

68079-0

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No. 68079-0

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

GOVERNOR'S POINT DEVELOPMENT COMPANY, Appellant,

vs.

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

GOVERNOR'S POINT DEVELOPMENT COMPANY'S APPEAL BRIEF

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I. INTRODUCTION

The issue in this appeal is the extent to which, in making long-term investment decisions, a landowner can rely on commitments by a city to provide water to a property so that it can be developed in accordance with its zoning. Conversely, the issue is the extent to which a city can disregard long-term commitments for water service in order to prevent development of a property, where the City has no zoning authority over the property but preventing development has become politically attractive.

Appellant Governor's Point Development Company ("GPDC"), which is owned by Roger Sahlin, and various entities owned by Mr. Sahlin and his family, own a 126-acre property ("the Governors Point Property") on what is commonly known as Governors Point at the south end of the Chuckanut area, north of Larrabee State Park and about 3 miles south of the City of Bellingham ("City"). Mr. Sahlin's father, Carl Sahlin, bought the Governors Point Property between 1960 and 1964, based on the express representation that the property was served with water supplied by the City.

That representation was supported not only by the statements of the sellers, but by City records of its water system and by the minutes of the City of Bellingham Water Board (under Bellingham's City Charter at the time, the Water Board had exclusive decision-making authority for the City's water system), which reflected Water Board approval of the service to the property, the City's 1953 installation of a 4-inch water main to the property with a 4-inch water meter at the Property boundary, and the 1953

installation of a private water main from that meter to the southern end of the Governors Point Property. Based on his understanding that the Governors Point Property had City water, in 1961 Mr. Sahlin's father paid half the cost of extending a 4-inch water main to the northern end of the Governors Point Property.

GPDC had begun buying water from the City of Bellingham in 1954. With the exception of a two-year period between 1988 and 1990, the City has billed GPDC for water provided to the Governors Point Property ever since.

The City has held itself out as willing to provide water to not just the Governors Point Property, but to the Chuckanut area as a whole, over at least seven decades. The entire Chuckanut area was originally a development of the Larrabee Real Estate Company, which in order to support a series of subdivisions, over the period 1935 through 1945 paid for the City to extend its water lines from the City's southern boundary to Larrabee State Park and along the roads between Chuckanut Drive and Puget Sound. Over the decades, the City has provided direct water connections to hundreds of homes in the Chuckanut area. In 1989, the City replaced the original 6-inch water main along Chuckanut Drive with a 12-inch main. Although the entire Chuckanut area was not included in an urban growth area when the City adopted urban growth areas under the Growth Management Act, RCW ch. 36.70A, in 1997, the City built water mains to serve additional portions of the Chuckanut area as late as 1999. The entire Chuckanut area, including Governors Point, is within the

“potential water service area” map in the capital facilities element of the City’s current comprehensive plan. At the time of the request to formalize the water contract between GDDC and the City, the summary denial of which precipitated this lawsuit, the Governors Point Property was within the “Existing Retail Service Area” shown in the Water System Plan the City had submitted to the State Department of Health to support reinstatement of state funding. Between 2004 and 2007, the City entered into at least 53 contracts to provide at least 78 new direct connections to lots in the Chuckanut area.

For reasons lost to history, when City water was extended to the Governors Point Property, it was done not by direct connection to lots as they were platted, but to GPDC as a water district. In 1971, GPDC received preliminary approval from Whatcom County for a 308-lot subdivision of the Governors Point Property. A requirement of final plat approval was City approval to provide water to that plat. After a series of meetings, submissions by GPDC, and reviews by the City engineer, on September 12, 1972, the Water Board gave final approval to provide City water to the plat. That approval was in the alternative: if the rest of the Chuckanut area wanted their water service improved, then the City would provide direct service to Governors Point and GPDC would help finance that improvement; otherwise the City would provide water to GPDC as a water association and GPDC would build its own water system. The choice was immaterial to GPDC.

In reliance on the Water Board's approval, GPDC built the roads for the plat. It was in the process of staking lots for the recording of the first phase of the plat, when Carl Sahlin was diagnosed with ALS or Lou Gehrig's disease. Carl Sahlin's diagnosis, and his death the following year, brought the recording of the final plat and sale of lots to a halt.

Both Roger Sahlin and his father intended long-term development of the Property, something they manifested by never putting the property in any sort of open space or current use tax status. They understood the property had water from the City. As a result, they felt no need to rush the development of the property.

In 1992, GPDC vested an application for a 141-lot subdivision of the Property. The plat fully complies with the zoning on the property and the Whatcom County Comprehensive Plan to which it vested.

On February 13, 2009 GPDC submitted a request to the City, updated to reflect current engineering and City costs, to formalize the contract for water services that had been approved in 1972 in order to serve development of the Property. In response, the City refused to prepare the feasibility study required by BMC 15.36.090.¹ Instead, it summarily denied GPDC's request.

Whatcom County Superior Court Judge, Hon. Charles Snyder, sustained that denial in two summary judgment motions. In the first, the

¹ BMC 15.36.090 was repealed by Ordinance 2011-05-025, approved June 2, 2011.

trial court held on summary judgment that no implied contract to supply water existed, but if it did, the statute of limitations to enforce it had run. In the second, the trial court held that although the Property was within the City's Retail Service Area, and despite the evidence showing that the City had extended water to the Governors Point Property in the 1950s, the City could rely on its current policies stating that it would not extend direct service outside its urban growth area to deny service to the Property entirely.

GPDC submits that the trial court erred. Material issues of fact precluded either summary judgment decision. A reasonable trier of fact could and should find that an implied contract exists to supply water for development of the Governors Point Property, and the Sahlin family has reasonably relied on that contract. Similarly there were material issues of fact as to whether any action by the City put GPDC on notice that the City had disavowed or breached the implied contract, and thus triggered the running of the statute of limitations. Finally, the operative fact here is that City water was extended to the Chuckanut area, including Governors Point Property, in the 1930s, 40s and 50s. The City's policies concerning water extensions had to be read with that foundation. Fundamental notions of due process, as well as Washington statutes and regulations, preclude a City from using water service policies as it purports to use them here – as a basis to refuse development that is politically incorrect, while providing no impediment to actions that are less controversial.

II. ASSIGNMENTS OF ERROR

A. Assignment of Error: The trial court erred in granting the City of Bellingham's Motion for Partial Summary Judgment. CP 215-218.

Issues Pertaining to Assignment of Error A.

1. Were there material issues of fact as to whether the City held itself out to GPDC as a public utility willing to serve all customers within the Chuckanut area?

2. Were there material issues of fact as to whether the course of dealing between the City and GPDC created an implied contract requiring the City to supply water to GPDC for development consistent with the Governors Point Property zoning and the Whatcom County Comprehensive Plan, unless engineering constraints prevented such service?

