NO. 102184-4

SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 56803-9-II)

Viking JV, LCC,

Respondent,

v.

City of Puyallup,

Appellant.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

Petitioner City of Puyallup ("Petitioner", "City" or "Puyallup") seeks review of the Court of Appeals decision designated in Section II below.

II. COURT OF APPEALS DECISION

The Petitioner seeks review of the following Unpublished Opinion of the Court of Appeals: *Viking JV, LLC v. City of Puyallup*, Court of Appeals Case No. 56803-9-II, filed on June 13, 2023, hereinafter Opinion. A copy of this Opinion is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Was the City Council approved latecomer's agreement a land use decision subject to exclusive review under LUPA and, if so, should Viking's action be dismissed for lack of jurisdiction due to Viking's failure to name and serve all necessary parties required under RCW 36.70C.040(2)?

2. Did the City contribute to the public sewer facility constructed such that City-owned property was lawfully excluded from the latecomer's agreement?

IV. STATEMENT OF THE CASE

The Court of Appeals Opinion ("Opinion") provides the basic factual and procedural background concerning this matter; accordingly, the City refers the Court to those portions of the Opinion. *See* Opinion at 2-10. However, because the Opinion fails to acknowledge several key facts or place them in proper context, the City provides the following additional background.

Franklin Puyallup, LLC (Franklin) developed a large commercial shopping center known as Pioneer Crossing on the southwest corner of East Pioneer and Shaw Road in Puyallup. CP 8. The development required construction of certain public sewer facilities. *Id.* As early as April 1, 2011, Franklin had plans for construction of the public sewer facilities and had entered into an agreement with Cascade Christian Schools (CCS) to obtain property rights necessary for the construction. *See* CP 68-80.

In January 2014, Schnitzer West, LLC submitted a short plat application and State Environmental Policy Act[1] (SEPA) Checklist to construct a warehouse facility at 302 33rd Street SE in Puyallup, near the Franklin development. CP 552, 558-61, 563-65. Viking subsequently acquired the property that was the subject of the application and continued on with the proposed project. CP 553, 611.

The Viking project proposal included extension of and connection to the City's sewer system. CP 552-53, 561, 565. In other words, the Viking proposal required the very same public sewer facilities that Franklin had been planning to construct since 2011. Meanwhile, Franklin continued to actively pursue development of the needed public sewer facilities it was agreeing to construct in connection with its shopping center approval. In a January 8, 2015 letter, Franklin stated its intent to enter into a

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[1] RCW Ch. 43.21C.

latecomer agreement with the City in connection with such development. CP 197.

Franklin also asked the City early on for a financial credit for the infrastructure it was agreeing to create. As explained by City Engineer, Hans Hunger:

> During the process leading up to approval of the sewer lift station that is the subject of the latecomer agreement in this matter the City was working with Franklin to approve the facility. During those discussions, Franklin asked the City to give them a credit for the infrastructure that they were planning to build as part of their development. The City agreed to credit the sewer system development charges (SDC) because the infrastructure being constructed was also identified in the city's sewer comprehensive plan as a future sewer expansion. SDCs are connection fees that are charged when new construction connects to the utility. The SDC is designed to allow new development to buy into the existing system that existing customers have paid to build and also to fund future expansion of facilities needed based on the impacts of the new development. The City reasoned that the credits were in fact a contribution to the sewer lift station and as a project contributor the City would not be required to pay into the latecomers when a future sewer connection from the City park was made.

CP 555-56.

Subsequently, in August 2017, after it had requested credits from the City, Franklin entered into an agreement with Viking under which Viking, not Franklin, would construct the sewer utilities, including a sewer lift station and sewer force main, for the benefit of both Franklin and Viking. Under the agreement, the construction was not on Viking property at all, but on the property owned by Franklin and CCS. CP 83-105; *see also* CP 5. In addition to providing the underlying property rights, Franklin also agreed to contribute $600,000 to Viking toward the construction costs. CP 87. The City was not a party to the agreement between Franklin and Viking.

Viking ultimately constructed the sewer facility on the Franklin/CCS property and requested a latecomer agreement with the City, which the City prepared. *See* CP 22-32. On March 23, 2021, the Puyallup City Council approved the latecomer agreement. CP 266. It includes an assessment roll specifically identifying all the properties and taxpayers that would be subject to latecomer fees. CP 22, 32. The latecomer agreement approved

by the City Council excluded from future latecomer fees the properties owned by Franklin and CCS, as well as the City-owned Van Lierop Park, in recognition of the contributions made by those property owners. *See* CP 22-32. Viking objected to the exclusion of the City-owned Van Lierop Park, but agreed to exclusion of the other properties. CP 6, 8, 266. In light of Viking's objection, the latecomer's agreement was never executed by either Viking or the City.

If the City were required to pay a latecomer fee for the City-owned Van Lierop Park, its latecomer fee alone would be $196,421.69. CP 554. The total latecomer fees for Franklin, CCS and City-owned properties would collectively total $411,523.89. That total is nearly $200,000 less than the $600,000 Franklin contributed, not including the additional value of the underlying property rights Franklin (and CCS) agreed to provide to Viking. CP 556. Meanwhile, the City has already credited Franklin with $258,280.70 in sewer system development charges for the sewer facilities constructed on Franklin's property. CP 556.

On April 7, 2022, Viking filed in Pierce County Superior Court its "Complaint for Declaratory Judgment, Injunctive Relief and Writ of Mandamus or, Alternatively, Land Use Petition Act Petition" naming the City as the only other party. CP 1-32. Viking did not name or serve any of the owners of the properties that the City Council-approved latecomer agreement expressly identified as regulated properties subject to latecomer reimbursement fees.

The City moved for dismissal and/or summary judgment on several grounds, including that (1) City Council action on a proposed latecomer's agreement was a land use decision only subject to review under the Land Use Petition Act, RCW 36.70C ("LUPA"), and Viking had failed to comply with LUPA's stringent requirement for naming and serving necessary parties; and (2) the City had contributed to the cost of the sewer facility and like Franklin and CCS should not be required to pay latecomer fees if and when Van Lierop Park connected to the

system. CP 33-106; *see also* CP 107-272 (Viking Opposition pleadings) and CP 288-302 (City Reply pleading).

The superior court denied the City's motion. CP 308-12.

Viking subsequently brought its own motion for summary judgment. CP 313-491; *see also* CP 492-595, 708-11 (City Response pleadings); CP 596-707 (Viking Reply pleadings). The superior court entered an Order granting Viking's motion for summary judgment. CP 712-15. The Order rejected the City's contention that its $258,280.70 credit to Franklin had effectively been passed through to Viking and that it would be a windfall for Viking and a double dip into City funds if the City was required to pay a latecomer fee to Viking. The Order further rejected the City's argument that LUPA was the exclusive means of review. CP 713-15.

On April 4, 2022, the City filed its notice of appeal with the Court of Appeals. Oral argument was held on May 5, 2023. On June 13, 2023, the Court of Appeals issued its Opinion.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should grant review under RAP 13.4(b)(2) and (4) because the Opinion of the Court of Appeals is in conflict with a published decision of the Court of Appeals and this petition also involves issues of substantial public interest.

A. The Opinion is in Direct Conflict with the Court of Appeals Published Decision in *Cave Props. v. City of Bainbridge Island*, 199 Wn. App. 651, 401 P.3d 327 (2017).

