

NO. 39407-3-II

IN THE COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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*CITY OF FEDERAL WAY*, a Washington municipal corporation,

Petitioner/Respondent,

vs.

*TOWN & COUNTRY REAL ESTATE, LLC*, a Washington limited liability  
company; *FRANK A SCARSELLA*, taxpayer; *EMIL P. SCARSELLA*,  
taxpayer, and the *CITY OF TACOMA*, a Washington municipal  
corporation,

Respondents/Appellants.

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OPENING BRIEF OF PETITIONER/RESPONDENT CITY OF  
FEDERAL WAY

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## I. INTRODUCTION

This case concerns the well-established legal principle, arising under the State Environmental Policy Act, RCW 43.21C (“SEPA”), that a City may require a developer to mitigate the off-site traffic impacts of its development by paying the pro-rata share of the cost of projects needed to mitigate those impacts.

The City of Tacoma correctly applied this SEPA mitigation principle below, and required developer Town & Country Real Estate (“Town & Country,” or “T&C”) to pay its pro-rata costs of street improvements in the City of Federal Way necessary to mitigate the off-site impacts of Town & Country’s proposed new “Scarsella” housing subdivision. (Although the proposed “Scarsella” subdivision is located in northeast Tacoma, the evidence demonstrated that 76% of the Scarsella car trips would drive north through Federal Way, adversely affecting intersections and an arterial corridor there.) T&C appealed to the Tacoma Hearing Examiner who, while rejecting T&C’s attack on traffic engineering supporting the pro-rata share mitigation, relied on a novel but unsupported legal theory to invalidate the mitigation.

Federal Way filed a LUPA petition, which was heard by well-respected Pierce County Superior Court Judge Thomas Felnagle. During briefing and argument, T&C was forced to acknowledge critical errors in the

Hearing Examiner's decision. After thorough consideration, Judge Felnagle issued a detailed and well-reasoned written decision reinstating the initial City of Tacoma SEPA mitigation decision, because it correctly keyed the extent of T&C's mitigation obligation to the exact same percentage of Scarsella Plat traffic trips that would travel through affected intersections.

T&C appealed to this Court. After initial briefing was completed, the Court ruled *sua sponte* that the case must be re-briefed with Federal Way acting as the appellant, even though Federal Way prevailed in Superior Court. Regardless of the order of briefing, at the end of the day T&C is left with the argument that only a project that is the "straw that breaks the camel's back" by triggering a failure of transportation Level of Service ("LOS") standards may be assessed mitigation; a project (like the Scarsella Plat) whose traffic combines with traffic from other new developments to cause an LOS failure may escape scot-free. As Judge Felnagle observed, however, nothing in any published decision, SEPA, or RCW 82.02.020 compels such an absurd result; instead, applicable law supports a requirement for mitigation where, as here, the amount required directly corresponds to the percentage of T&C's Scarsella Plat impacts.

Therefore, as discussed in more detail below, this Court should affirm Judge Felnagle's decision below, which affirmed Tacoma's SEPA mitigation condition requiring T&C to pay its pro rata share of the costs of

street improvements necessary to mitigate Scarsella Plat traffic impacts.

## II. ASSIGNMENTS OF ERROR

The Hearing Examiner's Decision and Reconsideration Decision were an erroneous interpretation of law, constituted a clearly erroneous application of the law to the facts, and were not supported by substantial evidence, entitling the City of Federal Way to relief under RCW 36.70C.130(b), (c) and (d), as follows:

A. The Decision's conclusion that the MDNS was to be judged by whether it was "outside the statutory authority or jurisdiction" of the Tacoma SEPA Responsible Official (Decision at 19, Conclusion of Law 12) was an erroneous interpretation of the law, because an MDNS must be accorded substantial weight and may be overturned only if it is clearly erroneous "in view of the public policy of the Act [SEPA]."

B. The Decision's conclusion (Finding 16 and Conclusions 16 and 17) that a developer may not be required to pay a traffic mitigation fee when intersection and corridor levels of service are already predicted to fail, and the local government has already planned a construction project to address the failures, was an erroneous interpretation of the law and a clearly erroneous application of the law to the facts. Washington courts have repeatedly held that the existence of failing levels of service, safety hazards, and already-planned construction projects do not bar a local

jurisdiction from requiring a developer to contribute his or her fair share to the cost of the improvements.

