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COURT OF APPEALS
DIVISION II

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No. 37697-1-II

STATE OF WASHINGTON
BY  _____
DEPUTY
COURT OF APPEALS,

DIVISION II

OF THE STATE OF WASHINGTON

Michael Stanzel, Respondent

v.

Pierce County, a political subdivision, Appellant,

and

City of Puyallup, a municipal corporation, Appellant.

REPLY BRIEF OF APPELLANT CITY OF PUYALLUP

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I. INTRODUCTION

Appellant City of Puyallup submits this brief in reply to Respondent Stanzel's brief.

II. ARGUMENT

A. Objection to attempt to supplement the record with additional evidence

Appellant City of Puyallup objects to Mr. Stanzel's attempt to supplement the record with additional evidence in violation of RAP 9.11. In his letter, dated October 3, 2008, Mr. Stanzel informs the Court that he submitted a copy of the Pierce County Coordinated Water System Plan (CWSP) for the Court's use. In his brief, he represents that the Pierce County CWSP was admitted into the record as Exhibit 10. Mr.'s Reply Brief, 5. However, in footnote 1 on page 5 of his brief, he acknowledges that the whole plan was not included as part of the record. Respondent's Reply Brief, 5, fn 1. Mr. Stanzel represents that the CWSP was assigned an exhibit number by the hearing examiner at page 157 in the administrative record.

As Mr. Stanzel acknowledges, the CWSP was not entered into the record. The 2001 version of the CWSP, with attachments, is a 320 page document. The only portion of the CWSP that was entered into the record is a four page section of Appendix C of the 2001 version of the plan.

CAR 182-185. The document that Mr. Stanzel cites on page 157 of the Certified Administrative Record is a 1994 Standard Service Agreement which establishes water utility service area boundaries. CAR 157-162.

In order to supplement the record, RAP 9.11(a) requires a party to satisfy its six elements. *State vs. Elmore*, 139 Wash.2d 250, 302, 985 P.2d 289 (1999). *Department of Labor and Industries vs. Lanier Brugh*, 135 Wash.App. 808, 823, 147 P.3d 588 (2006). The entire text of RAP 9.11 is as follows:

RULE 9.11 ADDITIONAL EVIDENCE ON REVIEW

(a) Remedy Limited. The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

(b) Where Taken. The appellate court will ordinarily direct the trial court to take additional evidence and find the facts based on that evidence.

Mr. Stanzel has not moved the Court to direct that additional evidence on the merits of the case be taken before the decision of a case on review is issued. Nor has Mr. Stanzel made any showing to support the six criteria in the rule. Rather, Mr. Stanzel simply submitted a copy of the CWSP to the Court for its use.

An appellant made a similar attempt to supplement the record in

Lanier Brugh. In that case, the appellant attached supporting documents in its appendix. *Lanier Brugh*, 135 Wash.App at 822. The supporting documents were not contained in the record before the trial court. *Lanier Brugh*, 135 Wash.App at 822. The Court of Appeals determined that introduction of the documents was an impermissible attempt to present new evidence. *Lanier Brugh*, 135 Wash.App at 822.

This Court should rule similarly: Mr. Stanzel's attempt to introduce the complete CWSP into the record is an impermissible attempt to present new evidence in violation of RAP 9.11. If the Court chooses to allow Mr. Stanzel to supplement the record with the complete 2001 CWSP, then please consider the following two points: First, the record is devoid of evidence that shows that Puyallup was a signatory of the 2001 version of the Pierce County Coordinated Water System Plan. Puyallup did become a signatory to an earlier version of the Pierce County CWSP when it signed the Standard Service Agreement Establishing Water Utility Service Area Boundaries that is in the record. However, all three copies of the Standard Service Agreement Establishing Water Utility Service Area Boundaries that are in the record show that Puyallup signed on August 29, 1994. CAR 113, 161 and 274. Thus, although Mr. Stanzel contends that the timely and reasonable service criteria contained in Appendix C. of the 2001 version of the title Pierce County coordinated

water system plan governed the City of Puyallup, there is no evidence in the record to show that the City of Puyallup was subject to the Appendix C criteria in the 2001 CWSP.

