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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re City of Lynnwood North-East-South Annexation Proposal,
Snohomish County, Washington; File No. 01-2009

CITY OF MILL CREEK, a Washington municipal corporation,

Appellant,

v.

WASHINGTON STATE BOUNDARY REVIEW BOARD FOR
SNOHOMISH COUNTY; CITY OF LYNNWOOD, a Washington
municipal corporation; SNOHOMISH COUNTY, a Washington
municipal corporation; CITY OF MUKILTEO, a Washington municipal
corporation; SNOHOMISH COUNTY FIRE DISTRICT No. 7, a
Washington municipal corporation; SNOHOMISH COUNTY FIRE
DISTRICT No. 1, a Washington municipal corporation; OPUS
NORTHWEST, LLC; GORDON NESS; CLINT OLSON; and MARK
BEALES,

Respondents

A handwritten signature in black ink is written over a rectangular stamp. The signature appears to be 'J.B.' or similar. The stamp is mostly illegible but seems to contain some text and a date.

MILL CREEK REPLY BRIEF

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I. SUMMARY OF REPLY

The City of Mill Creek is appealing the Snohomish County Boundary Review Board decision approving the use of a minor collector street, Larch Way, as the City of Lynnwood's permanent annexation boundary. Larch Way lies east of Interstate 5 and is within Mill Creek's municipal urban growth area.

The underlying policy question is whether approval of a permanent annexation boundary that ignores the most obvious and natural physical boundary between two growing municipalities comports with the statutory annexation objectives. Because the answer to that question is "no", the Board's final decision to the contrary does not properly interpret or apply the statutory objectives.

The Board misinterpreted and misapplied the statutory annexation objectives in RCW 36.93.180(1), (2), (3), (4), and (7) by failing to declare the natural boundary formed by Interstate 5 to be the permanent annexation boundary between Lynnwood and Mill Creek. The Board's legal errors are substantial and do not conform with applicable precedent. Mill Creek is substantially prejudiced by this mistaken result.

Lynnwood would like the issue in this appeal to be whether there is substantial evidence to support the Board's decision. But that is not the proper standard. The issue is whether the Board committed errors of law

when interpreting and applying the legal criteria of RCW 36.93.180 to approve a permanent annexation boundary on a minor collector road east of Interstate 5. This Court reviews such legal errors under the clearly erroneous or mistake of law standard. That review is performed de novo because it rests with the Court to declare what the law is and its proper application.

Mill Creek respectfully asks the Court to reverse the Board's final decision as to the use of Larch Way as a permanent annexation boundary. The Court may remand this matter to the Board for correction of the error, or the Court itself may declare the final annexation boundary to be Interstate 5 north of Interstate 405.

II. REPLY TO LYNNWOOD'S FACTUAL STATEMENTS

A. The Mill Creek and Lynnwood MUGAs Overlap; One is Not Preferred Over the Other

The Mill Creek and Lynnwood municipal urban growth areas ("MUGA") overlap as to that portion of the annexation area lying east of Interstate 5 and north of Interstate 405 ("Disputed Annexation Area").¹ Lynnwood repeatedly states that that Snohomish County "approved" Lynnwood's MUGA to the inferred exclusion of Mill Creek.² That is not true. In fact, Snohomish County left it to Mill Creek and Lynnwood to

¹ Mill Creek uses the same identifiers and citation format in this Reply Brief as in its Opening Brief. See Mill Creek Opening Brief at 6 and citations therein.

² See, e.g., Lynnwood Response Brief at 4, 9, 24 (note 18), and 25.

resolve their overlapping MUGAs,³ and invoked the Board's jurisdiction "only to ensure that an annexation agreement [between Lynnwood and Snohomish County] was entered before the close of the Board's hearing."⁴ Further, Lynnwood does not take issue with the fact that the staffs and Planning Commissions of both cities, and the Mill Creek City Council, all agreed that the proper boundary between the two cities was Interstate 5 north of Interstate 405.⁵ Finally, whether or not Snohomish County approved the annexation is legally irrelevant since it is the Board that has the authority to make that decision.

