

No. 73608-6-1

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE**

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VERN F. SIMS FAMILY LIMITED PARTNERSHIP I.,  
GILBERT FAMILY PROPERTIES, LLC, AND LDV  
BURLINGTON PROPERTIES, LLC  
Plaintiff/Appellants,

v.

CITY OF BURLINGTON, a municipal corporation in Washington, and  
COSTCO WHOLESALE CORPORATION, a Washington Corporation  
Defendant/Respondents

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**REPLY BRIEF**

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## INTRODUCTION

Why after 15 years has the City of Burlington failed to execute a latecomer's agreement? In its response brief, Respondent Costco Wholesale Corporation blames "Appellants' litigious conduct and their ten-year campaign to stop the Costco latecomers agreement." (Response Brief at 3). This credits Appellants with more influence than they actually have.

The timeline in this case gives the answer: the City has unreasonably delayed the process. It has taken years to complete steps that should have taken months. In 1999, the City promised a latecomer's agreement to Costco — despite not having the ordinance in place to create one. It then took *seven years* for the City to take the first step by mailing notices to surrounding landowners. After the City held its first hearing in August 23, 2007, two years passed before it held the second hearing on October 8, 2009. The City needed an additional year and a half to approve a written final decision on challenges to the latecomer's agreement, which then took another four months for City officials to sign. The City entered its final written decision on June 9, 2011.

Nearly five years later, the City has still not completed a latecomer's agreement. Although it is a party to this lawsuit and appeal,

the City offered no explanation in the trial court for the delay and fails to file a response brief here.

Costco built the improvements as required. Had the City signed a latecomer's agreement in 2000, there would be no dispute between the parties. Development since 2000 would have long since paid the \$850,000 Costco deserved. But the City's 15-year delay has eroded any justification for imposing an agreement now. Subsequent development has absorbed all new capacity from Costco's traffic improvements.

Appellants Vern F. Sims Family Limited Partnership I, Gilbert Family Properties, LLC and LDV Burlington Properties, LLC ("the Gilberts") ask this Court for three rulings. First, the Land Use Petition Act, RCW Ch. 36.70C, does not apply until the Gilberts seek a permit to develop their property. Second, the Superior Court has authority now to review the City's failure to enact a timely latecomer's agreement. And third, the City's procedural errors and 15-year delay bar it from executing a latecomer's agreement today.

The City does not have unlimited time to complete its work.

**I. LUPA DOES NOT APPLY TO THE GILBERTS UNTIL THEY SEEK A PERMIT**

To dismiss the Gilberts' lawsuit, the trial court made two legal rulings under LUPA:

- LUPA applied to the Gilberts before the City imposed a specific latecomer’s fee on their property; and
- The final decision on the Gilberts’ appeal was the City Council’s vote, not its written findings and conclusions.

Both of these rulings are in error.

A. LUPA Applies When The City Imposes A Specific Latecomer’s Fee On A Parcel, Not When It Adopts An Ordinance

Citing Washington cases on impact and mitigation fees, Costco argues that the City Council’s vote to authorize a latecomer’s agreement is “indistinguishable from other municipal actions courts routinely scrutinize under LUPA.” (Response Brief at 13). Yet these cases prove the opposite point: LUPA applies when a land use authority *imposes* fees at the permitting stage. Until the City of Burlington calculates and imposes a specific latecomer’s fee for the Gilberts’ property, it has not made a site-specific decision subject to LUPA. Imposition of the fee, not adoption of the ordinance requiring a fee, is the triggering event.

Here, LUPA will not apply until the Gilberts seek a development permit and the City determines how much of a latecomer’s fee to collect. At that point, the City makes “an interpretive or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development,

modification, maintenance, or use of real property.” RCW 36.70C.020(b). The cases Costco cites all condition LUPA review on a land use agency requiring an owner to pay a specific fee.

First, for impact fees, the Supreme Court triggered LUPA review on imposing the fee as a permit condition, not on passing the impact fee ordinance.

[I]dentification of the specific impact of a development on a community, assessment of the public facilities necessary to serve that development, and determination of the amount of impact fees needed to aid in financing construction of the facilities *at the time a county issues a building permit* inextricably links the impact fees imposed to the issuance of the building permit. Under Nykreim, building permits are ministerial decisions subject to judicial review under LUPA, and we find that the imposition of impact fees as a condition on the issuance of a building permit is as well.

James v. Kitsap County, 154 Wn.2d 574, 586, 115 P.3d 286 (2005) (emphasis added).

Kitsap County passed its impact fee ordinance in 1991. James, 154 Wn.2d at 578 (“in 1991, the County adopted an impact fee ordinance”). Yet the County did not make a site-specific determination -- a land use decision -- until it calculated the fees and imposed them on the James’ property. That occurred when the James sought permits.