C. The Decision's Conclusions 17 and 18 were an erroneous interpretation of the law and a clearly erroneous application of the law to the facts, to the extent they conclude that the MDNS' traffic mitigation condition "does not comport with the nexus requirements of RCW 82.02.020, 58.17.110, and 43.21C.060, and does not satisfy the rough proportionality requirements of RCW 82.02." The traffic mitigation fee was carefully calculated to require payment of only the percentage of the TIP project costs equal to the percentage of Scarsella Plat trips estimated to contribute to LOS failures at specific intersections and street corridors.

D. The Decision's Finding 18 and a portion of Conclusion 17, which conclude that Federal Way "did not develop information on the two TIPS for 2009 horizon year "without the project," and therefore "did not actually determine the specific impact of the proposed subdivision alone since it is "lumped" into all trips expected to be using the two street facilities at the 2009 horizon year," are not supported by substantial evidence when the record as a whole is considered. Federal Way's Traffic Impact Analysis expressly stated that its analysis included "conditions with and without the project."

E. The Decision's conclusion that "the percentage of trips using the identified intersection and arterial corridor from Town & Country's plat, is insignificant," (Conclusion 17) was an erroneous interpretation of the law, a clearly erroneous application of the law to the facts, and was not supported by substantial evidence. Because the Scarsella Plat's traffic is part of the traffic will cause levels of service to fail at the intersection and on the arterial corridor in 2009, the Scarsella Plat traffic is a direct, significant adverse environmental impact justifying the MDNS mitigation fee requirement.

F. The Decision's reliance upon the definition of "proportionate share" in RCW 82.02.090 (Initial Decision at 23, Conclusion 17) was an erroneous interpretation of the law, because that definition applies only to GMA impact fees imposed by ordinance under RCW 82.02.050 - .080, and not to a traffic mitigation fee required under SEPA.

G. The Decisions erroneously interpreted the law to conclude (Conclusion 17) that the constitutional takings tests of "nexus" and "rough proportionality" apply to a traffic mitigation fee. Decisions of the United States Supreme Court, the Ninth Circuit Court of Appeals, and the Washington Supreme Court establish that the "nexus" and "rough proportionality" tests apply only to a requirement that a permit applicant dedicate land as a condition of approval.

H. The Reconsideration Decision erroneously interpreted the law, was a clearly erroneous application of the law to the facts, and was not supported by substantial evidence when the record is viewed together as a whole, because it failed to correct the errors in the Decision to which error is assigned above.

### III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Should a hearing examiner decision be reversed when the decision applied the wrong standard of review and failed to grant the required deference to the State Environmental Policy Act Responsible Official's decision?

B. May a city require a developer to pay its pro rata share of traffic mitigation if the developer's project will add even more traffic to already congested streets and intersections where the city has anticipated level-of-service failures and identified projects needed to mitigate them?

C. Does RCW 82.02.020 allow traffic mitigation where the mitigation is reasonably necessary to address direct impacts in the form of transportation level-of-service failures that the proposed subdivision's traffic would cause when combined with other cumulative traffic impacts, and where the mitigation is limited to the developer's pro rata share of the cost of the transportation projects reasonably necessary to correct the level-of-service failures?

D. May a city require a developer to pay its pro rata share under the State Environmental Policy Act to mitigate transportation level of service failures, where unchallenged findings of fact demonstrate that those LOS failures will result from the cumulative, significant impact of the developer's proposed subdivision combined with traffic impacts from other development?

### III. STATEMENT OF THE CASE

#### A. Town & Country's Project.

This case began on December 18, 2006, when Town & Country submitted its application and SEPA environmental checklist for the proposed “Scarsella” subdivision to the City of Tacoma (“Scarsella Plat”). The Plat proposed to divide 9.23 acres into 51 lots, and its eastern boundary directly abuts the City of Federal Way.<sup>1</sup> The State Environment Policy Act (“SEPA”) environmental checklist acknowledges that the proposed subdivision will generate stormwater runoff, as well as 490 new vehicle trips per day. R 625b;<sup>2</sup> R 628b (Checklist at 6, 12). Tacoma staff did not themselves undertake to evaluate whether the Scarsella Plat would have any impacts in neighboring jurisdictions like Federal Way, but rather

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<sup>1</sup> R 573-74 (Tacoma maps of project location); R 576-77 (Tacoma Staff Report at page 1). Citations to the record below are in the form of “R \_\_\_,” followed by a parenthetical identifying the document title and page number within that document. These documents were assigned exhibit numbers by the Hearing Examiner, but because the record is individually and separately paginated (rather than being paginated as part of the Clerk’s Papers), this brief cites directly to the page number in the record rather than an exhibit number or a Clerk’s Paper designation.