B. Annexations are Not a Race to the Courthouse

Lynnwood argues that it has been planning for this annexation and Mill Creek hasn't, implying that it has thus acquired some priority right to consummate the annexation.⁶ The Court is well aware that endless bad decisions and legally improper actions have been preceded by purported "years of planning."⁷ More directly, the Washington Supreme Court has ruled that there is no statutory violation nor legal inconsistency when two jurisdictions plan for development and annexation of the same

³ Testimony of Lynnwood's Community Development Director Paul Krauss. Record (Sub 21) SC BRB Rec. 30-31.

⁴ Lynnwood Response Brief at 9-10.

⁵ See Mill Creek Opening Brief at 8-9 and citations therein.

⁶ See, e.g., Lynnwood Response Brief at 4.

⁷ Lynnwood Response Brief at 1.

unincorporated area.⁸ The Supreme Court also recognized that in the absence of a contract or an applicable regulation, neither jurisdiction may pre-empt the other from an annexation by virtue of having started its planning efforts first.⁹ Lynnwood's annexation must stand or fall on its own merits under the applicable annexation criteria.

In a related argument, Lynnwood says that Mill Creek "did not want to annex" up to the Interstate 5 boundary, implying that Mill Creek's long-standing MUGA designation was somehow ineffective to serve its intended purpose of designating Mill Creek's ultimate growth boundary.¹⁰ The accurate explanation of Mill Creek's urban growth planning, and its interaction with regional planning efforts, is set out in Mill Creek's Opening Brief.¹¹ Finally, it is a fact that Mill Creek's MUGA and Mill Creek's annexation policies were all adopted before the Board's hearing, and thus comprise the operative context for the Board's decision and this appeal.

⁸ "[T]here is no logical reason to conclude that two municipalities may not identify the same area of land for potential annexation simply because one or the other has already done so." *Chevron USA v. Central Puget Sound Growth Management Hearings Board*, 123 Wn. App. 161, 168, 93 P.3d 880 (2004), *affirmed* 156 Wn. 2d 131, 124 P.3d 640 (2005) ("*Chevron USA*").

⁹ *Id.*

¹⁰ Lynnwood Response Brief at 4. Lynnwood's citations to the Record for this proposition are to third party newspaper reports – hardly a credible source for what the Mill Creek City Council collectively intended or for the legal consequences of Mill Creek's previous, formal planning actions.

¹¹ Mill Creek Opening Brief at 9-13.

In the end, who planned first is not relevant to the statutory objectives in RCW 36.93.180, and is not pertinent to whether the Board properly interpreted and applied them in this case.

C. Lynnwood's Annexation Report is Not Necessarily Accurate or Infallible

Lynnwood makes a number of factual assertions throughout its Response Brief regarding police protection, fire services, and other matters.¹² While not directly pertinent to Mill Creek's appeal, they should still be read critically. For example, Lynnwood claims that it will provide better police response based on historic standards, but does not mention that this annexation will nearly double Lynnwood's population, that there will be no immediate increase in the City's police force to provide those expanded services, and that Snohomish County deputies will not be available to help.¹³ It is as likely as not that Lynnwood's police staffing ratio will actually decrease upon the annexation, a result that does not equate to improved police services east of Interstate 5.

¹² See, e.g., Lynnwood Response Brief at 5-8; 32-34.

¹³ See Record (Sub 21) SC BRB Rec. 205 (stating that it will take three years after annexation to fully staff the police department to meet the needs of the newly annexed area) and Mill Creek Opening Brief at 30 and citations to the Record therein. Lynnwood's claim omits comment on the highly restricted access across the Interstate 5 barrier. See Mill Creek Opening Brief at 32-33.

III. APPLICABLE LEGAL STANDARDS

A. Lynnwood Overstates the Deference Standard

Lynnwood relies heavily on the concept of deference to an agency decision.¹⁴ While it is true that deference is accorded to administrative decisions, the legal analysis only starts there. Courts "also recognize the countervailing principle that it is *ultimately for the court to determine the purpose and meaning of statutes*, even when the court's interpretation is contrary to that of the agency charged with carrying out the law."¹⁵ Moreover, our State Supreme Court has held that "[c]oncerning conclusions of state law this court is the final arbiter, and *conclusions of state law entered by an administrative agency or court below are not binding on this court.*"¹⁶

This Court has the clear authority to review the Board's legal decisions and determine if the Board properly interpreted and applied the statutory annexation criteria. That review is not performed under a deference standard.¹⁷

¹⁴ Lynnwood Response Brief at 13-14, 26, 31.