Second, for traffic mitigation fees, the Court of Appeals assumed without discussion that LUPA applies to a mitigation payment imposed as

a condition of subdivision approval. City of Fed. Way v. Town & Country Real Estate, LLC, 161 Wn. App. 17, 27, 252 P.3d 382 (2011), as corrected (May 10, 2011) (“Tacoma approved the Scarsella plat on condition that Town & Country either “construct[s] all TIP projects impacted by ten or more vehicular trips or voluntarily contribute \$266,344 to the City of Federal Way in pro-rata share contributions”). Like impact fees, the triggering event is requiring payment. LUPA applies to the imposition of fees on a *specific* development or parcel.

Third, for other assessments on development, LUPA applies when the land use agency requires the fees as a condition of permit approval. United Dev. Corp. v. City of Mill Creek, 106 Wn. App. 681, 26 P.3d 943 (2001). In United Development, the developer of a phased residential subdivision appealed imposition of various mitigation fees, claiming they duplicated fees on earlier phases. Although the City had enacted the ordinances requiring the fees (and collected fees for earlier phases) long before the appeal, the Court of Appeals conditioned LUPA review on the City *imposing fees* on the new parcels.

For example, the City had previously adopted an ordinance on public park impact fees.

The City has adopted a formula by which public park impacts are assessed according to the per person cost of creating the necessary facilities, which is applied to the

projected population increase attributable to the development. The city code requires that development approvals be conditioned upon mitigation of such impacts.

United Development, 106 Wn. App. at 691. No one apparently appealed adoption of the ordinance. But that did not foreclose later review.

Years after it adopted the ordinance, the City imposed the park impact fees as a condition of preliminary plat approval. That is what triggered LUPA. United Development, 106 Wn. App. at 686 (“the City approved Mill Creek 23, conditioned upon UDC's payment of \$39,547 in traffic mitigation fees, \$33,445 in neighborhood park impact fees, and \$27,801.43 in community park impact fees”). Imposing fees, not adopting the formula in an ordinance, is the site-specific land use decision.

Washington law uniformly requires a permit applicant to appeal impact or mitigation fees when imposed, not when the land use agency adopts the fee ordinance. Costco alleges “when plaintiffs fail to challenge generally applicable fees and development agreements under LUPA, subsequent challenges are barred.” (Response Brief at 15). Yet the case Costco cites, Tapps Brewing Inc. v. City of Sumner, 482 F.Supp.2d 1218 (W.D.Wa 2007), required a LUPA appeal from the City’s permit decision – not earlier. Tapps, 482 F.Supp.2d at 1222 (“dispute concerns a stormwater pipe upgrade requirement imposed...in exchange for granting their development permit and waiving certain permit fees”).

Because the City of Burlington has not, and will not, impose a latecomer's fee until the Gilberts seek a development permit, there is no site-specific final land use decision under LUPA to appeal. The Gilberts retain the right to challenge the latecomer's fee when they apply for development permits.

B. An Oral Vote Is Not A Final Decision

The trial court's second error was transforming the Burlington City Council's preliminary voice vote on the Gilberts' appeal into a final land use decision. At the October 8, 2009 Council meeting, Burlington's City Attorney announced that he would draft written findings of fact and conclusions of law for the Council's approval. (Exhibit B to Plaintiff's Fifth Motion for Summary Judgment; CP 67-98). The Council's vote was preliminary; the final decision would be the written findings and conclusions.

Despite this, Costco argued and the trial court accepted that the voice vote started the LUPA appeal period. As argued above, LUPA does not apply to the Gilberts until they seek a permit. But if this Court concludes that a potential LUPA appeal exists from the City's decision, it began on June 9, 2011 when the Council signed and entered its written decision. This was after the Gilberts filed their lawsuit.

Costco alleges that the Court of Appeals in Northshore Investors v. City of Tacoma, 174 Wn. App. 678, 301 P.3d 1049 (2013) disapproved of by Durland v. San Juan Cty., 182 Wn.2d 55, 340 P.3d 191 (2014) defines the vote as the final land use decision. But the Northshore court ruled on a different set of facts. There, the writing at issue – a notice of decision – merely repeated what the Tacoma City Council had already decided.

The notice was written after the decision was made. Most importantly, the notice underscores that the City Council had already made its decision: “Please be advised that on Tuesday, April 13, 2010, the Tacoma City Council *heard* [Northshore's] appeal.... At that time the City Council *moved* to concur with the Findings, Conclusions and Recommendation of the Hearing Examiner and *denied* the appeal.”

Northshore, 174 Wn. App. at 691.