The Opinion holds that "Viking's challenge [to the Puyallup City Council approved latecomer agreement] was not subject to exclusive review under LUPA." Opinion at 13. This is in direct conflict with the Division II Court of Appeals published decision in *Cave Props. v. City of Bainbridge Island*, 199 Wn. App. 651, 401 P.3d 327 (2017) (hereinafter "*Cave Props.*"), which holds that a city council approved latecomer agreement is a land use decision subject to exclusive review under LUPA.

In *Cave Props.*, Cave Properties and Marcia Wicktorn (collectively referred to as "Cave") appealed the dismissal by the

superior court of an action in which Cave asserted both a petition under LUPA, chapter RCW 36.70C, and a petition for writ of review under chapter RCW 7.16 RCW, which concerns writs of certiorari, mandamus and prohibition. *Cave Props.* at 653-55. Cave's action challenged the approval by the City of Bainbridge Island's city council of a latecomer reimbursement agreement that required Cave to reimburse John and Alice Tawresey if Cave connected to a water main that the Tawreseys had constructed. *Id.* In reversing the trial court, Division II of the Court of Appeals held unequivocally in *Cave Props.* "that the city council's approval of the Tawreseys' latecomer reimbursement agreement qualified as a land use decision under RCW 36.70C.020(2)(b)" and that the superior court had LUPA jurisdiction. *Id.* 654.

Cave Props. began its analysis recognizing the bedrock principle that LUPA is the exclusive means by which superior courts obtain jurisdiction to review local land use decisions and that LUPA jurisdiction requires an underlying "land use decision" as defined in LUPA. *Id.* at 656.

LUPA eliminates the former writ of certiorari appeal process for land use decisions. RCW 36.70C.030(1) ("[t]his chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions").

LUPA cannot be evaded by resort to a supposed declaratory judgment claim. *Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 106, 38 P.3d 1040, 1046 (2002) (LUPA provides adequate remedy thereby precluding declaratory relief under chapter RCW 7.24).

As explained in *Cave Props.*, when LUPA applies, a land use decision must be appealed within 21 days per RCW 36.70C.040(3); when LUPA does not apply, an appeal may be filed much later under for example chapter 7.16 RCW. *Cave Props.* at 656.

After explaining this context, the *Cave Props.* court then proceeded to a detailed analysis of whether the Bainbridge Island city council's approval of an RCW Ch. 35.91 latecomer

agreement constituted a land use decision under LUPA and whether the superior court had erred by dismissing Cave's LUPA petition for lack of subject matter jurisdiction. *Id.* at 660-667. The analysis examined RCW 36.70C.020(2)(a)-(b), which contains the following alternative definitions of "land use decision":

> 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, on:
>
> (a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used . . . ;
>
> (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; and

RCW 36.70C.020(2).

The court held that the city council's decision on the latecomer reimbursement agreement was not a land use decision under RCW 36.70C.020(2)(a) because, although the Tawreseys

requested government approval of the agreement thereby satisfying the first two elements of RCW 36.70C.020(2)(a), the Tawreseys were not required by law to obtain approval of a latecomer reimbursement *before* their property could be developed. *Id.* at 661-62.

However, following a lengthy analysis the court held that RCW 36.70C.020(2)(b) did apply. The city council's approval of the terms of the latecomer reimbursement agreement met all three elements for a land use decision under that LUPA definition. *Id.* at 667. The court reasoned that the approval was a "declaratory decision" and that "by approving the agreement's terms, the city council necessarily declared the City's position regarding those terms." *Id.* at 664. The court also concluded that "[u]nder the terms of the approved latecomer reimbursement agreement, the city council's decision established that the Cave property would be subject to the established reimbursement charges if it connected to the new water main" and therefore the declaratory decision applied to specific property. *Id.* at 664. And,

the court concluded that the latecomer agreement was adopted pursuant to city ordinances that "regulated" Cave's use and development of its property by imposing a significant charge if it engaged in any development of its property that required connection to the water main. *Id.* at 664-65.

The *Cave Props.* court found Division One's unpublished opinion in *Vern F. Sims Family Ltd. P'ship v. City of Burlington*, 73608-6-I, 2016 Wash. App. LEXIS 1547 (Wash. Ct. of App., July 5, 2016) instructive, noting that "it is the only case we have located that addresses the issue presented in this case." *Cave Props.* at 665, n.2.[2] In *Sims*, the Burlington city council voted to approve a latecomer reimbursement agreement with a developer in connection with street improvements pursuant to RCW 35.72.010-.020. *Cave Props.* at 665. The issue on appeal was

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[2] *Sims,* decided after March 1, 2013, is nonbinding authority, but may be cited and accorded such persuasive value as the court deems appropriate per GR 14.1(a). The *Cave Props.* Court concluded that per GR 14.1(c) it was necessary to cite and discuss *Sims* to reach a reasoned decision.

whether the city council's approval was a land use decision under RCW 36.70C.020(2). The *Sims* court held that it was a land use decision under subsection (2)(b) because the approval meant that, should Sims or others decide to develop their property within the assessment area during the period of the latecomer agreement, once executed, they would have to pay assessments. *Id.*

The *Cave Props.* court acknowledged that *Sims* was slightly distinguishable from the case before it because in *Sims* the reimbursement payments were mandatory if there was any development during the duration of the agreement, while Cave would only be charged if it intended to connect to the water main. *Id.* at 666. The court nonetheless concluded that was a distinction without a difference, explaining that the approved latecomer agreement still "regulated" Cave's property and the determination could not turn on whether it was absolutely necessary for Cave to connect because that could not be known at the time of the council's decision. *Id.*

Per *Cave Props.* and *Sims,* the Puyallup City Council's approval of the latecomer agreement here was a land use decision under LUPA. Accordingly, LUPA was the exclusive means of judicial review of that land use decision. There is no basis for distinguishing *Cave Props.* or *Sims* from the instant case. The extensive analysis in *Cave Props.* clearly concludes that a city council approved latecomer agreement is a land use decision subject to exclusive review under LUPA. It does not matter what party or parties challenge such a decision or why they choose to do so, the decision remains a land use decision.

The Opinion here offers the following explanation in an effort to distinguish *Cave Props.*:

> Here, Viking's specific challenge concerned Puyallup's decision to exclude itself from any payment obligation under the latecomer contract. *Cave*, therefore, does not resolve the issue of whether the city council's decision to approve the contract was a land use decision because the city was not required to pay any fees prior to development on its property requiring connection to the facilities, as was the situation in *Cave*. As noted by the court in *Cave*, the latecomer contract was governed by the city's ordinances, and the reason

> these ordinances regulated Cave's property use and development was because the fees needed to be paid prior to any development on the property. *Id.* But here, as pointed out by Viking, the city's property was specifically excluded from the assessment roll and was not subject to the latecomer contract. Accordingly, Puyallup's specific property was not regulated by the decision, so Viking's challenge was not subject to exclusive review under LUPA.

Opinion at 13. This explanation does not hold up under any reasonable scrutiny.

While it is true that City owned property was excluded from the assessment roll and was not subject to the approved latecomer contract, that is of no consequence. The assessment roll included numerous other properties and those properties are subject to the approved latecomer agreement. Under the approved latecomer agreement, those property owners will have to pay latecomer reimbursement fees upon connection to the sewer facilities. Thus, as in *Cave Props.*, the approved latecomer agreement is a declaratory decision that applies to specific properties, regulating the use and development of them by

imposing significant charges if they connect to the facilities. There is no colorable way that *Cave Props.* can be distinguished.