¹⁵ *Overton v. Washington State Econ. Assistance Auth.*, 96 Wn. 2d 552, 555, 637 P.2d 652 (1981) (emphasis added).

¹⁶ *Leschi Improvement Council v. Washington State Highway Comm'n*, 84 Wn. 2d 271, 286, 525 P.2d 774 (1974) (emphasis added).

¹⁷ See Mill Creek Opening Brief at 13-16. Lynnwood does not directly challenge Mill Creek's presentation of these legal standards, but tries to recast Mill Creek's appeal into a more favorable substantial evidence challenge, which it is not.

B. Lynnwood's Substantial Evidence Arguments are Not Pertinent to This Appeal

Lynnwood says repeatedly that the Board is required to consider all nine statutory annexation objectives and determine whether, overall, there is substantial evidence that the objectives are hindered or advanced.¹⁸ While that is a correct statement of law, it does not pertain to this case.

The focus of Mill Creek's appeal is whether the Board committed reversible error in interpreting and applying the legal criteria of RCW 36.93.180. That is not a substantial evidence challenge, but is a direct challenge to the Board's legal conclusions. The Court reviews that action de novo, and is the final arbiter of what the law says. Lynnwood does not understand this distinction, and thus all of Lynnwood's substantial evidence arguments are not pertinent to the Court's decision here.

Beyond that, RCW 36.93.150(5) expressly states that a Board may modify or deny a proposed annexation when there is evidence that the action is inconsistent with "*one or more* of the objectives under RCW 36.93.180."¹⁹ The Board committed reversible error when it improperly interpreted and applied the statutory criteria to approve Lynnwood's use of Larch Way as its permanent annexation boundary. The Board should have

¹⁸ Lynnwood Response Brief at 16-17.

¹⁹ Emphasis added.

modified that portion of the proposed annexation by setting the permanent boundary at Interstate 5 lying north of Interstate 405.

Because the Board approved an annexation that includes land east of Interstate 5 and within Mill Creek's MUGA, the Board's decision fails to achieve five of the statutory objectives. On that independent basis, this Court can easily conclude that the Board's decision does not overall further the goals and objectives of RCW 36.93.180. The Board's conclusion to the contrary is error of law or clearly erroneous, and the Court should therefore reverse that decision.

C. Statutory Annexation Factors and GMA Are Not Defenses to the Board's Errors

Lynnwood notes that Mill Creek did not challenge the Board's interpretation of the statutory "factors" listed in RCW 36.93.170 or the compliance of the annexation with applicable Growth Management Act ("GMA") statutes.²⁰ Mill Creek did not raise those issues because they were not central to the Board's failure to designate Interstate 5 as the boundary between two growing cities in accordance with a proper analysis and application of the statutory objectives in RCW 36.93.180. Lynnwood gains no defense to the Board's mistaken decision merely because Mill Creek focused its appeal on the issue and statutes that do matter.

²⁰ Lynnwood Response Brief at 14-15.

As to the statutory "factors", Lynnwood cannot benefit from the Board's oral discussion of the factors or the case prior to entry of its Final Decision.²¹ Rather, Lynnwood must defend the scant analysis outlined in the Board's Final Decision.²² It is the agency's written decision which is to be scrutinized by a reviewing court in determining the agency's compliance with law.²³ The reasons for this are well recognized:

Findings of fact by an administrative agency are subject to the same requirement as are findings of fact drawn by a trial court. The purpose of findings of fact is to ensure that the decisionmaker has dealt fully and properly with all the issues in the case before he or she decided it and so that the parties involved and the appellate court may be fully informed as to the bases of his or her decision when it is made. [...] Statements of the position of the parties, and a summary of the evidence presented, with findings which consist of general conclusions drawn from an indefinite, uncertain, undeterminative narration of general conditions and events, are not adequate.²⁴

As to the three cited GMA statutes, RCW 36.70A.020 merely lists the 13 undifferentiated goals of GMA, RCW 36.70A.210 describes the process for adopting countywide planning policies and identifies general

²¹ Lynnwood Response Brief at 10-11.

