next council meeting (October 22, 2009).

City Attorney Thomas distributed a draft of an ordinance regarding possible reduction in pay for Council members. He stated that the ordinance would allow council members to decline a portion of their pay with the provision that the portion of the pay declined

COUNCIL CHAMBERS

CITY HALL

BURLINGTON, WA

October 8, 2009

would be directed to a specified fund. He suggested a Library fund be selected along with a request from the Friends of the Library provide matching funds for purchase of books. He noted that the council cannot change their wages during current terms, but after consultation with Municipal Research and the Internal Revenue Service it was determined the draft ordinance would provide the legal mechanism to reduce pay. Councillor Aslett noted that he asked personnel at the Internal Revenue Service the same question and received the same answer as City Attorney Thomas. City Attorney Thomas stated both council member and their spouse would have to sign an authorization for pay to be redirected to another city fund. Unless he hears any objections, he will bring the ordinance to the next council meeting for consideration.

#### SPECIAL REPORT:

Ms. Lisa Swanson, Burlington Chamber of Commerce, reported that Harvest Festival was very successful with more people attending than in past years. The Pumpkin Pitch had 16 competitors. The Chamber's membership emphasis this time of year is on retaining members into the next year. She noted there were five new members this month. The new Chamber website should be live within the month. Visitor Information Center staff member is working hard. Walk-in visitors and phone contacts are higher than same time last year.

#### UNFINISHED BUSINESS:

##### COSTCO LATECOMERS AGREEMENT.

City Attorney Thomas stated that this will be handled as a land use issue. He presented a brief history of the Costco development from 2004 forward to present. Traffic count calculations in the agreement will be used for future developers to determine the amount of pay-back fees. He noted that the fees will be due at time of issuance of a building permit. Councillor Edmundson asked about new businesses who established after Costco or those that might come into vacant buildings. City Attorney Thomas noted that new business already in place will not be required to pay a reimbursement fee. A new business that comes in to an existing building after this agreement would only be required to pay if they remodeled so that they would generate additional traffic trips beyond the business that occupied the building prior to the new business. He stated that a latecomer's agreement would be in effect for fifteen (15) years.

Mr. Melaney, of Foster Pepper Law Firm representing Costco, asked that the appeals be denied. He went on to describe the history of the process. He noted a two year delay (2007 to now) has not been the fault of Costco and thus developments that have happened in the past two years will not pay fees to help Costco recover their development costs. He noted that Costco will not recover any fees if there is no new development following execution of the agreement.

Mr. David Markley, Transportation Solutions Incorporated, described the traffic count studies that were developed prior to and following construction of Costco. He noted the study done prior to construction was not done by his firm, but he did state that their study of actual traffic counts done following development confirmed traffic count estimates projected in the study done prior to Costco development. He noted that his firm has done several studies for other reasons in the same area and the Costco traffic counts in their study are confirmed. He noted concerns about possible expansion of the Costco fuel station. If that happens, Costco would pay latecomer fees for any additional development. Councillor Loving asked why buildings developed since Costco but prior to the latecomers agreement won't have to pay. Mr. Markley explained the details of a latecomers agreement. Mayor Brunz asked if a very big business moved into the area, might they have to pay all the fees. Mr. Markley explained how the fees would be repaid by various developers.

Mr. Brad Furlong, 825 Cleveland Avenue, Mount Vernon, representing the Nagatani Partnership reminded folks that the Nagatanis had been farmers in the City of Burlington

COUNCIL CHAMBERS

CITY HALL

BURLINGTON, WA

October 8, 2009

area since the 1940's. The City grew up around them and with no male heirs, the 62 acres of property is in trust. He noted that Costco has made several million dollars in revenue over the past few years. He suggested that Costco, in a deal with another developer, now wants to impose fees on other property owners. He suggested that the Council reject the latecomers agreement. He talked about numbers of trips and trip capacity. He noted the tremendous amount of development in Burlington Crossings and across from Burlington Boulevard totalling 513,000 square feet of additional retail area. He believes all the capacity available has been consumed by the development already constructed since Costco. He talked about possible development of the Nagatani property. He complimented the City Attorney and Planning Department but noted the City ordinances are out dated. He noted the uncertainty for owners of undeveloped property relating to the possible change of flood elevations by FEMA.

Mr. Tom Moser, 411 Main Street, Mt. Vernon, representing the Vern Sims and X families who own property along Goldenrod Road. He noted that when the traffic studies were done, the bridge on Goldenrod Road had not been constructed. He noted his disagreement is not with Costco, but rather with the issue of the latecomers agreement itself. He stated it has been ten years since Costco came to town and it is too late now to ask the remaining property owners to pay.

Mr. John Ravnik, representing Ms. Sandra Coons (owner of the Cocusa Motel) distributed a document requesting a change to their TAZ designation. He noted that the Cocusa Motel customers cannot get to the motel by exiting Interstate 5 at Hopper Road; they must exit at State Route 20.

Mr. Mark Osborne, Warren Jewelers on Burlington Boulevard, asked that the city not enter into a latecomer's agreement. He noted there are several property owners not represented here tonight that should not be burdened with this development fee. He asked the city council to reject the agreement.

Rebuttal/response by Mr. Melany stated that Costco is a member of this community just as other citizens and business. Costco pays 1 million dollars in sales tax to the City, which is 1/6 of the city's annual sales tax revenue. Costco employs 250 people and provide benefits to those employees. He noted that the Revised Code of Washington (RCW) allows the recovery of development impact costs. Councillor Loving asked why the reimbursement amount cannot be reduced based on the other developments in place since Costco. Mr. Osborne explained why the repayment amount does not change, but it cannot be imposed on developments prior to the date of the agreement. It is imposed upon a certain pool of properties. He stated that he has no problem changing the TZA for Mr. Moser's client and for Mr. Ravnik's client.

Mr. Markley, Transportation Solutions. He noted that while the improvements increased by 655 trips, there was a number of trips in the location already in place. He restated that existing businesses will not be affected by these fees in the latecomers agreement; only new developments. He clarified why the existing businesses cannot be included in this agreement.

Mr. Furlong reviewed his argument against the latecomer's agreement. He noted Costco makes a lot of money and really has no need to be reimbursed for the \$1 million by requiring property owners to pay Costco for traffic capacity that is no longer available.

City Attorney Thomas outlined the following procedure and asked that council provide verbal discussion and decision. Councillor Loving asked if the latecomer's agreement could be tossed. City Attorney Thomas clarified that the decision before council tonight is to approve the appeal of the four property owners here tonight by removing them from the assessment area or not. Following a decision by Council he will prepare Conclusions of Law and Findings of Fact and bring it to Council at the next regular meeting. Following that, the Council would consider the latecomer's agreement.

Councillor Aslett suggested an executive session regarding possible litigation - to have a few questions answered prior to a council decision. The Mayor and Council adjourned to executive session at 8:36 p.m. The Mayor and Council returned at 8:49 p.m.

COUNCIL CHAMBERS

CITY HALL

BURLINGTON, WA

October 8, 2009

A motion was made by Councilors Bensen/Edmundson to deny the appeals of the property owners regarding the COSTCO Latecomers Agreement. Voting in favor were Councilors Bensen, Valentine, Aslett, Montgomery, Doyle and Edmundson. Voting against was Councilor Lovlug. Motion carried.