The explanation offered in the Opinion focuses not on what the decision actually was or actually does, and not on the fact that the decision was a declaratory decision that regulates certain, specific properties – regardless of whether it regulates the City's property. Instead, it focuses on the nature of Viking's complaints about the decision. But a decision is either a "land use decision" subject to LUPA or it is not. That determination turns on the definition of "land use decision" in RCW 36.70C.020(2); it is not a fluid determination that examines who is challenging the decision or why. Instead, it simply looks at the decision itself and whether that decision meets the definition of "land use decision." Here, the approved latecomer agreement meets the definition of "land use decision," consistent with the holding in *Cave Props.*

The Opinion is directly contrary to *Cave Props.* It also creates an anomalous framework, suggesting that whether a

decision is a land use decision subject to LUPA requires an examination of who is challenging the decision and why. For example, if one of the property owners on the City's assessment roll (which consists of property clearly regulated by the approved latecomer agreement) were to challenge the latecomer agreement, arguing that the rates were too high, that would certainly be an action subject to exclusive review under LUPA. But the Opinion holds that Viking's challenge to the very same agreement/decision is somehow not subject to LUPA because of what motivates Viking's challenge. In other words, under the Opinion's reasoning it is not enough to be an approved latecomer agreement -- or any decision relating to land use -- that fits the words of the statutory definition. To be subject to exclusive review under LUPA, depends on who is bringing the action and/or what their challenges are to the decision. Respectfully, the Opinion is inconsistent with LUPA and in direct conflict with *Cave Props*. LUPA is meant to bring uniformity and to eliminate

uncertainty about judicial review of land use decisions.[3] The Opinion contravenes that purpose, converting LUPA into a portal for case-by-case dialectic about whether a decision that meets the LUPA statutory definition nevertheless is not subject to it.

B. Because the Latecomer Agreement was a Land Use Decision Subject to Exclusive Review Under LUPA, Viking Was Required to Serve All of the Owners of the Properties Identified in the Decision.

After incorrectly concluding that *Cave Props.* does not control and that Viking's challenge to the approved latecomer agreement was not subject to exclusive review under LUPA, the Opinion goes on to conclude that even if Viking's challenge were subject to exclusive review under LUPA, Viking complied with LUPA procedural requirements when it named and served only the City as a party. Opinion at 14-15. Respectfully, this conclusion is fundamental error.

Here, Viking filed a LUPA petition as one of its several alternative causes of action, recognizing that it might well apply.

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[3] RCW 36.70C.010.

Viking also appropriately named and served the City as the decision-making body. CP 16-19. However, Viking did not comply with LUPA requirements for naming parties and service. *See* RCW 36.70C.040; RCW 36.70C.070(5). It failed to identify as parties or serve any of the owners of the properties that the latecomer application and decision included as regulated properties. These were all clearly identified in the latecomer agreement that the City Council approved on March 23, 2021. *See* CP 22, 32 (assessment roll included as Exhibit C to the latecomer agreement, specifically identifying the properties and taxpayers that would be subject to latecomer fees); *see also* CP 8, 24, 248, 311.

This omission was fatal to the superior court's jurisdiction under RCW 36.70C.040:

> (2) A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served on the following persons who shall be parties to the review of the land use petition:

> (a) The local jurisdiction, which for purposes of the petition shall be the jurisdiction's corporate entity and not an individual decision maker or department;
>
> (b) Each of the following persons if the person is not the petitioner:
> . . .
>
> (ii) Each person identified by name and address in the local jurisdiction's written decision as an owner of the property at issue;

RCW 36.70C.040(2) (emphasis added). LUPA authorizes service on parties other than the local jurisdiction either in accordance with the superior court civil rules or by first-class mail, making it very easy to serve all necessary parties. RCW 36.70C.040(5).

In concluding that Viking nonetheless complied with LUPA's strict and mandatory procedural requirements, the Opinion offers the following rationale:

> . . . Viking's challenge to the latecomer contract concerned *only* the city's decision to exclude itself from any payment obligation under the contract.... If, to qualify as a land use decision under RCW 36.70C.020(2)(b), the decision must concern a

> "specific property," then that must in turn be the "property at issue" for purposes of serving the proper parties with the petition under RCW 36.70C.040(2)(b)(ii). Accordingly, here, the "specific property" in the land use decision is the city's property, which Viking is challenging the exclusion of in the contract.
>
> Puyallup does not challenge the service of Viking's petition on Puyallup, only on other property owners, which Viking was not required to do. . . .

Opinion at 14-15.

This explanation turns LUPA's plain terms upside down. The City's property, of course, cannot possibly be the "specific property" that would make the approved latecomer agreement qualify as a land use decision: it was not regulated by the approved latecomer agreement or included on the assessment roll, and the latecomer agreement does not apply any zoning/development requirements, fees, etc. to the City's property.

Per *Cave Props.*, an approved latecomer agreement is a land use decision under RCW 36.70C.020(2)(b) because it

regulates those properties that will be subject to reimbursement costs by imposing a significant charge if they engage in development that requires connection to the improved utility. *Cave Props.* at 663-67. It is those properties on the assessment roll that are "at issue" and those properties' owners must be identified and served as necessary parties under LUPA. Here, it is undisputed that they were not.

As with whether a decision is a "land use decision," identifying the parties that must be served under LUPA is not a fluid determination: the parties that must be served are set in stone once a land use decision has been made by a local jurisdiction. The parties that must be served do not change dependent upon what challenges are brought to a land use decision. And it is irrelevant that a LUPA challenge "would not increase the payment obligation of any other property owners already identified in the contract." Opinion at 14. LUPA petitioners do not get to decide who is served based on what challenges they decide to assert.

C. This Petition Involves Issues of Substantial Public Interest: Puyallup's Citizens Have Already Paid More Than Their Fair Share Toward the Facilities and the Opinion Requires Them to Pay Again.

The Opinion holds that, even though the City provided $253,000[4] in SDC credits to Franklin, the City did not contribute to the facilities' cost, and it would be unfair to Viking to construe the $600,000 contribution it received as a joint contribution from both Franklin and the City. Opinion at 19-21. This matter presents issues of significant public importance. Puyallup's citizens have already paid in the form of SDC credits $253,000. The Opinion, by refusing to credit that contribution, will require Puyallup's citizens to pay another $196,000 in latecomer fees on top of the $253,000.

RCW 35.91.010(2) provides that the reimbursements pursuant to a latecomer agreement must be "from latecomer fees received by the municipality from property owners who

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[4] The credits actually total over $258,000. *See* CP 556. However, because the Opinion refers repeatedly to $253,000 in credits rather than $258,000, the City is utilizing that number here.

subsequently connect to or use the water or sewer facilities, but who did not contribute to the original cost of the facilities." RCW 35.91.020(2) (emphasis added).