<sup>2</sup> Some portions of the record are misnumbered, in that they are double-sided but have page numbers assigned only to the face page. For these portions of the record, this brief uses the citation format “R \_\_a” to refer to the front, numbered side of the page, and “R \_\_b” to refer to the back, unnumbered side of the same page.

waited to receive comments.<sup>3</sup>

On March 2, 2007, after the application had been deemed complete, Tacoma circulated the application and environmental checklist to other public agencies and requested comments as called for by Tacoma's own code, TMC 13.12.510, as well as the Department of Ecology's SEPA Model Rules, especially WAC 197-11-335(3). R 611a-b (Notice of Application at 1-2). The City of Federal Way was one of the agencies to which Tacoma circulated the application and environmental checklist.

On March 16, 2007, the City of Federal Way responded via letter from Director of Community Development Services Kathy McClung. R 614-15. Ms. McClung indicated that Federal Way was "concerned about adverse transportation impacts to existing and future City of Federal Way streets and intersections resulting from the proposal," and noted that a

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<sup>3</sup> T&C has suggested that this somehow indicates that Tacoma staff had determined that the project would have absolutely no traffic impacts whatsoever but as Tacoma staff testified, however, they lack sufficient staff to analyze a project's extra-territorial impacts on Tacoma's seven different neighboring cities and unincorporated county area. Instead, they simply wait to evaluate comments received. If the comments are based on accepted traffic engineering methodologies (which they considered Federal Way's to be), Tacoma incorporates those comments into Tacoma's eventual SEPA threshold determination. Tr. 7/11/08 at 281-82 (testimony of Tacoma engineer Dana Brown). Mr. Brown also testified that Tacoma would have required mitigation for impacts to Tacoma streets, but the City had recently completed extensive improvements to Norpoint Drive and 49<sup>th</sup> Avenue, in the vicinity of the proposed plat, so no additional mitigation was required for the Scarsalla Plat, but that if any level of service deficiencies had been identified in Tacoma, "[T]he developer would have been responsible to pay the entire bill for whatever improvement was necessary." Tr. 7/11/08 at 288.

transportation impact analysis for the project had not been provided to Federal Way. *Id.* Therefore, Federal Way requested that “a traffic impact analysis be required to identify any appropriate mitigation to maintain the City’s level of service standards so that [Growth Management Act-required] concurrency requirements do not preclude planned development in the City.” *Id.*

In response to the City’s letter, T&C’s engineer, Hans Korve, contacted Federal Way’s Traffic Engineer, Rick Perez, and inquired about what type of transportation impact analysis the City was requesting. Tr. 7/11/08 at 176: 15-20. Mr. Perez suggested a concurrency analysis consistent with the way Federal Way then analyzed traffic impacts for development within its own borders. Mr. Korve agreed. *Id.*

B. Federal Way Traffic Impact Analysis.

On April 26, 2007, Mr. Korve submitted a concurrency application to the City of Federal Way. R 934-35. The application estimated that the Scarsella Plat would generate 51 new, p.m. peak hour vehicle trips. R 935. Federal Way then prepared a Transportation Impact Analysis, or “TIA.”<sup>4</sup> The TIA was prepared in accordance with Federal Way’s standards applicable to such analyses, which Federal Way had adopted

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<sup>4</sup> R 638-815 (November 5, 2007 letter from Ken Miller to Jim Fisk, and enclosed TIA).

based on SEPA.<sup>5</sup> As explained by Mr. Perez, in preparing a TIA, the City first examines existing conditions and quantifies how the roadway system is functioning in the area of the project.<sup>6</sup> It then examines the “horizon year,” which is the year that a development is anticipated to be constructed. The TIA then forecasts what traffic conditions will be like at that time, calculates the amount of traffic being generated by the development, and adds those trips to the horizon year analysis to determine the project’s impact. If there are deficiencies in adopted transportation levels of service for the horizon year “with the project,” the TIA would identify the need for a mitigation, either by contribution of the developer’s pro-rata share mitigation towards an already-planned transportation improvement project<sup>7</sup> or, if there was to be an impact not addressed by an anticipated construction project, the TIA would also determine the amount of mitigation above and beyond a pro-rata share contribution.<sup>8</sup>

Based on this analysis, the TIA concluded that the Scarsella Plat would generate 10 or more evening peak hour trips that would affect four

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<sup>5</sup> R 641-44; Tr. 7/11/08 at 178: 3-5.