NEW BUSINESS:PROPOSED 2010 – 2015 CAPITAL IMPROVEMENT PLAN.

Planning Director Fleek stated that the Planning Commission conducted a public hearing on September 16, 2009 regarding the proposed Capital Improvement Plan. A motion was made to recommend adoption of the plan, and to send a letter to the Mayor and City Council to further explain the concerns and priorities of the Planning Commission. Following the public hearing, a letter expressing concerns about setting priorities for residential streets, community connections and park maintenance was sent to the Council and the Mayor. She noted a request by Parks & Recreation Director Cavanaugh to include a hose reel for Skagit River Park that is being recommended for partial funding through the use of Lodging Tax Funds. The cost of the water cannon reel is \$28,500, Lodging Tax Funds would pay for \$20,000 of the total. A motion was made by Councilors Aslett/Montgomery to approve the resolution adopting the 2010 – 2015 Burlington Capital Improvement Plan. All agreed. Motion carried.  
(Resolution 16 – 2009)

PROPOSED AMENDMENTS TO CRITICAL AREAS ORDINANCE FOR FLOOD HAZARD AREAS.

Planning Director Fleek stated that the Federal Emergency Management Agency (FEMA) conducted a Community Assistance Visit and asked that the Flood Hazard Area standards be updated to include definitions of basement, substantial damage, and that specific section be added on interpretations of the Flood Insurance Rate Maps. The City has also been discussing options for infill development with Tom Carlson, who lives next to Gages Slough and would like to add one or two more residences to the site. FEMA has reviewed the proposal and is in agreement with the proposed language. Minor cleanup is also included, updating the location of city hall and the reference to the International Building Code. A motion was made by Councilors Aslett/Lovlug to adopt amendments to Burlington Municipal Code Chapter 15.15 Critical Areas. All agreed. Motion carried.  
(Ordinance # 1683)

LODGING TAX ADVISORY COMMITTEE RECOMMENDATION FOR 2010 FUNDS.

Finance Director Thramer stated that there were twenty-one (21) requests for lodging tax funds amounting to \$343,656. The advisory committee recommends funding \$259,350 (\$141,350 from 2010 revenues and \$118,000 from lodging tax fund reserves). A motion was made by Councilors Valentine/Edmundson to adopt the Lodging Tax Advisory Committee recommendation for 2010 funding in the amount of \$259,350. All agreed. Motion carried.

ORDINANCE TO AMEND THE 2009 BUDGET ORDINANCE AS A RESULT OF A GRANT AWARD TO THE CITY.

Finance Director Thramer stated that the City received a FEMA grant in 2009 in the amount of \$132,205 for the purchase of self-contained breathing apparatus. This grant was not included in the original 2009 budget. By adopting this ordinance, the City will effectively increase the budget authority in the Fire Reserve Fund to cover this purchase. A motion was made by Councilors Bensen/Aslett to approve the ordinance to amend the 2009 Budget Ordinance #1676. All agreed. Motion Carried.  
(Ordinance #1684)

# Appendix 4

COUNCIL CHAMBERS

CITY HALL

BURLINGTON, WA

February 10, 2011

CALL TO ORDER:

Mayor Brunz called the meeting to order at 7:00 p.m., with the Pledge of Allegiance. Council members present: Bieche, Edmundson, Loving, Sexton and Valentine. Staff present: Accro, Ackermann, Buckholz, John Burt, Carroll, Dempsey, Erickson, Fleck, Hodgins, Kinney, O'Hara, Rabenstein, Sheahan, Stafford, Thomas, Thruener, Tingley, and VanSickle.

A motion was made by Councilors Edmundson/Bieche to excuse Councilor Montgomery and Councilor Aslett from tonight's meeting. All agreed; motion carried.

MINUTES:

A motion was made by Councilors Loving/Edmundson to approve the minutes of the January 27, 2011 Council meeting. All agreed. Motion carried.

AUDIT OF BILLS:

Councillor Sexton presented the bills. A motion was made by Councilors Sexton/Loving to approve vouchers 59692 - 59795 in the amount of \$127,213.69. All were in favor. Motion carried.

Current Expense	\$ 68,019.21
Current Expense Cumulative Reserve	46.17
Fire Equipment Cumulative Reserve	215.93
City Street	5,336.81
Library	6,351.00
Parks & Recreation	4,578.91
Cemetery Fund	111.84
Stadium Fund	8,452.57
Sewer Fund	32,476.34
Storm Drainage Utility	1,624.91
<b>Total</b>	<b>\$ 127,213.69</b>

SPECIAL REPORT:

Ms. Linda Fergusson, Executive Director Burlington Chamber of Commerce, presented an overview of the January chamber and Visitor Information Center activities. She reported that the Chamber is supporting the efforts of the outlet Shoppes in procuring charging stations for electric vehicles from Washington State Department of Transportation.

PUBLIC COMMENTS:

There were no public comments.

OFFICER REPORTS:

Recreation Coordinator Kinney reported the success of the Daddy/Daughter sweetheart dance held at the community center this past weekend. She noted that she has had many positive comments from participants. She invited council members to an open house at

COUNCIL CHAMBERS

CITY HALL

BURLINGTON, WA

February 10, 2011

the Recreation Center (900 E. Fairhaven) on Saturday February 12<sup>th</sup>. The program features the current computer animation class. She reported that in 2010 there were 2,400 receipts issued for enrollment in city recreation activities. She noted that this does indicate total participants, only number of receipts.

Councillor Loving reported that the historical board has acquired an antique barber chair that had been used in the barber shop of the Commercial Hotel. The plan is to have it reupholstered and then put on display at City Hall.

City Attorney Thomas reminded Council members that the Economic Development Association of Skagit County Annual Economic Forecast Dinner is the evening of Thursday February 17<sup>th</sup>.

**CONSENT AGENDA:**

- 1) Agreement with Northwest Agriculture Business Center for 2011 Lodging Tax Funds.
- 2) Agreement with Skagit Valley Symphony for 2011 Lodging Tax Funds.
- 3) Agreement with Skagit County Community Action Agency for 2011 services.
- 4) Agreement with McIntyre Hall Performing Arts and Conference Center for 2011 Lodging Tax Funds.

A motion was made by Councillors Loving/Valentine to approve consent agenda items #1-4. All agreed; motion carried.

**UNFINISHED BUSINESS:**

**COSTCO LATECOMER'S AGREEMENT FINDINGS OF FACT, CONCLUSIONS OF LAW.**

City Attorney Thomas stated that on October 8, 2009, the city council heard protests to a proposed latecomer's agreement with COSTCO, Inc. The latecomers agreement would apportion some \$1.7 million in expenses incurred by COSTCO to install traffic improvements. The improvements allowed 685 additional vehicle trips to move through the George Hoper/I-5 interchange, resulting in a charge of \$2,494 per trip. COSTCO's share of these improvements is \$638,617.60 (256 trips), and the remaining costs would be paid back to COSTCO by subsequent development constructed over the next 15 years. He noted that the proposed Findings and Conclusions regarding the COSTCO Latecomers agreement addresses the issues presented on October 8, 2009. He noted that although the public hearing has already been held, two parties have requested a time to speak to council members this evening. Mayor Brunz asked council if they wished to hear from the two parties. Council members indicated they would like to allow the parties to speak. Mr. Brad Furlong (representing the Nagatani family, owners of 62 acres) noted that two council members are new and did not participate in the public hearing of 2009. He stated his belief that it is unlawful for different council members to make this decision. He requested a new public hearing. He stated that the issues raised by the Nagatani's at the public hearing are not addressed in the Findings of Fact, Conclusions of Law. Mr. Tom Moser representing the Gilbert and Sims families, property owners along Goldenrod Road north of Sims Honda, stated his agreement with comments by Mr. Furlong. He asked the council to reconsider and to hold a new public hearing to address this issue. A motion was made by Councillors Loving/Edmundson to approve the Findings of Fact, Conclusions of Law as presented. All agreed; motion carried.