3. Were there material issues of fact as to whether the statute of limitations barred GPDC's claim?

B. Assignment of Error: The trial court erred in granting the Order Granting City of Bellingham's Second Motion for Partial Summary Judgment, And Dismissing The Cause of Action With Prejudice. CP 5-8.

Issues Pertaining to Assignment of Error B.

1. Water service having been extended to the Governors Point Property in the 1950s, did the trial court err in holding that the City's utilities service extension ordinance, Ordinance 2006-03-026, excused the

City from proceeding with a feasibility study as requested by BMC 15.36.090?

2. Did the trial court err in holding that Ordinance 2006-03-026 prohibited provision of City water to newly created lots outside the urban growth area?

III. STATEMENT OF THE CASE

A. The City Extended City Water To The Chuckanut Area and to the Governors Point Property Decades Ago.

Prior to January 1, 1973, the City's water system was governed by its Water Board. CP 792-793, 960. Minutes of the Water Board, combined with the City's GIS system, tell the story of the City's extension of its water system throughout the Chuckanut area in the 1930s, 40s, 50s and 60s. CP 793, 806-812.

The City extended a water main on Chuckanut Drive from the City limits all the way to Larrabee State Park in 1938, and during the 1930s and 40s extended water mains down Chuckanut Shore Road, Chuckanut Point Road, White Cap Road, and Cove Road to serve various "Chuckanut Additions to Bellingham," each of which was a subdivision proposed by the Larrabee Real Estate Company. CP 793. Particularly to the west of Chuckanut Drive, the Chuckanut Additions to Bellingham contained some very small lots. CP 914, 833-834.

The Governors Point Property was originally part of the Larrabee Real Estate Company's master plan that was submitted to the City and made part of the City's "Water Book." The Water Book was the counter

reference used by the city engineer, and made available to the public, to show where the City had extended water and where it intended to provide water. CP 793.

In 1949, the Governors Point Property was purchased from Larrabee Real Estate Company by Enio Usitalo and Lee Simonson.² CP 905. In 1953, Mr. Usitalo requested that the City extend water to the Governors Point Property. The minutes of the Water Board reflect that “Upon motion the matter was referred to the water superintendent for action.” CP 793, 817. While the entry in the minutes might be ambiguous, the actions that followed were not. City records show that on June 22, 1953, based on a fee of \$1,589.16 paid on June 15, 1953, the City installed a 4-inch tap and a 4-inch meter at tap 2215 to serve the “Governor’s Point Development Company,” with the “Class of Building” being “Water Dist.” A 4-inch tap was typical of water mains expected to serve significant amounts of development at the time. Thereafter GPDC constructed water mains running to the sound end and the north end of the Governors Point Property. CP 793-794, 943, 944, 907.

² Usitalo and Simonson initially purchased the 27 acres to the south of the current Governors Point Property as well. Those 27 acres were sold to Keagle in 1953, and later Williams, then Dahlgren. That parcel is generally referred to as the “Dahlgren property” in the record. GPDC installed the southern water line to reach the Dahlgren property in 1953. In 1961, GPDC sold 1.5 acres towards the northern end of the Governors Point Property to McCush. CP 905. The McCush residence is provided with City water by GPDC.

GPDC's understanding that the City provided water to the Governors Point Property through a water district or association has been confirmed by City officials in at least three ways over time.

First, although records are incomplete during some early years, what records exist show that the City has sent the bills to GPDC for water used on the Governors Point Property for all but two years (1998-1990) between 1954 and the present. CP 907, 947. That included water to supply the McCush residence, and to supply the Dahlgren residence prior to 1988, when the City gave the Dahlgren's a direct connection from the City water main on Pleasant Bay Road. It also included providing water that GPDC used at various time for fire protection. CP 907-908

Second, in 1964, a couple named the Flints bought a 5.3 acre parcel from GPDC.³ CP 906. Mr. Flint wrote to the City Water Department, seeking water for that property. CP 965-966. The City's Water Superintendent, Charles Gold, replied to the Flints:

Since the Governor's Point area is supplied with city water through a water district (by reason of the area being outside the city limits) I have referred your letter in its entirety to the following address for reply:

Governor's Point Development Company
Pleasant Bay Road
Bellingham, Washington

CP 967. Mr. Gold forwarded Mr. Flint's letter to GPDC, "as a matter

³ Carl Sahlin later purchased the property from the Flints, who never built a home on the property, and the Flint property is now part of the Governors Point Property. CP 906, 931.

under your cognizance.” CP 968, 910.

Third, in 1979, the City created water and sewer “service zones,” within which the City would provide direct water or sewer service. CP 1184-1208. Although the remainder of the Chuckanut area, from 300 feet west of Chuckanut Drive to Puget Sound, was included within a water service zone, CP 1205-1207, the Governors Point Property was not. When Mr. Sahlin’s attorney wrote to the City’s Public Works Director, John Garner, asking that the Governors Point Property be included in the water service zone, CP 1210, 1212, Mr. Garner responded:

The matter of concern is whether or not the Governor’s Point Area should have been included in the Direct Service Zone for water as defined in City Ordinance 8724. The intent of that Direct Service Zone is to describe properties served directly by the City of Bellingham Water Utility. For purposes of this ordinance, direct service means the condition where a City-owned main fronts on the parcel receiving service and that service is directly between the City and the receiver, not through an intermediary organization such as an association, district or co-op. My understanding of the Governor’s Point situation is that service is through an intermediary organization and any indication otherwise would be helpful in reviewing the situation.

CP 976 (emphasis added).

B. In September of 1972, After Extensive Consideration, The City Committed to Provide Water For Full Development Of The Governors Point Property, Creating An Implied, If Not Express, Contract To Provide Water For Development Of The Governors Point Property.

The Governors Point Property is currently owned by Appellant, GPDC, which is wholly owned by Roger Sahlin, and by 3 limited liability

companies and a trust, owned by or for the benefit of Mr. Sahlin and his wife and children. CP 904, 931. GPDC and the Property were purchased by Mr. Sahlin's father, Carl Sahlin, in a series of transactions between 1960 and 1969. CP 905-906. Carl Sahlin bought the Property in reliance on express representations that "there is now a water line furnishing City of Bellingham water extending into [the southern portion of the property.]" Based on that representation, Carl Sahlin agreed to share the cost of running the water main (which previously ran from the City's 4-inch tap to the southern end of the Property) to the northern end of the Property. CP 905-907, 935, 941.

In 1971, GPDC received preliminary approval from Whatcom County for a 308-lot subdivision of the Governors Point Property. One of the conditions of final plat approval was approval from the City of Bellingham to provide water to the property. CP 909.