Second, even if the 2001 CWSP applied to the City of Puyallup, the 2001 CWSP allows purveyors to require annexation as a condition of service. The 2001 CWSP addresses annexation on Page IV-3. The full text is as follows:

2. Conditions of Service by Designated Purveyor

Water service can be provided by the designated purveyor either through direct connection to the purveyor's existing water system, or as a detached satellite system. In either case, the following policy applies.

SA-Policy 4 The purveyor will identify for the applicant all of the conditions of service which must be agreed to prior to the provision of water service. These conditions would include engineering, financial, managerial, or other requirements deemed appropriate by the purveyor. The Coordination Act requires that the purveyor be willing to extend service in a timely and reasonable manner. Once the applicant agrees to these conditions, a building permit or preliminary permit review may continue.

Certain conditions of service which are not technically related to the provision of service may be imposed under the sole discretion of the purveyor. An example of this would be a municipal utility which requires annexation prior to provision of service. In such a case, the applicant may be required either to annex or agree not to oppose future annexation in order to receive service. Such a requirement is neither supported nor rejected by the objectives of this Plan.

By its plain language, the 2001 CWSP, under SA-Policy 4, allows purveyors to impose conditions of service which are not technically related to the provision of service, including a requirement that the applicant agree to annex his or her property. Accordingly, Puyallup's requirement that Mr. Stanzel agree to Annex his property as a condition of receiving water service was permitted by the 2001 CWSP.

Moreover, requiring an agreement to annex as a condition of receiving utility service is valid, proper and reasonable. In a longstanding case, *Yakima County*, the Washington Supreme Court ruled that requiring applicants to agree to annex as a condition of receiving utility service is valid and proper. *Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima*, 122 Wash.2d 371, 382, 858 P.2d 245 (1993). And more recently, the Court of Appeals ruled that an exclusive provider of a utility service may impose reasonable conditions of service, such as requiring an agreement to annex, and further ruled that conditions that may be imposed are not limited to those that relate to the capacity of the utility to provide such service. *MT Development, LLC v. City of Renton*, 140 Wash.App. 422, 165 P.3d 427 (2007).

B. It's not that the City wouldn't, it's that the City couldn't

In support of his argument that the City refused to provide water service, Mr. Stanzel contends that "Ms. Harris outright said the City was

not going to give [him] his water availability letter” when he approached the City on June 25, 2004. Mr.’s Reply Brief, 11. More accurately, Mr. Stanzel testified that Colleen Harris told him that the City was not providing water availability letters outside the city limits anymore. VT 43. In fact, Ms. Harris’s alleged statement was true. The City was prohibited from granting permits for or extending water or sewer service outside its corporate boundaries by Ordinance No. 2777. The relevant text of Ordinance No. 2777 is as follows (Please see the Appendix for a complete copy of the ordinance.):

Section 1. Moratorium imposed. Notwithstanding provisions of any city code, ordinance, resolution, policy or plan to the contrary, a six (6) month moratorium is hereby imposed on the extension of and any permits for City water and sewer service outside its corporate boundaries that otherwise could have been authorized by the City Council or staff through a Utility Extension Agreement. For the duration of the moratorium, the City shall not accept, process, or issue any applications or requests related in any manner to the extension of city water or sewer service outside the City's corporate boundaries. An emergency is declared requiring the immediate response of the City through passage of this ordinance.

...

Section 9. Effective date. This ordinance is an emergency ordinance and shall be effective immediately. This ordinance shall remain in effect until six months after the date of its passage, or as provided by law, unless it is revoked or extended by the City Council. . . .

PASSED by the City Council of the City of Puyallup this 5th day of JANUARY, 2004 and signed in authentication thereof this 5th day of JANUARY, 2004.

Published: JANUARY 8, 2004.

Pursuant to Ordinance No. 2777, the six month moratorium extended through early July of 2004. Then in July of 2004, the City was again authorized to provide connections for, or extensions of, water and sewer service outside its city limits pursuant to amendments to, and revisions of, PMC 14.22. CAR 78-80. Thus, when Mr. Stanzel submitted a letter, wherein he asked for a fire flow and/or water service availability letter to the Development Services Department of Puyallup on January 6, 2005, the City, according to Mr. Stanzel, responded by mailing a copy of the Puyallup municipal code to him. VT 45, 46. In order to obtain water service, Mr. Stanzel should have complied with the requirements of Puyallup's municipal code.