**NEW BUSINESS:**

# Appendix 5

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BEFORE THE CITY COUNCIL FOR THE CITY OF BURLINGTON

RE: Costco Wholesale Corporation Latecomer's Agreement	
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I. PROCEDURAL HISTORY

1. On November 24, 1999, the City of Burlington issued a Mitigated Determination of Non-significance for the construction of a 154,762 square foot warehouse sales facility on 17 acres, to COSTCO Wholesale, Inc.

2. On December 7, 1999, Dan R. Mitzel appealed the MDNS. The matter was set for hearing on January 25, 2000.

3. On January 24, 2000, the City of Burlington, Costco, and Dan Mitzel entered into a settlement agreement, resulting in the dismissal of claims brought by Dan Mitzel. 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

1 enter into a latecomer's agreement with COSTCO would be modified, to provide that  
2 COSTCO could seek a latecomer's agreement with the City.<sup>1</sup>

3  
4 4. The post occupancy traffic study was completed, and the results submitted to the  
5 City by letter dated March 7, 2002, from Peter Kahn of COSTCO.

6 5. Costco received a temporary certificate of occupancy on August 1, 2000

7  
8 6. On July 13, 2006, the Burlington City Council adopted Resolution No. 13-2006,  
9 authorizing the mayor to enter into an assessment reimbursement (latecomers)  
10 agreement with COSTCO. Resolution No. 13-2006 established a preliminary  
11 Assessment Reimbursement Area, consisting of those properties situated such that  
12 additional development would utilize the improvements installed by COSTCO. Further,  
13 the Resolution directed that notice be given to affected property owners as provided by  
14 the Resolution directed that notice be given to affected property owners as provided by  
15 law.

16  
17 7. Pursuant to RCW 35.72.040, on March 14, 2007, notice was given by certified  
18 mail to the owners of property situated within the preliminary assessment  
19 reimbursement area. The owners of record, and their mailing addresses, was  
20 determined by COSTCO through examination of tax records, and a spreadsheet  
21 showing the owners and their addresses provided to the City. The notice advised the  
22 property owners that the City was considering an assessment reimbursement contract  
23 with COSTCO, the boundaries of the preliminary assessment area, and the right of  
24 property owners to request a hearing before the City Council.  
25  
26

27 8. The City received notice from 19 property owners, who requested a hearing  
28 before the City Council. Of those 19 requests, 12 owners either withdrew their  
29

30 <sup>1</sup> Settlement Agreement, ¶ 7.

1 requests or did not appear at hearing. Those property owners who filed a timely  
2 appeal include the following:

- 3  
4 i. Tom Moser, Esq., on behalf of Vern Sims and the Gilbert Family  
5 ii. John Ravnik, on behalf of Sandra Coons and the Cocusa Motel  
6 iii. Ragnar Pettersson, Park Pettersson, on behalf of Valley Cadillac  
7 iv. John Martin, on behalf of Pacific Pride  
8 v. Dan Mitzel  
9 vi. Mark Osborn  
10 vii. Don Johnson  
11 viii. Brad Furlong, on behalf of Nagatani Brothers, Inc.,

12  
13 9. The City provided notice that a hearing had been requested by one or more  
14 property owners, to all property owners with property situated within the preliminary  
15 assessment area by regular mail.

16  
17 10. David Day, Esq., appearing on behalf of Mary Thramer and the Estate of  
18 Bill Thramer, verified prior to the date of the hearing that their property was situated  
19 North of Highway 20, and therefore outside of the preliminary assessment area.

20  
21 11. Brad Furlong, appearing on behalf of Nagatani Brothers, Inc., contacted  
22 the City seeking additional information; all of the information was not provided by the  
23 City in a timely fashion, and by agreement between Mr. Furlong and the City Attorney  
24 Nagatani Brothers' appearance at the August 23, 2007 hearing was continued to a  
25 later date such that Nagatani Brothers waived no rights under its appeal (which was  
26 later heard on October 8, 2009.)

27 12. That hearing took place on August 23, 2007.

28 13. That hearing was continued, to October 8, 2009. At that time, six  
29 individuals who had requested a hearing appeared:

- 30 i. Tom Moser, Esq., on behalf of Vern Sims and the Gilbert Family  
ii. John Ravnik, on behalf of Sandra Coons and the Cocusa Motel



1 ii. widened southbound approach to accommodate a dedicated left turn  
2 lane;

3 iii. Signalized the intersection.  
4

5 *B. George Hopper Road at I-5 Northbound Off-ramp:*

6 i. Added an extended northbound left turn lane;

7 ii. Signalized the intersection;  
8

9 *C. George Hopper Road at I-5 Northbound On-ramp:*

10 i. Signalized the intersection.<sup>3</sup>

11 5. Cost of Improvements. Costco constructed interchange improvements at a cost  
12 of \$1,708,799.00.

13  
14 6. Additional trips added to interchange. The Post Occupancy Traffic Study showed  
15 that 685 additional vehicle trips would be accommodated through the George Hopper  
16 interchange with I-5 during the p.m. Peak hour.<sup>4</sup>

17  
18 7. Cost per additional vehicle trip. The cost of the improvements installed by  
19 COSTCO divided by the number of additional vehicle trips is  $(\$1,708,799) / (685 \text{ new}$   
20  $\text{trips}) = \$2,494.60 \text{ per trip.}^5$

21  
22 8. COSTCO Trips. The Latecomer's Agreement Study showed that 256 of the 685  
23 additional vehicle trips would be utilized by COSTCO. Thus, COSTCO \$638,617.60 of  
24 the costs of the improvements should be allocated to COSTCO, and the balance of the  
25

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29 <sup>3</sup> January 23, 2004 letter from David Markely, P.E., Transportation Solutions, Inc., to Peter Kahn,  
COSTCO Wholesale.

30 <sup>4</sup> May 13, 2002 letter from David Markely, P.E., Transportation Solutions, Inc., to Peter Kahn, COSTCO  
Wholesale.

<sup>5</sup> Id.

1 cost of the improvements (429 vehicle trips) may be allocated to other developments to  
2 be paid through the Latecomer's Agreement.<sup>6</sup>

3 9. Allocation of Trips. Burlington has previously developed a traffic model, which  
4 predicted the percentage of traffic for various traffic analysis zones throughout the City;  
5 these zones are identified in Exhibit 2. The model for latecomer's cost allocation  
6 proposed by COSTCO's traffic consultant limits fee collection to those TAZ's situated in  
7 the southern portion of the City, reflected by TAZ's 10,11, and 13 – 44.<sup>7</sup> Those TAZ's  
8 situated outside of the City are excluded.