At that time, as discussed above, it was the City's Water Board that was empowered to grant that approval.⁴ CP 792, 960. On May 2, 1972,

⁴ A new charter went into effect on January 1, 1973, which eliminated the Water Board as the entity controlling the City water system. CP 909, 962. Section 14.02 of the new charter, CP 964, provided, however:

The adoption of this Charter shall not affect any right, obligation or liability, either in favor of or against the City, existing at the time of its effective date, nor any pending civil, criminal or administrative proceeding involving or relating to the City. All rights and property of every description and location which were vested in the City immediately prior to the effective date of this Charter, shall continue to be vested in the City, . . .

following the procedure of the time, GPDC's project engineer, Ronald Jepson, submitted a formal request to the Water Board, stating in part:

Upon reviewing all aspects of this project we wish to propose the following water service arrangements.

- a) That a "Governors Point" Water Association be formed for the 126 acre, 300 lot development and that water be purchased from the City through master metering control.
- b) That internal reservoir storage be constructed within the project boundaries (approx: 150,000 gal).
- c) That until such time that line service and independent reservoir capacity exists in the Chuckanut area, a pressure cut-off valve be placed on the City side of our water meter. This would mean that our reservoirs would only be fed at times when other demand in the Chuckanut area are low or off-peak.

CP 794-795, 818.

There ensued a series of discussions with the Water Board and the City's engineering staff – not over whether the City would provide water to the plat, but how it would provide water. CP 794-797. The Water Board routinely referred matters to the City Engineer for further study and report. That back-and-forth between the Water Board and the City Engineer proceeded several times over the summer of 1972 before the Water Board made a final decision regarding how to provide service to Governors Point. CP 795-799, 819-830.

The question of "how" arose because service to the Chuckanut area as a whole presents an engineering challenge. Most water systems are a series of loops, so that water can reach any location from multiple directions. But the Chuckanut area is served by a long, one-way water

main that dead-ends at Larrabee State Park. Because water reaching the south end of the Chuckanut area has to all come through this one main, pressure tends to drop the farther south it goes. As a consequence, there is not adequate fire flow to protect homes at the south end of the Chuckanut area. CP 794. City staff wanted the Water Board to at least consider using the development of the Governors Point Property as a vehicle to solve the issue of inadequate water pressure for existing and future water users at the south end of the Chuckanut area. CP 795.

Adequate water pressure for the Governors Point Property could be achieved in one of two ways. As Mr. Jepson proposed, GPDC could build a storage tank on the Governors Point Property, which would be filled at night and when demand on the system was low, so that it placed no demand on the system when homes outside the Governors Point Property needed City water. Or, GPDC could contribute to the cost of building storage on Chuckanut Mountain. Under that second scenario, others in the Chuckanut area would also have to contribute to the cost, but the entire area, not just the Governors Point Property, would have adequate fire flow. CP 795-796, 821.

GPDC was happy to proceed under either scenario. CP 796.

In an August 15, 1972 report to the Water Board the City engineer recognized that for the rest of the Chuckanut area, full fire flow would require up-sizing a number of mains other than the one on Chuckanut Drive, raising the cost for future hook-ups outside of the Governors Point Property to \$800, and requiring \$150/unit contribution from existing

homes. Without fire flow, the cost would be \$525/unit for homes on the Governors Point Property and \$450/unit for homes elsewhere in the Chuckanut area.

Under the method of providing domestic service only, Pointe Chuckanut would bear the total cost of the required 8 inch line servicing the proposed Development from Chuckanut Drive along with their share of the remainder of the required system. The installation of this portion of the proposed system, the 8 inch line, would be delayed until such time as need arises.

CP 828. (With GPDC being required to build storage on the Governors Point Property for fire flow, the existing 4-inch service would have been adequate until homes were built on more than half the lots on the Governors Point Property plat.) CP 797. Because under the second scenario the residents and property owners in the rest of the Chuckanut area would not only obtain adequate water for fire protection of their homes, they would also have to be willing to pay their fair share of the cost, the Water Board wanted to understand both the engineering issues and whether property owners in the rest of the Chuckanut area were willing to pay for improved service. CP 828.

On September 12, 1972, the issue came back to the Water Board for decision as two separate agenda items with two separate votes. As to the Chuckanut area as a whole, the Board voted:

to proceed with the upgrading of the Chuckanut Water System in accordance with the requests of the existing residents; such requests to be made upon receipt of more detailed proposal information to be furnished by the Engineering Department, together with costs, with the understanding that the City will bear the cost of wooden

line replacement and that no work would proceed for any alternative until (a) the required per residence contribution is on deposit or (b) an L.I.D. is established to guarantee the payment for the improvements.

As to the Governors Point Property:

It was moved by Commissioner Foster, seconded by Commissioner Henken, that the Water Superintendent proceed with plans to serve Pointe Chuckanut development on Pleasant Bay Road with the cost to be either \$650 per unit including fire protection or \$525 per unit for domestic service only.

CP 831. While the decision on the Chuckanut area as a whole left it to future administrative decisions exactly how the system would be designed, as to the Governors Point Property (Pointe Chuckanut), this was the final executive decision required. Under either alternative for the Chuckanut area, Pointe Chuckanut could proceed because either plan would provide the same service to the Governors Point Property. CP 798-799.

In reliance on the Water Board's September 12, 1972 approval of service to the Governors Point Property, GPDC proceeded to build the roads in the plat and to stake the lots in preparation for final recording of the first phase of the plat. CP 799, 909.

The recording of the final plat did not occur because in June of 1973, Carl Sahlin was diagnosed with ALS or Lou Gehrig's disease. The diagnosis brought work on the development to a halt as the family turned its attention to a search for a treatment that would slow or stop the progression of the disease. Carl Sahlin passed away in 1974, and after that it took a number of years to settle his estate. CP 909,799.

Based on what was by 1974 a 20-year course of dealing, culminating in the Water Board's express commitment in 1972 to serve the plat of the Governors Point Property, Roger Sahlin and Mr. Jepson understood the City had committed to provide water for development of the Property. CP 909-910, 799. Neither Roger Sahlin, nor his father, has conformed to our modern conception of a "real estate developer." The modern developer's business model is to "get in and get out" – develop as quickly as possible to maximize cash flow and minimize carrying costs. By contrast, both Mr. Sahlin and his father believed land could and should be developed over decades. Roger Sahlin always intended that his family would develop the Governors Point Property, as evidenced by the fact that it has never been put in open space tax status. CP 909-910, 916. But he believed – this lawsuit will determine if naively – that property owners could rely on the commitments that the City had made as to water service. And, he has in fact relied on those commitments.

C. Subsequent Events Neither Vitiating the City's Express Or Implied Contract To Serve The Governors Point Property, Nor Constituted A Breach That Commenced The Running Of The Statute of Limitations.