C. A trickle will not get you a torrent

Mr. Stanzel emphasizes that he already receives water service from the City of Puyallup. Mr.'s Reply Brief, 7. In fact, "he" does not receive water service from the City of Puyallup. Rather, the church on his real property receives water service from the City of Puyallup. VT 31, 32, and 37. Although the distinction between Mr. Stanzel and his church receiving water service may seem like a nuance that is insignificant, it is a distinction of paramount importance in this case.

Mr. Stanzel wants to build a Gameworks style game room and other buildings which he does not identify or describe. VT 37, 70. CP 6. Under Puyallup's municipal code, Mr. Stanzel's proposed Gameworks style game room and other unidentified buildings will require their own new connections, i.e., pipes and meter, to the Puyallup water system. Puyallup's Municipal Code (PMC) 14.02.240 requires that separate buildings on the same premises or on adjoining premises be served through separate service pipes and meters, and prohibits the piping system from being interconnected. The full text of PMC 14.02.240 is as follows:

14.02.240 Service to separate premises and multiple units, and resale of water.

(1) Number of Services to Separate Premises. Separate premises under single control or management will be supplied through separate individual service pipes and meters unless the city elects otherwise.

(2) Service to Multiple Units on Same Premises. Separate houses, buildings, living or business quarters on the same premises or on adjoining premises, under a single control or management, will be served through separate service pipes and meters to each or any unit and the piping system from each service will be independent of the others, and not interconnected.

(3) Resale of Water. Except by special agreement with the city, no customer shall resell any of the water received from the city, nor shall such water be delivered to premises other than those specified in such customer's application for service.

Mr. Stanzel's proposed game room and other unidentified buildings are governed by PMC 14.02.240(2). They are separate buildings on the same premises as the church, and all of the buildings are under the

control of Mr. Stanzel. Thus, although the church receives water service, the Gameworks style game room and other unidentified buildings will require their own new connections, i.e., pipes and meter, to the Puyallup water system. A trickle will not get you a torrent.

D.. Mr. Stanzel wants more water service connections, and thus, he must agree to annex

As a condition of service, Mr. Stanzel must agree annex his property into the City. PMC 14.22 governs connections to, or extensions of, water or sewer service outside Puyallup's city limits. PMC 14.22.010 (. . . all applicants for the extension/connection of water or sewer service outside the corporate limits of the city of Puyallup . . .). Property owners that seek connections to Puyallup's water system must comply with various conditions. PMC 14.22.020. These conditions include a specific requirement that applicants for city water service agree to annex their property into the City. PMC 14.22.020(5). The full text of PMC 14.22.020 is as follows:

14.22.020 Permit issuance for outside city connection.

Permits or approvals for connections to city sewer or water utility service may be issued only upon the written application of the property owner and subject to the following terms and conditions:

(1) The applicant must be within the city of Puyallup urban growth area and shall first obtain city council approval as required by PMC 14.22.010.

(2) The applicant for any such permit shall attach to the

application a construction permit duly issued to the applicant or their contractor by the appropriate county and/or political subdivision for the construction of a side sewer and/or water service.

(3) The applicant or their licensed contractor shall agree to pay a monthly sewer and/or water service charge in strict compliance with the specifications of the city governing the construction and maintenance of side sewers and/or water services.

(4) The applicant shall agree to pay monthly sewer and/or water service charges for sewer and/or water service in an amount computed at twice the charge for residents of the city; further, any connection fees and/or system development charges, including without limitation those detailed in PMC 14.26.070, shall also be at twice the charge to residents of the city. Upon annexation, monthly rates shall be reduced to those applicable to customers located within the city limits.

(5) The applicant shall agree to annex to the city of Puyallup at such time the city desires to annex the property for which water or sewer service has been extended.

Mr. Stanzel's application is governed by PMC 14.22.020(5). His property is outside Puyallup's city limits. VT 31. And, he seeks commercial water service for his Gameworks style game room and other unidentified buildings. VT 37. Accordingly, he, like every other landowner that is similarly situated, must agree to annex his property as a condition of service.

