

68079-0

68079-0

No. 68079-0

COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

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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.

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CITY OF BELLINGHAM'S AND FRIENDS OF CHUCKANUT'S  
RESPONSE AND CROSS-APPEAL BRIEF

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## I. INTRODUCTION

Governor's Point Development Company (GPDC) sued the City of Bellingham (the City) to compel the City to provide water to a proposed 141-lot development at Governors Point 5 miles beyond the City's borders and its Urban Growth Area. GPDC and the City agree that the City is obligated to provide water under these circumstances only if required to do so by contract or statute. No contract or statute requires the City to supply water to the proposed Governors Point development.

As it did below, GPDC seeks to defend against summary judgment with a time honored technique resorted to where no material facts are in dispute. It spews forth a barrage of peripheral, non-material facts in hopes of obscuring the absence of material facts in dispute. The trial court saw through this subterfuge, and this court should do the same.

## II. ASSIGNMENTS OF ERROR

### A. **Three of GPDC's Issues Pertaining to Assignment of Error are not Legitimate Because They do Not Accurately Reflect Rulings by the Trial Court, and Thus Should be Stricken.**

GPDC's Issue Pertaining to Assignment of Error A.2. states:  
"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 Governor's

Point Property zoning and the Whatcom County Comprehensive Plan, unless engineering constraints prevented such service?” (GPDC's Appeal Brief, p. 6). Presumably, GPDC meant this as a substitute (though a substantially inaccurate substitute) for the trial court's Order Granting Summary Judgment embodying the applicable legal standard: “That the City and GPDC did not, through a course of dealings and common understanding show a mutual intent to contract.” (CP 217).

GPDC's Issue Pertaining to Assignment of Error B.2. states: “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?” (GPDC's Appeal Brief, p. 7). Presumably, GPDC meant this as a substitute (though a substantively inaccurate substitute) for the trial court's Order Granting Summary Judgment embodying the applicable legal standard: “That denying water service to GPDC did not violate the RCW [43.20.260] or WAC [246-290-106] because the City was acting consistently with its plans, regulations, and ordinances, including its ‘utilities service extension’ ordinance 2006-03-026.” (CP 7).

GPDC's Issue Pertaining to Assignments of Error B.1. states: “Water service having been extended to Governors Point property in the 1950's, 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?” (GPDC's Appeal Brief, p. 6-7). Presumably this was a substitute (though a substantially inaccurate substitute) for the trial court's Order Granting Summary Judgment: “That the City should not be compelled to undertake a feasibility study under BMC 15.36.090 because Ordinance 2006-03-026 prohibited the City from providing water to newly created lots outside the City's urban growth area regardless of the feasibility of providing such services.” (CP 7).

The City requests that these three issues pertaining to assignments of error be stricken because they do not fairly and accurately reflect the ruling of the trial court, and thus do not present proper issues on appeal.

**B. Motion to Strike Issues Pertaining to Assignment of Error Because GPDC Provides No Supporting Argument or Authority.**

The City moves to strike the following GPDC Issues Pertaining to Assignment of Error because GPDC provided neither argument nor authority to support these issues.

Issue Pertaining to Assignment of Error A.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 restraints prevented such service?” (GPDC's Appeal Brief, p. 6).

Issue Pertaining to Assignment of Error B.1. “Water service having been extended to Governors Point Property in the 1950’s, did the trial court err in holding that the City’s utility service extension ordinance, Ordinance 2006-03-026, excuse the City from proceeding with a feasibility study as requested by BMC 15.36.090?” (GPDC's Appeal Brief, p. 6-7).

Valley View Industrial Park v. City of Redmond, 107 Wn.2d 621, 630, 733 P.2d 182 (1987) (“A party abandons assignments of error to findings of fact if it fails to argue them in its brief.”); State v. Motherwell, 114 Wn.2d 353, 358, 788 P.2d 1066 (1990) (“Although Motherwell assigns error to the trial court’s findings that he was acting as a social worker, he has not presented any argument or authority as to why the finding was erroneous. Therefore, we consider the assignment of error abandoned.”); First American Title Insurance Company v. Liberty Capital Star Point Equity Fund, LLC., 161 Wn. App. 474, 496-97, 254 P.3d 835 (Div. 1, 2011) (“The UOs’ opening brief provides no argument or analysis for why this challenged finding is not supported by substantial evidence and cites nothing in the record that casts doubt on this critical finding. The UOs’ challenge to this finding is thus waived. See Cowich Canyon,

118 Wn.2d at 809, 828 P.2d 549 (plaintiffs who assign error to finding of fact but presented ‘no argument in their opening brief on any claimed assignment’ waived that assignment of error.)”); Lindblad v. Boeing Company, 108 Wn. App. 198, 207-208, 31 P.3d 1 (Div. 1, 2001) (“Lindblad fails to cite any portion of the record to support his contention that the trial court abused its discretion in denying sanctions. . . . His ‘argument’ consist of nothing more than a list of references to case-laws principals governing discovery. Lindblad fails to even suggest that the trial court abused its discretion, and we will not make his argument for him.”).

**C. City of Bellingham Cross Appeal.**

**Assignment of Error:** The trial court erred in refusing to grant summary judgment on two issues presented in the City of Bellingham’s Second Motion for Partial Summary Judgment. (CP 6-7).

**Issues Pertaining to Assignment of Error**

1. Did the trial court err in refusing to grant summary judgment on the issue whether denying water to Governor's Point did not violate RCW 43.20.260 or WAC 246-290-106 because Governor's Point is not in the City’s “Retail Service Area?” (11/18/11 VRP, p. 34).

2. Did the trial court err in declining to rule on the issue whether denying water service to Governor's Point Development

Company did not violate RCW 43.20.260 or WAC 246-290-106 because Governor's Point Development Company applied for a bulk water contract for resale of water to consumers and not "retail water service" direct to consumers? (11/18/11 VRP, p. 38).

### **III. STATEMENT OF THE CASE**

GPDC's Statement of the Case is argumentative, inaccurate and loaded with purported facts not material to issues on appeal. Because it does not present "a fair statement of the facts and procedure" as required under RAP 10.3(a), the City submits this alternative statement of the case.

#### **A. Posture of the Case.**

In 2009, GPDC sued the City claiming that the City was obligated either by an implied contract (CP 1278) or by RCW 43.20.260 (CP 1279) to provide water to a 141-lot residential development 5 miles beyond the City limits and 5 miles beyond the City's Urban Growth Area.

In May 2010, the City filed a Motion for Summary Judgment addressing issues related to GPDC's implied contract cause of action. GPDC and the City agreed that an implied contract to supply water to the GPDC development arises only 1) if the City held itself out as a public utility willing to serve all customers in the Chuckanut area or 2) if the City and GPDC, through a course of dealings and common understanding, had shown a mutual intent to contract. (CP 1036, 1038, 1242). The motion

also addressed whether any GPDC claim based on a supposed contract formed in 1972 was barred by the statute of limitations. On July 2, 2010, the trial court granted summary judgment on all three issues.

1. “That the City did not hold itself out as a public utility willing to serve all customers in the Chuckanut area.”

2. “That the City and GPDC did not, through a course of dealings and common understanding show a mutual intent to contract.”

3. “That any claim of GPDC based on a contract that may have been formed by the Bellingham Water Board decision of September 12, 1972, is barred by a passage of the statute of limitations.”

(CP 217).

In September 2011, the City filed a Second Motion for Partial Summary Judgment addressing GPDC’s cause of action based on RCW 43.20.260. Under the statute and the nearly identical WAC 246-290-106, the City would have a duty to provide water to the GPDC development only if three conditions were met: (1) the GPDC development was in the City’s “Retail Service Area;” (2) GPDC had applied for “retail water service” direct to consumers; and (3) providing City water was consistent with the City’s plan, regulations, and ordinances, including its “utility service extension” Ordinance 2006-03-026.

