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3 **BEFORE THE WASHINGTON STATE BOUNDARY REVIEW BOARD**
4 **FOR SNOHOMISH COUNTY**

5 In re: CITY OF LAKE STEVENS
6 RHODORA ANNEXATION, BRB File
7 No. 04-2018

No. 04-2018
SUPPLEMENTAL BRIEFING OF
PROPERTY OWNER IN FAVOR OF
ANNEXATION

8
9 Lake Stevens Mountain View, LLC (“Mountain View”), as successor in interest to
10 Mary Mayberry, hereby submits this supplemental brief pursuant to the request of the
11 Snohomish County Boundary Review Board.

12 **I. INTRODUCTION**

13 A public hearing before the Snohomish County Boundary Review Board (the “Board”)
14 was held on October 1, 2018, pursuant to the invocation of the Board’s jurisdiction over the
15 Rhodora Annexation. The Board focused on three legal questions during the hearing and asked
16 for further briefing: (1) Whether a variance in the legal description used throughout the process
17 effects the petition’s validity, (2) Whether Section 6.37 of the Covenants, Conditions &
18 Restrictions (the “CC&Rs”) of the Fenner Plat community continue to provide the City of Lake
19 Stevens proxy to petition for annexation in their name, and (3) Whether Elizabeth Fenner is
20 subject to the CC&Rs and that proxy.

21 **II. AUTHORITY AND ARGUMENT**

22 **A. The Boundary Review Board’s decision making authority is limited to the**
23 **factors and objectives under Chapter 36.93 RCW.**

24 The Boundary Review Board is a creature of statute, namely, Chapter 36.93 RCW, and
25 “[t]he board shall not modify or deny a proposed action unless there is evidence on the record

1 to support a conclusion that the action is inconsistent with one or more of the objectives under
2 RCW 36.93.180.” RCW 36.93.150. Any such determination to modify or deny a proposed
3 action shall be made in writing pursuant to a motion, and shall be supported by appropriate
4 written findings and conclusions, based on the record. *Id.* Annexations are a multi-faceted
5 jurisdictional process, with several layers and delineations of authority. The Board’s role in
6 this process is to determine if the annexation proposal meets the objectives in RCW 36.93.180.

7 With regard to the specific issues presented, it is the purview of the Snohomish County
8 Auditor or Assessor to verify the sufficiency or insufficiency of petition signatures according
9 to RCW 35A.01.040(4) and RCW 57.24.010. Additionally, the Superior Court may reverse the
10 decision if any substantial rights may have been prejudiced because the administrative
11 findings, inferences, conclusions, or decisions are affected by other error of law.
12 RCW 36.93.160(6)(d).

13 The Board should consider the factors under RCW 36.93.170 and make a decision
14 based on whether the objectives in .180 have been met. The Board should not consider any
15 evidence or arguments not relevant to those objectives. Given the reports by the City of Lake
16 Stevens and Snohomish County, with detailed explanations of how this proposal meets each
17 of the applicable objectives, there is no evidence in the record for any conclusion other than
18 that the proposal meets the objectives in RCW 36.93.180.

19 **B. The variance in the legal description has no effect on the validity of the**
20 **petition.**

21 The purpose of the description is to give notice and provide the minimum information
22 necessary for the public and a surveyor to comprehend the proposal. Courts have recognized that
23 area descriptions in such petitions satisfied this requirement “where the surveyor could identify
24 and survey the area contemplated for annexation by looking at a map accompanying the petition.”
25 *McAlmond v. City of Bremerton*, 60 Wn.2d 383 (1962). Our Supreme Court in *McAlmond* held that

1 “a description by which a competent surveyor, either with or without the aid of extrinsic evidence,
2 can ascertain the property in question is sufficiently definite.” 60 Wn.2d at 384; *see also Long v.*
3 *City of Olympia*, 72 Wn.2d 85 (1967).

4 No member of the public, or any other person, has claimed that they were unsure, based
5 on the legal description presented to them, whether their property was included in the
6 annexation petition. At the hearing, the City of Lake Stevens offered testimony that the change
7 in the legal description was a technical preference decision to clarify boundaries, not to add or
8 remove whole properties. The Board should not consider this issue in making its decision, but
9 if it does, the Board should take into account the caselaw above and determine that the legal
10 description was sufficient to provide notice under settled law.