²² See Final Decision at Record (Sub 21) SC BRB Rec. 4-11.

²³ See, e.g., Administrative Procedures Act at RCW 34.05.461 (agency orders to be in writing), RCW 34.05.570(3) (review of agency orders); Rules of Appellate Procedure ("RAP") 2.1(c), RAP 2.2(a)(1) and (3).

²⁴ *Weyerhaeuser v. Pierce County*, 124 Wn. 2d 26, 35-6, 873 P.2d 498 (1994) (all quotations, citations and grammatical alterations omitted). This is yet another example of the Board's failure to properly evaluate and apply the law in this case.

contents of such policies,²⁵ and RCW 36.70A.110 concerns the establishment of county urban growth areas, not MUGAs.²⁶ Lynnwood's arguments on these points are simply not relevant or pertinent to this appeal, and should be disregarded by the Court.

IV. INTERPRETATION AND APPLICATION OF STATUTORY OBJECTIVES

A. Interstate 5 is the Logical and Appropriate Physical Boundary that Best Meets the Annexation Objectives

Lynnwood's principal counter argument as to RCW 36.93.180(2) is that *any* road qualifies as a physical boundary, and since Larch Way (east of Interstate 5) is such a road, this objective must necessarily have been met.²⁷ This simplistic approach fails to address the major underlying problem with the Board's analysis – the failure to use the *most obvious physical boundary* in the area to denote the natural dividing line between two growing jurisdictions and the natural demarcation of service areas.

Lynnwood misses these same points in its analysis of *City of Richland v. Franklin County Boundary Review Board* (hereafter "*Richland*").²⁸ The key fact of that case is the Court's endorsement of Pasco's use of the Columbia River as the appropriate jurisdictional

²⁵ RCW 36.70A.210(1) plainly says "Nothing in this section shall be construed to alter the land-use powers of cities."

²⁶ RCW 36.70A.110 concerns only the establishment of *county* urban growth areas, not *municipal* urban growth areas.

²⁷ Lynnwood Response Brief at 18-27.

²⁸ 100 Wn. 2d 864, 676 P.2d 425 (1985).

boundary between two growing cities *instead of using minor roads across the Columbia River*:

*Pasco's annexation would use the Columbia River as a boundary. Richland's plans were to annex a smaller area immediately across the Columbia River and to provide it with services by extending sewer and water lines across the river. Richland's proposal would extend its boundaries across the Columbia and into Franklin County. Richland argued that the land remaining between its newly created boundaries across the Columbia and Pasco could be annexed and serviced by Pasco.*²⁹

The parallel to Lynnwood's proposed annexation *across* the natural boundary of Interstate 5 and into a "no man's land" somewhere within Mill Creek's MUGA is unmistakable. The *Richland* court concluded that Pasco "was the most logical municipality" to provide services because all of the area to be serviced was located *on Pasco's side of the Columbia River*.³⁰ While Lynnwood naturally relies on the fact that Pasco had engaged in extensive planning prior to the annexation,³¹ the critical fact was Pasco's proximity to the service area lying between Pasco's city limit and the Columbia River.

²⁹ *Richland* at 871 (emphasis added).

³⁰ *Richland* at 871.

³¹ Lynnwood makes much of the fact that it has been planning for this annexation for some time. This is nothing more than a restatement of the "race to the courthouse" argument described above at Section II.B. Annexation boundaries should be set based on what is the best permanent boundary, not who got there first. On the merits of this argument, however, Lynnwood's 1995 planning actions (see Lynnwood Response Brief at 4) still postdate Mill Creek's adoption of its original UGA and its designation of Interstate 5 as its northwesternmost urban growth area boundary in 1992. See Mill Creek Opening Brief at 9.

In the same way, Mill Creek is the logical service provider to the Disputed Annexation Area east of Interstate 5. Extending Mill Creek's boundaries west to Interstate 5 will utilize the obvious "river " between Lynnwood and Mill Creek as the long-term jurisdictional boundary between the cities. This result also solves all of the problems Lynnwood faces with the restricted access routes across Interstate 5.³²

The Board's approval of Larch Way as the dividing line between Lynnwood and Mill Creek has none of the attributes sanctioned by the *Richland* court – it breaches the natural boundary of Interstate 5, it provides no visual or discernable long-term boundary between Lynnwood and Mill Creek, and it permanently divides the logical service area that lies between Mill Creek's present boundaries and the Interstate 5 barrier. The Board's failure to recognize this and properly apply RCW 36.93.180(1), (2) and (3) and the *Richland* case is reversible error of law.