9 11. Notice Provided to Property Owners. In accordance with the provisions of RCW  
10 35.72.040, the City provided notice, by certified mail, to the owners of record of the  
11 properties situated within the proposed reimbursement area.

12 12. Completion of Goldenrod Road. Goldenrod Road, which extends from TAZ 18  
13 through TAZ 25, has been completed subsequent to the COSTCO's post occupancy  
14 traffic study with the installation of a bridge across Gages Slough. The completion of  
15 this roadway provides an alternative route to access I-5 for those properties situated  
16 within TAZ 25 (i.e., by entering the newly-completed Highway 20 interchange), and  
17 avoiding the George Hopper/I-5 interchange.

18 13. Vern Sims and the Gilbert Family argued that the completion of Goldenrod Road  
19 alters the traffic analysis, and that it is therefore appropriate to assign those properties  
20 situated North of McCorquedale Road (currently, parcel numbers P24066, P115546,  
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<sup>6</sup> Id.

<sup>7</sup> Letter of January 23, 2004 from TSI to Peter Kahn.

1 P115546, P24062, P24065, P116150, P117699, P107761, and P24064) to TAZ 18.

2 COSTCO agreed to revise the TZA's to reflect the completion of Goldenrod Road.

3  
4 14. Nagatani Brothers, Inc., argued that (1) all excess capacity provided by the  
5 COSTCO improvements has been utilized, particularly by COSTCO itself, but also by  
6 other developments; (2) the ordinance adopted by the City is insufficient to require  
7 reimbursement pursuant to RCW 35.72.010; (3) the City and COSTCO have failed to  
8 execute a contract requiring reimbursement; and (4) Nagatanis have not been advised  
9 of their proportionate share of the improvement costs, thus resulting in improper notice.  
10

### 11 III. CONCLUSIONS OF LAW

12 Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

13 The City Council makes the following conclusions of law from the foregoing findings of  
14 fact:  
15

- 16 1. Authority of City Council. Pursuant to RCW 35.72.040, the City Council is  
17 authorized to hear this matter. The City Council's decision is determinative and final.
- 18 2. Standing. Those property owners identified in Section I (12) and who appeared at  
19 the October 8, 2009 hearing have standing in this matter.  
20
- 21 3. Burden of Proof. Any property owner requesting a hearing has the burden of  
22 proof.  
23
- 24 4. TAZ 25 and 18. The completion of Goldenrod Road alters the traffic analysis. It  
25 is appropriate and proper to assign those properties situated North of McCorquedale  
26 Road (currently, parcel numbers P24066, P115546, P115546, P24062, P24065,  
27 P116150, P117699, P107761, and P24064) to TAZ 18, as COSTCO has agreed.  
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1 5. Reimbursement Criteria. The reimbursement methodology reflects a pro rata  
2 share of construction and contract administration costs of the COSTCO improvements,  
3 and is determined by a method of cost apportionment based on the benefit to the  
4 property owner assessed a latecomers fee.

6 6. Engineer's Determination of Required Improvements. Section 12.28.010(A) of  
7 the Burlington Municipal Code provides that, "[i]mproved right-of-way is required for  
8 access to all new construction projects." BMC § 12.28.010(D) goes on to provide,  
9

10 D. The city of Burlington comprehensive transportation plan has  
11 adopted level of service "C" for all streets except Burlington Boulevard,  
12 for which a level of service "D" is adopted. If a traffic study meeting the  
13 specifications of the city engineer is prepared that demonstrates that the  
14 development causes the level of service to decline below the adopted  
15 standards, then transportation improvements or strategies to  
16 accommodate the impacts of development are required to be made  
17 concurrent with the development, or the development permit application  
18 shall be denied.

19 BMC § 12.28.010(C) provides that the City Engineer is to determine whether  
20 improvements are required at the time of development:  
21

22 All other new construction shall meet the right-of-way improvement  
23 standards specified in this code unless, in the opinion of the city engineer,  
24 improvements are not warranted at the time of development. In that case,  
25 the property owner shall be required to do one of the following, as  
26 specified by the city engineer:

- 27 1. Enter into a binding agreement to participate in any street improvement,  
28 local improvement district (LID) affecting the described right-of-way which  
29 LID may be formed now or in the future;
- 30 2. Enter into a binding agreement to construct specified right-of-way  
improvements at a specified date;
3. Construct improvements which conform to existing improvements in the  
immediate area.

7. Ordinance Requiring Improvements. The MDNS issued for the COSTCO project  
reflects the city engineer's determination, and thus required that improvements be

1 installed by COSTCO. These improvements are identified in Section II (3), above.

2 Thus, the City had in place an ordinance requiring particular street improvements as a  
3 condition of property development.  
4

5 8. Commercial Development. Commercial, multi-family, and industrial development  
6 property situated in TAZ's 10, 11, and 13 – 44 would require similar street  
7 improvements to those installed by COSTCO upon development. Development projects  
8 that would generate less than 10 vehicle trips during the PM Peak hour would not  
9 require such improvements. The assessment reimbursement encompasses TAZ's  
10 10,11, and 13 – 44.  
11

12 9. Notice. The City has properly sent, by certified mail, a preliminary determination  
13 of area boundaries and assessments, along with a description of the property owners'  
14 rights and options, to property owners within the proposed assessment area. A  
15 proportionate share of costs is determined based upon the intensity of development  
16 (i.e., the amount of impact); to establish a different reimbursement formula would be  
17 arbitrary, but such a formula necessarily precludes a precise dollar amount. Rather,  
18 assessment amounts are readily ascertainable by formula, which a property owner may  
19 readily determine.  
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23 10. Hearing. The City Council properly held a hearing in this matter.  
24

#### 25 IV. CONCLUSION

26 For the foregoing reasons, the City Council hereby concludes that the appeals should  
27 be DENIED, PROVIDED that COSTCO verifies that the properties identified in Section  
28 III (4) be reallocated to TAZ 18.  
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1 Adopted by the Burlington City Council, this 9<sup>th</sup> day of June, 2011.

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ATTEST:



Greg Thrasher,  
Finance Director

# Appendix 6

might be affected by reason of the establishment of the proposed mall or the board of directors of a mall organization shall, within twenty days of such hearing, file with the city clerk a statement describing the real property as to which the claim is made, the nature of the claimant's interest therein, the nature of the alleged damage thereto and the amount of damages claimed. After the receipt thereof, the corporate authority may negotiate with the affected parties concerning them or deny them. [1965 c 7 § 35.71.110. Prior: 1961 c 111 § 11.]

**35.71.120 Contracts with mall organization for administration—Conflicting charter provisions.** If the corporate authority desires to have the mall administered by a mall organization rather than by one of its departments, the corporate authority may execute a contract with such an organization for the administration of the mall upon mutually satisfactory terms and conditions: PROVIDED, That if any provision of a city charter conflicts with this section, such provision of the city charter shall prevail. [1965 c 7 § 35.71.120. Prior: 1961 c 111 § 12.]