<sup>6</sup> Tr. 7/11/08 at 183: 3-10

<sup>7</sup> Mr. Perez and others at the hearing refer to planned street projects as “TIP” projects. The acronym refers to projects that are included on a city’s 6-year Transportation Improvement Program (“TIP”), required to be adopted each year by RCW 35.77.010.

<sup>8</sup> Tr. 7/11/08 at 183: 14-25 – 184: 1-4.

intersections or corridors. R 638. Those four intersections were predicted to have failing levels of service by the year 2014, the end year for the City's proposed Transportation Improvement Plan ("TIP").<sup>9</sup> The TIA concluded that the project's pro-rata share contribution to the cost of the four projects, planned in the City's TIP to address those LOS failures, equaled \$266,344.<sup>10</sup>

Federal Way shared this with the City of Tacoma, and requested that Tacoma require SEPA mitigation in the form of a condition requiring Town & Country to pay the pro-rata share contribution of \$266,344 to the City of Federal Way. When Tacoma issued its SEPA threshold environmental determination, in the form of an MDNS, Tacoma included the requested condition.<sup>11</sup>

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<sup>9</sup> Tr. 7/11/08 at 181: 1-9.

<sup>10</sup> R 638 (November 5, 2007 letter to Tacoma's Jim Fisk, enclosing TIA). T&C will likely complain that the TIA assumed that the TIP projects would be constructed and thus levels of service would not fail. Appellant's Brief at 9-10. As Rick Perez explained, though, the TIA made this assumption because the City is required by the GMA to demonstrate "concurrency" by showing that transportation levels of service will not fall below adopted levels if new projects are planned to be in place "concurrent" with the new development. Tr. 7/11/08 at 209-210; RCW 36.70A.070(6)(b). Federal Way planned the TIP projects in the first place because modeling showed LOS failures by 2014. Tr. 7/11/08 at 221: 8-14; at 274. The TIA highlighted the Scarsella Plat impacts by identifying which "already projected to fail" levels of service the Plat would exacerbate and by how much, along with showing how the TIP projects would rectify LOS failures.

<sup>11</sup> R 621 (SEPA MDNS at 5, Mitigation Measure No. 1).

C. Town & Country SEPA Appeal.

T&C filed an administrative appeal of Tacoma's SEPA MDNS. R 559-561 (SEPA Appeal). T&C's SEPA Appeal challenged the factual basis for the traffic mitigation condition.<sup>12</sup> In response, Federal Way reconsidered its mitigation request. Federal Way concluded that because the TIA guidelines called for the horizon year to be the estimated completion of the Scarsella Plat construction, and that year was 2009 (not 2014, the TIP's concluding year), two of the four intersections would – although perilously close - not have failing levels of service by that 2009 date.<sup>13</sup> To its credit, Federal Way then removed amounts for projects related to those two intersections, which dropped the requested pro-rata share contribution to \$250,123. Tr. 7/11/08 at 181: 1-9.

The \$250,123 total mitigation amount was for the two remaining projects: (1) the installation of left-turn lanes to the intersection of 21<sup>st</sup> Avenue SW and SW 336<sup>th</sup> Street (“21<sup>st</sup>/336<sup>th</sup>”); and (2) the widening to five lanes of the corridor extending west-east along SW 340<sup>th</sup> and SW

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<sup>12</sup> R 559-561 (alleging that Tacoma “did not give appropriate consideration” to T&C traffic engineer Chris Brown’s comments, that the TIA included several projects for which there was allegedly “no clear nexus” given their distance from the proposed Scarsella project site, and that the dollar amount of mitigation was unreasonable because it was allegedly higher on a per-unit basis than mitigation fees in other cities).

<sup>13</sup> These were the projects that T&C’s appeal alleged had “no clear nexus.”