Here, the Burlington City Council’s Findings of Fact and Conclusions of Law is the final decision, not the voice vote two years earlier. As the written decision states: “For the foregoing reasons, the City Council hereby concludes that the appeals should be DENIED, PROVIDED that COSTCO verifies that the properties identified in Section III(4) be reallocated to TAZ 18.” (Findings and Conclusions; Exhibit B to 6/9/14 Mullaney Dec.; CP 262-271). This is not a memorialization of an earlier decision, but rather the decision itself.

Given the language of Council's Findings and Conclusions, the written decision started any LUPA appeal period.

[T]he writing is the decision itself. Nothing in the ICC mandates that the decision be made in writing. But here a proposed written decision was prepared in advance and presented to the BICC for approval. When the BICC voted to approve, it signed the document and had it attested. It states in the present tense that the "use described in this permit shall be undertaken[.]" The document was not written after the decision had been made. When Island County mailed a copy, its cover letter referred to it as a "decision document" and we agree with that characterization.

Hale v. Island Cty., 88 Wn. App. 764, 769, 946 P.2d 1192 (1997). This corresponds to the rule for judicial proceedings.

In judicial proceedings, the date of a decision is generally the date on which the decision is reduced to writing, as opposed to an earlier date on which it may be orally announced. In quasi-judicial proceedings such as these, the rule is the same.

King's Way Foursquare Church v. Clallam Cty., 128 Wn. App. 687, 691-92, 116 P.3d 1060 (2005), as amended (Aug. 23, 2005).

The trial court erred by ruling that the voice vote was a final decision. It was not, and was never intended to be. If any appeal right exists from the Council's denial of the Gilberts' appeal, it started with entry of the written decision.

## **II. THE SUPERIOR COURT HAS AUTHORITY TO DECLARE THE CITY'S DECISIONS UNTIMELY AND INVALID**

If LUPA does not apply to the Gilberts until the City imposes latecomer's fees on a specific parcel, what authority does the Superior Court have now to review the City's inaction? There are two answers. First, as Costco argues, LUPA may also apply to an appeal from the City Council's ruling on the Gilberts' appeal. If this is so, the Gilberts filed their complaint before entry of the final decision and can amend it to include a LUPA claim. Second, the Court retains its power under a writ of review and the declaratory judgment act to rule the City's proposed latecomer's agreement invalid. Woodcreek Land Ltd. Partnerships I, II, III & IV v. City of Puyallup, 69 Wn. App. 1, 847 P.2d 501 (1993).

Costco argues that even under the Court's writ powers, the Gilbert's complaint was untimely. But as with LUPA, this argument assumes the oral decision, and not entry of the City Council's written decision, was final. As order states, the Findings and Conclusions were "adopted this 9<sup>th</sup> day of June, 2011." (Findings and Conclusions; Exhibit B to 6/9/14 Mullaney Dec.; CP 262-271). The Gilbert's complaint was timely. Both the Superior Court and this Court have the authority to review the City's inaction – and to conclude that 15 years is too much time to execute a latecomer's agreement.

### III. THE CITY HAS WAITED TOO LONG TO IMPOSE LATECOMER'S FEES

The City's proposed latecomer's agreement and ordinance has three fundamental flaws. First, the City did not have an ordinance that required the traffic improvements when Costco filed a complete application. Second, the City has delayed executing an agreement beyond any reasonable limit. Third, by the City's reimbursement formula, current development has already absorbed all excess capacity from Costco's improvements. There are no more compensable benefits to surrounding properties.

#### A. No Ordinance Binding On Costco Required The Improvements

The City amended its development regulations requiring street improvements *after* Costco filed a complete application to build its store. Under the vested rights doctrine, the City could not retroactively require Costco to make the improvements. Town of Woodway v. Snohomish Cty., 180 Wn.2d 165, 172-73, 322 P.3d 1219, 1223 (2014) (“developers are entitled to have a land development proposal processed under the regulations in effect at the time a complete building permit application is filed, regardless of subsequent changes in zoning or other land use regulations”).

Costco tacitly acknowledges this, noting that “the amended ordinance was in place before Costco began construction of the improvements, before the assessment reimbursement area was created, and before initiation of the City’s latecomer’s process.” (Response Brief at 32). None of this is relevant to Costco’s vested rights. Had it wanted to contest the amended ordinance, it would have won.

As described in the Gilbert’s opening brief, the December 1999 amendments to the City’s development regulations added provisions *requiring* traffic improvements as mitigation. (Opening Brief at 6-7). And the City amended BMC 12.28.010 precisely because it failed to meet the standards of RCW 35.72.010 (“elect to install as a result of ordinances that require the projects as a prerequisite to further property development”). Under its vested rights, Costco did not have to improve the roadway “as a prerequisite to further property development”.