**35.71.130 Election to discontinue mall—Ordinance—Outstanding obligations—Restoration to former status.** The board of directors of a mall organization may call for an election, after the mall has been in operation for two years, at which the voting shall be by secret ballot, on the question: "Shall the mall be continued in operation?" If sixty percent of the membership of the organization vote to discontinue the mall, the results of the election shall be submitted to the corporate authority. The corporate authority may initiate proceedings by ordinance for the discontinuation of the mall, allocate the proportionate amount of the outstanding obligations of the mall to the abutting property of the mall or property specially benefited if a local improvement district is established, subject to the provisions of any applicable statutes and bond ordinances, resolutions, or agreements, and thereafter, at a time set by the corporate authority, the mall may be restored to its former right-of-way status. [1965 c 7 § 35.71.130. Prior: 1961 c 111 § 13.]

**35.71.910 Chapter controls inconsistent laws.** Insofar as the provisions of this chapter are inconsistent with a provision of any other law, the provisions of this chapter shall be controlling. [1965 c 7 § 35.71.910. Prior: 1961 c 111 § 15.]

### Chapter 35.72 RCW CONTRACTS FOR STREET, ROAD, AND HIGHWAY PROJECTS

#### Sections

35.72.010	Contracts authorized for street projects.
35.72.020	Reimbursement by other property owners—Contract requirements.
35.72.030	Reimbursement by other property owners—Reimbursement share.
35.72.040	Assessment reimbursement contracts.
35.72.050	Alternative financing methods—Participation in or creation of assessment reimbursement area by county, city, town, or department of transportation—Eligibility for reimbursement.

**35.72.010 Contracts authorized for street projects.** 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. [1983 c 126 § 1.]

**35.72.020 Reimbursement by other property owners—Contract requirements.** (1) Except as otherwise provided in subsection (2) of this section, the 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.

Street projects subject to reimbursement may include design, grading, paving, installation of curbs, gutters, storm drainage, sidewalks, street lighting, traffic controls, and other similar improvements, as required by the street standards of the city, town, or county.

(2)(a) The contract may provide for an extension of the fifteen-year reimbursement period for a time not to exceed the duration of any moratorium, phasing ordinance, concurrency designation, or other governmental action that prevents making applications for, or the approval of, any new development within the benefit area for a period of six months or more.

(b) Upon the extension of the reimbursement period pursuant to (a) of this subsection, the contract must specify the duration of the contract extension and must be filed and recorded with the county auditor. Property owners who are subject to the reimbursement obligations under subsection (1) of this section shall be notified by the appropriate county, city, or town of the extension filed under this subsection.

(3) Each contract shall include a provision requiring that every two years from the date the contract is executed a property owner entitled to reimbursement under this section provide the appropriate county, city, or town with information regarding the current contract name, address, and telephone number of the person, company, or partnership that originally entered into the contract. If the property owner fails to comply with the notification requirements of this subsection within sixty days of the specified time, then the contracting county, city, or town may collect any reimbursement funds owed to the property owner under the contract. Such funds must be deposited in the capital fund of the county, city, or town. [2006 c 88 § 1; 1983 c 126 § 2.]

**35.72.030 Reimbursement by other property owners—Reimbursement share.** 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. [1983 c 126 § 3.]

**35.72.040 Assessment reimbursement contracts.** The procedures for assessment reimbursement contracts shall be governed by the following:

(1) An assessment reimbursement area shall be formulated by the city, town, or county based upon a determination by the city, town, or county of which parcels adjacent to the improvements would require similar street improvements upon development.

(2) 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.

(3) The contract must be recorded in the appropriate county auditor's office within thirty days of the final execution of the agreement.

(4) If the contract is so filed, it shall be binding on owners of record within the assessment area who are not party to the contract. [1988 c 179 § 16; 1983 c 126 § 4.]

Additional notes found at [www.leg.wa.gov](http://www.leg.wa.gov)

**35.72.050 Alternative financing methods—Participation in or creation of assessment reimbursement area by county, city, town, or department of transportation—Eligibility for reimbursement.** (1) As an alternative to financing projects under this chapter solely by owners of real estate, a county, city, or town may join in the financing of improvement projects and may be reimbursed in the same manner as the owners of real estate who participate in the projects, if the county, city, or town has specified the conditions of its participation in an ordinance. As another alternative, a county, city, or town may create an assessment reimbursement area on its own initiative, without the participation of a private property owner, finance the costs of the road or street improvements, and become the sole beneficiary of the reimbursements that are contributed. A county, city, or town may be reimbursed only for the costs of improvements that benefit that portion of the public who will use the developments within the assessment reimbursement area established pursuant to RCW 35.72.040(1). No county, city, or town costs for improvements that benefit the general public may be reimbursed.

(2) The department of transportation may, for state highways, participate with the owners of real estate or may be the sole participant in the financing of improvement projects, in the same manner and subject to the same restrictions as provided for counties, cities, and towns, in subsection (1) of this section. The department shall enter into agreements whereby the appropriate county, city, or town shall act as an agent of the department in administering this chapter. [1997 c 158 § 1; 1987 c 261 § 1; 1986 c 252 § 1.]

(2014 Ed.)

**Chapter 35.73 RCW**  
**STREET GRADES—SANITARY FILLS**

Sections

35.73.010	Authority—First and second-class cities.
35.73.020	Estimates—Intention—Property included—Resolution.
35.73.030	Hearing—Time of—Publication of resolution.
35.73.040	Ordinance—Assessments.
35.73.050	Lien of assessments.
35.73.060	Improvement district bonds—Issuance.
35.73.070	Improvement district bonds—Payment—Remedies.
35.73.080	Provisions not exclusive.

**35.73.010 Authority—First and second-class cities.**

If a city of the first or second class establishes the grade of any street or alley at a higher elevation than any private property abutting thereon, thereby rendering the drainage of such private property or any part thereof impracticable without the raising of the surface of such private property, or if the surface of any private property in any such city is so low as to make sanitary drainage thereof impracticable and it is determined by resolution of the city council of such city that a fill of such private property is necessary as a sanitary measure, the city may provide therefor, and by general or special ordinance or both make provision for the necessary surveys, estimates, bids, contract, bond and supervision of the work and for making and approving the assessment roll of the local improvement district and for the collection of the assessments made thereby, and for the doing of everything which in their discretion may be necessary or be incidental thereto: PROVIDED, That before the approval of the assessment roll, notice shall be given and an opportunity offered for the owners of the property affected by the assessment roll to be heard before such city council in the same manner as in case of assessments for drainage or sewerage in the city. [1965 c 7 § 35.73.010. Prior: (i) 1907 c 243 § 1; RRS § 9426. (ii) 1907 c 243 § 4; RRS § 9429.]

**35.73.020 Estimates—Intention—Property included—Resolution.** Before establishing a grade for property or providing for the fill of property, the city must adopt a resolution declaring its intention to do so.

The resolution shall:

- (1) Describe the property proposed to be improved by the fill,
- (2) State the estimated cost of making the improvement,
- (3) State that the cost thereof is to be assessed against the property improved thereby, and
- (4) Fix a time not less than thirty days after the first publication of the resolution within which protests against the proposed improvement may be filed with the city clerk.

The resolution may include as many separate parcels of property as may seem desirable whether or not they are contiguous so long as they lie in the same general neighborhood and may be included conveniently in one local improvement district. [1965 c 7 § 35.73.020. Prior: 1907 c 243 § 2, part; RRS § 9427, part.]