336<sup>th</sup><sup>14</sup> from Hoyt Road to 26<sup>th</sup> Place SW (“340<sup>th</sup>/336<sup>th</sup>”). For the 21<sup>st</sup>/336<sup>th</sup> intersection, the Scarsella Plat would contribute 27 new p.m. peak hour trips, out of a total of 4,945, which required a pro-rata contribution of \$67,420 towards a total cost of \$12,348,000. For the 340<sup>th</sup>/336<sup>th</sup> corridor, the Scarsella Plat would contribute 227 new trips along its various segments, out of a total of 20,032 trips, which required a pro-rata contribution of \$182,703 towards a total project cost of \$15,312,000. Thus, while the \$250,123 figure is not, by itself, insubstantial, it represents only a small fraction of the nearly \$28 million in total costs needed to mitigate the impacts of the Scarsella Plat and other new developments’ traffic. And, the \$250,123 figure is directly proportionate to Scarsella Plat’s percentage of the total number of trips anticipated to use the 21<sup>st</sup>/336<sup>th</sup> intersection and the 340<sup>th</sup>/336<sup>th</sup> corridor in the horizon year.

In its Pre-hearing Brief to the Examiner, Town & Country repeated the factual arguments from its appeal.<sup>15</sup> At the SEPA appeal hearing,

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<sup>14</sup> The locations of these projects are shown in purple highlighting on the map at R 307.

<sup>15</sup> See, e.g., R 224-26 (Town & Country’s Pre-Hearing Brief) at 9; at 10 (fee of \$5,222 per lot “an exorbitant amount”); at 11 (attacking Federal Way’s distribution of trips). T&C also challenged a Tacoma-recommended subdivision condition requiring Town & Country to pay a pro rata contribution for use of a Federal Way regional stormwater detention facility, to which runoff from the Scarsella Plat would drain. This condition required payment of approximately \$70,000 to Federal Way. The Examiner upheld this condition, and T&C has not challenged it either below or here.

however, gaping holes in T&C's factual claims were quickly exposed. The factual and engineering bases for Federal Way's TIA were demonstrated to be fundamentally sound - the transportation modeling, trip generation and trip distribution were based on the well-accepted Puget Sound Regional Council model, used the standard method (Institute for Traffic Engineers Trip Generation Manual) for estimating the number of trips generated by each new house, and correlated well with census tract data and the PSRC regional employment forecast. T&C's "expert," Christopher Brown, had actually used the very same methodology in his work on other projects in Federal Way,<sup>16</sup> and he admitted on cross-examination that his work on the Scarsella Plat and elsewhere was riddled with errors.<sup>17</sup>

After its case collapsed, T&C's closing brief to the Examiner literally "ran away" from T&C's initial factual claims. T&C suddenly claimed that its case "[did] not stand or fall" on fact-finding (despite nearly two full days of engineering testimony), and mocked its own expert's testimony and that of other engineers, labeling it "sound and

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<sup>16</sup> R 880-85 (Brown TIA for Wynstone Plat); Tr. 7/11/08 at 82-84 (Brown cross-examination re same).

<sup>17</sup> Tr. 7/11/08 at 66-76; at 85-88 (Brown cross-examination); R 897-909.

fury”<sup>18</sup> on “arcane technical issues of transportation engineering.” R 143 and R 157 (T&C Post-Hearing Brief at 3 and 17, respectively). T&C argued instead that the City had failed to establish that levels of service would be affected by the Scarsella Plat, because the City planned to build the TIP improvements with or without the Scarsella Plat. R 151-152 (T&C Post-Hearing Brief at 11-12). T&C also argued for the first time that the percentage of trips affecting the intersections – instead of the dollar amount – was itself too small to constitute an impact. R 146-47 (T&C Post-Hearing Brief at 6-7). Because post-hearing briefs were submitted simultaneously, neither Federal Way nor Tacoma received an opportunity to respond to Town & Country’s new legal arguments.<sup>19</sup>

D. Hearing Examiner Decision.

On September 5, 2008, the Tacoma Hearing Examiner mailed his Findings of Fact, Conclusions of Law, and Decisions (“Decision”). The Decision rejected T&C’s claims that the traffic engineering modeling used by Federal Way’s TIA was unreasonable:

It has not been shown by appellant that the transportation model used by Federal Way . . . has not been developed in

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<sup>18</sup> The reference is a partial quotation from Shakespeare: “It [life] is a tale, told by an idiot, full of sound and fury, signifying nothing.” Shakespeare, *Macbeth*, Act V, Scene 5.