The City argued below and will undoubtedly argue here that various subsequent acts by the City vitiating the City's implied, if not express, commitment to provide water to the Governors Point Property for its development. This was a summary judgment proceeding, which means that the City was entitled to have all reasonable inferences drawn in its favor. The record reflects that in each case, the City at the time either told

GPDC that the ordinance the City now relies on did not apply to the Governors Point Property, provided an explanation that was inconsistent with its current position, or the events on their face did not address the City's obligation to provide water or were statements by people with no knowledge of the facts and no authority to change the City's obligations. GPDC submits that none of those actions cancelled or vitiated the contract that existed between the City and GPDC. Nor did any of them constitute a breach of that contract that would trigger the running of the statute of limitations. Although as the years have gone on there have been people in the City who have sought to prevent the development of the Governors Point Property, a property owner should not lose the right to water service based on statements and policies the property owner could and did reasonably understand had no application to their property.

Before reviewing the specific acts the City relied on in its first summary judgment motion, some big picture facts are important to keep in mind. They show that the proposed development of the Governors Point Property is fully consistent with the Growth Management Act, RCW ch. 36.70A, and with the zoning and comprehensive plan under which it vested, and that the City has continued up through the 2000s to hold itself out as willing to serve the Chuckanut area.

- The 1990 Growth Management Act required Whatcom County to adopt urban growth areas by October 1, 1993. RCW 36.70A.110. None of the Chuckanut area has ever been within the City of Bellingham's urban growth area. *See, Whatcom County Planning and Dev. Servs.,*

http://www.co.whatcom.wa.us/pds/2031/pdf/1a-bell_zone_august.pdf (last visited April 22, 2012) for the City's current urban growth area. Nonetheless, the record shows that in 1999 the City constructed a water main in the Chuckanut area on Beacon Road, a few hundred feet from the Governors Point Property. CP 801, 931. Between 2004 and 2007 the City entered into contracts to supply at least 78 new water services in the Chuckanut area. CP 801, 833-834. These were actions years after it was settled that the Chuckanut area would remain "rural" and never be annexed into the City. Clearly the City has continued to expand its provision of water in the rural areas of Whatcom County.

- The City has no zoning or planning authority over the Chuckanut area or Governors Point. Whatcom County has that zoning and planning authority. As of the date of the City's first summary judgment motion, July 2, 2010, CP 215-218, the County zoning on the Governors Point Property was RR(3) ("Rural residential," 3 units/acre), which was the zoning that had existed since zoning was first adopted in the 1960s.⁵ CP

⁵ On May 10, 2011 Whatcom County adopted Ordinance 2011-013. The comprehensive plan designation of the Governors Point Property remains "Rural (Suburban Enclave)" under Ordinance 2011-013, as is the entire Chuckanut area. Ordinance 2011-013 downzoned the Governor Point Property, however, to RR(5A), permitting one dwelling unit per five acres. *See*, Ordinance Amending Whatcom County Zoning Code Title 20, The Official Whatcom County Zoning Map, and the Whatcom County Comprehensive Plan and Maps, To Implement Changes Relating to Rural Land Use Planning,

<http://www.co.whatcom.wa.us/council/2011/ord/ord2011-013mb3.pdf> (May 10, 2011). Because GPDC has a vested preliminary plat application for a 141-lot plat on the Property, the ultimate impact of that downzone is

914-916. Whatcom County's county-wide planning policies provide in part:

If legally allowed water extensions are made outside Urban Growth Areas, the maximum number of connections shall not exceed the density allowed under the associated zoning.

CP 803. As described above, the City extended water to the Governors Point Property in 1953, so restrictions on "extensions" of water are not directly applicable. Nonetheless, County policy is clearly supportive of provision of water service, so long as the number of connections does not exceed the density allowed by the rural zoning.

- Much of the City's position seems to be based on the premise that with the advent of Growth Management, water is an "urban governmental service," which should not be provided outside of urban growth areas. The City has in fact long provided water to water associations outside of the City's urban growth boundary and continues to do so. CP 802, 850. Any argument that water is only an "urban" governmental service was

impossible to speculate about. Whether the ultimate development density is just over 1 unit/acre (141 lots on 125 acres) or 1 unit/5 acres (25 lots on 125 acres) is immaterial to this lawsuit, however. Water is essential to the ultimate development of the Property in either event. There is no other water purveyor that could supply water for the development of the Governors Point Property. Nor are wells an option. The property is a rocky peninsula and there is no suggestion that wells could provide adequate potable water for any development of the property. If the City is not required to provide water for the plat, then GPDC's only alternative will be to supply water through a reverse osmosis desalination plant, which will convert sea water to potable water. The present value of the estimated additional costs of providing water through a reverse osmosis plant is approximately \$5.8 million. CP 917.

eliminated in 1997 when the Legislature amended RCW 36.70A.030 to add subpart (16), defining “rural governmental services” to include “domestic water systems,” just as “domestic water systems” are defined as “urban governmental services” in RCW 36.70A.030(18). Laws of 1997, ch. 429, §3. So water is both an “urban governmental service” and a “rural governmental service.” Sewers, by contrast, are only an “urban governmental service.” RCW 36.70A.030(18).

- The City first identified “urban service areas” within which it would provide urban services including water, sewer, police and fire protection, in 1985. CP1216-1227. The City nonetheless replaced the original 6-inch water line in Chuckanut Drive with a 12-inch line in 1989, despite the fact that it served only areas outside the City’s “urban service area.” CP 801-802. The City in fact built a water main within a few hundred feet of the Governors Point Property in 1999, after the final decision had been made that the Chuckanut area would not be within the City’s urban grown area and thus would remain “rural.” CP 801, 931.

- The City has never adopted any standards for what is an “urban” level of water service versus what is a “rural” lever of water service. Whatcom County has, however, adopted an updated Coordinated Water System Plan, in order to coordinate the various water purveyors within the County. The water service GPDC has proposed for its plat is fully consistent with the standards for the RR(3) zone, under which the 141-lot plat vested, or the current RR(5A) zoning adopted in May of 2011. CP 804, 860, 863.

- Under the capital facilities element of the City's current comprehensive plan, the Governors Point Property is shown as being within the "potential water service area" of the City.⁶ CP 804, 875. Department of Health (DOH) regulations require a water purveyor to update its water system plan at least every six years. WAC 246-290-100(1). The City had apparently submitted an updated Water System Plan to DOH in April of 2007; however that plan was viewed as significantly inadequate by DOH. CP 891-898. On July 24, 2008 DOH notified the City that as a result of its failure to update its water system plan, it no longer qualified for certain state funding. CP 899-900. In response, on September 8, 2009, the City submitted a revised draft water system plan to DOH, which formed the basis of DOH's reinstatement of state funding. CP 901. That September 2009 plan remained the water system plan on file with the state when GPDC submitted its request to formalize the water contract between it and the City, when the City summarily denied that request, and when the City Council upheld the rejection of the GPDC request. CP 804. That water system plan, used to secure state funding, showed the Governors Point Property inside the City's "Existing Retail Service Area." CP 903.