Viking acknowledges, as does the Opinion, that Franklin and CCS are contributing parties and should not be required to pay latecomer assessments. The City should be treated the same as Franklin and CCS based on the City's contribution to the facilities through direct credits the City gave to Franklin, the owner of the lift station site. As noted, Franklin agreed to provide Viking $600,000 toward construction. Meanwhile, the City contributed $253,000 to the facility's expense in the form of credits negotiated for the express purpose of offsetting Franklin's property and financial ($600,000) contribution to the sewer lift station. Those credits represent real dollar contributions by the City to the construction of the sewer lift station that Franklin was required to provide for its project. The fact that Franklin contracted with Viking to build the facility does not negate the City's contribution to its cost. The contributions from CCS and

the City were essentially passed through Franklin which had been for years the developer planning the sewer expansion needed for its development and who originally sought a latecomer's agreement with the City. CP 83-105; CP 555-56; CP 197.

The City's credit contribution represented taxpayer money that provided a significant portion of the funding to make the project possible after many years of discussions and negotiations by the multiple parties. That contribution should not be discounted, thereby requiring Puyallup's citizens to contribute twice for potential connection of a public park property to the City sewer system.

In concluding that it would be "unfair" to construe the $600,000 as a joint contribution from both Franklin and the City, the Opinion reasons that Viking "agreed by contract not to pursue latecomer fees from Franklin and Cascade [CCS] due to this contribution. Viking made no such agreement with the City of Puyallup." Opinion at 21. However, as the Opinion expressly

acknowledges,[5] RCW 35.91.010(2) states reimbursements through latecomer fees may only be collected from "property owners who subsequently connect to or use the . . . sewer facilities, but who *did not contribute to the original cost of the facilities*." RCW 35.91.010(2)(c) (emphasis added). The statute does not require Viking to agree in a contract not to pursue latecomer fees from those who did contribute; instead, it expressly mandates that fees may only be collected from those who did not contribute.

The Opinion argues that the City credits did not go toward the original cost of the facilities and that "it might be more accurate to say that the credit partially reimbursed Franklin for money that Franklin contributed to the original cost of the facilities." Opinion at 20. That is a distinction without a difference. The $600,000 contribution was facilitated by and comprised in part of the $253,000 in credits that Franklin knew

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[5] Opinion at 20.

it would receive from the City. It is no different than CCS giving property rights to Franklin who in turn conveyed those rights to Viking. Here, the City and its citizens contributed to the cost of the facilities just as Franklin and CCS did and they should not be required to pay a second time.

This matter also involves an issue of substantial public interest concerning land use appeals under LUPA as explained above. Although unpublished, the Opinion may be cited and accorded persuasive value per GR 14.1(a). The Opinion conflicts with *Cave Props.* and the LUPA framework intended to eliminate uncertainty and provide uniformity. The Opinion stands for the proposition that to determine whether a decision is a "land use decision" subject to exclusive review under LUPA, a court may go beyond the plain fact of the type of decision and the plain terms of LUPA's definition to an inquiry based on other factors that LUPA does not include. Parties seeking for whatever reason to avoid LUPA review of a land use decision, as LUPA defines one, will benefit while the uniformity and certainty that

are LUPA's core purposes will be lost. The Opinion further stands for the proposition that whether certain parties must be named as LUPA requires does not depend upon whether the parties' properties are affected by or listed in the decision, but instead on a debate on whether and how the relief sought will impact them. The Opinion provides a new, very subjective approach to LUPA diverging significantly from the plain language of LUPA and its purposes.

VI. CONCLUSION

The City respectfully requests that the Court grant review.

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I certify that this Petition is in 14-point Times New Roman font and contains 4,961 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 13th day of July, 2023

Respectfully submitted,

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CITY OF PUYALLUP

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CERTIFICATE OF SERVICE

I, Leona Phelan, an employee of Eglick & Whited PLLC, declare that I am over the age of eighteen, not a party to this lawsuit and am competent to testify as to all matters herein.

On July 13, 2023, I filed the foregoing PETITION FOR REVIEW with the Court of Appeals, Division II, of the State of Washington, and served a copy of said document via email on the following parties:

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Dated at Marysville, Washington this 13th day of July, 2023.

Leona Phelan
Paralegal for Eglick & Whited PLLC

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

June 13, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

VIKING JV, LLC, Respondent, v. CITY OF PUYALLUP, Appellant.	No. 56803-9-II UNPUBLISHED OPINION

CRUSER, J. – Viking JV, LLC (Viking) spent $2.6 million constructing and installing sewer facilities to extend the City of Puyallup's sewer service to the property on which Viking built a warehouse. The price of the construction was $3.2 million, but Viking received a $600,000 contribution from a neighboring property owner, Franklin Puyallup, LLC (Franklin), leaving Viking to cover the remaining $2.6 million in construction costs for installing the facilities. Viking sought a latecomer contract from the city pursuant to RCW 35.91.020, which allows a developing property owner who installs water or sewer facilities to be partially reimbursed for construction costs when other property owners connect to the facilities. Because Puyallup had credited $253,000 in sewer connection fees to Franklin, the city claimed that the money it credited to Franklin passed through to Viking as a contribution because Franklin gave Viking $600,000 toward the construction of the sewer line and facilities. Based on this passthrough contribution theory, Puyallup excluded itself from an obligation to pay a pro rata reimbursement to Viking under the latecomer contract the city drafted.

After the city council approved the latecomer contract, Viking filed a lawsuit challenging Puyallup's decision to exclude itself from any payment obligation under the contract. Viking's complaint included a LUPA petition in the alternative, should the trial court determine that LUPA was the exclusive means of review of the city's decision. Puyallup filed a motion for summary judgment, arguing that LUPA was the exclusive means of review and that Viking failed to comply with LUPA's procedural requirements. Puyallup further argued that Viking was not entitled to a latecomer contract under the relevant statute and that, even if it was, Puyallup should not be obligated to pay latecomer fees due to its credit of connection fees to Franklin, who contributed $600,000 toward the construction costs. Puyallup also later argued that the contract should be returned to the city council for correction of some numbers that the city engineer found were incorrect. The trial court denied summary judgment to Puyallup and later granted summary judgment to Viking. Puyallup appeals the trial court's orders on summary judgment.

We hold that Puyallup's arguments are without merit and affirm the trial court's orders denying summary judgment to Puyallup and granting summary judgment to Viking.

FACTS

I. Background on Latecomer Reimbursement Contracts

Chapter 35.91 RCW is the Municipal Water and Sewer Facilities Act. "The act provides a process through which a property owner who funds [ ] construction or improvement [of water facilities or sewer systems] . . . can obtain reimbursement for their costs from other property owners who later connect to or use the water or sewer facilities." *Cave Props. v. City of Bainbridge Island*, 199 Wn. App. 651, 657, 401 P.3d 327 (2017). "The reimbursement amounts collected from other property owners are called 'latecomer fees.' " *Id.* (quoting RCW 35.91.015(1)).

Municipalities are required by statute to contract with a developing property owner "for the construction or improvement of water or sewer facilities that the owner elects to install solely at the owner's expense" when the municipality's ordinances require construction of the facilities "as a prerequisite to further property development." RCW 35.91.020(1)(a). The statute further provides that the developing property owner must submit a request for a latecomer reimbursement contract to the municipality prior to approval of the water or sewer facility by the municipality. *Id.* Such a contract must provide for pro rata reimbursement to the developing owner for a portion of the costs of the construction of the sewer facilities. RCW 35.91.020(2)(b). These reimbursements come from "latecomer fees received by the municipality from property owners who subsequently connect to or use the water or sewer facilities, but who did not contribute to the original cost of the facilities." RCW 35.91.020(2)(c).