The trial court granted summary judgment on only the third requirement (CP 7). It denied summary judgment on the first requirement pertaining to inclusion in the City's retail service area and found it unnecessary to rule on the second requirement pertaining to whether GPDC had applied for retail water service. (11/18/11 VRP, p. 34 and 38). Because all three requirements must be met before RCW 43.20.260 obligated the City to supply water to the GPDC development, and because the trial court had previously granted summary judgment that there was no contractual basis to compel the City to supply water, the trial court dismissed the GPDC case with prejudice. The trial court also ruled that the City was not required to conduct a feasibility study of an action that it was prohibited from taking.

The trial court concluded:

1. "That denying water service to GPDC did not violate the RCW [43.20.260] or WAC [246-290-106] because the City was acting consistently with its plans, regulations, and ordinances, including its 'utility service extension' ordinance 2006-03-026."
2. "That the City should not be compelled to undertake a feasibility study under BMC 15.36.090 because Ordinance 2006-03-026 prohibited the City from providing water to newly created lots outside the City's urban growth area regardless of the feasibility of providing such services."

3. “That all of GPDC’s claims having been denied by summary judgment, this cause should be dismissed with prejudice.”

(CP 7).

The trial court denied summary judgment on two issues:

1. “That denying water to Governors Point did not violate RCW 43.20.260 or WAC 246-290-106 because Governors Point is not in the City’s ‘Retail Service Area.’”

2. “That denying water service to GPDC did not violate RCW 43.20.260 or WAC 246-290-106 because GPDC applied for a bulk water contract for re-sale of water to consumers and not ‘retail water service’ direct to consumers.”

(CP 6-7).

The City of Bellingham seeks cross review on the denial of summary judgment on these two issues. As a matter of law, both issues uphold the City’s right to refuse water service to Governors Point.

**B. Facts.**

Governor’s Point is a 157 acre forested peninsula surrounded on three sides by Puget Sound and separated from homes along Chuckanut Drive by the Burlington Northern railroad tracks and Pleasant Bay Road. (CP 1094, 1158). See Appendix, Aerial Photo of Governors Point (CP 1158). The peninsula is divided into six parcels: Dahlgren, Hunt, and McCush are served by City water. (CP 1098-1100, 1158). Gibb applied for and was denied City water. (CP 1100, 1169). The Chuckanut Beaches

Assoc. parcel is a conservation area. GPDC owns the remaining 126 acre uninhabited parcel. (GPDC's Appeal Brief at 1). The following is a timetable of relevant events:

1972 – The City Water Board authorized water service to GPDC's proposed 308-lot "Point Chuckanut" subdivision at Governor's Point. (CP 831). GPDC never sought final plat approval for the 308-lot subdivision and abandoned the proposal. (CP 1026, 1047-1048).

1976 – The City Council declared a moratorium on extension of water beyond the City limits. (CP 1174, 1181, 1184).

1978-79 – Despite requests from GPDC, the water service zone map adopted with Ordinance 8728 was not enlarged to include Governor's Point. (CP 1210, 1212).

1979 – The City adopted Ordinance 8728, which lifted the 1976 moratorium, created a system for determining circumstances under which water would be provided beyond the City limits, and established that such water service would be at the discretion of the City. (CP 1184-1208). The ordinance established water service zones for direct water service to individuals, including a water service zone running south of the City along Chuckanut Drive. (CP 1186). Governor's Point was not within a water service zone. (CP 1214). The ordinance also established detailed application procedures for contract re-sale of water to water districts and

associations. (CP 1190-1194). For the next 30 years, GPDC did not apply for contract water services as required by Ordinance 8728. (CP 718, 1056, 1176).

1979 to present – The City has both denied and granted water applications in the Chuckanut area depending on whether the application complied with City ordinances. (CP 1094-1097, 1112-1121, 1130-1144, 1167, 1169, 1171).

1985 – In June 1985, the City adopted Ordinance 9461 which established an Urban Service Area surrounding the City which it expected to be developed at urban levels and for which the City would provide municipal water and sewer service. (CP 1175, 1216-1227). The ordinance prohibited the extension of City water to areas outside the City's Urban Service Area except minor extensions to address public health and safety concerns. (CP 1218-1219). Governor's Point was located outside the City's Urban Service Area. (CP 1227). Because there was no Urban Service Area located south of the City limits, only properties already located in the water service zone along Chuckanut Drive were eligible for water service. Properties, like those on Governor's Point, located outside the water service zone could not be added to the zone without amending the Urban Service Area through the Comprehensive Plan Amendment Process. (CP 1175, 1218, 1231-1232).

1990 – GPDC applied to Whatcom County for a 57.5 acre short plat subdivision at Governor's Point. (CP 1049, 1052). When Whatcom County asked the City for its position on water availability for Governors Point, the City replied: “Water is NOT available to new lots in this area from the City of Bellingham. The property is outside our Water Service Zone and outside the Urban Service Area jointly set by the City and County.” (CP 1234; emphasis in original).

1992 – GPDC submitted its current 141-lot long subdivision application for Governor's Point. (CP 1050-1051, 1053).

1992 – In its formal comments to Whatcom County on the proposed 141-lot Governor's Point subdivision, on April 8, 1992, the City stated: “The site is not in the City’s current water or sewer service area. Since it is the City’s policy not to extend utilities outside this area, the technical review committee unanimously recommended that the project not proceed at this time.” (CP 1071-1072, 1077).

1992 – When GPDC requested that the City enlarge its Water Service Zone and amend its Urban Service Area to include Governor's Point, the City responded: “[T]his property is outside the Urban Service Area established by BMC 15.36.065. The City Code (BMC 15.36.080) states that water and sewer service requests outside the Urban Service

Area will not be considered. Consequently, your request must be denied.”  
(CP 1177, 1238-1239, 1241).

1993 - The City adopted a Comprehensive Water Plan, under which Governor's Point was located outside the City's Existing Service Area. (CP 1097, 1146).

2006 - The City Council adopted the City's 2005 Comprehensive Water Plan, under which the Existing Water Service Area terminated at the City's southern municipal boundary, approximately five miles north of Governor's Point. (CP 278-279, 1098, 1151).

2006 – The City Council adopted Ordinance 2006-03-026 to bring the City's water service policy into compliance with the Growth Management Act. (CP 1096-1097, 1123-1125). The 2006 Ordinance adopted a policy to deny requests to extend or expand water or sewer service outside of the City's urban growth area. (CP 1124). The Ordinance states: “The City will not extend or expand urban governmental services such as water and sewer outside the UGA [Urban Growth Area] unless authorized by law.” (CP 1124).

2006 – The City adopted Ordinance 2006-06-064 to clarify the term “in existence” used in Ordinance 2006-03-026 to specify who could receive water service beyond the City's UGA. (CP 1097, 1127-1128).

2008 – Regarding the GPDC subdivision, a City Attorney wrote to the Whatcom County Planning Director: “At this time, the City is unaware of any legal obligation to provide water services to this subdivision and has no plans to provide such water.” (CP 1057-1058, 1062).

2008 – The Bellingham Mayor wrote to Whatcom County Planning Director: “[T]he City will not provide City water to the proposed 141-unit subdivision at Governors Point.” (CP 1058, 1064).

2009 - The City Council adopted its 2009 Water System Plan, using the term “retail service area” for the first time. Consistent with Ordinance 2006-03-026 and the 2005 Comprehensive Water Plan, the City’s 2009 Water Plan terminated the City’s retail service area at the City’s southern boundary, miles north of Governor’s Point. (CP 274, 281-282, 1098, 1153).