Lynnwood says many cities straddle Interstate 5.³³ While that is true, it is true in part because Interstate 5 was constructed through those jurisdictions after the cities had already developed. More importantly, however, Lynnwood again misses the point that, in a situation where two jurisdictions are growing toward each other and a major interstate highway

³² See Mill Creek Opening Brief at 32-33.

³³ Lynnwood Response Brief at 26.

lies between them, that distinct physical and geographic feature should be used as the designated boundary in accordance with the RCW 36.93.180 objectives.

Lynnwood ultimately relies on the fact that because Larch Way is a road, it comprises a "physical boundary" under RCW 36.93.180(2) and that is enough.³⁴ But it is not enough, in these circumstances. The Legislature clearly meant more when it used, as its stated examples of such physical boundaries, "bodies of water, highways, and land contours."³⁵ Larch Way is not a highway, and is not even a main, direct, or primary route to anywhere.³⁶

The Board's approval of Larch Way as a permanent annexation boundary under the requisites of RCW 36.93.180(2) and the Richland case is an error of law. The Final Decision does not meet the statutory objectives listed in RCW 36.93.180(1), (2), and (3) and should be reversed.

³⁴ Lynnwood Response Brief at 21-22.

³⁵ RCW 36.93.180(2).

³⁶ Lynnwood does not challenge the dictionary definitions of American Heritage Dictionary or Webster's Ninth New Collegiate Dictionary, used in Mill Creek's Opening Brief at 17-21. Those definitions clearly denote the character of the "physical boundary" intended by use of the word "highway".

B. Larch Way Bisepts a Natural Geographic Area and Community, Violating the Statutory Annexation Objectives

Lynnwood claims that Larch Way "does not bisect any geographically distinct area or socially or locationally distinct group."³⁷ A look at the map of the area easily belies this contention.³⁸ The geographically distinct area that is bisected is the area east of Interstate 5 and west of Mill Creek's current City boundaries. In short, Larch Way artificially divides a long-standing, cohesive area bounded on the west by Interstate 5 and assigns it to Lynnwood merely for political purposes.

Lynnwood says that it knows the habits, preferences and feelings of the thousands of people residing in the annexation area, but the Record does not contain meaningful evidence of that assertion.³⁹ Mill Creek's search of the Record indicates that it is devoid of evidence that residents *in the Disputed Annexation Area* were "pleased that Lynnwood was interested in including them in the City."⁴⁰

Lynnwood's claim that residents east of Interstate 5 and north of Interstate 405 are "already part of the Lynnwood community"⁴¹ is similarly self-serving and unsupported. While that assertion may be true

³⁷ Lynnwood Response Brief at 22.

³⁸ Record (Sub 21) SC BRB Rec. 665, 667; See Appendix 1 to Opening Brief.

³⁹ See Lynnwood Response Brief at 28.

⁴⁰ Lynnwood Response Brief at 28-29. The evidence cited by Lynnwood appears to apply only generally to responses at unspecified public gatherings without differentiation as to location.

⁴¹ Lynnwood Response Brief at 28.

for some residents in that area, it is equally likely that many of those residents identify with, shop, and recreate in Mill Creek, Mukilteo, Everett, Bothell, or Brier.⁴² That assertion also does not account for the realities of the restricted access across Interstate 5 during the morning and evening rush hours, when residents east of Interstate 5 have far more convenient access to Mill Creek than Lynnwood. In short, the Record lacks meaningful evidence that Lynnwood has a monopoly on the hearts and minds of residents in the Disputed Annexation Area.