The Puyallup Municipal Code (PMC) similarly provides for reimbursements to property owners who extend the city's sewer services, collected from "noncontributing property owners" when these property owners connect to the sewer facilities. PMC 14.20.030. Under the city's procedure, once the extension is complete, the developing property owner is required to submit a notarized cost breakdown to the city engineer. PMC 14.20.040. The city engineer then prepares an assessment roll detailing the total area of property paying or sharing the costs of constructing the sewer main, the total area of the property that may be served by the proposed line, and the names and addresses of all property owners that fall into the above categories. PMC 14.20.040(1)(a)-(c). This information is then forwarded to the city council and all property owners on the assessment roll, along with an estimate of the pro rata costs to each property owner for connecting to the sewer main. PMC 14.20.040(2). The city council then holds a public hearing, after which the city council

"may enter into a contract between the city and the property owners paying the cost of the extension." *Id.*

II. AGREEMENTS REGARDING INSTALLATION OF SEWER FACILITIES

Viking has constructed a warehouse on property it owns in Puyallup. Because there was no existing city sewer infrastructure at the site, Viking installed sewer facilities, including a lift station and main lines, to serve the property.[1] These facilities would not only serve Viking's property, but would also serve several nearby properties that could connect to the facilities.

Franklin was constructing a shopping center around the same time that Viking was constructing its warehouse. Franklin's development also necessitated construction of sewer facilities. Viking entered into an agreement with Franklin in 2017 concerning the construction of

[1] The Mitigated Determination of Non-Significance (MDNS) issued by the city states:

> *There is no existing City sewer infrastructure serving the project site and surrounding area, thus constituting a potentially significant impact given potential future sewer needs of the site and vicinity under current zoning*. Based upon a review of project/sub-basin sewer generation relative to City sewer facilities plans, a preferred alignment and scope of sewer infrastructure to serve this site has been identified. Specifically, a technical memorandum ("Analysis for East Valley Sewer Service Area," BHC Consultants, 11/13/14) documents the prescribed sewer infrastructure necessary to adequately connect this project site with the prescribed downstream sewer system, as consistent with City utility plans. In sum, this BHC document prescribes a sewer line alignment, consisting of gravity/forced main lines, lift stations[,] and related equipment, extending sewer service from this site/vicinity south to the "Cross-Valley" sewer trunk line in the vicinity of Shaw Road-12th Avenue SE. Prior to issuance of any occupancy permits for this project site, said sanitary sewer infrastructure shall be installed, to City Engineer approval, the provision of which will adequately mitigate this potentially significant impact to Public Services/Utilities. **Please see Mitigation condition #8 later in this document for further detail.**

Clerk's Papers at 587. Mitigation condition #8 provided that "sanitary sewer infrastructure shall be installed, as specified in the 'Analysis for East Valley Sewer Service Area' technical memorandum (BHC Consultants, 11/7/14) or as otherwise approved by the City Engineer, to provide adequate sewer service" to the project site. *Id.* at 591.

sewer facilities that would benefit both of their properties. Under the agreement, Viking constructed a sewer lift station and sewer lines at Viking's "sole cost and expense," aside from a payment of $600,000 from Franklin. Clerk's Papers (CP) at 84. The lift station was constructed on Franklin's property, and the sewer lines were primarily constructed on property owned by Cascade Shaw Development, LLC (Cascade). Viking agreed not to seek latecomer fees from either Franklin or Cascade in exchange for the property rights granted and the monetary contribution from Franklin.

Franklin also came to an agreement with the city in which the city agreed to give Franklin a credit of approximately $253,000 in system development charges (SDCs), which are imposed on new customers who connect to the public sewer system. In the evidence submitted below, which includes both letters and emails sent to and from the city, the city offered inconsistent explanations about why it granted this credit.[2] Viking was not informed of this arrangement until it learned about the credits in a separate, related administrative appeal.

[2] The record contains a letter from Franklin to the city in January 2015 indicating Franklin's intent to enter into a latecomer reimbursement contract because Franklin expected to fund construction of the facilities, though the letter also indicates that Franklin was coordinating with other developers in the area. Accordingly, the city may have agreed to credit the SDCs to Franklin in consideration of Franklin's plan to construct the sewer facilities that were ultimately constructed by Viking, without the city knowing that Viking actually constructed the facilities. However, the record is unclear on exactly when the city agreed to credit the fees for Franklin because it lacks any formal memorialization of the agreement. It was not until March 2019 that Franklin informed the city engineer in an email that, in an "earlier meeting[ ]," it had been agreed that Franklin's $600,000 payment to Viking would "offset" the SDCs, and the city engineer emailed back that the city agreed the SDCs were offset by Franklin's "[c]ontribution toward the lift station." *Id.* at 192. Therefore, in correspondence after the 2015 letter, it appears that the city knew that Viking would be the developer responsible for constructing the sewer facilities, and the city, without involving Viking, unilaterally decided that the credit it gave to Franklin would be deemed a contribution to Viking for the cost of constructing the sewer facilities. As a result, the city excused itself from the obligation to pay a latecomer fee when it later connected to the facilities as part of the city's development of a park on city-owned property.

III. LATECOMER CONTRACT SOUGHT BY VIKING

Viking requested a latecomer contract from the City of Puyallup for partial reimbursement of its construction costs for the sewer facilities pursuant to RCW 35.91.020. The total cost for constructing the facilities was approximately $3.2 million. After accounting for the $600,000 contribution from Franklin, the "[t]otal cost reimbursable to Viking" was approximately $2.6 million. *Id.* at 31.

The city prepared a latecomer contract that stated both Franklin and the city contributed to the construction costs. Based on the square footage of property capable of being served by the sewer facilities, and excluding the square footage of the property owned by Franklin and the City of Puyallup, the reimbursement cost under the latecomer contract was $0.2728 per square foot. Under the contract prepared by the city, the city's property was excluded from the assessment roll, or list of properties obligated to pay latecomer fees to Viking. *See* PMC 14.20.040(1). The city otherwise would have been obligated to pay approximately $199,000 for connecting to the sewer lift station.

The Puyallup City Council held a public hearing on the latecomer contract. Viking's lawyer and one of its managers spoke at the hearing, opposing the exclusion of the city from paying latecomer fees. Following the hearing, the city council approved the contract in its current form (with the exception of an amendment to remove Cascade from any obligation to pay, pursuant to Viking's agreement with Franklin). Viking informed the city that it intended to sign the contract under protest after filing a lawsuit, and the city subsequently withdrew the DocuSign invitation for Viking to sign the contract, meaning no contract had been signed prior to the present litigation.

IV. LITIGATION

Viking brought a complaint for a declaratory judgment, injunctive relief, and writ of mandamus specifically challenging the city's decision to exclude its property from a pro rata payment obligation under the latecomer contract. According to Viking's complaint, because the relief it sought simply added a party—the city—to pay reimbursement fees, relief granted to Viking would not increase the payment obligation of any other property owners that were currently on the assessment roll. Viking's complaint also included a LUPA petition in the alternative "in an abundance of caution" so that it could preserve its right to challenge the latecomer contract, even though it did not believe that LUPA applied. *Id.* at 3. Viking also sought an order authorizing recording of the latecomer contract in the form approved by the city council so that Viking did not lose the opportunity to collect latecomer fees during the pendency of the litigation.