2009 – An Assistant City Attorney wrote to Whatcom County officials: “The City is on record dating back to at least May 1990 that it will not provide water service for the proposed 141-unit Governor’s Point subdivision. The City is unaware of any legal obligation to supply water to the proposed subdivision which is located five miles outside the City and its Urban Growth Area and believes providing such water would violate local and state law.” (CP 1058-1059, 1069; emphasis in original).

2009 – GPDC requested water service from the City for its proposed 141-lot Governor's Point subdivision. (CP 718).

2009 – GPDC's request to the City for water service at Governor's Point was titled: "Re: Governors Pointe Development: Request for Formal Water Re-Sale Contract." (CP 718). The letter states: "We are simply seeking to formalize an implied contract with the City that will allow the Governors Point Development Company to continue to function as a bulk water purchaser and reseller to the Governors Pointe Development." (CP 719). Twice in the letter, GPDC identifies itself in bold faced section headings as "a Bulk Purchaser and Reseller of City Water." (CP 719, 721).

2009 – Responding to GPDC's request for "a formal water re-sale contract to serve the proposed Governor's Point subdivision," the City Public Works Director said: "Based on the City's lack of contractual relationship with GPDC, its formerly adopted policy against extending or expanding water service outside the UGA as documented in Ordinance 2006-03-026, and the GMA prohibition on the City extending water into rural areas, I am not authorized to process your request for a formal resale water contract to serve the proposed Governor's Point subdivision." (CP 1094, 1103-1105).

2009 - At the City Council's hearing to review the denial of water service, GPDC testified that it was seeking a water re-sale contract from

the City so that the company could re-sell the water to home owners in its proposed subdivision. (CP 87). The City Council affirmed the denial of water service. (CP 1107-1108).

2009 – GPDC’s Second Amended Complaint states that its 2009 request to the City was for “contract services to sell water to a recognized water district or association to be formed by GPDC, which would in turn operate a Class A water system reselling and distributing the City water to residents of the Governors Pointe Development.” (CP 1274).

#### IV. ARGUMENT

##### A. **Washington Appellate Decisions Support the City’s Right to Refuse Water Service Beyond its City Limits.**

Two Washington appellate cases affirm the City’s right to refuse water services beyond the City limits, absent an expressed or implied contract. Brookens v. City of Yakima, 15 Wn. App. 464, 550 P.2d. 30 (1976); Harberd v. City of Kettle Falls, 120 Wn. App. 498, 84 P.3d, 1241 (2004).

In both cases, as here, a developer sued the city claiming an implied contract to provide water services to a development. In both, as here, the city had previously supplied water to the property being developed. In both cases, as here, the city had not held itself out as a public utility willing to serve all comers and had not dealt with the

developer in a way to indicate a mutual intent to provide water services. And in both cases, the trial court summarily dismissed the developer's implied contract lawsuit, and the appellate court upheld that decision.

Brookens and Harberd each accept the premise that, absent a contract, the decision to supply water beyond the city limits is discretionary with the city:

The power to supply water beyond corporate limits is permissive, with supply being a matter of contract between the municipality and property owners. In the absence of contract, express or implied, a municipality cannot be compelled to supply water outside its corporate limits.

Brookens, 15 Wn. App. at 465-66; Harberd, 120 Wn. App. at 515-16.

Quoting an ALR, the Brookens court added:

(A) city cannot be compelled to supply water to anyone outside its limits, even if it is already engaged in doing so in a given extra-territorial area, where it has made merely limited and special contracts to do so with particular parties and has not placed itself by contract or conduct in a position of a public utility subject to regulations, . . .

Brookens, 15 Wn. App. at 466, fn 3, quoting 48 ALR 2<sup>nd</sup> 1222.

Brookens and Harberd agree that an implied contract to supply water service beyond the city limits can come about only through either a course of dealing and common understanding that shows a mutual intent to contract or by the city holding itself out as a public utility willing to supply all those who request service in a general area:

[A]n 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 District No. 6 v. Jackson P'ship, 109 Wn. App. 113, 122, 34 P.3d 840 (2001), review denied, 147 Wn.2d 1003, 53 P.3d 1007 (2002). "A contract to supply water may also be found by implication, as where a municipality **holds itself out as a public utility** willing to supply **all** those who request service in a general area." Brookens, 15 Wn. App. at 466 . . .

Harberd, 120 Wn. App. at 516, (emphasis added). In neither case did the court find evidence of a course of dealing demonstrating a mutual intent or that the city had held itself out as a public utility.

In Brookens, the trial court dismissed a complaint seeking to compel the City to extend water service beyond the City limits to a proposed 95-unit development despite the fact that the City had supplied water to plaintiff's home on the property he wished to develop for over 20 years and despite the fact that the City water main ran through the Brookens property. Brookens, 15 Wn. App. at 465. The court rejected the argument that the City had held itself out as a public utility willing to supply all comers.

A contract to supply water may also be found by implication, as where a municipality holds itself out as a public utility willing to supply all those who request service in a general area. However, the record reflects no holding out by the City from which to imply a general offer to supply any and all land owners, or to supply the Brookens individually. We do not find the presence or absence of a water main in front of the home, which main supplies other homes in the area, necessarily to be a holding out of such

an intent. On the contrary, adoption by the City of a 1968 resolution to supply water only when the user complies with the Yakima General Plan for land use clearly manifests an intent not to supply the general area indiscriminately, nor expand any prior agreement with the Brookens. The 1968 resolution predates this action by three years.

Brookens, 15 Wn. App. at 466-67.

The Brookens ruling contains three elements directly responsive to GPDC's allegations. These elements refute the underpinnings of GPDC's claim that the City held itself out as a public utility willing to supply all applicants.

1. The fact that the City had long supplied water to a residence on the property proposed for development did not create an inference that the City held itself out as ready to serve all applicants.

2. The fact that a City water main ran through the property did not create an inference that the City held itself out as ready to serve all applicants.

3. The fact of a City regulation that water would be supplied only when the user complies with the City's plan does not imply that the City held itself out as ready to serve all applicants, but rather it implies "an intent not to supply the general area indiscriminately, nor expand any prior agreement with the Brookens."

In Harberd, the court upheld the City's refusal to extend City water to additional lots on a parcel outside its City limits despite a long history of earlier extensions of City water to lots previously carved out of the same 103-acre parcel. After providing water to new lots in 1983, 1985, 1988, and 1989, the City in 1994 adopted a moratorium on new out-of-town hook-ups and denied Harberd's request for water to eight additional hookups. Upholding the City's summary judgment, the court rejected arguments that the City had held itself out as a "public utility" because "the record shows the City historically retained discretion to grant or deny water hookups." Harberd, 120 Wn. App. at 517. In our case, the record likewise shows that the City of Bellingham "historically retained discretion to grant or deny water hook-ups." In fact, the record goes considerably further: the City has refused to grant new service except in narrowly tailored circumstances.

In both Brookens and Harberd, the city's motion for summary judgment was upheld despite the fact that the city had previously supplied water to a user on the property to be developed, just as Bellingham had previously supplied water to a user at Governor's Point.

**B. Undisputed Facts Support the Trial Court's Ruling that No Implied Contract Required the City to Supply Water to GPDC's Proposed Subdivision.**

GPDC claims that the City has an obligation under an implied contract to supply water to GPDC's proposed 141-lot "Governor's Pointe" subdivision, which is 5 miles south of both the City limits and the City's Urban Growth Area, either because: 1) the City held itself out as a public utility willing to serve all customers in the Chuckanut area who requested service, or because 2) the City engaged in a course of dealing and common understanding showing a mutual intent to contract with GPDC. (CP 1278). For the reasons provided in Brookens and Harberd, these arguments are not persuasive.

1. **Since 1976, City ordinances and the City's denials of applications which did not meet the standards of the ordinances show that the City has not held itself out as a public utility ready to serve all applicants in the Chuckanut area.**

In 1976, the City Council declared a moratorium on extension of water beyond the City limits, an action incompatible with the City holding itself out as a public utility willing to serve anyone requesting water service. (CP 1174, 1181, 1184).