E. The City submitted the declaration of Tom Heinecke only to support its exhaustion of remedies motion, not to supplement the record

In the land use petition action before the superior court, the City of Puyallup moved the superior court to dismiss Mr. Stanzel's land use

petition because he failed to exhaust his administrative remedies, and thus lacked standing. CP 25-29. Specifically, the City contended that Mr. Stanzel failed to submit an application, failed to pay an application fee, failed to submit to a review and approval process before the City Council, and then failed to seek redress or remedy for any of his claims with the City's hearing examiner. CP 25-29. The City submitted a declaration of Tom Heinecke in support of the motion. CP 30, 31.

Mr. Stanzel argues that the declaration of Tom Heinecke should be stricken because it is an attempt to supplement the administrative record. Respondent's Reply Brief, 27. Mr. Stanzel relies on RCW 36.70C.120. Respondent's Reply Brief, 27. His reliance is misplaced. RCW 36.70C.120 requires that judicial review of the factual issues and the conclusions drawn from the factual issues be confined to the administrative record. The restrictions in RCW 36.70C.120 apply only to a review of the factual issues and conclusions of the quasi-judicial body or officer, which in this case was the Pierce County hearing examiner. However, RCW 36.70C.120 imposes no confining restrictions with respect to the procedural and jurisdictional motions that must be noted for resolution at the initial hearing before the superior court. In fact, RCW 36.70C.120 permits the record to be supplemented for matters that were outside of the jurisdiction of the hearing examiner. RCW

36.70C.120(2)(c). The relevant text of RCW 36.70C.120 is as follows:

(1) When the land use decision being reviewed was made by a quasi-judicial body or officer who made factual determinations in support of the decision and the parties to the quasi-judicial proceeding had an opportunity consistent with due process to make a record on the factual issues, judicial review of factual issues and the conclusions drawn from the factual issues shall be confined to the record created by the quasi-judicial body or officer, except as provided in subsections (2) through (4) of this section.

(2) For decisions described in subsection (1) of this section, the record may be supplemented by additional evidence only if the additional evidence relates to:

....

(c) Matters that were outside the jurisdiction of the body or officer that made the land use decision.

The City's motion to dismiss Mr. Stanzel's land use petition because he failed to exhaust his administrative remedies, and thus lacked standing, was well outside of the jurisdiction of the Pierce County hearing examiner. The motion occurred during the land use petition action, which, in essence, was an appeal of the hearing examiner's decision. The hearing examiner had no authority to rule on the City's exhaustion of remedies motion, which was properly for the superior court. Thus, the superior court could consider the declaration of Tom Heinecke to support the motion to dismiss for failure to exhaust administrative remedies.

The procedural timeframe of RCW 36.70C lends further support to the City's reasoning. The provisions of RCW 36.70C.080 require that jurisdictional and procedural issues be noted for resolution at an initial

hearing. The record on review is prepared and submitted after the initial hearing occurs or after an initial hearing order is entered. RCW 36.70C.110. In fact, the record must be submitted within forty-five days after entry of the order. RCW 36.70C.110(1). Consequently, the record becomes available for reference quite some time after the hearing on any procedural or jurisdictional issues. This procedural timeframe indicates that a moving party who asserts a motion to dismiss cannot be confined to the record on review to support the motion. Otherwise, all jurisdictional and procedural issues that must be noted for the initial hearing under RCW 36.70C.080 must occur without evidentiary support.

The City submitted the declaration of Tom Heinecke to support its motion to dismiss for failure to exhaust administrative remedies. The City did not submit the declaration of Mr. Heinecke to supplement the administrative record on review. Nor has the City relied on Mr. Heinecke's declaration for that purpose. In addition, the superior court did not abuse its discretion when it considered the declaration for purposes of the initial hearing.¹ Accordingly, this Court should decline to strike the declaration.

F. Any futility lies with Mr. Stanzel's refusal to comply with

¹ Mr. Stanzel fails to contend that the Superior Court abused its discretion when it declined to sustain his objection to Mr. Heinecke's declaration. Mr. Stanzel also fails to assign error to the court's decision. RAP 10(3)(b).