Collectively those facts show that what GPDC is seeking is water for what was recognized by Whatcom County as a rural development, and

⁶ The Governors Point Property is also within the Potential Sewer Service Area. CP 886.

that the City has continued to provide water for such development in the Chuckanut area up until the present.

1. Bellingham Ordinance 8728

The City first pointed, and will presumably still point, to its 1979 adoption of Bellingham Ordinance 8728. CP 1174, 1184-1208. Ordinance 8728 lifted a moratorium on sewer and water utility extensions outside the City limits that the City Council had imposed in 1976. CP 1181. Ordinance 8728 established water and sewer service zones outside the City, within which the City would provide direct service (a direct hookup to a building on a lot, with the City sending bills directly to the lot owner). CP 1186. The remainder of the Chuckanut area, except for the Governors Point Property (or the Dahlgren property which was at that time served with City water by GPDC⁷), was included in a water service zone. CP 1205-1207. The City argues that Ordinance 8728 told GPDC that the City did not intend to provide water to the Governors Point Property.

As described above, when GPDC asked why the Governors Point Property was not included in a water service zone, the Public Works Director, John Garner, explained that was because Governors Point “my understanding of the Governor’s Point situation is that service is through

⁷ Later the Dahlgren property received direct service from the City. CP 253. Over the years the City frequently expanded its direct service zones when people came forward asking for direct service. CP 800.

an intermediary organization.”⁸ CP 976. That explanation confirmed – did not deny – GPDC’s reliance on the September 1972 approval of the provision of water to the Property through a water association. It was an entirely reasonable explanation of why the Governors Point Property was not included in a “direct service” area – but gave no indication that the City was renegeing on the Water Board’s September 1972 decision.

The City continues to provide City water to the Lake Whatcom Water and Sewer District, Water District 7, Water District 2, the Deer Creek Water Association and the Lummi Water District. CP 680. Collectively those water districts and associations cover a substantial portion of the non-federal rural lands in Whatcom County. CP 850. None of these were included as water service areas under Ordinance 8728, yet the City has provided them with City water over the 32 years since Ordinance 8728 was adopted. Neither the ordinance, nor Mr. Garner’s explanation, disavowed the City’s commitment in September, 1972 to provide water for development of the Governors Point Property or commenced the running of any statute of limitations for breach. CP 799-800.

2. Bellingham Ordinance 9461

The City next relies on its adoption of Bellingham Ordinance 9461, CP 1216-127, in 1985, which identified “urban service areas,”

⁸ Over the years when Ordinance 8728 was in effect, the City also regularly expanded the water service zones as properties came forward seeking direct service. CP 800, 832.

within which the City would provide urban services “including municipal water, sewer, police and fire protection” by means of annexation, and where the City might extend water and sewer services without annexation and fire and police services through interlocal agreements. CP 1218. None of the Chuckanut area was included in the urban service area. CP 1227. Thus if the adoption of Ordinance 9461 was meant to telegraph that the City would no longer provide water outside of the urban service areas, there is simply no explanation for the dozens of additional services the City has provided in the Chuckanut area since 1985. CP 815-816, 833.

As described above, the City had extended water to the Governors Point Property in 1953. The currently pending 141-lot plat of the Governors Point Property can rely entirely on the 4-inch water main that was installed in 1953. CP 800. Thus GPDC had no more reason to be concerned about its exclusion from the “urban service” area than did other properties to which the City had previously extended water service.⁹

⁹ In 1992, as the County was developing its urban growth areas, GPDC applied to expand the urban service area so that sewers could be provided to the entire Chuckanut area. The Chuckanut area has many failing septic systems on the small lots that were platted in the 1930’s and 1940’s, and GPDC believed extending sewers, which are only an “urban” service, not also a “rural” service, under RCW 36.70A.030, was good public policy. But that caused a hue and cry among Chuckanut property owners who were concerned about being expected to pay for the cost of sewer service, and the proposal was denied. With advances in on-site sewage treatment systems over the last several years, the vested 141-lot plat for the Governors Point Property does not require a sewer system, and as described above, GPDC has long understood that it would provide water to the plat through a wholesale contract with the City. The decision not to extend the sewer service zone to the Chuckanut Area insured, however,

As the Chuckanut area demonstrated, Ordinance 9461 did not preclude expansion of the City's water system or extension of the water service to additional properties outside the urban service areas. In 1989, the City replaced the original 6-inch water main along Chuckanut Drive with a 12-inch water main from the City limits to past Cove Road. The City's Public Works Director at the time confirmed to Mr. Jepson that the new line would provide "plenty of water for your development." CP 801-801. The City constructed a water main immediately adjacent to the Governors Point Property in 1999, and another main within 1500 feet of the Governors Point Property as well as constructing water mains elsewhere in the rural areas, after adoption of Ordinance 9461. CP 931, 801. The City signed contracts to provide water to at least 78 new lots in the Chuckanut area between 2004 and 2007. None of this is consistent with Ordinance 9461 meaning that the City would no longer provide – or extend – water service outside of its urban service areas.

On its face, Ordinance 9461 applies only to extension of the package of urban services – water, sewer, police and fire protection – needed for urban development. It did not purport to affect areas where the City had already extended water service. It has not been interpreted by the City to preclude it from extending water service (without the full panoply of "urban services") outside the "urban service areas." Again, Ordinance

that it would remain outside the City of Bellingham's urban growth area. CP 914-915.

9461 neither disavowed the City's commitment in September, 1972, to provide water for development of the Governors Point Property nor commenced the running of any statute of limitations for breach. CP 800-801.

3. Bellingham Ordinances 2006-03-026 and 2006-06-064

The City relies on its adoption of Bellingham Ordinance 2006-03-026 in March of 2006. CP 1056, 1122-1123. Ordinance 2006-03-026 repealed the water and sewer service zones created by Ordinance 8728. It further recited:

C. The City is under no legal obligation to extend water and/or sewer service outside its corporate limits, absent a contractual duty. City Council finds that Ordinance No. 8728 was not intended to create any such contractual duty, express or implied. Rather, it was intended merely to create an opportunity to apply for an extension, which the City, in its discretion, could grant or deny based upon listed criteria.

CP 1122 (emphasis added).¹⁰

As described above, when Ordinance 8728 was adopted, the then-Public Works Director, John Garner, explained that the Governors Point Property was not included in the Chuckanut water service zone because the City served the Governors Point Property through an “intermediary organization.” CP 976. Because Ordinance 8728 did not affect the Governors Point Property, its repeal could not affect it.

¹⁰ There is no basis for a City Council's finding about the “intent” of an ordinance adopted 27 years earlier to be given any weight.