In 1979, the City adopted Ordinance 8728, which lifted the 1976 moratorium and created a comprehensive system for determining where and under what conditions City water would be provided outside the City limits. (CP 1184-1208). Ordinance 8728 made extension of water services outside of the City discretionary with the City.

The Bellingham City Council has further determined that the City of Bellingham has no obligation to authorize the further extension of its water distribution and sewage/collection/service and therefore declares its intention to hereinafter deny requests for Direct Services or Contract Services unless the development for which proposed extensions or services are sought, are determined not to adversely affect the best interests of the City . . . .

(CP 1185).

This ordinance regulated both "direct service" to individuals and "contract service" to water districts and associations. Direct water service to individuals outside the City limits was limited to parcels within newly created "Water Service Zones," and available only under certain conditions. (CP 1186). The initial "Water Service Zones" were identified on a map that excluded the GPDC property. (CP 1214).

Under the ordinance, contract water service to water districts and associations were subject to conditions set forth in the ordinance. (CP1188). The ordinance declared that the City would contract for water services only when it is in the City's interest to do so.

It is specifically declared to be the policy of the City of Bellingham only to so expand such service zones or otherwise contract water distribution and sewage collection services with districts and associations where the City can be assured that the development which will use the City's system will not impose adverse impact upon the City of Bellingham.

(CP 1188).

The ordinance sets out a detailed application procedure for water districts and associations subject to both the judgment of the City Council regarding the best interests of the City and to criteria listed in the ordinance. (CP 1185, 1190, 1192-1194).

It is indisputable that Ordinance 8728 imposed prohibitions and limitations on who can get water service outside the Bellingham City limits, limitations incompatible with a public utility offering services to all who requested it.

In 2006, the City Council adopted Ordinance 2006-03-026 in response to the Growth Management Act. (CP 1123-1125).

The Growth Management Act (GMA) provides that it is not appropriate for urban governmental services, which includes water and sewer services, to be extended to or expanded in rural areas except in very limited circumstances that are necessary to protect basic public health and safety and the environment and which do not permit urban development.

(CP 1123).

The Ordinance further restricted water service outside the City limits by repealing aspects of Ordinance 8728 that were inconsistent with the Growth Management Act, including the water service zone located south of the City along Chuckanut Drive. (CP 1123-1124). The City Council found that “Ordinance No. 8728 is inconsistent with the GMA to the extent it authorizes the extension of City water and sewer service into

areas outside the City's Urban Growth Area ("UGA")." (CP 1123). Ordinance 2006-03-026 amended Ordinance 8728 to bring it into compliance with the policies of the GMA.

Ordinance 2006-03-026 also states that neither direct service nor contract service of City water would be extended or expanded outside the UGA. "The City will not extend or expand urban governmental services such as water and sewer outside the UGA unless authorized by law."(CP 1124).

In adopting Ordinance 2006-03-026, the City Council re-stated its intent that Ordinance 8728 did not create any contractual obligation to extend water services, but merely created the opportunity to apply for such an extension.

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 8728 was not intended to create any such contractual duty, express or implied. Rather, it was intended to create an opportunity to apply for an extension, which the City, in its discretion, could grant or deny based on listed criteria.

(CP 1123).

Ordinance 2006-03-026 did not terminate any existing water service, but stated that the "City Council does not intend for the continuation of these existing services to be **modified, expanded or extended.**" (CP 1124, emphasis added). No reasonable person could

understand Ordinance 2006-03-026 as the City holding itself out as public utility ready to serve all applicants.

In conformity with the City's policies and ordinances, its response to applicants for water service in the Chuckanut area outside the City limits demonstrates that the City did not hold itself out as a public utility willing to supply water to anyone from that area making a request. Since the 1976 moratorium, "the record shows the City historically retained discretion to grant or deny water hook-ups." Harberd, 120 Wn. App. at 517. Since 1979, the City has denied water to applicants in the Chuckanut area beyond the City limits and outside the water service zone created by Ordinance 8728, including both GPDC and John Gibb, another applicant for City water from property on Governor's Point -- property less than 500 feet from the GPDC's proposed subdivision. (CP 1100, 1112-1121, 1167, 1169, see Appendix Map). In each denial, the City described how the applicant failed to comply with City requirements. During the same period, many applicants who complied with City requirements were provided water in the Chuckanut area. (CP 1095-1096, 1174-1176). Because the City retained discretion as to whom it would serve, providing water to some but not to others in the Chuckanut area, the City did not hold itself out as a public utility ready to serve all. Brookens, 115 Wn. App. at 465-67; Harberd, 120 Wn. App. at 517.

GPDC concedes that the appropriate standard for establishing an implied contract is whether “a municipality holds itself out as a public utility willing to supply all those who request service in a general area.” (GPDC’s Appeal Brief, Issues Pertaining to Assignment of Error A.1, pgs. 6 and 35-36; Harberd, 120 Wn. App. at 517). (emphasis added). Because GPDC cannot counter the fact that Chuckanut residents were denied water service, including its close neighbor on Governor’s Point, John Gibb, (CP 1117, 1169, see Appendix Map), GPDC alters the standard to read “willingness to serve the area,” instead of willingness to serve all customers. (GPDC's Appeal Brief at 37). A willingness to serve only some properties in a geographical area is not enough to meet the “public utility” standard.

GPDC ignores the correct standard and trumpets the irrelevant fact that some properties which met the requirements of City ordinances were provided water. (GPDC’s Appeal Brief, p. 37-38). GPDC refuses to confront the relevant and documented fact that the City has both denied and granted Chuckanut area water applications, depending on whether the application complied with City ordinances. (CP 273-274, 1112-1121, 1130-1144, 1167, 1169).

GPDC tries to use its new, self-serving standard to support its bald-faced assertion that the City admitted “in 2006, with the adoption of

Ordinance 2006-06-064, that it had held itself out as willing to serve the entire area . . . .” (GPDC’s Appeal Brief, p. 37). GPDC offers no argument or authority to support this assertion, an assertion as inaccurate as its reformulated legal standard. To bring the City into compliance with the Growth Management Act, Ordinance 2006-03-026 restricted new and continuing water services outside the UGA. The City Council in 2006-03-026 made clear that it did “not intend to terminate any water or sewer service that is in existence as of this ordinance’s effective date.”

The stated purpose of subsequently adopted Ordinance 2006-06-064 was “to modify and clarify Ordinance No. 2006-03-026 regarding service to areas outside the City limits.” (CP 1127). Ordinance 2006-06-064 did this by more fully defining the term “in existence” as that term is used in 2006-03-026. Ordinance 2006-06-064 helped differentiate more completely those whose water service would not be terminated because their water service was “in existence” as provided in the ordinance. The ordinance in no way suggests that the City was holding itself out as willing to serve any applicant in the Chuckanut area. To the contrary, Ordinance 2006-06-064, like Ordinance 2006-03-026 made clear that some people would not receive water service, and that is in fact what happened. That some property owners, including GPDC, might have hoped for water service is immaterial to the City’s willingness to provide

service. The meaning of an ordinance is a question of law, and no court could find in Ordinance 2006-06-064 even a hint of an admission by the City that it was willing to provide water to all applicants.

In search of a shred of evidence to support its “willing to serve all customers” implied contract claim, GPDC looks to the City’s current Comprehensive Plan showing Governor’s Point within the “potential water service area” of the City and to a never adopted draft 2008 water system plan. (GPDC's Appeal Brief, pp. 21 and 38). Neither inclusion in a potential water service area nor inclusion in a never adopted draft water system plan raises a question of material fact about whether the City held itself out as a public utility ready to serve all applicants.