11 **C. The CC&Rs provide irrevocable proxy to the City of Lake Stevens for an**
12 **annexation petition.**

13 The sufficiency of the signatures in the petition is not relevant to the objectives in
14 RCW 36.93.180 that are the sole basis for the Board’s authority to modify or deny the proposal.
15 However, Section 6.37 of the CC&Rs, granting the City of Lake Stevens “irrevocable proxy
16 to petition” for annexation on behalf of Fenner Lot Owners, does not require the presence of
17 the “Declarant.” CC&Rs designated as Exhibit F and submitted at hearing. Mountain View
18 hereby echoes the arguments of the City of Lake Stevens at the October 1, 2018 hearing
19 regarding the distinction between the “Development Plan” and the “Development Period” in
20 the CC&Rs and offers the following additional considerations.

21 In reading this section as a whole, while the “Declarant” may have sought to secure
22 authority from the Fenner Lot Owners, the waiver itself was unequivocal and “appoint[ed] *the*
23 *City of Lake Stevens* as their true and lawful attorney, and grant[ed] the City an *irrevocable*
24 *proxy* to petition in their name, place, and stead for approval of the annexation of the Plat to
25 the City of Lake Stevens.” Section 6.37, CC&Rs, Exhibit F (emphasis added). Regardless of

1 the will of the Declarant, it is unmistakable that this provision provides ultimate authority over
2 the decision to sign on behalf of the Fenner Lot Owners to the City of Lake Stevens. This, in
3 conjunction with the waiver, “expressly waives any right to protest, appeal or otherwise
4 contest, in any way whatsoever, the annexation of the Plat to the City of Lake Stevens,”
5 operates to preclude the property owners from objecting to both (1) a Declarant attempt to
6 pursue annexation, and (2) the City of Lake Stevens’ proxy to include the Fenner Plat residents
7 in an annexation. There is no restriction on the City of Lake Stevens’ authority to use this proxy
8 and the Board should not insert one of its own creation.

9 **D. Elizabeth Fenner’s property, Lot 44 of the Fenner Plat, was unequivocally**
10 **included in the CC&Rs by her signature on the face of the final recorded plat.**

11 To be clear, this issue is not relevant to the objectives under RCW 36.93.180, but even
12 if it was, the issue would be moot, because even without Elizabeth Fenner’s signature, the
13 annexation petition meets the 60% threshold. If the Board decides to consider this issue, there
14 are only two facts to take into account.

15 On November 1, 2010, Elizabeth Fenner signed the face of the final Fenner Plat,
16 recorded at Snohomish County Auditor’s File No. 201011175001. Restriction 24 of this Plat
17 states “Subject to covenants, conditions, and restrictions recorded under recording
18 no. 201011170085.”

19 Those CC&Rs were recorded by Lake Stevens 43, LLC. The number 43 in the name
20 of the Grantor likely refers to the 43 of the 44 lots in the Fenner Plat that were newly created
21 as a result. And yet, the CC&Rs explicitly reference “Lots 1 through 44 and Tracts 996, 997,
22 998 through 999 of Fenner, according to the Plat thereof recorded under Auditor’s File No.
23 201011175001” in the legal description Exhibit A, to which the CC&Rs apply. Elizabeth
24 Fenner signed a legally recorded instrument that operates to apply the CC&Rs to her property.
25

1 If the above is not conclusive enough to the Board, then also note that the 2011
2 Amendment to the CC&Rs, submitted to the Board on October 1, 2018, and designated as
3 Exhibit G, specifically references Parcel No. 01120600004400, also known as Lot 44 in the
4 Fenner Plat, and owned by Elizabeth Fenner.

5 **III. CONCLUSION**

6 The Boundary Review Board should approve the annexation as proposed. The
7 annexation furthers the goals and objectives the Board is tasked to consider, especially when
8 considering the factors specified for review and the detailed reports of the City of Lake Stevens
9 and Snohomish County. There is no basis for the Board to conclude that the proposed
10 annexation does not further the objectives, and that is the only basis for the Board to deny or
11 modify the proposal. There is also no other valid legal basis for denying the proposal.

12 DATED this 2nd day of October, 2018.

13 JOHNS MONROE MITSUNAGA &
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