Lynnwood points to the boundaries of the Swamp Creek drainage basin as support for the Board's decision.⁴³ The problem with that analysis is that using a drainage basin to establish political boundaries has no practical effect on or meaning to the daily lives of residents. The things that do have a daily practical effect are readily identifiable city borders, travel and access points, community identity, and physical connection to the surrounding shopping and community areas.⁴⁴ Making the land east of Interstate 5 part of Lynnwood will not change those patterns, but will

⁴² See regional map at Record (Sub 21) SC BRB Rec. 227 (Lynnwood's Notice of Intent to Annex). As to this map, it is interesting that Mill Creek's MUGA is not shown in the "two-tone" colors used for the cities of Lynnwood, Bothell, Everett, Mukilteo and Mountlake Terrace, thus giving the appearance that Mill Creek is not at all connected to Interstate 5 along its entire length north of Interstate 405 up to 128th Street. This is misleading to the Board, especially given the disputed MUGA boundary of the parties.

⁴³ Lynnwood Response Brief at 27.

⁴⁴ Record (Sub 21) SC BRB Rec. 751.

merely create an artificial border without regard to the logic of the geography, current uses, and future development patterns.

In *King County v. Boundary Review Brd.*, a drainage basin boundary was merely one of many factors that weighed on the side of meeting RCW 36.93.180(1).⁴⁵ Even at that, the Court noted that "*For the most part, the annexations are contained within the Rock Creek Drainage Basin.*"⁴⁶

The Board's reliance on maintaining integrity of a drainage basin, as opposed to the a direct application of the clear language in RCW 36.93.180(2) to use physical features like highways as annexations boundaries, is an error of law. The Board's approval of Larch Way does not meet statutory objectives under RCW 36.93.180(1) and (3).

C. Annexing East of Interstate 5 South of 164th Street Creates a Permanent Irregular Boundary that is Out of Sync With the Existing Interstate 5 Boundary

As approved by the Board, the annexation maintains Interstate 5 as the jurisdictional boundary between Lynnwood and Mill Creek north of 164th Street, and also maintains Interstate 405 as the jurisdictional boundary between Lynnwood and Mill Creek south of its intersection with

⁴⁵ *King County v. Boundary Review Brd.*, 122 Wn. 2d 648, 676, 860 P.2d 1024 (1993).

⁴⁶ *Id.* at 676.

Interstate 5.⁴⁷ The projection east of Interstate 5 and south of 164th Street intrudes on this long-established symmetry. That protrusion in these circumstances is contrary to the admonition of RCW 36.93.180(4) and (7) to prevent abnormally irregular boundaries and adjust impractical boundaries. Had the Board ended the eastward extent of the annexation along the Interstate 5 corridor, this symmetry would have been perfectly consistent with those statutory objectives and long-established boundaries. The long, linear barrier of Interstate 5 and Interstate 405 would have been the perpetual boundary between Mill Creek and Lynnwood – easy to understand, easy to implement, fully and easily recognizable by residents and public service providers, and absolutely consistent with the statutory annexation objectives and case law.

If the Board's decision is allowed to stand, the newly created boundary of Larch Way will forever be an anomalous and irregular dividing line between these two cities. Because Larch Way is the easternmost limit of Lynnwood's MUGA, and because Mill Creek's MUGA encompasses all of the remaining land to the east, the Larch Way collector street will become the permanent eastern city limit of Lynnwood. That is obviously inconsistent with the Legislative requirement to make city boundaries logical, distinct, meaningful, and consistent with

⁴⁷ See map at Record (Sub 21) SC BRB Rec. 227.

community patterns. The Board's decision to the contrary is decidedly inconsistent with a plain interpretation of the annexation objectives in RCW 36.93.180.

Lynnwood's response to this is that Larch Way "replaces a currently existing irregular boundary."⁴⁸ Lynnwood misses the obvious point of Mill Creek's appeal – terminating the annexation along the Interstate 5 corridor would also replace those same existing irregular boundaries. But instead of using a minor collector road that noticeably projects into Mill Creek's MUGA and divides the existing community east of Interstate 5, it would have used the most obvious linear boundary in the region – Interstate 5.

The Board's interpretation and application of RCW 36.93.180(4) and (7) are erroneous. The approval of Larch Way does not meet these statutory objectives and should be reversed.