As a fall back argument, Costco alleges that the City’s 1994 Comprehensive Transportation Plan required the improvements. If this were so, the City would not have needed to amend its ordinance. But the Plan merely set levels of service as “goals and objectives”, not as absolute standards. (Appendix 8 to Response Brief at 2). And the original ordinance did not require the applicant to make traffic improvements as a permit condition. Instead, BMC 12.28.010 required only “transportation

improvements or strategies to accommodate the impacts of development.”  
(BMC 12.28.010; CP 273).

Because the original version of BMC 12.28.010 did not require the traffic improvements, the City had to impose the condition as a SEPA requirement. This does not satisfy RCW 35.72.010. If it did, municipalities would have no need to pass ordinances requiring traffic improvements – a general SEPA condition would do. The Legislature specified an ordinance because reimbursement contracts should cover only legislatively-mandated improvements, not simply those deemed important by planners.

Costco alleges that a mix of comprehensive plans under the Growth Management Act, SEPA conditions as part of environmental review, and traffic plans can substitute for a specific ordinance requiring traffic improvements. They do not. The City did not require traffic improvements as a condition of development until it amended BMC 12.28.010 in December 1999. This was too late legally to bind Costco’s vested application.

B. The Legislature Never Intended 30-Year Periods For Reimbursement

The City’s second flaw – which continues today – is its failure to execute a reimbursement contract in a reasonable time. The Legislature

set a 15-year term for reimbursement contracts, assuming both the developer and land use agency would want an agreement in place immediately. RCW 35.72.020(1) (“a period not to exceed fifteen years”). May a City delay entry of a reimbursement contract indefinitely, only to impose it on the last undeveloped parcel?

Costco believes it can. “There is no statute of limitations for latecomers agreements.” (Response Brief at 28). According to Costco, there are no limits on how long the City can wait.

This is not the law nor should it be. The statutory scheme in RCW Ch. 35.72 provides two benchmarks for requiring timely execution of reimbursement contracts. First, the term of an executed contract cannot exceed 15 years, barring development moratoria. RCW 35.72.020(2)(a). It is not unreasonable to require the City to execute a reimbursement contract within 15 years of the completion of the improvements – giving the City 30 years of potential adjacent development to levy.

Second, the City must execute the reimbursement contract before the useful life of the improvements expire. As described in the next section, the City’s metric for measuring traffic improvements – additional rush-hour trips – proves that existing development has already consumed the additional capacity. Under RCW 35.72.030, there is no longer a statutory benefit to the adjoining undeveloped property.

C. During The City's Delay, Permitted Development Has Used the Additional 429 Rush-Hour Trips

In its written Findings and Conclusions, the City measured the benefits from Costco's improvements as additional rush-hour trips.

The Latecomer's Agreement Study showed that 256 of the 685 additional vehicle trips would be utilized by Costco...[T]he balance of the cost of the improvements (429 vehicle trips) may be allocated to other developments to be paid through the Latecomer's Agreement.

(6/9/11 Findings and Conclusions ¶ 8; CP 266-267). Costco's Traffic Engineer proposed the same criteria. (1/23/04 TSI Memo at 2; Exhibit A to 1/21/15 Markley Declaration; CP 232) ("Latecomers Agreement terminates when the remaining 429 trip capacity is used by future developments").

Costco does not dispute that intense commercial development along George Hopper Road has absorbed more than 429 additional trips. Instead, it argues that the Court cannot consider this fact. "The court's review was accordingly limited to the record created before the administrative tribunal." (Response Brief at 41-42). According to Costco, the Court may only consider evidence before the City Council.

This objection is too little too late. Evidence before the City Council and the Superior Court established the high levels of development and traffic since 2000. (10/7/09 Furlong Letter; CP 108-154) (SCOG

Grant Application; CP 108-154). Costco now argues both that the evidence is inadmissible and that it shows remaining useful life in the traffic improvements. This Court appropriately looks at all evidence before the trial court on review of summary judgment.

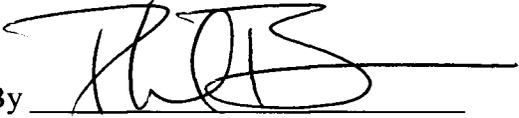
### CONCLUSION

Respondent City of Burlington had a reasonable amount of time to execute a valid reimbursement contract with Respondent Costco Wholesale Corporation. Through inaction and delay, the City has failed to complete a contract more than 15 years after Costco made the traffic improvements. Under RCW Ch. 35.72 and Washington law, the City has waited too long.

Appellants respectfully request this Court to reverse the trial court's order of dismissal and hold that the City has lost any rationale for adopting a latecomer's agreement.

DATED this 7<sup>th</sup> day of March, 2016

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**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of the Reply Brief to:

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DATED this 7 day of March, 2016.

  
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