Two months after it adopted Bellingham Ordinance 2006-03-026, the City was forced to admit that, the recitals in Ordinance 2006-03-026 notwithstanding, its course of dealing had created an obligation to provide service in the Chuckanut area. Because of the protests of property owners in the direct water service portion of the Chuckanut area, who felt exactly as GPDC feels, that they had relied on the City to provide water to their properties, the City adopted Ordinance 2006-06-064, to define properties in the Chuckanut area as having water service “in existence” within the supposedly repealed direct service area if the property owner signed a contract and paid the fee within one year after Ordinance 2006-06-064 went into effect.¹¹ CP 1126-1127. Thereafter, the City granted service to dozens of additional lots in the Chuckanut area. CP 800-801, 833-834.

Because Ordinance 2006-03-026 and Ordinance 2006-06-064 purported to deal only with the direct water service areas created by Ordinance 8728, and the Governor’s Point Property was not included in a direct water service area because the City services it through GPDC, GPDC reasonably believed the 2006 ordinances did not affect it. At the

¹¹ There is a certain Alice in Wonderland quality (“nothing is quite what it seems”) about Ordinance 2006-06-064 “defining” service as being “in existence” when the definition by its terms shows that service was not “in existence” to those properties as of the date of the Ordinance. But what it really shows is that the City recognized that its behavior over a very long time had created expectations by property owners that their property would receive City water.

City Council meeting where the Council considered Ordinance 2006-06-064, Public Works Director Dick McKinley testified:

Mr. McKinley: But we're not talking about Governor's Point here.

Ms. Bjornson: Yeah well—

Mr. McKinley: We're not talking about Governor's Point.

Ms. Bjornson: Well that's what I want to make sure.

Mr. McKinley: That's not part of this, that never was part of this, that's not going to be part of this, we're not talking about Governor's Point.

CP 342-343.

To confirm that Ordinance Nos. 2006-03-026 and 2006-03-064 had no bearing on the Governors Point Property, however, GPDC's attorney wrote to then Public Works Director, Dick McKinley, stating in part:

You have indicated publicly that recently passed Bellingham City Ordinances Nos. 2006-03-026 and 2006-06-064 do not apply to Governors Point. We agree with you and believe, as outlined above, that the issue of service was dealt with years ago. Final engineering decisions need to be made and implemented. However, in the event that the City determines that the ordinances do apply to Governors Point and to avoid any future confusion with regard to that determination, we are submitting this basic data for formation of a contract for a utility service agreement and requesting that you accept this submission and the attached detailed narrative as a request for a "contract" pursuant to Ordinances Nos. 2006-03-026 and 2006-06-064. Assuming those ordinances do not apply then we simply suggest we meet to discuss engineering implementation and related concerns.

CP 981-982. Although GPDC representatives subsequently met with Mr. McKinley to discuss the engineering implications and related concerns, Mr. McKinley never responded to Mr. Tull's letter and never suggested that he thought Ordinances 2006-03-026 or 2006-06-064 applied to the Governor's Point Property. CP 913-914.

4. John Garner's Denial of Water for a Short-Plat on a Portion of the Governors Point Property

After Carl Sahlin's illness and death the Sahlin family did not understand that "use it or lose it" applied to City water. Roger Sahlin assumed he would wait until he retired to complete the development and it would be his children who ultimately sold lots and built homes on the Governors Point Property. By 1990, however, his wife wanted him to build a home for them on the west side of the Property. In an effort to do that, he directed his engineer, Ronald Jepson, to file a short plat application to break off three small lots from a 42-acre parcel that was acquired with Carl Sahlin's purchase of GPDC. CP 916.

The plan was to serve those lots from the existing GPDC water main that extends to the northern end of the Property. CP 802. Periodically in the years after 1979, Mr. Jepson had conversations with Public Works Director, Jack Garner, about the Governors Point Property. Mr. Garner always made it clear that he understood that GPDC expected eventually to develop the property and expected to receive water from the City of Bellingham. Mr. Garner also made it clear, however, that when GPDC went to develop, the City would insist on approving the road

standards, engineering, storm water management and transportation impact fees that were part of the development. CP 801.

The County process for the short-plat application required confirmation from the City that it would provide the water. Mr. Jepson talked to Jack Garner about the short plat. Mr. Garner said in substance, “If this is what you want, I’ll give you the water. But I am not going to get into piecemealing the development. If this is what you want, this is what you’ll get. But if you want more than that, you need to come forward with what you actually want.” CP 802.

Mr. Jepson acknowledged that, as Mr. Garner was aware, GPDC intended the eventual full development of the Property, and as a result, Mr. Garner would not confirm water for the short plat, telling GPDC to apply for what it actually wanted. That led to GPDC submitting its application for the 141-lot plat, which is currently vested. Mr. Garner’s denial of water for the short plat was expected after Mr. Jepson’s conversation with him, but did not suggest that water would not be available when GPDC submitted the full proposed plat. CP 802, 916. Rather, it affirmed that the City would expect the development of the Governors Point Property to meet City standards, something GPDC had long assumed. At the very least, for purposes of summary judgment, GPDC is entitled to the inference that it meant nothing more.

5. Various Comments By City Officials on the 141-Lot Plat

The City has a defined process for addressing requests for water contracts or expansion of water service districts. Bellingham Municipal Code (BMC) section 15.36.090 as it existed prior to June 2, 2011, provided:¹²

[A]ll requests for contract services, and all requests for enlargement of either service zone, shall be made to the Director of Public Works. Preliminary consideration of the request shall be directed to service and/or system related matters, including the question of the most appropriate manner of providing the service. The Public Works Department shall prepare a feasibility report with recommendations addressing these issues. Such feasibility report shall be completed within 30 days of the City's receipt of the request including all necessary material to make a decision. Should such final report recommend denial of the request, the applicant shall be so notified and if such party requests that the denial be reviewed by the City Council, such request along with the feasibility report and recommendations shall be forwarded to the City Council for review.

Bellingham Ordinance 2004-09-063.

The process spelled out by ordinance proceeded to a formal decision by the City Council. The Planning Director, the City Attorney and the Mayor do not decide water service issues and never have.

¹² By Ordinance 2011-05-025, adopted on June 2, 2011, the City changed the process to allow the Public Works Director to summarily deny a request. Ordinance 2011-05-025, §3. The very fact that the city felt compelled to amend its ordinance to allow summary denial demonstrates that the summary denial of GPDC's request, in February of 2009, CP 918, conflicted with City Code.

Between 1972 when the Water Board (then with the authority the City Council assumed under the 1973 charter) approved the provision of water for development of the Governors Point property, and GPDC's February 13, 2009 submission of a request to formalize the water contract, CP 716-729, the City Council never addressed the question of a water service contract with GPDC.