**35.73.030 Hearing—Time of—Publication of resolution.** Upon the passage of the resolution the city clerk shall cause it to be published in the official newspaper of the city in at least two successive issues before the time fixed in the resolution for filing protests. Proof of publication by affidavit

[Title 35 RCW—page 259]

# Appendix 7

ORDINANCE 1419

AN ORDINANCE amending Burlington Municipal Code Section 12.28.010 Application to establish standards and procedures for reimbursement agreements for street projects subject to reimbursement which may include design, grading, paving, installation of curbs, gutters, storm drainage, sidewalks, street lighting, traffic controls, and other similar improvements, as required by the city's street and storm drainage standards.

WHEREAS, the City of Burlington has a responsibility to insure that existing deficiencies in streets are remedied when new development is authorized, and

WHEREAS, the timing and funding of public improvements is frequently not compatible with the timing and scope of planned new development activity, and

WHEREAS, by adopting this ordinance, the City 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 the requirements of this code to install the projects as a prerequisite to further property development.

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF BURLINGTON DO ORDAIN AS FOLLOWS:

Section 1. Burlington Municipal Code Section 12.28.010 is hereby amended to read as follows:

12.28.010 Application

This chapter sets forth the specifications and requirements for the construction of public works including streets and sidewalks within the city.

A. Improved right-of-way is required for access to all new construction projects. A traffic study prepared to the specifications of the City Engineer may be required to identify required right-of-way improvements. The City Engineer may 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.

B. Improved right-of-way for new single-family and duplex buildings on existing lots of record is defined as grading to a minimum of 20 feet and installing six inches of crushed rock. An additional three-inch lift of crushed rock is required if the roadbed is destroyed by trucks during the construction process.

C. All other new construction shall meet the right-of-way improvement standards specified in this code, unless, in the opinion of the city engineer, improvements are not warranted at the time of development. In that case, the property owner shall be required to do one of the following, as specified by the city engineer:

1. Enter into a binding agreement to participate in any street improvement, local improvement district (LID) affecting the described right-of-way which LID may be formed now or in the future;
2. Enter into a binding agreement to construct specified right-of-way improvements at a specified date;
3. Construct improvements which conform to existing improvements in the immediate area.

D. The City of Burlington Comprehensive Transportation Plan has adopted Level of Service "C" for all streets except Burlington Boulevard, for which a Level of Service "E" is adopted. 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 shall be denied.

These strategies may include increased public transportation service, ride sharing programs, demand management, and other transportation systems management strategies. For the purposes of this section, "concurrent with the development" shall mean that improvements or strategies are in place at the time of development, or that a financial commitment is in place to complete the improvements or strategies within six years. In the case of transportation facilities of state-wide significance, which includes State Route 20, every effort shall be made to coordinate with the State to work toward timely planned improvements, although a six year commitment may not be feasible.

E. The city 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 the requirements of this code as a prerequisite to further property development.

The 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:

(1) Are determined to be within the assessment reimbursement area pursuant to RCW 35.72.040;

(2) Are determined to have a reimbursement share based upon a benefit to the property owner pursuant to RCW 35.72.030;

(3) Did not contribute to the original cost of the street project;

(4) Subsequently develop their property within the fifteen-year period and at the time of development were not required to install similar street projects because they were already provided for by the contract.

Street projects subject to reimbursement may include design, grading, paving, installation of curbs, gutters, storm drainage, sidewalks, street lighting, traffic controls, and other similar improvements, as required by the city's street and storm drainage standards.

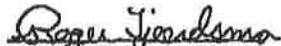
The reimbursement by other property owners shall be a pro rata share of construction and reimbursement of contract administration costs of the street project. The reimbursement share shall be determined by using a method of cost apportionment which is based on the benefit to the property owner from such project.

The procedure for reimbursement is subject to RCW 35.72.040.

Section 2. This ordinance shall be in full force and effect five days after its passage, approval and publication as provided by law.

INTRODUCED AND PASSED and approved at a regular meeting of the City Council this  
9th day of December, 1999.

THE CITY OF BURLINGTON

  
Roger A. Tjeerdema, Mayor

ATTEST:

  
Richard A. Patrick, Finance Director/City Clerk

APPROVED AS TO FORM:

  
Marilyn Yitteberg, City Attorney

FILED WITH CITY CLERK:	12/03/99
PASSED BY CITY COUNCIL:	12/09/99
SIGNED BY THE MAYOR:	12/09/99
PUBLISHED:	12/15/99
EFFECTIVE DATE:	12/20/99

# Appendix 8

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*City of*  
**BURLINGTON**  
**BURLINGTON**

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**COMPREHENSIVE  
TRANSPORTATION  
PLAN**

*1999 Update*

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**Rod Garrett**  
*City Engineer/Public Works Director*

**William Popp Associates**  
*Transportation Engineers/Planners*

February 1999

## I. INTRODUCTION

### Background

The Comprehensive Transportation Plan was adopted on May 12, 1994 by Resolution #5-94 and has been updated annually by the adoption of a new Six Year Road Plan each subsequent year. The plan completed the Skagit County Sub-Regional Transportation Planning Organization (RTPO) Transportation Certification process and was certified in the fall of 1997.

A number of regional documents have been prepared and adopted since the original adoption of the Transportation Plan in 1994, including the completion of the County-side Air, Rail, Water and Port Transportation System Study in February of 1996 and completion of the Skagit/Island Regional Transportation Plan in April of 1996, and the adoption of the 1998-2003 Six Year Transportation Improvement Plan in the fall of 1997. The City of Burlington Parks and Recreation Comprehensive Plan has also been updated which is the document that identifies trails, walkways, bike paths which are the non-motorized element of this plan.

This edition of the Comprehensive Transportation Plan incorporates relevant information from each of these planning documents and addresses the outstanding issues identified in the Transportation Plan Certification process through the Skagit Sub-Regional RTPO.

The Skagit County Overall Economic Development Plan (OEDP) anticipates an increase in employment from 35,340 in 1994 to 61,761 persons in 2014 which means an increase in of employment by 26,421 persons between 1994 and 2014. Much of the increase is expected to occur in sectors which generate freight such as manufacturing, retail and wholesale trade, resource extraction, and agriculture among other sectors. Many businesses seeking to locate in Burlington are attracted by the efficient transportation system and the area's proximity to resources and markets. Transportation costs are a very important component of business planning, with logistics being extremely important to freight-generating businesses. For retail firms, fast, efficient and reliable delivery is of paramount importance, while speed is of the essence in receiving inputs and shipping products to market for both manufacturing growth and agricultural growth. Improvements to the transportation system are critical as a means to enhance economic development.

Transportation is a major issue facing the elected officials, staff, business owners, and residents of the City of Burlington. Over the past nine years, a total of 2,325,477 square feet of new retail and commercial construction has been built, as well as 211 single family and 492 multi-family residential units. Growth is expected to continue at a reasonable pace and each new development is carefully evaluated for its impact on the transportation system. This growth generates increased traffic volumes to, from, and within the City of Burlington and it is very important to adequately mitigate the impacts of new development so that the impacts on level of service and traffic accidents are minimized.

