No. 102184-4

SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 56803-9-II)

VIKING JV, LLC,

Respondent,

v.

CITY OF PUYALLUP,

Appellant.

RESPONSE TO PETITION FOR REVIEW

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I. STATEMENT OF THE CASE

A. The Public Sewer Facility Viking Constructed.

Viking JV, LLC ("Viking") constructed an approximately 450,000 square feet high-cube warehouse facility on approximately 22 acres of real property located at 302 33rd Street SE. (CP 359, 611.) As a prerequisite to development, the City required Viking to also construct a sanitary sewer lift station and over 2,500 feet of sewer force main ("Sewer Facility"). (CP 587 at ¶ 2; 591 at ¶ 8.)

The Sewer Facility is a public facility that was approved and accepted by the City of Puyallup Engineer. (CP 358, 470.) The Sewer Facility is a regional facility that will benefit numerous properties in Puyallup. Benefitted properties include two City-owned parcels, known as Van Lierop Park, that comprise approximately 14.8 acres. (CP 239, 358-359, 624, 626, 635.)

Viking constructed the lift station on property owned by Franklin Puyallup, LLC, ("Franklin," or also referred to as

"PMF") and the force main was largely constructed on property owned by Cascade Shaw Development, LLC, successor to Cascade Christian Schools. Franklin was developing a large commercial shopping center known as Pioneer Crossing on the southwest corner of East Pioneer and Shaw Road. Through the permitting process for both the Viking and Franklin's developments, the City required connection to sewer and, moreover, construction of public sewer facilities that would not only serve Viking and Franklin's respective developments, but also a larger area of the Puyallup community. (CP 359).

Viking and Franklin agreed to work collaboratively to provide the required Sewer Facility. Their agreement was evidenced by a Temporary Construction Easement Agreement that Viking and Franklin executed in August 2017, and subsequently amended in February 2018 ("Viking/Franklin Agreement"). (CP 359, *See also*, CP 413.)

The Viking/Franklin Agreement (CP 81-106) provided Viking with all necessary property rights over both the Franklin

and Cascade Christian Property for Viking to construct the Sewer Facility. Franklin also agreed to contribute $600,000 toward the construction costs. Viking agreed to construct the Sewer Facility, with Viking incurring the balance of all necessary costs to construct the facility. Recognizing Franklin's monetary and easement contribution and Cascade Christian's easement contribution to the Sewer Facility, Viking also agreed that it would not seek a latecomer fee against either the Franklin or the Cascade Christian properties when those properties connected to the facility. (CP 359.)

The certified cost to construct the Sewer Facility was $3,266,384. Franklin's $600,000 contribution was appropriately deducted, and the certification acknowledges that ***$2,666,384 of the construction cost was paid exclusively by Viking***. To date Viking has received no reimbursement. (CP 381-382, 385).

B. The City's Undisclosed Side-Deal To Waive City-Imposed Connection Fees (System Development Charges) For Franklin.

Unbeknownst to Viking, Franklin requested, and the City agreed, to waive up to $600,000 in connection fees, known as System Development Charges ("SDC"), that the City would ordinarily assess against Franklin's new development.

SDCs are separate from any latecomer fee a property owner might be required to pay to connect to a public sewer facility constructed by a private developer with private funds. SDCs are authorized under a separate statute, RCW 35.92.025, and the City imposes SDCs on ***all*** new sewer customers pursuant to Chapter 14.10 PMC as a condition to connecting to the public sewer system. Thus, though Viking paid $2,666,384 to construct this regional public facility, it still had to pay SDCs (without any credits) to the City to connect to the facility Viking constructed. (CP 361.)

The City is the sole recipient of the proceeds. Facilities constructed by private developers are excluded from the cost

basis for the SDCs. (CP 396.) There are no provisions in Chapter 14.10 PMC authorizing the City to waive SDCs, much less to waive SDCs as a mechanism to help finance private developer construction of public sewer facilities.