Inclusion of Governor's Point in a potential water service area shows no more than the potential or possibility for inclusion and not the actual inclusion. It does not suggest a willingness to provide water service to anyone requesting it from the Chuckanut area.

The draft 2008 water system plan that erroneously included Governor's Point in a retail service area map, was just that, a draft. The plan, prepared by an outside consultant, was titled “Preliminary Draft Water System Plan” and stamped “DRAFT REVIEW NOT FOR DISTRIBUTION.” (CP 659). The Washington State Department of Health relied on the draft plan to make an administrative decision unrelated to the

inclusion of Governor's Point on the map. (CP 9-10, 11, 157-159, 168-169, 170).

Before adopting its new water service plan, the City corrected the error and excluded Governor's Point from the retail service area. (CP 159, 1153). The final water plan approved by both the City Council and DOH excludes not only Governor's Point but the entire Chuckanut area from the City's retail service area. (CP 1098, 1153).

Like so many of GPDC's "facts," the Comprehensive Plan potential water service designation and the never adopted draft 2008 plan are immaterial to the question of whether the City held itself out to serve all customers requesting water in the Chuckanut area.

The "decade by decade maps of development in the Chuckanut area" cited by GPDC and the replacement of a water main along Chuckanut Drive have no bearing on whether the City held itself out as a public utility willing to serve all customers in the Chuckanut area. (CP 806-16; GPDC's Appeal Brief, p. 37).

Since the 1976 moratorium, the City has followed Ordinances 8728, 9461, 2006-03-026, and 2006-06-064, granting those applications for water service that met the requirements of the ordinances and denying those that did not. The fact that some applicants for water service were

denied demonstrates conclusively that the City was not “. . . willing to serve all customers. . .”

Together, both the denials and the approvals of water service, like the City ordinances dating back to 1979, show that the City "historically retained discretion to grant or deny water hook-ups" and did not hold "itself out as a public utility willing to serve all customers in the Chuckanut area." Harberd, 120 Wn. App. at 517.

**2. Since 1976, the undisputed facts demonstrate no course of dealing and common understanding between the City and GPDC evidencing a mutual intent to contract for City water services at GPDC's proposed 141-Lot "Governor's Pointe" subdivision.**

GPDC's alternative for establishing an implied contract is to prove that "through a **course of dealing** and **common understanding**, the parties showed a **mutual intent** to contract with each other." Harberd, 120 Wn. App. at 516 (emphasis added). (CP 217; GPDC's Appeal Brief, p. 6 and 35). However, after stating the "course of dealing and common understanding" standard at the outset of Section IV.B. of its brief, GPDC writes not a word of argument in support of applying this standard. (GPDC's Appeal Brief, pp. 35-38). Therefore, the City has moved to strike the related Issue Pertaining to Assignment of Error.

To meet this standard at trial, GPDC must show three things: 1) course of dealing; 2) common understanding between the City and GPDC;

and these first two elements must add up to 3) a mutual intent to form a contract for the City to provide water to GPDC's 141-lot development.

After 1975, no evidence indicates that the City and GPDC shared a common understanding or a mutual intent that the City would supply water to the GPDC proposed development. "Common" and "mutual" are key words. Throughout its Appeal Brief, GPDC references GPDC's or Roger Sahlin's intent to receive City water (see p. 16 and 36). This unilateral intent cannot create the common understanding and mutual intent required to form an implied contract. Summary judgment is also sustainable because the course of dealings after 1975 is indisputably contrary to a mutual intent to provide municipal water services to Governor's Point.

This "course of dealing" element presents a somewhat unusual summary judgment question because it requires GPDC to show a pattern or course of conduct rather than on a single act. An anomalous fact does not establish that pattern or change the contrary pattern of dealings between the City and GPDC, a pattern of conduct unambiguously contrary to a common understanding and mutual intent to contract.

Overwhelming evidence shows that the City repeatedly and explicitly rejected any notion of a water contract with GPDC -- that the course of dealing between the City and GPDC produced no mutual

understanding that the City would supply water to GPDC. A reasonable jury could not find otherwise.

Beginning in 1979 and repeatedly since 1990, the City told GPDC that the City would not serve any subdivision at Governor's Point. The course of dealing has been indisputable – no meeting of the minds and no City water for the subdivision at Governors Point.

In 1972, the City agreed to provide City water to a proposed 308-lot "Pointe Chuckanut" subdivision at Governor's Point. However, GPDC abandoned this proposal; it was never completed or platted. (CP 1026, 1047-1048). RCW 58.17.140. Dealings between the City and GPDC were minimal for the next 18 years. (CP 1047).

As the City was preparing to adopt Ordinance 8728, an attorney for GPDC wrote to the City Public Works Director on November 14, 1978, noting that Governor's Point was not included in "the proposed water service district for the Chuckanut area just south of the City limits," and requesting that the service area be expanded to include Governor's Point. (CP 1210, 1212). The Water Service Zone map adopted with Ordinance 8728 was not enlarged to include Governor's Point, effectively rejecting GPDC's request, and demonstrating a lack of "mutual intent" to provide City water to Governor's Point. (CP 1214).

On May 11, 1990, GPDC submitted to Whatcom County a short subdivision application for 57.5 acres at Governor's Point. The application indicated: "Water Supply Source: City of Bellingham." (CP 1052). This notation prompted Whatcom County to contact the City Public Works Director seeking confirmation of water service availability from the City. The City responded: "Water is NOT available to new lots in this area from the City of Bellingham. The property is outside our Water Service Zone and outside the Urban Service Area jointly set by the City and County." (CP 1234, emphasis in original).

On June 11, 1990, the Whatcom County Public Works Department wrote to GPDC: "I'm sorry to inform you that your request for water service was denied by the City of Bellingham." (CP 1236). It is difficult to imagine how this interchange suggests a course of dealing and common understanding that the City would supply water at Governor's Point.

GPDC abandoned its 1990 short subdivision application, and on February 11, 1992, substituted its current 141-lot long subdivision application "Governor's Pointe." (CP 1047, 1051, 1053). On April 8, 1992, the Director of the City Planning Department submitted formal comments to Whatcom County concerning the proposed 141-lot subdivision: "The site is not in the City's current Water or Sewer Service Area. Since it is the City's policy not to extend utilities outside this area,

the Technical Review Committee unanimously recommended that the project not proceed at this time." (CP 1071-1072, 1077). This is another blunt indication that the City and GPDC did not share a common understanding of the future of City water at Governor's Point.

On June 18, 1992, an attorney for GPDC wrote to the City Public Works Director requesting enlargement of the City Water Service Zone to include Governor's Point stating: "We take this opportunity to formally request that the City of Bellingham's sewer and water service zones be extended to include all properties located at Governor's Point . . ." (CP 1177, 1238-1239). On October 15, 1992, the Director of the Bellingham Public Works Department responded:

You have requested that the City extend its water and sewer service zones to include all properties at Governor's Point. As we have discussed before, this property is outside the Urban Service Area established by BMC 15.36.065. The City's code (BMC 15.36.080) states that water and sewer service requests outside the Urban Service Area will not be considered. Consequently, your request must be denied.

(CP 1241). This rebuke again emphasizes the parties' lack of "common understanding" and "mutual intent" necessary for an implied contract.

In the City's formal comments on Whatcom County's SEPA determination of significance for GPDC's proposal 141-lot subdivision in March 1993, the City Planning Department Director stated:

Our main concern is that the proposal envisions significant development (just over one unit to the acre) on an

environmentally sensitive shoreline site that is outside a proposed urban growth area. The area is not eligible for extension of urban services at this time. As with other areas outside the current Urban Service Area, no extensions will be considered until the completion of the City's Comprehensive Plan update.

As you know, this update is being carried out under provisions of the State Growth Management Act. Based on provisions of that act and conditions affecting the subject area, it appears unlikely this area would be included within the City's Urban Growth Area.