Puyallup's application process and requirements, and its administrative remedy

The futility exemption is intended to apply in situations such as those where the validity of the remedy itself is challenged. *Ward vs. Board of County Commissioners, Skagit County*, 86 Wash.App. 266, 273, 936 P.2d 42 (1997). In this case, the City's hearing examiner could grant Mr. Stanzel's request for relief if the City's hearing examiner adopted Mr. Stanzel's reasoning. But Mr. Stanzel has chosen to use an entirely different administrative process, i.e., an administrative process before the Pierce County hearing examiner. Mr. Stanzel chose the administrative process before the Pierce County hearing examiner to avoid a requirement which applies to all applicants for water or sewer outside of Puyallup's city limits, namely, an agreement to annex.

As in *Harrington v. Spokane County*, 128 Wash.App. 202, 215, 114 P.3d 1233 (2005), where the Court of Appeals ruled that the futility doctrine was inapplicable because the petitioner failed to seek review with the shoreline hearings board, so too should this Court rule that the doctrine is inapplicable. Mr. Stanzel not only failed to use the City's application process, he also failed to seek review before the City's hearing examiner. Mr. Stanzel simply assumes that the outcome of the administrative process is already known. Perhaps it is, but that is because Mr. Stanzel continues

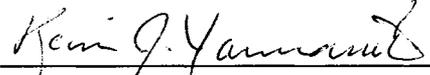
to decline to comply with Puyallup's requirements for water service.

III. CONCLUSION

Based on the foregoing, the City of Puyallup respectfully requests that the Court reverse the ruling of the superior court, and reinstate the decision of the Pierce County hearing examiner wherein the examiner concluded that he did not have authority to compel the City of Puyallup to provide water service to Mr. Stanzel's property.

Respectfully submitted,

Dated: November 21 2008


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Appendix

Ordinance No. 2777

ORDINANCE NO. 2777

AN ORDINANCE related to utility service extensions and permits within the City of Puyallup's Urban Growth Area, and, pursuant to RCW 35.63.200, 35A.63.220, 36.70A.390 and other appropriate authority, authorizing a moratorium on further extensions of and permits for such utility services as more particularly set forth herein.

WHEREAS, for many years, the City of Puyallup has required annexation or a binding contractual commitment to annex as a condition for properties located outside the City limits to receive water and/or sewer service from the City's utilities; and

WHEREAS, Washington statutes and case law provide that Cities are not legally required to provide water or sewer or other utility services to properties located outside the City limits, but that Cities have the discretion to provide such utilities as a legislative decision, on terms and conditions set forth in a contract; and

WHEREAS, the City of Puyallup is not the sole or exclusive provider for water or sewer or other utility services in any area outside the City limits, and property owners have other options for water and sewer service to such properties outside the City limits; and

WHEREAS, the Puyallup Municipal Code provides that the Puyallup City Council may, at its discretion, extend water or sewer service to areas outside of the City limits, and that such decisions are legislative decisions subject to staff review, one or more hearings, and a commitment by the property owner that the owner will agree to annex the property to the City and to comply with City zoning and development regulations, confirmed through a voluntarily negotiated contract agreed to by the property owner; and

WHEREAS, the City of Puyallup established and maintained requirements and practices for providing sewer and water extensions and service to properties outside the City limits before adoption of the Washington Growth Management Act and such requirements and practices were and continue to be consistent with the goals, policies and requirements of the GMA; and

WHEREAS, one of the underlying policies of the Washington Growth Management Act, codified as Chapter 36.70A RCW, is to ensure that urban development occur in an orderly fashion in established growth areas; and

WHEREAS, the City of Puyallup adheres to the policy objectives of the Growth Management Act, including the proposition that urban density development occurring in

its urban growth area should at the appropriate time be annexed into the City so as to be provided all the municipal services afforded by the City; and

WHEREAS, the City of Puyallup is willing to annex properties located within its Urban Growth Area; and

WHEREAS, the City has long relied upon Pre-Annexation Utility Extension Agreements as the contracts property owners must execute in order to receive City utility services outside the City limits, and such Agreements all require the signing parties and their successors to support annexation efforts that might come to pass, and to comply with the City's comprehensive plan, zoning and development regulations; and

WHEREAS, the Puyallup City Council finds that as a result of the Washington State Supreme Court's ruling in *Grant County v. Moses Lake*, which invalidated the petition method of annexation, it is now more problematic, and may not be possible to effectuate annexations through use of Utility Extension Agreements; and