The impact of growth has been realized throughout the State of Washington prompting the legislature to pass the Growth Management Act of 1990 with a subsequent amendment in 1991. The Act requires each city and county to prepare a comprehensive plan which identifies growth potential and its related impacts. Furthermore, the Act requires each agency adopt and enforce ordinances which insure facility improvements required to mitigate development impacts are functional at the time the development is

operational. Standards are established in Burlington Municipal Code Chapter 12.28. Level of service changes that may result in the need for additional traffic mitigation would be reviewed in accordance with the policies and procedures under Burlington Municipal Code Chapter 15.12 Environmental Policy.

The Capital Improvement Plan is updated annually, along with the Six-Year Transportation Plan and a detailed reevaluation of the financing of this plan continues to show that Impact Fees are only warranted in areas that generate traffic in the two corridors where new bridges are planned. The rate is \$35 per peak hour trip per 1000 square feet or per dwelling unit. This limited contribution supports the grant application process.

### Goals and Objectives

1. The transportation plan is designed to ensure the continued ability of the transportation system to function at a reasonable level of service throughout the urban service area and coordinate the links to the regional transportation system along with Mount Vernon.
2. The planned Level of Service is not to exceed Level of Service C except for the Burlington Boulevard corridor which is not to exceed Level of Service E. Certain intersections may fall below the standard level of service while awaiting improvements, such as along State Route 20, without being considered grounds for denial of a project, as long as the proposed projects makes every feasible effort to mitigate the impacts of the proposed development project.
3. Proposed projects that decrease the level of service below the planned level, because of their traffic contribution, shall be denied unless concurrent improvements are made to prevent a decrease in level of service below the planned level for that location. Improvements shall be in place before the use is occupied, except as follows:
  - a. Sites located where regional improvements are the only means to improve or maintain the level of service existing prior to the development, may be developed if the proponents make a fair share contribution to the regional improvement, when the improvement is planned for construction within six years, or sign an Agreement to Perform at a future date when the City sees needed improvements that are not possible under the Washington State Department of Transportation Warrant System.
  - b. Essential public facilities may be constructed subject to a commitment to contribute to the regional improvement at a future date, as funding becomes available from the public entity, including schools, hospitals, police and fire stations and the like.
  - c. Other exceptions may be authorized by the City of Burlington Technical Committee if consistent with the policy intent.
4. Optimize the potential for increased use of public transportation and access to the state and interstate routes in land use and site planning.

5. Complete the construction and upgrading of the arterial street network to maximize circulation and level of service within the community.
6. Implement detailed standards for upgrading residential streets so that the changes will enhance, rather than adversely affect the character of the area, whether initiated by the City or required to mitigate the impacts of developing a site.
7. The Six Year Road Plan and the transportation element of the annually updated City of Burlington Capital Improvement Plan shall be coordinated with the Land Use, Utilities and other relevant plan elements to ensure a balanced program that is adequately funded and responsive to community interests.
8. Implement programs to encourage the use of flextime, carpooling and transit as traffic levels increase over time, coordinating with Skagit Public Transit (SKAT):
9. Coordinate the Capital Improvement Plan with regional non-motorized travel plans, including bicycle and pedestrian.

## V. SYSTEM ANALYSIS AND ARTERIAL PLAN DEVELOPMENT

### System Analysis

The system analysis process used in the study consisted of comparing future year volumes on individual links of the various networks to an acceptable performance standard, the (LOS) level-of-service of either C or E depending on location in the system. When the demand volumes exceeded the standard, additional lanes or links were identified as needed to meet the standard. The analysis approach started with loadings of the existing network with the two future trip scenarios (2000, and 2012) followed by the "existing and committed" projects network. This latter network was defined based on conversation with the City Public Works Director. The term "committed" may be more appropriately considered as "highly probable".

The methodology used in determining needed improvements employed a table of generalized urban peak-hour level-of-service maximum volumes developed around data from the 1985 Highway Capacity Manual. This table along with computer network loading plots are contained in Appendix C.

Figures 5 through 8 depict LOS results of various loading combinations. Figure 5 also shows the new number of lanes and signals assumed for the various "committed" projects. It may be noted that LOS E extends nearly the full length of Burlington Boulevard with LOS F existing just north of George Hopper Interchange Road and on the Skagit River Bridge. SR 20 exhibits LOS F conditions east of Burlington Boulevard.

Figure 6 is the most extreme condition with 2012 volumes on the existing network ("Do-Nothing"). LOS F completely covers the principle arterial system.

Figure 7 shows LOS conditions with 2012 volumes on the committed network plus 6 lanes on I-5 south of SR 20, 4 lanes on SR 20 east of Burlington Blvd., 4/5 lanes on Burlington Blvd. from George Hopper Interchange Rd. south across the river, and the George Hopper Interchange Rd. extension over to Whitmarsh. The most significant problem with this scenario is Burlington Blvd. across the river - the proposed bridge widening will not be adequate. Ergo Figure 8 - another bridge over the Skagit River is added at Whitmarsh and the LOS F problem with the bridge crossings is corrected. Some other more minor and correctable LOS E and F problems exist which are addressed subsequently with the Recommended Plan.

### Recommended 2012 Arterial Plan

Figure 9 depicts the Recommended Long Range Plan for the arterial and freeway system. Critical capacity elements of the plan are I-5 at 6 lanes from SR 20 south; SR 20 from the east to the west Urban Growth Boundary with sections ranging from 4 lanes to 7 lanes; Burlington Blvd. Bridge at 4 lanes; a new Skagit River bridge at South Walnut - along with 4 lane construction of South Walnut between the river and Pease; 5-lane widening of the Hopper Interchange Road, 4 lane George Hopper Interchange Road extension to South Walnut, 3 lane extension of Spruce to Pease with a direct connection to the new South Walnut link; added southbound right turn lane on Burlington Blvd. at Rio

Vista (6 lanes); 4 lanes on Burlington Boulevard from north City limit to SR 11/I-5 interchange northbound ramps.

The proposed South Walnut Street Bridge would connect into Urban Ave. in Mt. Vernon (the old Inter-Urban R.O.W.) and provide very desirable capacity relief for Riverside Drive in the City of Mt. Vernon.

Figures 10 and 11 show recommended configurations for the two most critical intersections on Burlington Boulevard - Rio Vista and George Hopper Interchange Road. The George Hopper Interchange Road was reconfigured in 1997 based on modeling done for the Port of Skagit County, using the City of Burlington's traffic model.

**Alternative Network 2:** Alternative Network 1 with widening of SR 20 from Burlington Boulevard easterly.

**Alternative Network 3:** Alternative Network 1 with addition of Signals at SR 20/Spruce and Pease Rd/Port Drive

**Alternative Network 4:** Existing and Committed Network with widening of SR 20 from Burlington Boulevard easterly. Also includes signal at SR 20/Spruce, SR 20/Anacortes Jct, and SR 20/Gardener.

**Alternative Network 5:** Alternative 4 with widening of I-5 south of SR 20 interchange and Rio Vista connection from Spruce to Anacortes. Also includes signal at Burlington Blvd/Old SR 99.

**Alternative Network 6:** Alternative 5 with realignment of Whitmarsh to connect with Anacortes. Speed increase on Anacortes to 35 south of Gilkey. Also includes signals at I-5 ramps with George Hopper overpass.

**Alternative Network 7:** Alternative 6 with 4 lanes on Anacortes.

**Alternative Network 8:** Alternative 6 with speed increase on Rio Vista to 30.

**Alternative Network 9:** Alternative 8 with signal at Spruce/Pease. This loading was plotted and analyzed; see loading attachments.