(CP 1072-1073, 1082). This response is inconsistent with an implied contract based on a course of dealing and mutual intent.

In March 2006, the City Council passed Ordinance 2006-03-026 to bring Bellingham into compliance with the Growth Management Act. (CP 1096-1097, 1123-1125). The ordinance provided that "The City will not extend or expand urban governmental services such as water and sewer outside the UGA unless authorized by law." (CP 1124). Because Governor's Point was not included in the Urban Growth Area, this ordinance is another indication that the City did not contemplate providing water to a development at Governor's Point. An Assistant City Attorney confirmed this in a letter to the Whatcom County Planning Director:

The City of Bellingham has received a number of inquiries from your staff asking whether the City is providing water to the proposed 140-lot subdivision at Governor's Point. At this time, the City is unaware of any legal obligation to provide water services to this subdivision, and has no plans to provide such water.

(CP 1057-1058, 1062).

Three months later, on May 23, 2008, Mayor Dan Pike wrote to the Whatcom County Planning Director repeating the City's intent not to provide water to the subdivision at Governor's Point:

The letter is a follow up notice to Whatcom County that the City will not provide City water to the proposed 141-unit subdivision at Governors Point. This has been the City's position since at least 1990, as shown by the enclosed letters and notes. Statements by the developers of the proposed subdivision that the City has a legal obligation to provide water for the project have not changed the City's position.

(CP 1058, 1064).

On July 17, 2008, the Bellingham Public Works Director responded to a request for comment on the scope of the Governor's Point environmental impact statement. "As the City has previously notified Whatcom County, the City will not provide water for the Governor's Point subdivision." (CP 1058, 1066-1067).

On February 9, 2009, an Assistant City Attorney wrote to Whatcom County planners:

**The City is on record dating back to at least May 1990 that it will not provide water service for the proposed 141-unit Governor's Point subdivision.** The City is unaware of any legal obligation to supply water to the proposed subdivision which is located five miles outside the City and its Urban Growth Area and believes providing such water would violate local and state law.

(CP 1058-1059, 1069; emphasis in original).

On March 6, 2009, the City Public Works Director responded to a GPDC's request for "a formal water resale contract to serve the proposed Governor's Point subdivision." The Director concludes: "Based on the City's lack of contractual relationship with GPDC, its formally adopted policy against extending or expanding water service outside the UGA as documented in Ordinance 2006-03-026, and the GMA prohibition on the City extending water into rural areas, I am not authorized to process your request for a formal resale water contract to serve the proposed Governor's Point subdivision." (CP 1094, 1103-1105).

These repeated statements by the City that it will not supply water to the Governor's Pointe 141-lot subdivision establish beyond dispute a lack of common understanding, a lack of mutual intent, and an absence of a course of dealing demonstrating that the City would contract with GPDC for City water. A reasonable jury could not find otherwise.

**3. The statute of limitations on claims for breach of implied contract has long passed.**

For its summary judgment motion, the City assumed that under the 1972 City Water Board decision, GPDC had an implied or express contract for water service at \$525 per lot to its proposed 308-lot Point Chuckanut subdivision. (CP 1242-1256).

In its response to the City's summary judgment motion, GPDC conceded the specificity of the 1972 contract. "The Water Superintendent would proceed with plans to serve the proposed 308-lot plat. That was the final executive decision required to commit the City to serving the 308-lot subdivision of the Governor's Point Property." (CP 1028).

GPDC never sought final plat approval of the 308-lot Pointe Chuckanut subdivision and abandoned the proposal under the then applicable RCW 58.17.140. (CP 1026, 1047-1048).

There are two alternatives regarding the fate of the 1972 decision. The most compelling alternative is that the implied contract ceased to exist when GPDC abandoned the project.

The less plausible alternative is that the City's offer to proceed with plans to serve a specific development project somehow survived an intervening 18 years during which GPDC did nothing to pursue the contract. If so, then in 1990, the City breached the 1972 contract and started the running of the statute of limitations.

In June, 1990, GPDC submitted to Whatcom County a short subdivision application for 41.3 acres at Governor's Point. In its application, GPDC stated that City of Bellingham would provide water to the short plat. (CP 1052). In response to a written request from Whatcom County for verification that the City would provide water to the

development, the City wrote back: “Water is NOT available to new lots in this area from the City of Bellingham. The property is outside our Water Service Zone and outside the Urban Service Area jointly set by the City and County.” (CP 1234; emphasis in original).

On June 11, 1990, Whatcom County wrote to GPDC: “I’m sorry to inform you that your request for water services was denied by the City of Bellingham. Enclosed is the letter received from the City of Bellingham, Public Works Department.” (CP 1236). This was a direct breach of GPDC’s claimed contractual right. If the 1972 contract still existed and applied to any development at Governor’s Point that GPDC might propose, with the receipt of this letter, GPDC knew that the City was in breach of the contract.

GPDC’s claim that the City’s denial of water services was an anticipatory breach that cannot be decided on summary judgment is incorrect. (GPDC’s Appeal Brief, p. 39). The question of anticipatory breach is one of fact that can be decided on summary judgment “if, taking all evidence in the light most favorable to the non-moving party, reasonable minds can reach only one conclusion.” Versuslaw, Inc. v. Steel Rives, LLP, 127 Wn. App. 309, 321, 111 P.3d 866 (2005), rev. denied, 156 Wn.2d 1008 (2006). Here, the City’s response was “a clear and positive statement or action that expresses an intention not to perform

the contract,” making summary judgment appropriate for an anticipatory breach. Id.

The more persuasive analysis is that the City’s denial of water to GPDC’s proposed short plat was an actual, not an anticipatory breach. GPDC apparently relied on its 1972 implied contract with the City for water service in applying for the 41.3 acre short plat approval from Whatcom County. The City’s breach of the contract prevented GPDC from obtaining short plat approval. This was a breach, not an anticipatory breach. Even if the 1972 contract for a specific project that no longer existed survived an 18 year dormancy, GPDC knew in the spring of 1990 that the City rejected existence of a contract with GPDC and thus was in breach of such a contract if it existed.

Subsequent actions by the City confirmed the breach. The City repeatedly made clear that it had no intention of supplying water to development at Governor’s Point and that the City believed it had no contractual obligation to do so. In 1992, GPDC applied for the current 141-lot “Governor’s Pointe” long subdivision. An attorney for GPDC wrote to the City requesting enlargement of the City Water Service Zone to include Governor’s Point. The City responded: “As we have discussed before, this property is outside the Urban Service Area established by BMC 15.36.065. The City’s code (BMC 15.36.080) states that water and

sewer service requests outside the Urban Service Area will not be considered. Consequently, your request must be denied.” (CP 1177, 1238-1239, 1241). The City’s Planning Director also sent written notices stating that City water was not available to GPDC’s proposed subdivision. (CP 1077, 1082).

In 1990 and again in 1992, GPDC applied for new subdivisions at Governor’s Point while sitting on a very stale alleged contractual right. Both applications were explicitly based on the availability of City water. Twice GPDC applied; twice GPDC was told City water would not be available for developments at Governor's Point. As early as 1990 and no later than 1992, GPDC knew that the contractual right it now claims was rejected by the City. Once the City breached the 1972 agreement, GPDC had only three years under RCW 4.16.080 to bring a claim, yet it failed to challenge the City’s decision until March 2009. As early as 1993, and no later than 1995, the statute of limitations had run on GPDC’s contract claim. GPDC’s support for the summary judgment assignment of error is a subterfuge that raises no fact material on the issue. (GPDC’s Appeal Brief, p. 38-40).

**C. The City Owed No Duty to GPDC Under RCW 43.20.260 and WAC 246-290-106 and Thus Did Not Violate These Regulations When it Denied GPDC’s Request for a Water Service Contract.**

GPDC claims that the City violated RCW 43.20.260 and virtually identical WAC 246-290-106 when it refused to provide contract water services to GPDC's proposed 141-lot subdivision. (CP 1270-1280).