Nonetheless the City relies on letters by the City's Planning Director to Whatcom County, incorrectly opining as to whether the Property was served with City water, CP 1077, and commenting on the scope of the EIS for the 141-lot plat, CP 1082, as somehow vitiating the express or implied duty of the City to provide water for development of the Property. Ms. Decker admitted in her deposition that she had none of the facts when she submitted those letters. CP 356-357, 531-559. Similarly the City relies on letters from the City Attorney and the Mayor. CP 1062, 1064. While GPDC admittedly knew that there were officials in the City who were politically opposed to its proposal to develop the Governors Point Property under its County zoning, GPDC's rights to City water simply cannot be terminated by the expression of opinion by people who are not decision makers on that subject.

6. Other Denials Of Water Service to Other Properties

Finally, the City relies on various purported denials of water to other properties outside the City limits.¹³ CP 1097-1100. Only one was in

¹³ The City offered the declaration of Mr. Brent Baldwin to support that argument. Mr. Baldwin offered commentary on a number of City actions

the Chuckanut area – and in that instance the City actually approved the water service – after initially denying it. CP 359-360, CP 642-647. The City also argued that the denial of water for a short plat of the Dahlgren property to the south of the Governors Point Property somehow terminated GPDC’s rights to City water. As explained by Mr. Jepson, that denial was based on engineering limitations. CP 252-267. There were at the very least material issues of fact as to what inferences, if any, could be drawn as to the City’s obligations to GPDC from those City actions as to other properties.

prior to his first having any role with respect to the City’s water system in 2006. CP 617-618. That testimony was clearly incompetent to support a summary judgment. The Court should note that Mr. Baldwin submitted five declarations – the first on May 12, 2010 (CP 1093-1172), the second on June 25, 2010 (CP 273-289) after GPDC submitted its response to the City’s first motion, the third on June 30, 2010 (238-251) after Mr. Jepson responded to Mr. Baldwin’s second declaration (CP 252-267), the fourth on September 13, 2011 (CP 157-172) and the fifth on November 10, 2011 (CP 9-11). At some point the very fact that the City had to engage in a continuing battle of declarations demonstrates that this case was inappropriate for summary judgment. Summary judgment is not the place to resolve disputed issues of fact. If the facts were clearly as Mr. Baldwin originally stated them, there would be no need for five declarations. The party responding to a summary judgment motion does not have the last word, and has no right to continue responding to new issues raised as Mr. Baldwin’s declarations do. “It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment. Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond.” *White v. Kent Med. Ctr.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991).

ARGUMENT

A. The Summary Judgment Must Be Reversed Unless, Construing The Facts And Inferences In The Light Most Favorable to GPDC, The City is Entitled to Judgment As A Matter Of Law.

When reviewing an order granting summary judgment, the appellate court engages in the same inquiry as the trial court, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. “A material fact is one upon which the outcome of the litigation depends in whole or in part.” *Brown v. Brown*, 157 Wn. App. 803, 812, 239 P.3d 602 (2010).

“[W]here material facts are particularly within the knowledge of the moving party. . . ‘ it is advisable that the cause proceed to trial in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor of the moving party while testifying.” *Brown*, 157 Wn. App. at 820 (reversing summary judgment where the credibility of the moving party was potentially at issue). Summary judgment is improper where intent is an issue and is unclear. *Washington Hydroculture, Inc. v. Payne*, 96 Wn.2d 322, 329, 635 P. 2d 138 (1981). “Whether a party justifiably relies upon information is a question of fact generally not amenable to summary judgment.” *Harvey v. Snohomish County*, 124 Wn. App. 806, 819, 103 P.3d 836 (2004), *rev’d on other grounds*, 157 Wn.2d 33 (2006). “Any doubts as to the existence of a

genuine issue of material fact is resolved against the moving party.” *Atherton Condo Apartment-Owners Ass’n. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). The granting of such motion is proper only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and no genuine issue remains for trial. It is not the purpose of the rule to cut litigants off from their right of trial by jury if they really have issues to try. *Burback v. Bucher*, 56 Wn.2d 875, 877, 355 P.2d. 981 (1960). Where different conclusions may be reached from the undisputed facts and reasonable men might reach different conclusions, a summary judgment should not be entered. *Peterson v. Peterson*, 66 Wn.2d 120, 124, 401 P.2d 343 (1965).

B. There Is At Least An Issue Of Fact As To Whether The City’s Actions Created An Implied – If Not Express – Contract To Provide Water For Development Of The Governors Point Property.

“An implied contract comes about when through a course of dealing and common understanding, the parties show a mutual intent to contract with each other.” *Irvin Water Dist. v. Jackson P’ship*, 109 Wn. App. 113, 122, 34 P.3d 849, *rev. denied*, 147 Wn.2d 1003 (2001) (finding an implied contract for water service, although not one immune to rate changes after the contract was made.) In *Brookens v. City of Yakima*, 15 Wn. App. 464, 466, 550 P.2d 30, *rev. denied*, 87 Wn.2d 1011 (1976) the court said that a contract to supply water may be found from an express agreement to serve indiscriminately the general area in which the tract is located, or by implication where a municipality holds itself out as a public

utility willing to supply all those who request service in a general area. See, also *Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 381-382, 858 P.2d 245 (1993) (recognizing that where the City had held itself out as willing to provide sewer service it had a duty to serve, although it could condition service on agreement to annexation.)

Here there is evidence from which the trier of fact could find both an express and implied contract to supply water for the development of the Governors Point Property.

The express contract arose from the City's inclusion of the Property in its Water Book as part of the Larrabee Real Estate Company master plan (CP 793), the 1953 approval of a 4-inch tap with a 4-inch meter to the Property for GPDC as a water district (CP 793-794, 943-944, 907), the City's 55 years of billing GPDC for water used on the Property (CP 907, 947-948), and the Water Board's explicit agreement in 1972 that the City would provide water for development of the Property. CP 909, 792, 960, 818-831. The Sahlin family has in fact relied on that explicit agreement over many years. CP 909-910.

In *Brookens*, the court found no express contract because the only contracts were very specifically limited to two houses. 15 Wn. App. at 466. Here, by contrast, the City's 1953 extension of water to the Property was with a 4-inch main and a 4-inch tap, which at the time was the size main that would be provided for a very substantial development. CP 794. That intent was confirmed in 1972, when the specific proposal approved was a request for water to serve a 308-lot plat. CP 798.

An implied contract also arose from the fact that for many years the City held itself out as a public utility willing to serve the entire Chuckanut area.

Again, that holding out began with the Water Book, which was the resource the public could turn to to learn where the City intended to serve and showed the Governors Point Property as part of the master planned properties of the Larrabee Real Estate Company that the City intended to serve. CP 944, 793. It continued with the 1972 approval of service for the plat of the Governors Point Property either through a Governors Point water district if the Chuckanut area did not want to pay their share of upgrading the City's system to provide fire flow for the entire area or by direct service if the entire area was upgraded. CP 798.