In their Petition, the City infers that it was unaware that Viking, as opposed to Franklin, constructed the Sewer Facility, even though the City was intimately involved with the project as the permitting authority. The City also infers that it was unaware of the collaborative agreement between Viking and Franklin when it gave Franklin SDC credits. This is not true. Franklin specifically informed the City of the Viking/Franklin Agreement. In fact, the agreement was the basis for the credits. Emails between Franklin and the City obtained through a public records request confirm.

On March 5, 2019, Tim Jackson, on behalf of Franklin, wrote to Hans Hunger and other City Staff:

> We are working through the building permit fee and everything is looking correct to us with the

> exception of the Sewer System development Fees.
>
> In one of our earlier meetings with Christine and Mark Palmer [former Mayor], it was agreed that PMF's $600,000 payment to Viking for the Lift Station project as part of our agreement with them for the construction of the new lift station would offset this fee. Many reasons were discussed including its inclusion in the city's CIP [Capital Improvements Plan]. Based on this inclusion in our fee I am guessing those meeting notes were not forwarded to you and Mark.

(CP 260-361, 411.) Mr. Hunger responded on March 12, 2019:

> The city is in agreement that the Sewer SDC's can be offset by Pioneer's Contribution toward the lift station. This offset will be tracked by the city then subtract each building's Sewer SDC as those tenant improvements are applied for.
>
> Can you provide some copy of the contribution or some form of evidence of your payment? We will need that when we work the latecomer's agreement for the lift station.

(*Id.*)

Pursuant to the above private agreement, the City waived approximately $253,000 in SDC fees that Franklin (PMF) would otherwise have been obligated to pay to the City when it

connected its new Pioneer Crossing development to the Sewer Facility. (CP 360-361, 418-423.)

The City did not communicate to Viking that it was waiving SDCs for Franklin and voluntarily forgoing that revenue. The City certainly did not communicate to Viking that it intended to claim Franklin's SDC waiver as a "contribution" *to Viking's construction costs*. Viking learned indirectly, during an unrelated administrative appeal, that some form of fee waiver/credit was provided to Franklin, with more details only discovered after investigation by Viking, including public records requests. (CP 361, 358-359, 404-416.)

Again, no credits or fee waivers were provided to Viking and, while the City's credits to Franklin may have provided Franklin with a source of funds to pay its later payment obligation to Viking under the Viking/Franklin Agreement, ***the credits did not reduce the costs Viking incurred to construct the Sewer Facility***. (CP 361-362.)

C. Viking's Request For A Latecomer Agreement.

Pursuant to RCW 35.91.020 and Chapter 14.20 PCM, Viking requested a latecomer agreement so that Viking may be reimbursed for a portion of the $2,666,384 it spent on the Sewer Facility from property owners that will benefit when they connect to the Sewer Facility. (CP 362, 467-468.)

Only after Viking made its application for a latecomer agreement did it learn about the City's private arrangement with Franklin; and, further, that the City intended to "credit" itself for SDCs it voluntarily elected not to collect from Franklin and exclude itself from any payment obligation under Viking's latecomer agreement. Viking repeatedly communicated to the City that the credits extended to Franklin cannot lawfully be treated as a City contribution to Viking's construction costs under the state statutory framework, as set forth in Chapter 35.91 RCW, nor the City's regulatory framework as set forth in Title 14 PMC. (CP 362, 418-423, 425-431, 435-438, 441-442.)

The City Engineer nonetheless prepared a latecomer agreement that excluded the City-owned Van Lierop property from the latecomer assessment roll. But for the exemption, the City would have been obligated to pay approximately $200,000 when the Van Lierop property connects to the Sewer Facility. (CP 418, 681, 361-362.)

City officials expressly informed Viking that it would not receive a latecomer agreement unless it excluded any payment obligation for the City's park property. (CP 37, 362.) It was a take it or leave it proposition – exempt the City from payment or receive no opportunity at all for any reimbursement of the $2,666,384 spent on the regional public facility. (CP 362.)