WHEREAS, given this Court ruling and the many unanswered questions as a result of it, the City is unsure about how it might modify its policies to achieve the goals and objectives set forth above; and

WHEREAS, despite clear and unequivocal language contained in two Utility Extension Agreements executed by the owners/developers of the Blackstone plats, located in unincorporated Pierce County and within the City's Urban Growth Area, the owners/developers who knowingly, voluntarily and under advice of legal counsel signed those two Agreements have breached the terms of those Agreements -- which are binding contracts -- by filing and pursuing a \$5,000,000.00 claim for damages against the City, specifically contesting the City's ability to require Utility Extension Agreements as a prerequisite to providing City utility services outside the City limits; and

WHEREAS, the \$5 million lawsuit by the owner/developer of the Blackstone plats is now pending in the Pierce County Superior Court, and is captioned *Regent-Mahan v. City of Puyallup*, Cause No. 03-2-03873-9; and

WHEREAS, the \$5 million lawsuit by the owner/developer of the Blackstone plats has cost the City and its taxpayers a substantial amount of staff time and money to defend, has called into question the value to the City of providing sewer and water utility services to properties outside of the City limits, has created uncertainty as to whether the City's Utility Extension Agreements will be honored by other property owners or developers and whether the City can rely on the representations, assurances and promises made by the property owners/developers in those Agreements; and

WHEREAS, given the numerous allegations and claims raised in the *Regent-Mahan* lawsuit, the City Council finds that it is prudent to withhold further extension Agreements and permits until the lawsuit is resolved, and the City determines if it wants

to risk further litigation from property owners/developers who refuse to comply with terms and conditions in Utility Extension Agreements; and

WHEREAS, for all the reasons listed above, the City Council hereby imposes a moratorium upon the further extension of and permits for water and sewer services beyond its corporate boundaries, as more particularly described herein; and

WHEREAS, the Puyallup City Council finds that the City's ability to plan for utility service, other public services and urban growth will be jeopardized unless this moratorium is authorized; and

WHEREAS, the Puyallup City Council finds that the authorization for this moratorium is necessary to protect and preserve the City's police power authority to control and regulate land that will, at some time, come in to the City, and to ensure that such land will be developed consistent with the City's comprehensive plan, zoning and development regulations; and

WHEREAS, the Puyallup City Council finds that the authorization for this moratorium is necessary to protect the citizens of Puyallup from unduly burdensome utility fees and charges if properties within the Urban Growth Area and which may be served by City water and sewer utilities are not ultimately annexed to the City, as required by the Utility Extension Agreements and City policy; and

WHEREAS, the Puyallup City Council finds that the authorization of this moratorium is necessary to protect the health, welfare, safety and future economic viability of the City; and

WHEREAS, the Puyallup City Council finds that the best interests of the City and its taxpayers would be served if such a moratorium was authorized.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF PUYALLUP, STATE OF WASHINGTON DOES ORDAIN AS FOLLOWS:

Section 1. **Moratorium imposed.** Notwithstanding provisions of any City code, ordinance, resolution, policy or plan to the contrary, a six (6) month moratorium is hereby imposed on the extension of and any permits for City water and sewer service outside its corporate boundaries that otherwise could have been authorized by the City Council or staff through a Utility Extension Agreement. For the duration of the moratorium, the City shall not accept, process, or issue any applications or requests related in any manner to the extension of City water or sewer service outside the City's corporate boundaries. An emergency is declared requiring the immediate response of the City through passage of this ordinance.

Section 2. **Existing Utility Extension Agreements.** During this moratorium, City water and sewer service may be extended and permits issued to serve properties within

the urban growth area at the time such properties annex to the City. Utility Extension Agreements executed before the effective date of this ordinance will be honored, and City water and sewer service, and any permits authorized under the terms of a valid Utility Extension Agreement, will be made available to properties covered by such Agreements, so long as parties are in full compliance with each and every term of their respective Utility Extension Agreements. The City will not continue to provide water or sewer service to any properties covered by a Utility Extension Agreement where the owner is not in compliance with each and every term of the respective Agreements.