That willingness to serve the area as a whole is chronicled in the decade-by-decade maps of the development of the Chuckanut area. CP 806-812, 813-816. It was continued in 1989, when the City replaced the entire original 6-inch main in Chuckanut Drive with a 12-inch main, which the City's Public Works Director assured GPDC's engineer provided "plenty of water" for the development. CP 801-802. The form of the implied contract as to the Governors Point Property was different from that of the rest of the Chuckanut area because from the inception the City treated the Governors Point Property as receiving wholesale water rather than direct service. But the City's admission in 2006, with the adoption of Ordinance 2006-06-064, that it had held itself out as willing to serve the entire area and its subsequent granting of 78 more water

services, shows that even the City acknowledged that its course of conduct had been relied on for years by property owners who expected that their property in the Chuckanut area would receive City water. The City continued holding itself out as willing to serve the entire area, including Governors Point, by including the area in the potential water service area in its current Comprehensive Plan, CP 804, 875, and by including the property in the “Existing Retail Service Area” in the Water Service Plan which it submitted to DOH and had on file up through the City Council’s denial of GPDC’s request for a water service contract. CP 903.

Irvin Water Dist., Brookens, and Yakima County Fire Prot. Dist. 12 apply the principles of promissory estoppel, under which an implied contractual duty can arise where a party justifiably relies on the promise of another.

The court has described the five elements of a promissory estoppel claim: (1) a promise, (2) that promisor should reasonably expect to cause the promisee to change his position, and (3) actually causes the promisee to change position, (4) justifiably relying on the promise, (5) in such a manner that injustice can be avoided only by enforcement of promise.

McCormick v. Lake Washington Sch. Dist., 99 Wn. App. 107, 117, 992 P.2d 511 (1999). All of those elements are met in this case. The trial court erred when it dismissed GPDC’s contract claim.

C. The Statute of Limitations Does Not Bar GPDC’s Claim.

The trial court ruled on summary judgment that if there was an implied contract, the statute of limitations had run on a suit to enforce it.

CP 217. As described above, the City bases its claim that the statute of limitations has run on a variety of actions over the years that either specifically did not apply to the Governors Point Property, or were expressions of opinion by City officials who clearly believed the Governors Point Property should not be developed under the County zoning but had no authority to make decisions about City water service. The City of Bellingham has no land use authority outside its territorial limits, and GPDC's proposed use of its property is in full compliance with Whatcom County's regulations. Washington courts hold that it is improper for cities to attempt to influence extraterritorial land use decisions in this way. *MT Dev., LLC v. City of Renton*, 140 Wn. App. 422, 429, 165 P.3d 427 (2007).

For the statute of limitations to have run, there had to be an anticipatory breach of the contract. Anticipatory breach must show clear and unequivocal intent not to perform. *See, Wallace Real Estate Inv. Inc. v. Groves*, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994); *CKP, Inc. v. GRS Const. Co.*, 63 Wn. App. 601, 620, 821 P.2d 63 (1991), *rev. denied*, 120 Wn.2d 1010 (1992). Anticipatory breach is a question of fact and is thus inappropriate for summary judgment. *Versuslaw v. Stoel Rives, LLP*, 127 Wn. App. 309, 321, 111 P.3d 866 (2005), *rev. denied*, 156 Wn.2d 1008 (2006).

Whether a six-year statute of limitations applies because an express obligation is created by the 1972 Water Board action as reflected in the minutes, RCW 4.16.040, or a three year statute of limitations applies

under RCW 4.16.080(3), the various actions that the City relies on were either accompanied by statements by City officials that they had other explanations (i.e., Mr. Garner's explanation that the Property was not included in a direct water service zone because the City served the Property through an intermediary organization, CP 911-912, 976) or were statements that could not be viewed as anticipatory breach of the obligation to provide water because they were made by people who didn't have authority to make such decisions and who were simply antagonistic to the development of the Property (i.e., Patricia Decker's letters regarding the EIS on the plat, CP 1077, 1082). There was an issue of fact as to each of the things the City points to regarding whether an anticipatory breach of contract had commenced the running of the statute of limitations.

The City is arguing that actions that were at best ambiguous deprived the Governors Point Property of the right to receive City water that the Sahlin family had reasonably relied on since the 1960s. Without water, the Property cannot be developed. Due process requires that property rights not be abolished without notice and an opportunity to be heard. *See, Weinberg v. Whatcom County*, 241 F.3d 746, 754 (9th Cir. 2001). Those rights should not expire in circumstances like this, where the property owner was not clearly advised that the rights were being taken.

D. The City Had An Obligation To Serve The Governors Point Property Under RCW 43.20.260 and WAC 246-290-106.

RCW 43.20.260 provides in part that:

A municipal water supplier . . . has a duty to provide retail water service within its retail service area if:

(1) Its service can be available in a timely and reasonable manner;

(2) the municipal water supplier has sufficient water rights to provide the service;

(3) the municipal water supplier has sufficient capacity to serve the water in a safe and reliable manner as determined by the department of health; and

(4) it is consistent with the requirements of any comprehensive plans or development regulations adopted under chapter 36.70A RCW or any other applicable comprehensive plan, land use plan or development regulation adopted by a city, town, or county for the service area and, for water service by the water utility of a city or town, with the utility service extension ordinances of the city or town.

See also, WAC 246-290-106.

As described above, the City extended city water to the Governors Point Property in 1953. As noted above, the water mains had been installed decades ago. In 2009, there was no “extension” of service that was being requested. The trial court agreed that at the time GPDC requested service, it was within the City’s existing retail water service area. The City made no showing that it lacked sufficient water or could not serve the property in a safe and reliable manner. To the contrary, GPDC submitted an engineering report showing that such service could be provided. CP 730-748. There is no dispute that the proposed plat was fully consistent with the applicable zoning and comprehensive plan. CP 915-916.

The trial court held that nonetheless, the City did not have a duty to serve under RCW 43.20.260 because service was not consistent with the City's utility service extension ordinances. CP 811. GPDC submits that the trial court erred. The City's ordinances speak to the circumstances under which the City will extend service to new areas today. But the ordinances do not address the question of service to areas that the City extended service to decades ago. Construing RCW 43.20.260 and WAC 246-290-106 to allow a city to engage in a hypothetical analysis of how it would act today under its current ordinances if it could reconsider actions it took decades ago, guts the statute of its obvious purpose, which is to prevent cities from refusing service to areas it long ago committed to serve, unless there are reasons water availability or engineering constraints.

IV. CONCLUSION

This case is at this Court following dismissal on summary judgment. At this point, Appellant GPDC is entitled to the benefit of all disputed facts and all reasonable inferences from the undisputed facts. Based on the record before the trial court, the summary judgments in favor of the City must be reversed and the case remanded for trial.

DATED this 27th day of April, 2012.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the State of Washington that on this day I caused to be served a true and correct copy of the **Governor's Point Development Co. Appeal Brief** and this Certificate of Service by the method indicated below, and addressed as follows:

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