D. The City's Latecomer Agreement Approval Process.

PMC 14.20.040 sets forth City's "reimbursement procedure," which is the process to receive a latecomer agreement. Consistent with this process, on February 23, 2021, the City adopted Resolution No. 2431 "setting a public hearing regarding a latecomer agreement with Viking" for March 23,

2021. (CP 467.) The owners of the property "capable of being served by the sewer lift station" were notified by regular mail of the hearing, as well as the amount they would be assessed, assuming the Council did not change the assessments following the public hearing. (CP 467, 376.) Each property capable of being served and the current owners of each property are listed in an Exhibit C to the latecomer agreement. (CP 386.) But only Viking and the City are parties to the latecomer agreement. (*See* CP 376, 380.)

The public hearing was held at a regular City Council meeting on March 23, 2021. (CP 467, 485.) None of the benefitted property owners that would pay latecomer fees participated in or were party to the hearing, nor did they submit any objections to the stated assessment amounts. The City Council Meeting Minutes document that the Council received written testimony only from Viking's Council and Tim Jackson, who wrote on behalf of Franklin to support Viking. (CP 485.)

The Minutes further document that only representatives of Viking spoke at the hearing. (*Id.*)

The Council closed the public hearing and, disregarding Viking's objection, passed a motion "to approve a Latecomer's Agreement in a form as approved by the City Attorney." (CP 485.)

E. Viking's Lawsuit.

Viking filed a Complaint for Declaratory Judgment, Injunctive Relief and Writ of Mandamus or, Alternatively, Land Use Petition Act Petition (LUPA) on April 7, 2021, 15 days after the Council passed the motion. (CP 1-32.) It is Viking's position that the City's actions regarding the latecomer agreement did not constitute a final land use determination exclusively subject to review under LUPA; but nonetheless alternatively filed under LUPA in less than 21 days following the Council meeting in an abundance of caution. (CP 357.)

In the Complaint, Viking objected only to the City's unilateral decision to exclude itself from any payment obligation under the latecomer agreement for City-owned property. Viking otherwise supported and accepted the latecomer agreement. (CP 356.) ***Viking did not challenge the reimbursement assessment amount of any assessed benefitted property owner***.

Viking sought a declaratory judgment that the City was without authority to and unlawfully excluded its property from a pro rata payment obligation under the latecomer agreement. Viking also sought injunctive relief compelling the City to amend the latecomer agreement to delete the unsupported statement that the City contributed funds to Viking to construct the Sewer Facility, and to require the City to pay its pro rata share of Viking's construction costs if and when the City-owned Van Lierop Park property is connected to and enjoys the benefits of the Sewer Facility. (CP 369-370.)

Before the lawsuit was filed, the City presented the latecomer agreement to Viking for signature via DocuSign. (*See* CP 284.) In its Complaint, Viking informed the City that it intended to sign the latecomer agreement, under protest to preserve its challenges, so that the latecomer agreement could be recorded, and property owners are appropriately put on notice of their payment obligation while this litigation is pending. (CP 2.) The City, however, refused to move forward with the agreement if it was subject to any challenge and rescinded the DocuSign invitation. Viking was notified:

> Viking has filed an appeal saying they will only sign under protest. City Atty is asking to have the document pulled back.

(CP 284.) The City thereafter expressly confirmed to the trial court: "The only and exclusive option that the City afforded Viking to receive a latecomer agreement, was conditioned upon exempting the City from the latecomer agreement." (CP 37.)

The City moved for summary judgment in June 2021, asking the court to affirmatively conclude that Viking was not

entitled to any latecomer/reimbursement agreement under RCW 35.91.020 because Viking accepted a $600,000 contribution from Franklin and did not pay 100% of the costs of construction. (CP 40-45.) Both the trial court and Division II rejected that argument, and the City has finally abandoned that argument in this request for review. The City also argued that even if Viking was entitled to an agreement under RCW 35.91.020, the City was still free, as a contracting party in its exclusive discretion, to set the terms of the contract it would accept. (CP 51-52.) The City has also abandoned this argument.