Puyallup brought a motion to dismiss and/or for summary judgment. Relevant here, Puyallup primarily argued that a developer who receives a contribution from any other party toward construction costs of sewer facilities, such as Viking, is not entitled to a latecomer contract under RCW 35.91.020(1)(a)[3] because sewer facilities are not installed solely at the developer's expense when there has been a contribution. Thus, Viking was not entitled to collect latecomer fees from any party who later connected to the sewer system it paid $2.6 million to construct

[3] As explained above, RCW 35.91.020(1)(a) provides:

> At the owner's request, a municipality must contract with the owner of real estate for the construction or improvement of water or sewer facilities that the owner elects to install solely at the owner's expense. The owner must submit a request for a contract to the municipality prior to approval of the water or sewer facility by the municipality. The owner's request may only require a contract under this subsection (1)(a) in locations where a municipality's ordinances require the facilities to be improved or constructed as a prerequisite to further property development.

because Franklin contributed $600,000 to the construction, and Franklin and Cascade both contributed property rights. Alternatively, the city argued that its $253,000 SDC credit to Franklin passed through to Viking and therefore constituted a contribution to the original cost of the facilities. Thus, the city argued, even if Viking was entitled to a latecomer contract under RCW 35.91.020(1)(a), Viking would not be able to seek latecomer fees from the city under RCW 35.91.020(2)(c) due to this contribution.

Puyallup also argued that the city council's approval of the latecomer contract was a land use decision and, therefore, subject to exclusive review under LUPA. Accordingly, because Viking did not serve its petition on " '[e]ach person identified by name and address in the local jurisdiction's written decision as an owner of the property at issue,' " which the city contended was all property owners required to pay latecomer fees under the contract, the city argued that the petition must be dismissed. CP at 47 (quoting RCW 36.70C.040).

The trial court denied the city's motion, and it also granted Viking's motion to record the latecomer contract. The contract was to be recorded with a notation indicating that Viking approved the contract except as to the issue of the city's payment obligation, which the parties were litigating, and that resolution of the dispute would not result in an increase in fees to any property owner on the assessment roll. Any fees collected pursuant to the latecomer contract would be paid into the court registry until the case was resolved.

Viking subsequently moved for summary judgment. Puyallup's responsive materials included a request to return the latecomer contract to the city council for correction. This was based on a declaration from City Engineer Hans Hunger, who stated: "Upon review of the documents related to this matter in preparation for providing this declaration I learned that several of the

numbers included in . . . [the] original latecomer agreement were incorrect." *Id.* at 554. Hunger attached "a new version . . . with the corrected numbers shown." *Id.* The declaration did not appear to provide any explanation regarding the correction or calculation of the numbers. The suggested changes in the new version included an increase in the total square footage of property able to be served by the sewer facilities and obligated to reimburse costs, as well as an increase in the total square footage of the City of Puyallup and Franklin properties "contributing to [the] project." *Id.* at 593. These changes resulted in a decrease to the reimbursement costs per square foot.

In support of Viking's reply, Viking submitted a declaration from a managing officer, who stated that the warehouse was approximately 450,000 square feet and that the "project could not have been constructed without connection to sewer. Septic was never a viable option." *Id.* at 612. There is no evidence in the record that disputes or conflicts with these assertions by Viking. The declaration also disputed Hunger's "corrected" numbers regarding the square footage able to be served by the sewer facilities, stating that it appeared that Hunger added undevelopable property to the calculations that the city had previously agreed could not be served by the lift station.

The trial court granted Viking's motion for summary judgment. The court specified that the motion was decided pursuant to the court's authority under the Uniform Declaratory Judgments Act, chapter 7.24 RCW, and that Viking's challenge as presented was not subject to exclusive review under LUPA. In addition, the court concluded that Puyallup was required to contract with Viking under RCW 35.91.020, the city's SDC credits to Franklin did not constitute a contribution to the original costs of constructing the sewer facilities, and, therefore, the city unlawfully excluded itself from the contract as a property owner obligated to pay a pro rata reimbursement to Viking upon connection to the facilities. Accordingly, the court ordered the city to revise the latecomer

contract to include the city as a property owner subject to latecomer fees. The court further ordered the city not to revise any aspect of the latecomer contract aside from this addition and accompanying reduction of other property owners' pro rata share of the reimbursement costs.

The city appeals the trial court's orders denying its motion for summary judgment and granting Viking's motion for summary judgment.

DISCUSSION

I. STANDARD OF REVIEW

We review a summary judgment order de novo, viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Meyers v. Ferndale Sch. Dist.*, 197 Wn.2d 281, 287, 481 P.3d 1084 (2021). Summary judgment is appropriate when the pleadings, affidavits, depositions, and admissions on file demonstrate that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). "An issue of material fact is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party." *Reyes v. Yakima Health Dist.*, 191 Wn.2d 79, 86, 419 P.3d 819 (2018). Here, the parties do not dispute any issue of material fact; rather, the questions presented in this appeal concern whether Viking was entitled to judgment as a matter of law.

II. PRINCIPLES OF STATUTORY INTERPRETATION

Statutory interpretation is a question of law that we review de novo. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Our "objective is to ascertain and carry out the Legislature's intent." *Id.* "[I]f the statute's meaning is plain on its face," we "must give effect to that plain meaning as an expression of legislative intent." *Id.* at 9-10. We are to discern plain meaning " 'from the ordinary meaning of the language at issue, the context of the

statute in which that provision is found, related provisions, and the statutory scheme as a whole.' " *State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131 (2010) (quoting *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009)).

If, after a review of the plain meaning, a statute is susceptible to more than one reasonable interpretation, it is ambiguous. *Id.* "[B]ut 'a statute is not ambiguous merely because different interpretations are conceivable.' " *Id.* (internal quotation marks omitted) (quoting *Est. of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 498, 210 P.3d 308 (2009)). If a statute is ambiguous, we may look to legislative history and relevant case law to discern legislative intent. *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014).

III. APPLICABILITY OF LUPA

The city argues that LUPA is the exclusive means of challenging the city council's approval of the latecomer contract and that the trial court erred by not dismissing Viking's lawsuit because Viking failed to comply with LUPA's procedural requirements. Viking argues that LUPA does not apply because the city's property is not regulated by the latecomer contract and, even if LUPA did apply, Viking complied with LUPA's procedural requirements. We agree with Viking.

A. LEGAL PRINCIPLES

With limited exceptions, LUPA is "the exclusive means of judicial review of land use decisions." RCW 36.70C.030(1). However, if an appeal does not involve a "land use decision," it is not subject to review under LUPA. *Cave*, 199 Wn. App. at 656. LUPA defines land use decision as follows:

> [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, on

> (a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used . . . ;
>
> (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; and
>
> (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)(a)-(c).

B. ANALYSIS

Puyallup argues that LUPA is the exclusive means of challenging the city council's decision to approve the latecomer contract at issue in this case because that constituted a land use decision.