**Alternative Network 10:** Alternative 9 with new bridge across Skagit River. This loading was plotted and analyzed; see loading attachments.

**Alternative Network 11:** Alternative 9 without Norris St extension. This loading was plotted and analyzed; see loading attachments.

**Alternative Network 12:** Alternative 11 without Rio Vista with Greenleaf with 6 lanes on SR 20 between I-5 and Burlington Blvd

**Alternative Network 13:** Alternative 12 with 2nd bridge over Skagit River.

**Alternative Network 14:** Alternative 12 with Gilkey extension between Spruce and Anacortes.

**Alternative Network 15:** Alternative 14 with 2nd bridge over Skagit River



# CITY OF BURLINGTON

PUBLIC WORKS ❖ ENGINEERING

820 Washington Avenue • Burlington WA 98233  
(360) 755-9715

1999 - 2004

Six Year

TRANSPORTATION

Improvement

PROGRAM

Six Year Transportation Improvement Program

From 1999 to 2004  
 Hearing Date 5/27/96  
 Adoption Date 5/27/96  
 Resolution No. 12-95

Agency Burlington  
 County No. 29  
 City No. 0140  
 MPO NON

Functional Class	Priority Number	Project Identification A. Federal Aid No. B. Bridge No. C. Project Title D. Street/County Road Name or Number E. Terminal Beginning and End F. Describe Work to be Done	Improvement Type(s)	Mileage	Total Length	Unity Codes	Project Costs in Thousands of Dollars						Expenditure Schedule (Local/Agency)				Federally Funded Projects City										
							Project Phase (mm/yy/yyyy)	Federal Funding			State Source Information			Local Funds	Total Funds	1st	2nd	3rd	4th Year	Ewk. Type	RAW Required Data (mm/yy)						
								Federal Fund Code	Federal Cost by Phase	State Fund Code	State Funds	Funds															
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21							
06	17	2 Phases in Project PINE STREET IMPROVEMENTS Plus Street Grounded Avenue to Avon Avenue Curbcut curb & gutter, drainage, sidewalks	01	P	.320	W T G P	02/01/2000						40	40					40					No			
07	18	2 Phases in Project GEORGE HOPPER INTERCHANGE IMPR. George Hopper I-5 to Burlington Boulevard Widening, curb & gutter, sidewalks, drainage	03	P	.720	W T G P	02/01/2000						84	84					84						No		
08	19	2 Phases in Project RBO VISTA RECONSTRUCTION RBO Vista Ave. Section Street to Gardner Road Widening, gutter & curb, sidewalks, drainage	03	P	.250	W T G P	02/01/2000					UATA	105	105					105							No	
06	20	2 Phases in Project GEORGE HOPPER IMPROVEMENTS George Hopper Road 800' east of Burlington Blvd. to Port Dr Completed near end of the term approved, curb & gutter.	01	P	.510	W T G P	02/01/2007					UATA	122	122					122							No	
Totals							0						384	384					384								
Totals							0							256	256					256							
Totals							0							106	106					106							
Totals							0							435	435					435							
Grand Totals for Burlington							6813						9879	9414	20306	1661	4986	4657	5769								

**TABLE 6  
CITY OF BURLINGTON  
ROAD IMPROVEMENT COSTS  
BASED ON 2015 TRANSPORTATION SYSTEM NEEDS**

Road Segment No.	Road Segment (From - To)	Major Class of Work	Existing Width	Recomnd Width	Work Descriptions	Project Cost (000's)	Amount Assigned to Day, Extension
(401)	Old SR 88 Burlington Blvd to 0.61 mi. n/o Burlington Blvd.	Major Widening	24'	52'	SH, B, Pvg Lighting, ROW	1,077	1,077
(402)	Burlington Blvd North of City Limits to I-5 NB Ramps	Major Widening	24'	52'	C, G, SW, DR, B, Pvg, Signal, Lighting, ROW	1,063	
403	Pulver Road McCorquedale to SR 20	Minor Widening	22'	30'	SH, B, Pvg	89	
404	McCorquedale Road Pulver to Goldenrod	Minor Widening	18'	35'	C, G, SW, DR, Pvg, Signal	498	
(405)	Goldenrod Road McCorquedale to Andis	New Construction	0' - 22'	35'	C, G, SW, DR, Pvg, Bridge, Lighting, ROW	2,049	2,049
406A	George Hopper IC Rd Bouslog to I-5 NB Ramp	Traffic Control	35'	35'	Channelization Signal	203	
(406B)	George Hopper IC Rd I-5 NB Ramps to Burlington Blvd	Major Widening	35'	54'	C, G, SW, DR, B Pvg, Signal, Lighting	200	
407A	George Hopper IC Rd Burlington Blvd to Port Dr	New Construction	0'	52'	C, G, SW, DR, B, Pvg Signal, Lighting, ROW	1,043	499
(407B)	George Hopper IC Rd Burlington Blvd to Port Dr	New Construction	0'	35'	C, G, SW, DR, Pvg Signal, Lighting, ROW	1,265	602
408	Anacortes Str Pease to Glikay	Major Widening	22'	42'	SH, B Lighting, ROW	414	
501	E Frontage Burlington Blvd to Andis Rd	New Construction	0'	28'	C, G, SW, DR, Pvg, Signal, ROW	508	
503	Pulver Rd SR 20 to Peterson Rd	Minor Widening	24'	32'	SH, B, Pvg	90	
504	Pulver/Hopper Rd McCorquedale to Bouslog	Minor Widening	18'	30'	SH, B, Pvg	230	
505	Andis Rd Pulver to 0.25 mi. s/o Pulver	New Construction	0'	28'	C, G, SW, DR, Pvg, Lighting, ROW	488	488
* 506	George Hopper IC Rd Port Dr to Whitmarsh	New Construction	0'	44'	C, G, SW, DR, Pvg, ROW	551	
* 507	Whitmarsh Burlington Blvd to Walnut	Minor Widening	18'	30'	SH, B, Pvg	39	
508	Walnut Whitmarsh to Pease	New Construction	0'	52'	C, G, SW, DR, B Pvg, Lighting, ROW	3,418	3,418
(509)	Port Dr Pease to George Hopper Rd	New Construction	0'	35'	C, G, SW, DR, Pvg, Lighting, ROW	1,445	
* 510A	Whitmarsh 500' s/o Pease to George Hopper Rd	Major Widening	20'	52'	SH, B, DR Pvg, ROW	113	

**DECLARATION OF SERVICE**

The undersigned declares that on the date below written, I caused to be served in the manner noted copies of the following upon designated counsel:

- 1. Brief of Respondent Costco Wholesale Corporation; and
- 2. this Declaration of Service.

C. Thomas Moser  
1204 Cleveland Avenue  
Mount Vernon, WA 98273  
Email: [tmoser@advocateslg.com](mailto:tmoser@advocateslg.com)  
*Attorneys for Appellants*

- Via U.S. Mail
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- Via Messenger
- Via Email
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*Attorneys for Respondent City of Burlington*

- Via U.S. Mail
- Via Facsimile
- Via Messenger
- Via Email
- Via e-file / ECF

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 5th day of February, 2016.

  
Debra A. Samuelson