The City also asserted (and continues to assert in its Petition) that the City's actions were exclusively reviewable under LUPA; and it moved to dismiss, claiming that the benefitted property owners were necessary parties to a LUPA action and were not timely served. (CP 47-48.) The trial court denied the City's motion. (CP 308-09.)

On March 11, 2022, following a separate motion by Viking, the trial court granted summary judgment in favor of

Viking. (CP 712-715.) The trial court concluded, as a matter of law, that (1) the City was required under RCW 35.91.020 to enter into a latecomer agreement with Viking and (2) the City unlawfully exempted its benefitted property from any reimbursement obligation under the latecomer agreement. The trial court ordered the City to revise the latecomer agreement to include its Van Lierop Park property as a benefitted property with a pro rata share of the reimbursement, and then execute and record the latecomer agreement. (*Id.*) Division II of the Court of Appeals affirmed.

II. ARGUMENT

A. Supreme Court Review Of Division II's Decision Regarding Applicability Of And Compliance With LUPA Is Unwarranted.

1. Division II correctly distinguished *Cave* and correctly concluded that LUPA does not apply to Viking's unique challenge.

The City asserts that Division II's decision directly conflicts with *Cave Properties v. City of Bainbridge Island*, 199 Wn. App. 651, 401 P.3d 327 (2017), and claims review is thus

warranted under RAP 13.4(b)(2). The argument is questionable on its face. *Cave* is a fairly recent Division II decision; and Division II was interpreting its own decision when it concluded that *Cave* is distinguishable from the unique facts presented in this case. Division II seems better suited than the City to determine the applicability of its own decision. Regardless, Division II reached the correct conclusion.

Contrary to the City's assertion, the *Cave* Court did not hold that all disputes regarding latecomer agreements are subject to LUPA. The *Cave* decision was fact specific; and it was based on the specific challenge asserted in the context of the City of Bainbridge Island's ("Bainbridge") specific process leading to Cave's challenge. Division II's decision in this case was likewise fact specific, and the facts here are distinguishable from *Cave.*

Before the trial court and Division II, the City decisions subject to scrutiny were the City's decisions to (1) exempt itself from the latecomer agreement and (2) refuse Viking the

opportunity to sign the latecomer agreement under protest so that it could receive the benefit agreement, yet still preserve the challenge presented in this litigation. Though in this Petition the City has jettisoned the second argument, it remains relevant to determine if the unexecuted latecomer agreement – which the City unilaterally withdrew and refused to honor in the face of legal challenge – was a final land use decision subject to LUPA.

In *Cave*, unlike here, the challenge was not asserted by the developer who constructed the public facility – the actual party to the latecomer agreement and the recipient of any collected reimbursement fees – but was presented by Cave Properties ("Cave"), an owner of one of the benefitted parcels that was required to pay a latecomer reimbursement fee. The *Cave* Court noted that, if the developer party to the latecomer agreement appealed, which it did not, then LUPA would not apply, because the latecomer agreement came *after* development was complete and no permit was conditioned

upon the latecomer agreement. As to the developer, the latecomer agreement did not serve to regulate or control development or use of the developer's already developed property as required by RCW 36.70C.020(2). *Cave*, 199 Wn. App. at 661-62.

But the *Cave* Court concluded that Cave's challenge – as a specific property owner challenging the latecomer agreement requirement that he pay the reimbursement fee *before* or as a *prerequisite to development or connection* – required review of a "land use decision" as defined by RCW 36.70C.020(2)(b); and, thus, was thus subject to LUPA's jurisdictional requirements.[1] *Cave*, 199 Wn. App. at 564, 663-667 RCW 36.70C.020(2)(b) provides:

> "Land use decision" means **a final determination** by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

[1] The *Cave* Court found that the latecomer agreement challenged was not a land use decision as defined by RCW 36.70C.020(2)(a). *Cave Properties*, 199 Wn. App. at 660-662.

* * *

> (b) An interpretative 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**. (Emphasis added.)