The parties dispute whether *Cave* is controlling on the issue of whether the latecomer contract in this case is subject to exclusive review under LUPA. In *Cave*, this court held that the Bainbridge Island City Council's approval of a latecomer reimbursement contract was a land use decision under RCW 36.70C.020(2)(b). 199 Wn. App. at 654. In the contract at issue in *Cave*, property owners in the identified area were required to pay reimbursement charges prior to connecting to the water main that had been installed by another property owner. *Id.* The only undeveloped properties in the reimbursement area were owned by Cave and the developing owner who requested the latecomer contract. *Id.*

Relying on principles of statutory interpretation, the *Cave* court concluded that the city council's approval of the contract met the three elements to qualify as a land use decision under RCW 36.70C.020(2)(b): "(1) an interpretative or declaratory decision[,] (2) regarding the application to a specific property[,] (3) of zoning or other ordinances or rules regulating the

improvement, development, modification, maintenance, or use of real property." *Id.* at 663. Regarding the final element, the court reasoned that the latecomer reimbursement contract was governed by the city's ordinances and that "the ordinances 'regulated' Cave's use and development of its property" because Cave was required to pay the charges prior to any development on its property that would necessitate connection to the water main covered by the contract. *Id.* at 664.[4]

Here, Viking's specific challenge concerned Puyallup's decision to exclude itself from any payment obligation under the latecomer contract. *Cave*, therefore, does not resolve the issue of whether the city council's decision to approve the contract was a land use decision because the city was not required to pay any fees prior to development on its property requiring connection to the facilities, as was the situation in *Cave*. As noted by the court in *Cave*, the latecomer contract was governed by the city's ordinances, and the reason these ordinances regulated Cave's property use and development was because the fees needed to be paid prior to any development on the property. *Id.* But here, as pointed out by Viking, the city's property was specifically excluded from the assessment roll and was not subject to the latecomer contract. Accordingly, Puyallup's specific property was not regulated by the decision, so Viking's challenge was not subject to exclusive review under LUPA.

[4] The court noted that an unpublished Division One case was instructive but "not directly on point" because the contract in the other case mandated reimbursement payments if property owners engaged in any development, whereas the contract at issue in *Cave* only mandated reimbursement payments if a property owner intended to connect to the water main. 199 Wn. App. at 665-66.

C. WHETHER VIKING COMPLIED WITH LUPA'S PROCEDURAL REQUIREMENTS

Even if LUPA applied in this case, Viking complied with LUPA's procedural requirements.

LUPA's procedural requirements are strictly enforced, and a party's failure to comply with these requirements bars their LUPA petition. *Viking JV, LLC v. City of Puyallup*, 22 Wn. App. 2d 1, 9, 509 P.3d 334 (2022). Relevant here, a LUPA petition must be dismissed unless it is timely filed with the court and served on "[e]ach person identified by name and address in the local jurisdiction's written decision as an owner of the property at issue." RCW 36.70C.040(2)(b)(ii).

Puyallup argues that Viking's LUPA petition should have been dismissed because Viking failed to serve the petition on "the owners of the properties at issue that the latecomer application and decision included as regulated properties." Br. of Appellant at 33. In other words, Puyallup contends that all property owners required to pay reimbursement fees under the latecomer contract were owners of "the propert[y] at issue" and that Viking was required to serve its petition on these property owners. *Id.*

However, Viking's challenge to the latecomer contract concerned *only* the city's decision to exclude itself from any payment obligation under the contract. Viking's complaint even clarified that, because the relief it sought added a party to pay reimbursement fees, it would not increase the payment obligation of any other property owners already identified in the contract. If, to qualify as a land use decision under RCW 36.70C.020(2)(b), the decision must concern a "specific property," then that must in turn be the "property at issue" for purposes of serving the proper parties with the petition under RCW 36.70C.040(2)(b)(ii). Accordingly, here, the "specific

property" in the land use decision is the city's property, which Viking is challenging the exclusion of in the contract.

Puyallup does not challenge the service of Viking's petition on Puyallup, only on other property owners, which Viking was not required to do. Viking complied with LUPA's procedural requirements, so it was not error for the trial court not to dismiss the petition on this basis.

IV. WHETHER VIKING IS ENTITLED TO A LATECOMER CONTRACT UNDER RCW 35.91.020 AND WHETHER PUYALLUP CONTRIBUTED TO THE ORIGINAL COST OF THE FACILITIES

Puyallup argues that Viking is not entitled to a latecomer contract under RCW 35.91.020 because Viking did not meet the requirements under that statute, and that, even if Viking is entitled to a latecomer contract under the statute, the city should not be required to pay latecomer fees to Viking under the contract because it contributed to the original cost of the facilities. Viking argues that it met the requirements under RCW 35.91.020 to be entitled to a latecomer contract under the statute and that the city did not contribute to Viking's original construction costs. We agree with Viking.

A. LEGAL PRINCIPLES

As explained above, "a municipality must contract with the owner of real estate for the construction or improvement of water or sewer facilities that the owner elects to install solely at the owner's expense." RCW 35.91.020(1)(a). Such a contract is to provide for reimbursement for the cost of construction on a pro rata basis when other property owners subsequently connect to or use the facilities. RCW 35.91.020(2)(b)-(c).

But a contract is only required by statute when the "municipality's ordinances require the facilities to be improved or constructed as a prerequisite to further property development." RCW

35.91.020(1)(a). Furthermore, the latecomer fees under the contract must only come from property owners "who did not contribute to the original cost of the facilities." RCW 35.91.020(2)(c).

B. ANALYSIS

1. Whether Viking is Entitled to a Latecomer Contract

a. Contributions Do Not Defeat a Property Owner's Ability to Seek a Latecomer Contract

The city argues that Viking is not entitled to a latecomer contract under RCW 35.91.020 because the facilities were not installed solely at Viking's expense due to Franklin's monetary contribution to the construction cost.

Puyallup's argument that Viking is not entitled to a latecomer contract under the statute because the facilities were not constructed solely at Viking's expense is without merit. When determining the plain meaning of a statute, we look at related statutory provisions. *Gonzalez*, 168 Wn.2d at 263. As noted by Viking, the requirement in RCW 35.91.020 that the developing owner must install the sewer facilities "solely at the owner's expense" appears in subsection (1)(a), and further in the statute, it clarifies that latecomer fees may only be collected "from property owners who subsequently connect to or use the . . . sewer facilities, *but who did not contribute to the original cost of the facilities*." RCW 35.91.020(2)(c) (emphasis added).

The fact that property owners "who did not contribute to the original cost of the facilities" are subject to paying fees under a latecomer contract shows that the legislature contemplated circumstances where other property owners may choose to contribute and, due to their contribution, should not be required to pay fees under such a contract. *Id.* Such a contribution clearly does not preclude a developing owner from seeking latecomer reimbursement from other property owners for portions that the developing owner solely paid for; the owner is simply only

able to seek reimbursement for those costs that were solely their expense. RCW 35.91.020(1)(a). Puyallup responds that subsection (2)(c) "simply confirms that latecomer fees will not be collected from the property owner who installed the facilities," but this argument is illogical considering the reimbursements go to *that* property owner. Reply Br. of Appellant at 28. Accordingly, Viking satisfied the requirement that the facility costs subject to reimbursement were solely Viking's because Franklin's $600,000 contribution was excluded from the costs for which it sought reimbursement.

b. Viking Was Required to Install the Sewer Facilities

The city also argues that Viking is not entitled to a latecomer contract because Puyallup's ordinances did not require Viking to construct the facilities as a prerequisite to further development. We disagree.