RCW 43.20.260 states:

A municipal water supplier . . . has a duty to provide retail water service within its retail service area if . . . (4) it is consistent with the requirements of any comprehensive plans or development regulations adopted under chapter 36.70A RCW [Growth Management Act] 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. (Emphasis added).

The City owes a duty if all three statutory criteria are met:

1. Governor's Point is within the City's "retail service area;"
2. GPDC applied for "retail water service" direct to consumers; and
3. Providing water service to GPDC is consistent with applicable plans, regulations, and ordinances.

1. **RCW 43.20.260 Did Not Impose a Duty Because to do so Would Force the City to Act Inconsistently with its Plans, Regulations, and Ordinances, Including its "Utility Service Extension" Ordinance 2006-03-026.**

Though GPDC misstates the trial court's ruling, apparently GPDC appeals from the trial court's grant of summary judgment that "the City was acting consistently with its plans, regulations, and ordinances, including its 'utility service extension' Ordinance 2006-03-026." (CP 7).

The statute particularly singles out consistency with “utility service extension ordinances” and ordinances passed pursuant to the Growth Management Act as essential before the statute will impose a duty to supply water. To comply with the Growth Management Act, in 2006 the City passed its “utility service extension ordinance” 2006-03-026 that limited extension of water services beyond the City’s Urban Growth Area. Section 1.A. of that ordinance states:

The Growth Management Act (“GMA”) provides that it is not appropriate for urban governmental services, which include water and sewer services, to be extended to or expanded in rural areas except in very limited circumstances that are necessary to protect public health and safety and the environment and which do not permit urban development. (CP 1123).

The ordinance addresses both new services and existing services, prohibiting extension, expansion or modification in both cases. “The City will not extend or expand urban governmental services such as water and sewer outside the UGA unless authorized by law.” (CP 1124). “[The] City Council does not intend for the continuation of these existing services to be modified, expanded or extended.” (CP 1124).

Because Governor’s Point is well beyond the City’s Urban Growth Area, compelling extension of water services to Governor’s Point under RCW 43.20.260 would not be consistent with the City’s utility extension service ordinance. Extension of water service to Governor’s Point

would also not be consistent with the City's 1993 Comprehensive Water Plan which placed Governor's Point outside the City's existing service area; with the City's 2005 Comprehensive Water Plan, which terminated the City's water service boundary at the City's southern City limits, approximately 5 miles north of Governor's Point; and with the 2009 Water System Plan, which again limits the City's retail service area to its southern boundary.

RCW 43.20.260 requires provision of water services only in very limited circumstances: retail water service to individuals within a Retail Service Area, but only if that service is consistent with plans and regulations, specifically regulations adopted to bring the City into compliance with the GMA. Contrary to GPDC's claim that the City is engaging in a hypothetical analysis to reconsider actions taken decades ago (GPDC's Appeal Brief, p. 42), the City is doing what it is required to do by the Growth Management Act and allowed to do by RCW 43.20.260 -- to come into compliance with the GMA. Ordinance 2006-03-026 does not take away existing water service but restricts extension, expansion or modification of service beyond the Urban Growth Area. Rather than inviting reconsideration of past actions, RCW 43.20.260 supports past actions. It says that the City has no duty to act contrary to 2006-03-026 and other plans and ordinances.

Because RCW 43.20.260 imposes a duty only when to do so is consistent with City plans, regulations, and utility service extension ordinances, the trial court correctly ruled as a matter of law that the City had no duty under these provisions to provide water to Governor's Point.

**2. The City Should Not Be Compelled to Undertake a Feasibility Study Under BMC 15.36.090 Because Ordinance 2006-03-026 Prohibited the City From Providing Water to Newly Created Lots Outside the City's Urban Growth Area Regardless of the Feasibility of Providing Such Service.**

Though including a demand for a feasibility study as an assignment of error, GPDC provides no argument or evidence in support of its position. Thus, the City has moved to strike the related Issue Pertaining to Assignment of Error.

In 2009, when GPDC made its request for water, the feasibility of supplying water to Governor's Point was irrelevant to the City's response because the State in the Growth Management Act and the City in Ordinance 2006-03-26 had already restricted the availability of City water service in rural areas such as Governor's Point. Because a feasibility study would not alter the decision, the trial court correctly ruled as a matter of law that a writ of mandamus ordering a feasibility study would be an order to do a useless act, an order that the court declined to make.

For over 100 years Washington courts have declared that courts should not require the doing of a useless act. Legoe v. Chicago Fishing

Co., 24 Wn. 175, 181, 64 P. 141 (1901) (“But such an act would have been useless, and the law rarely requires useless things to be done.”); State v. Coyle, 95 Wn.2d 1, 11, 621 P.2d 1256 (1980) (“The Court of Appeals held that compliance with the knock-and-wait statute was not required because it would have been a ‘useless act.’”); Orion Corp. v. State, 103 Wn.2d 441, 458, 693 P.2d 1369 (1985) (“The futility exception to the exhaustion doctrine is premised upon the rationale that courts will not require vain and useless acts.”).

GPDC seeks a writ of mandamus (CP 1280-1281) ordering a feasibility study of an action foreclosed by City ordinance and state law. Our courts have looked with particular disfavor on mandamus in such situations. Eugster v. City of Spokane, 118 Wn. App. 383, 422, 76 P.3d 741 (2003) (“Mandamus is inappropriate to command ‘the performance of useless or vain acts.’ [citations omitted] A court ‘will not compel by mandamus the doing of an act that would serve no useful purpose, nor should a writ issue when by operation of law a compliance with the mandate could have no operative effect.’”).

#### **D. City’s Cross Appeal Issues**

- 1. RCW 43.20.260 Does Not Require City Water Service to GPDC Because Governor’s Point is Not and Has Never Been in the City’s “Retail Service Area.”**

Providing other criteria are met, RCW 43.20.260 only imposes a

duty for water service within the City's "retail service area." The trial court erred in denying summary judgment that Governor's Point is not in the City's Retail Service Area. No material facts dispute that GPDC's proposed development was and is outside the City's "retail service area."

With the City's first use of the term "retail service area," the 2009 Water System Plan terminated the "retail service area" at the City's southern municipal boundary, approximately 5 miles north of Governor's Point. (CP 1153).

Predecessor plans and ordinances likewise consistently excluded Governor's Point from comparably designated service areas. In its 1993 Comprehensive Water Plan, Governor's Point was located outside the boundary of the City's Existing Service Area; in the City's 2005 Comprehensive Water Plan, Governor's Point was well beyond the City's Existing Water Service Area.

GPDC cannot point to a single City-adopted water plan that includes Governor's Point in the "retail service area," "designated service area," or "existing service area". The following maps all show Governor's Point located outside the City's retail service area: (1) the Retail Service Area Map from City's 2009 Water Service Plan, (CP 1153), (2) the Designated Service Areas Map from the City's 2006 Comprehensive Plan (CP 81), (3) the Designated Service Areas Map from Whatcom County's

current Comprehensive Plan (CP 14-15), (4) the Existing Service Area Map from the City's 2005 Water System Plan, (CP 1151), and (5) the Existing Water Service Map from the City's 1993 Water Plan (CP 1146).

By repeated official actions, the City has made clear beyond factual dispute that Governor's Point is not in Bellingham's retail service area or existing service area. Therefore, RCW 43.20.260, which creates the "duty to provide retail water service within its retail service area . . ." does not apply to Governor's Point. Because no material fact disputes the conclusion that Governor's Point is not in the City retail service area, the trial court should have granted summary judgment on this issue.