The challenge presented in *Cave*, followed a hearing specially requested by the protesting landowner pursuant to the Bainbridge's code. The *Cave* Court described the latecomer process under the Bainbridge Island Municipal Code ("BIMC") chapter 13.32 in extensive detail (*see Cave,* 199 Wn. App. at 658-660),[2] noting that the BIMC provisions "are consistent with RCW 35.91.020 and add additional procedures." *Id.* at 658.

Like in Puyallup, Bainbridge requires the developer who constructed the public facility to make application to the City for a latecomer agreement, providing cost information and identifying benefitted property owners that did not contribute

[2] The complete text of chapter 13.32 BIMC may be viewed at https://www.codepublishing.com/WA/BainbridgeIsland/#!/BainbridgeIsland13/BainbridgeIsland1332.html#13.32.170.

to the costs. *Id*. at 658-659, *citing* BIMC 13.32.040, 13.32.100, 13.32.120. Based on this information, Bainbridge's public works director calculates a pro rata reimbursement charge, drafts a latecomer agreement, and then sends it to the developer to sign. *Id.* at 659, *citing* BIMC 13.32.130, 13.32.150.

Under the BIMC, and unlike in Puyallup, the public works director must first obtain a signed agreement from the developer, and then must send official notice of the recommended reimbursements to the benefitted property owners. *Id*. at 659, *citing* BIMC 13.32.150, 13.32.170. The notice must include an opportunity to request a hearing before the city council within 21 days of the notice. *Id.*, *citing* BIMC 13.32.170. If no hearing is requested, the BIMC authorizes the public works director to sign the latecomer agreement. BIMC 13.32.190.

If a benefitted property owner timely requests a hearing, a hearing is scheduled. *Cave* , 199 Wn. App at 659-660, *citing* BIMC 13.32.170. The BIMC expressly provides that the

Council decision is "the city's final action on the reimbursement charge and area." *Id*. at 660, citing BIMC 13.32.180.

Cave requested a public hearing to challenge the reimbursement charges assessed to Cave. *Cave*, 199 Wn. App at 655. The Bainbridge council conducted the requested hearing over two days, where Cave submitted materials to support its challenge. *Id*. Thereafter, the council voted to approve the latecomer agreement as signed by the developer, without modification, and Cave appealed pursuant to LUPA. *Id*.

It was this in this context that the *Cave* Court concluded that Cave was challenging a final land use decision as defined by RCW 36.70C.020(2)(b).

Significant to the *Cave* Court's conclusion was the fact that the latecomer agreement specifically and expressly identified Cave's property and required Cave to pay the reimbursement latecomer fee *before* he could connect and *before* he could develop his property. Based on these specific

facts, the court found that the City's decision to approve the latecomer agreement served to "regulate" that property owner's development opportunities. *Cave Properties*, 199 Wn. App. at 664-67.

Here, Viking, who already received all permits, completed all construction, and is connected to the Sewer Facility, is the party challenging the latecomer agreement. Moreover, the latecomer agreement at issue here does not in any way "regulate[] the improvement, development, modification, maintenance of use" of the City's property. To the contrary, the City's property is not identified or even mentioned in the latecomer agreement. The City is (1) identified in the latecomer agreement as one of the two parties to the contract, (2) self-identified as having made "contributions" to the cost of construction; and (3) identified as the party that that approved the construction and prepared the assessment roll. But the City is not identified as a property owner of a benefitted parcel and its property is not mentioned in

nor is it subject to the latecomer agreement. Division II correctly distinguished *Cave* base on those salient, undisputed facts.

Moreover, under Puyallup's code, the challenged Council decision is not a "final determination" as required by RCW 36.70C.020(2). Recall in *Cave*, BMIC 13.32.180 expressly provided: "the city council decision by motion shall be the final action of the city on the reimbursement charge and area." *Cave Properties*, 199 Wn. App at 660.

The Puyallup code contains no such express language. PMC 14.20.040 provides: "Following the closing of the public hearing, the city council may enter into a contract between the city and the property owners paying the cost of the extension."