Section 3. **Emergency exception.** Existing facilities within the urban growth area currently served by wells or septic systems which fail during the moratorium may be provided city water or sewer service respectively under this emergency exception if such service can reasonably be made available. Applications under this exception must be filed with the Development Services Administrator, in a written form approved by the Administrator. The Administrator shall have discretion to determine whether an emergency exists, qualifying the applicant for utility service(s) under this section. The Administrator is hereby authorized to conduct all lawful research and investigations needed to reach a determination and to require additional studies or information from an applicant, the costs of which shall be the applicant's responsibility. The Administrator shall seek to issue a written determination as soon as possible after receiving a complete written application, understanding that additional studies or investigation may delay any determination. The Administrator's final determination shall be issued in writing, and may be appealed as an administrative decision to the Hearing Examiner within 10 days of issuance.

Section 4. **Duration and possibility of extension.** The moratorium imposed pursuant to Section 1 above may be extended for one or more additional six (6) month periods in the event a work plan or further study determines that such extension is necessary to determine the effect of the Supreme Court's decision in *Grant County v. Moses Lake*, the *Regent-Mahan* case, or the outcome of motions to reverse, reconsider or clarify such matters, or to determine what further policies and procedures related to future utility extensions will best serve the best interests of the citizens of the City of Puyallup.

Section 5. **City is not the sole or exclusive provider of utility services outside the City limits.** The City Council hereby reasserts its position that the City of Puyallup is not the sole or exclusive provider of sewer or water service in any area outside of the City's corporate limits. The City shall not be considered or construed as being the sole or exclusive utility purveyor for any properties outside of the City's corporate limits or within the City's urban growth area, and no action, omission, statement or decision of the City, other than a valid legislatively approved Utility Extension Agreement fully complied with by the property owner, shall in any way be considered or construed as a contract, express or implied, for the extension or supply of water or sewer utilities to the urban growth area or any area outside of the City's corporate limits.

Section 6. Findings. The findings and statements set forth in the recitals contained in this ordinance are adopted in full by the City Council as findings in support of its decision to declare an emergency and implement the moratorium adopted herein.

Section 7. Public hearing. In conformance with RCW 35A.63.220 and RCW 36.70A.390, a public hearing on the moratorium declared by this ordinance shall be scheduled within 60 days of its passage.

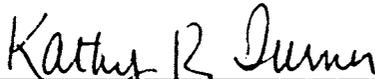
Section 8. Severability - Construction.

(1) If a section, subsection, paragraph, sentence, clause, or phrase of this ordinance is declared unconstitutional or invalid for any reason by any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance.

(2) If any provision of this ordinance is found to be inconsistent with the other provisions of the Puyallup Municipal Code, this ordinance is deemed to control.

Section 9. Effective date. This ordinance is an emergency ordinance and shall be effective immediately. This ordinance shall remain in effect until six months after the date of its passage, or as provided by law, unless it is revoked or extended by the City Council. This moratorium may be revoked at any time by action of a majority of the City Council, and may be extended by action of the City Council in conformance with RCW 35A.63.220 and RCW 36.70A.390.

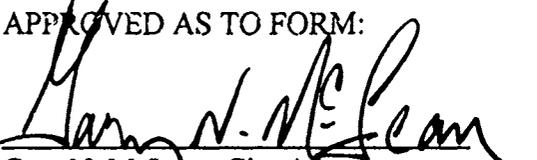
PASSED by the City Council of the City of Puyallup this 5TH day of JANUARY, 2004 and signed in authentication thereof this 5TH day of JANUARY, 2004.


Kathy R. Turner, Mayor

ATTEST:


Barbara J. Price, City Clerk

APPROVED AS TO FORM:


Gary N. McLean, City Attorney

Published: JANUARY 8, 2004

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3
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5 Service by mailing a copy, postage prepaid, to the following address:
6

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9 Pierce County Prosecuting Attorney - Civil Division
10 955 Tacoma Avenue South, Suite 301
11 Tacoma, WA 98402
12 253-798-6503
13 WSBA No. 27888
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16 Service by mailing a copy, postage prepaid, to the following address:
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18 Michael C. Walter
19 Keating Bucklin & McCormack, Inc., P.S.
20 800 5th Avenue, Suite 4141
21 Seattle, Washington 98104
22 206-623-8861, ext. 34
23 WSBA No. 15044
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25

26 Dated: November 21, 2008
27


By: Kevin J. Yamamoto 26787
Senior Assistant City Attorney