**2. RCW 43.20.260 Does Not Require City Water Service to GPDC Because GPDC Did Not Apply For "Retail Water Service."**

Provided other criteria are met, RCW 43.20.260 only imposes a duty for "retail water service" direct to consumers, not bulk or wholesale water service to water districts and associations.

The trial court erred in declining to rule on this issue. No material fact disputes that GPDC applied for a bulk water contract for resale of water to consumers rather than retail water service.

The City provides two types of water service – direct retail water service to consumers (BMC 15.36.010) and bulk or wholesale contract water service to water districts and associations for resale to ultimate

consumers (BMC 15.36.020). GPDC did not request direct, retail service. It considered itself a water district or association intending to resell water to individual lot owners in the proposed subdivision on Governor's Point. In its complaint, GPDC describes itself as a water wholesaler. "[I]n February 2009, GPDC requested the City to review its request for contract services to sell water to a recognized water district or association to be formed by GPDC, which would in turn operate a Class A water system re-selling and distributing the City water to residents of the Governors Pointe development." (CP 1274).

When GPDC applied in 2009 for a water resale contract, it applied for a bulk water contract for resale of water to consumers and not for retail water service direct to consumers. GPDC's 2009 application to the City, labeled "**RE: Governors Pointe Development: Request for Formal Water Resale Contract**," (CP 718; bold original) repeatedly says that it is a request for a bulk water contract. The letter states: "We are simply seeking to formalize an implied contract with the City that will allow the Governors Point Development Company to continue to function as a bulk water purchaser and reseller to the Governors Pointe Development." (CP 719, emphasis added). Twice in the Request for Formal Water Resale Contract, GPDC identifies itself in bold-faced section headings as "**a Bulk Purchaser and Reseller of City Water**." (CP 719, 721; bold in original).

The City's initial denial letter characterized the 2009 request as "Request for Formal Water Resale Contract." (CP 1103). GPDC did not dispute this characterization.

At the City Council public hearing to review the denial of GPDC's request, GPDC testified that it was seeking a water resale contract from the City so that GPDC could resell the water to home owners in its proposed subdivision. (CP 86-87).

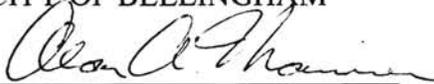
It is simply too late for GPDC to claim that it was not a bulk purchaser of water services in order to qualify for the duty under RCW 43.20.260. Because no material facts support such a claim, the trial court's failure to rule on this issue should be reversed.

#### V. CONCLUSION: RELIEF REQUESTED

The City requests this Court to affirm all issues on which the trial court granted summary judgment and to grant summary judgment on the two issues for which the trial court either denied summary judgment or did not rule.

DATED this 25th day of June, 2012.

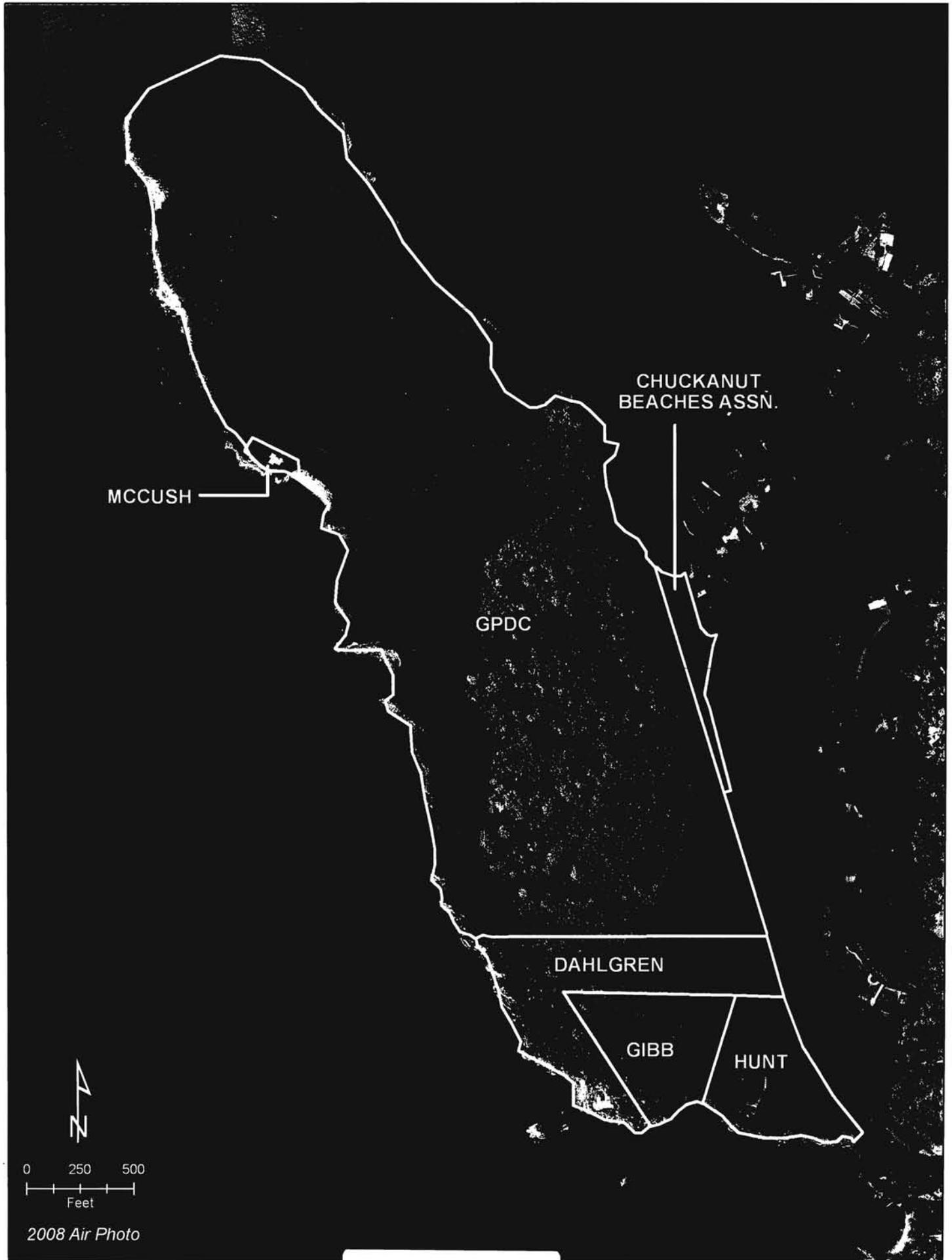
CITY OF BELLINGHAM

  
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# Air Photograph of Governors Point Showing Ownership



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

**GOVERNOR'S POINT  
DEVELOPMENT COMPANY,**

**Appellant,**

v.

**CITY OF BELLINGHAM, a  
Washington municipal corporation,  
and THOMAS L. ROSENBERG,  
its Director of Public Works,**

**Respondents/Defendants,**

and

**FRIENDS OF CHUCKANUT,**

**Respondent/Intervenor.**

**NO. 68079-0**

**CERTIFICATE OF  
SERVICE**

I declare under the penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. I am an employee of the City of Bellingham. My employment address is 210 Lottie Street, Bellingham, Washington 98225.

Office of the City Attorney  
210 Lottie Street  
Bellingham, WA 98225  
360-778-8270

CERTIFICATE OF SERVICE - 1

On June 27, 2011, I served a true and correct copy of the following documents to be delivered as set forth below:

1. **City of Bellingham's Response and Cross-Appeal Brief; and**
2. **Certificate of Service.**

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Graham & Dunn, PC [ ] By Facsimile  
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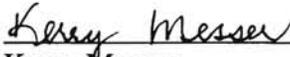
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360-778-8270

DATED this 27 day of June, 2011.

CITY OF BELLINGHAM

  
\_\_\_\_\_  
Kerry Messer  
Legal Administrative Assistant

CERTIFICATE OF SERVICE - 3

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