The Council's motion, ***and the City's subsequent actions*** confirm that the latecomer at issue here was not a final land use determination. The Council's vote, as documented in the March 23, 2021 Meeting Minutes, was on a motion "to approve a Latecomer Comer's Agreement in a form as approved by the

City Attorney." (CP 485.) The motion approved appears to authorize post-vote changes.

Moreover, the City never signed the latecomer agreement and refused to implement it once Viking filed suit. Viking did not request a stay of the Council approval as authorized by LUPA, RCW 36.70C.100. Viking instead expressly stated its intent to sign the latecomer agreement under protest. The City Attorney, on the other hand, unilaterally "pulled" the document, refused to sign, refused to allow Viking to sign it and, effectively, unilaterally voided the agreement. (CP 284.) If the unexecuted latecomer agreement was a "final land use decision," the City Attorney could not unilaterally withdraw it. The City's actions further confirmed that the latecomer agreement at issue here was not a final land use determination subject to LUPA.

The City's decisions and actions challenged by this lawsuit did not invoke LUPA. The trial court appropriately resolves this case through declaratory judgment and affirmative

injunctive relief. *See e.g., Eugster v. City of Spokane,* 118 Wn. App. 383, 76 P.3d 741 (2003); *Stone v. Southwest Suburban Sewer District,* 116 Wn. App. 434, 65 P.3d 1230 (2003); *Pioneer Square Hotel Co. v. City of Seattle,* 13 Wn. App.2d 19, 461 P.3d 370 (2020).

2. Division II correctly concluded that, even if LUPA applied, Viking named all parties required under LUPA to satisfy LUPA's jurisdictional requirements.

Even if LUPA applies, which it does not, LUPA was pled (CP 370-373), and timely filed and served on the City. The City nonetheless argues that Viking's challenge should be dismissed because LUPA's requirements to invoke the Court's jurisdiction were not met.

Specifically, the City asserts that Viking was required under LUPA, but failed, to name as parties all the benefitted property owners listed in an exhibit to the latecomer agreement (CP 386). The City relies upon RCW 36.70C.040(2)(a)(ii), which provides that a LUPA petition must name as a party: "(ii) Each person ***identified by name and address in*** the local

jurisdiction's written ***decision as an owner of <u>the property at issue</u>***." (Emphasis added.) Division II correctly concluded that the City's argument is without merit.

Viking's challenge is discrete and limited. Regarding the Council's decision, as evidenced by the Meeting Minutes (CP 485), Viking affirmatively states in its Verified Complaint that it is asserting a single challenge to the latecomer agreement; and it accepts all other aspects and terms of the latecomer agreement as drafted. Viking stated:

> Viking generally supports and accepts the attached Latecomer Agreement with a single exception: Viking objects to the City's unilateral decision to exclude the City from its payment obligation for its pro rata share for the Van Lierop Park property, nearly $200,000 of the costs. …
>
> * * *
>
> Because the requested amendment seeks an additional reimbursement not otherwise provided in the Latecomer Agreement – a reimbursement from the City – the requested amendment will not increase the payment obligation of any of the other property owners obligated under the Latecomer Agreement in its present form. ***Viking thus intends to sign the***

> ***attached Latecomer Agreement, under protest and subject to the objection expressed in this Complaint***, so that the Latecomer Agreement may be recorded, and property owners are appropriately put on notice of their payment obligation while this litigation is pending. The recorded Latecomer Agreement should be accompanied by a notification that the Latecomer Agreement is subject to and may be modified as a result of this legal action, ***but such modification will not increase any property owner's payment obligation.*** (Emphasis added.)

(CP 356-357.)

At Viking's request, the trial court entered an Order that expressly states: "Resolution of the dispute between Viking and the City of Puyallup will not result in an increase to the fees of any individual property owner as stated in the assessment roll appended to the Latecomer Agreement," (CP 311.) Thus, Viking's available relief was limited by its own Complaint and, significantly, by court order. Viking cannot cause an increase to any benefitted property owner's reimbursement assessment with this lawsuit, whether decided under LUPA or otherwise.