D. Mill Creek Remains Substantially Prejudiced by the Board's Approval of the Larch Way Boundary

Lynnwood does not take issue with the substantial prejudice Mill Creek will suffer as a consequence of the Board's erroneous decision to use Larch Way as the final, permanent annexation boundary. The

⁴⁸ Lynnwood Response Brief at 39.

statutory standard is specifically focused on whether "substantial rights [of a party] *may have been* prejudiced."⁴⁹

That standard is met in this case because the Board's decision not only might prejudice, but will in fact have very real impacts that substantially prejudice Mill Creek. Those impacts include (i) the creation of a permanent and unnecessary intrusion into Mill Creek's MUGA, (ii) unnecessarily removing significant territory from Mill Creek's MUGA, (iii) permanently preventing Mill Creek from implementing its existing Comprehensive Plan and realizing its ultimate and logical city boundaries, and (iv) permanently burdening Mill Creek with the illogical aftermath of Lynnwood's bad planning choices and the Board's bad decision.

In contrast, Lynnwood would suffer no harm if the Court agrees that Interstate 5 north of Interstate 405 is the proper annexation boundary under the applicable statutory objectives and case law. Mill Creek Community Development Director Bill Trimm pointed out some the advantages of this result to the Board:⁵⁰

If the Board limits Lynnwood's proposed annexation to the west side of Interstate 5, Lynnwood could still assume the role of planning the expansion of the transit facilities and related transit-oriented development that is planned for the west side of Interstate 5, while enabling Mill Creek to fulfill its large city obligations and create a unified plan for

⁴⁹ RCW 36.93.160(6) (emphasis added).

⁵⁰ Record (Sub 21) SC BRB Rec. 748.

the [east] side of Interstate 5. Allowing both cities to plan appropriate developments on each side of Interstate 5 will positively reflect each community's respective values in terms of design, land use mix, and access, and will create opportunities for properly allocated development and coordination with regional service providers.

The Court should properly interpret and apply the annexation objectives of RCW 36.93.180 by eliminating the Disputed Annexation Area from the proposed annexation and establishing Interstate 5 north of Interstate 405 as the final annexation boundary.

V. APPEARANCE OF FAIRNESS

Lynnwood argues that Mill Creek has not shown any prejudice and that it did not act soon enough to preserve this claim. The prejudice is outlined above and arises as a consequence of the Board's decision, in which Chairman Sing participated. And it is still the fact that immediately after making his disclosures, Chairman Sing moved directly to taking testimony and hearing the evidence in the case, without offering any opportunity for the parties or other attendees to challenge his disclosure. Even if that action did not effectively preclude a timely challenge by Mill Creek, it gave the appearance of an unfair hearing to everyone in attendance. As stated in *Sherman v. State*, "The appearance of fairness doctrine *requires* that an administrative body must be fair, free from

prejudice, *and have the appearance of impartiality.*"⁵¹ The cure for such a failure is to remand the matter to the Board with instructions to hold another hearing.

VI. REPLY TO BOARD'S BRIEF

The Board's Response Brief basically restates the procedural steps that occurred in the case, along with the statutory objectives in RCW 36.93.180, and makes an expected assertion that the Final Decision satisfies the law. The Board did not respond to the extensive arguments laid out in Mill Creek's Opening Brief, and acknowledges that it will not advocate for or against either party's position.

VII. CONCLUSION

The Board erroneously approved Larch Way as Lynnwood's eastern annexation boundary because it misinterpreted and misapplied the annexation objectives of RCW 36.93.180 and the Supreme Court precedent of the *Richland* case. Because of that result, Mill Creek appealed and challenges the Board's legal conclusions as errors of law. This Court reviews such errors de novo, and has the authority to declare what the law is and its proper application.

On the law and precedent applicable to this case, the Court should hold that the Board's approval of a permanent annexation boundary along

⁵¹ 128 Wn. 2d 164, 188, 905 P.2d 355 (1995) (emphasis added).

Larch Way is error of law and clearly erroneous because it ignores the most obvious and natural physical boundary between two growing municipalities – Interstate 5.

For all of the foregoing reasons, Mill Creek respectfully asks the Court to reverse and modify the Board's Final Decision to exclude the Disputed Annexation Area from the proposed annexation and establish the easterly boundary of the Disputed Annexation Area as Interstate 5 north of Interstate 405.

RESPECTFULLY SUBMITTED this 19TH day of November, 2010.

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CERTIFICATE OF SERVICE

Linda Cooper hereby certifies that on this 19th day of November, 2010, I caused a true and correct copy of the foregoing document to be delivered via email and First Class Mail to the following attorneys of record:

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