Puyallup's argument can be summarized as follows: In planning this project, Viking had two different options. The first option was for Viking to install its own septic system that would not have required installation of sewer infrastructure. The city contends that Viking did not utilize this option, even though it could have, because it "chose instead to maximize warehouse square footage." Br. of Appellant at 7.

The second option was for Viking to install sewer infrastructure consisting of a sewer lift station and sewer lines to extend city sewer service. Under this option, the city concedes that it did require these facilities to be installed in order for Viking to satisfy the MDNS that was issued for this project. According to the city, however, the requirements under the MDNS only became true requirements on which further development was conditioned because Viking *chose* this second option rather than simply install a septic system.

Puyallup's argument, however, ignores that a septic system was not viable for the 450,000-square foot warehouse Viking sought to build. To say that Viking could have chosen the first option of installing its own septic system is tantamount to saying that Viking could have chosen not to build the warehouse at all. Puyallup has never disputed Viking's declaration that it could not have installed a septic system for this warehouse.

Puyallup relies on this court's decision in *Woodcreek Land Ltd. Partnerships I, II, III and IV v. City of Puyallup*, 69 Wn. App. 1, 847 P.2d 501 (1993). In *Woodcreek*, the city made street improvements after a traffic study recommended widening the street. 69 Wn. App. at 2-3. After the first improvement phase was complete, the city sought reimbursement through latecomer fees from property owners in the affected area. *Id.* at 3. Following a challenge from one of the property owners, the court analyzed language from RCW 35.72.010 stating that a municipality " '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.' " *Id.* at 4-5 (quoting RCW 35.72.010).

The city in *Woodcreek* urged this court to hold that Title 21 of the PMC, which "set up the City's environmental policy and which adopted the City's Comprehensive Plan," and also expressed an intent to improve that specific street, satisfied the ordinance requirement. *Id.* at 6. However, the court explained that those provisions did not require such improvements prior to further property development and did not satisfy the requirements of RCW 35.72.010. *Id.*

Title 21 PMC, Puyallup's environmental policy, was adopted by ordinance under SEPA[5] and accompanying regulations. PMC 21.04.010. Under this portion of the PMC, mitigation

[5] State Environmental Policy Act (SEPA), ch. 43.21C RCW.

measures found in an MDNS issued by the city "shall be deemed conditions of approval of the permit decision and may be enforced in the same manner as any term or condition of the permit, or enforced in any manner specifically prescribed by the city." PMC 21.04.120(7).

Here, Puyallup argues that "[c]onsistent with *Woodcreek*, [ ] there is no City ordinance that required Viking to improve or construct the facilities as a prerequisite to further property development." Br. of Appellant at 45. However, in *Woodcreek*, the improvements were not made as a mitigation measure required by an MDNS. Although no provision of Title 21 PMC specifically requires construction of the sewer facilities in this case, Puyallup acted under its authority within Title 21 to require Viking to construct sewer facilities consistent with a technical memorandum that prescribed the type of sewer infrastructure necessary for the project before Viking could obtain any occupancy permits for the project site. The MDNS stated that this was required because "[t]here is no existing City sewer infrastructure serving the project site and surrounding area, thus constituting a potentially significant impact given potential future sewer needs of the site and vicinity under current zoning." CP at 587 (emphasis omitted).

Because Puyallup acted under its SEPA authority consistent with Title 21 PMC in requiring Viking to construct the sewer facilities as a condition of development, we hold that the ordinances required Viking to construct the facilities as a prerequisite to further development. Accordingly, Viking satisfied the requirements of RCW 35.91.020 and Puyallup was therefore required to enter into a latecomer contract with Viking under the statute.

2. Whether Puyallup Contributed to Original Cost of the Facilities

Puyallup further argues that, even if Viking is entitled to a latecomer contract under RCW 35.91.020, the city should not be required to pay latecomer fees under any such contract because

it contributed to the original cost of the facilities. Specifically, Puyallup argues that its SDC credits to Franklin passed through to Viking as a contribution.

The statute does not define contribution, but it states that reimbursements through latecomer fees may only be collected from "property owners who subsequently connect to or use the . . . sewer facilities, but who *did not contribute to the original cost of the facilities*." RCW 35.91.020(2)(c) (emphasis added). In its argument, Puyallup points out that the city's $253,000 in credits went to Franklin to offset Franklin's contribution to the lift station. Therefore, under the city's own argument, it plainly did not "contribute to the original cost of the facilities." *Id.* Rather, *Franklin* contributed $600,000 to the original cost of the facilities, and the city credited SDCs to Franklin that it otherwise would have charged for Franklin's connection to the facilities under the assumption that this credit would be a contribution. But this credit did not go toward the original cost of the facilities; it might be more accurate to say that the credit partially reimbursed Franklin for the money that Franklin contributed to the original cost of the facilities.

Furthermore, Franklin's contribution was not included in the costs for which Viking seeks reimbursement. As described above, under RCW 35.91.020(1)(a), a developing owner may only seek reimbursement for construction of sewer facilities that were solely at the owner's expense. Any pro rata reimbursement to the owner under a latecomer contract, therefore, actually reimburses the developing owner for the costs it actually incurred, with contributing property owners specifically excluded, so that the developing owner is not reimbursed for costs paid by contributors. Because Franklin's $600,000 contribution was, therefore, excluded from Viking's costs under the latecomer agreement, it is unclear how the city's credit to Franklin as a result of this contribution would be a contribution for the costs for which Viking sought reimbursement.

To the extent that Puyallup argues that it partially reimbursed Franklin for its contribution to Viking, rendering the $600,000 received by Viking a *joint contribution* from both Franklin and the city, it would be unfair to reduce the reimbursement Viking should receive through a latecomer contract based on a side agreement that it was never informed of. Viking contracted for the $600,000 contribution from Franklin in exchange for Viking incurring the remainder of the construction costs, and Viking agreed by contract not to pursue latecomer fees from Franklin and Cascade due to this contribution. Viking made no such agreement with the City of Puyallup.

We hold that Puyallup's SDC credits to Franklin did not constitute a contribution to the original cost of the sewer facilities.

V. REVISIONS TO LATECOMER CONTRACT

Lastly, the city contends that the trial court erred by refusing to allow the city to make corrections to the latecomer contract before signing it. The city's argument is based on the declaration of the city engineer, Hunger, who stated that he "learned that several of the numbers included in . . . [the] original latecomer agreement were incorrect" after he reviewed the documents to prepare his declaration. CP at 554. However, the city claims that we "need not sort through the various calculations and exhibits to the latecomer agreement," confining its argument to the idea that if the latecomer contract is not a land use decision under LUPA, the city should be able to make whatever corrections it deems necessary to the calculations. Reply Br. of Appellant at 35.

The city has not made any argument to this court that any corrections are actually necessary; it merely states that if it believes corrections are necessary, it should be allowed to make such corrections. But the city has cited no authority for such a proposition. When a party cites no authority in support of a proposition, we may assume counsel has found none. *DeHeer v. Seattle*

Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). Accordingly, the city has not established any error in the trial court's decision not to allow corrections to the latecomer contract.

CONCLUSION

We hold that Puyallup's arguments are without merit and affirm the trial court's orders denying summary judgment to Puyallup and granting summary judgment to Viking.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

CRUSER, J.

We concur:

GLASGOW, C.J.

CHE, J.

EGLICK & WHITED PLLC

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