Thus, though owners of benefitted property are identified in the latecomer agreement appendix, the persons and entities do not own "property at issue" to Viking's challenge so as to require their joinder under RCW 36.70C.040(2)(a)(ii). Viking named all necessary parties to adjudicate its action, whether under LUPA or otherwise.

B. The City's Undisclosed Credit To Franklin Did Not Reduce Viking's Construction Costs And Was Not A Contribution Under RCW 35.91.020.

RCW 35.91.020, governs this issue. Initially we note, RCW 35.91.020(1)(b) provides that "a municipality may participate in financing water or sewer facilities development project," if authorized by ordinance or contract. The City did not participate in financing the lift station. Regardless, it has cited no local regulation, in chapter 14.10 or 14.20 PMC or any other ordinance, that authorized it to make fee credits, much less make credits to a third party to fund a public facility. On its face, the basic requirement of the statute, which envisions a

joint effort by a City and a developer to build infrastructure, is not met.

The City asserts that it was nonetheless a "contributor" pursuant to RCW 35.91.020(2). This section provides that pro rata reimbursements pursuant to a latecomer agreement may be required from "from property owners who subsequently connect to or use the … sewer facilities, but who did not contribute to the original cost of the facilities."

The City's side and undisclosed "credit" agreement between the City and Franklin did nothing to advance or finance the construction of the lift station. ***Before*** the credit, Viking had everything it needed to build the lift station – it had the land and the money. This is key. The City's side arrangement, ***done without Viking's involvement or knowledge***, was immaterial to the construction; and the lift station would be there today regardless of that undisclosed side arrangement. The City did not "contribute to the original cost of the facilities."

The City accuses Viking of "double dipping" into City funds and cries that the affirmed trial court order provides a "windfall" to Viking. (Petition at 8.) The City further proclaims that this matter is of substantial public interest because taxpayer money was at play. (*Id.* at 25.) But Viking is also a taxpayer. Viking is a taxpayer that

- spent $2,666,385 to build a regional sewer facility, for which, it has received no reimbursement;
- unlike Franklin, received no SDC credits;
- received no additional financial contribution because of the credits Franklin received; and
- was not informed of the City's side-agreement, much less invited to participate in the "negotiated" arrangement.

Viking received no windfall. To the contrary, Division II correctly concluded that "it would be unfair to reduce the reimbursement Viking should receive through a latecomer contract based on a side agreement that it was never informed of." (Opinion at 21.)

The City may have given up something – e.g., the right to receive SDC fees from Franklin – but this did not facilitate the construction of the lift station and moved no financial needles for Viking. By giving Franklin a credit for land and/or money Viking already had obtained, one might say the City credited the wrong party. Regardless, the work Viking did, and the cost it incurred, are exactly the same as they would have been whether or not the City gave credit to Franklin.

If there is a taxpayer concern here, it is that the City made an unauthorized and undisclosed fee credit to Franklin. But Viking was not involved. If some corrective action is necessary, it cannot be at Viking's expense.

III. CONCLUSION

This Court should deny review of Division II's decision affirming the trial court's summary judgment order. Division II correctly affirmed the trial court's ruling that the City violated RCW 35.91.020; Viking is entitled to a latecomer agreement; and the City is obligated to pay its pro rata share of sewer

facility construction costs when it connects its Van Lierop park property the Sewer Facility.

Dated this 31st day of August, 2023.

The undersigned certifies this response contains 4,933 words in compliance with RAP 18.17(b).

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By _____
Margaret Y. Archer, WSBA No. 21224
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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the 31st day of August, 2023, I caused true and correct copies of this document to be served on the parties listed below, via the method(s) indicated:

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DATED at Tacoma, Washington this 31st day of August, 2023.

/s/ Kimberly Harmon
Kimberly Harmon

GORDON THOMAS HONEYWELL

August 31, 2023 - 2:19 PM

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