<sup>19</sup> Federal Way and Tacoma instead focused primarily on the factual engineering issues that had dominated the hearing *See, e.g.*, R 180-197 (Federal Way Post-Hearing Brief at 2-19) R 166-170 (Tacoma Post-Hearing Brief at 8-12); Tr. 7/11/08 at 293: 11-295: 20 (Hearing Examiner’s outline of questions for counsel to address).

accordance with accepted transportation modeling practices or has been improperly utilized by Federal Way in its analysis of Town & Country's subdivision proposal. In fact, the weight of the evidence is to the contrary.

R 109 (Decision at 8, Finding 13) (emphases added).

The Hearing Examiner also found that Federal Way's methods for calculating the number of Scarsella Plat vehicle trips, and distributing those trips over the Federal Way street network to evaluate their impacts, were also "consistent with accepted transportation princip[les]." R 110 (Decision at 9, Finding of Fact 14). Based on that finding, the Hearing Examiner also agreed with Federal Way that 76% of the vehicle trips generated by the Scarsella Plat would travel north into Federal Way. *Id.* He further specifically found that the Federal Way TIA correctly calculated the traffic impacts to the two areas of concern: the 21<sup>st</sup>/336<sup>th</sup> intersection, and the 336<sup>th</sup>/340<sup>th</sup> arterial corridor. Concerning the 21<sup>st</sup>/336<sup>th</sup> intersection, the Examiner found:

Using accepted transportation methodologies, Federal Way calculated that Town & Country's proposed 51-lot subdivision would contribute 27 new PM peak hour trips to the 21<sup>st</sup> Avenue SW / SW 336<sup>th</sup> Street intersection at a horizon year of 2009, with expected volumes of 2,945 vehicle trips during the PM peak hour or stated another way, approximately one-half of one percent contribution to that intersection.

R 110 (Decision at 9, Finding 15). He made a similar finding concerning the arterial corridor:

In regard to the SW 336<sup>th</sup> Street / SW 340<sup>th</sup> Street . . . arterial corridor, Federal Way, again using accepted transportation methodology, calculated Town & Country's proposed subdivision would contribute 27 to 32 PM peak hour trips to this corridor. By 2009, the referred to corridor would be expected to experience traffic volumes during the PM peak ranging from 2,263 to 2,682 vehicle trips, which would result in an LOS F for that arterial corridor . . . The proposed vehicle trip contribution to the corridor in 2009 by Town & Country's proposed subdivision, would represent 1.2 percent of the vehicle trips using that corridor by 2009.

R 110-111 (Decision at 9-10, Finding 15).

Unfortunately, however, the Hearing Examiner swallowed whole T&C's novel new legal arguments, made for the first time during the simultaneous post-hearing briefing. The Decision noted that due to traffic from other new developments in addition to the Scarsella Plat, the level of service will fall to the designation "F"<sup>20</sup> both with and without the project. Because of that fact, and because Federal Way had (as required by state law) anticipated level of service failures by planning for future improvements to address them, the Examiner somehow concluded that the need for improvements could not be the direct result of Scarsella Plat traffic.<sup>21</sup> The Decision also concluded that the percentage of Scarsella Plat trips affecting the intersection are - somehow - *per se* insignificant. R 125

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<sup>20</sup> A level of service designation of F is referred to as "LOS F."

<sup>21</sup> R 111 (Decision at 10, Finding of Fact 16); R 123-24 (Decision at 22-23, Conclusions of Law 16-17).

(Decision at 24, Conclusion 17). Based on these two fundamental legal errors, the Decision then concluded that the traffic mitigation required by the MDNS did not comply with RCW 82.02.020, and must be stricken. R 125 (Decision at 24, Conclusion of Law 18).

All parties sought reconsideration. R 68-90; R 47-67; R 42-46. Federal Way and Tacoma sought reconsideration of the traffic mitigation portion of the Decision, while T&C sought reconsideration of the Examiner's approval of the condition requiring T&C to pay its pro-rata share for use of Federal Way's regional stormwater detention facility. The Examiner amended a conclusion of law supporting his decision on the stormwater mitigation fee, but otherwise issued a one-line order affirming the initial Decision.<sup>22</sup>

E. Federal Way's Land Use Petition.

Federal Way timely filed a land use petition in Pierce County Superior Court seeking reversal of the Initial and Reconsideration Decisions. CP 3-66 (Land Use Petition). The parties thoroughly briefed the issue, with T&C again raising new issues that it had not pursued before the Examiner below. CP 354-363. Prior to oral argument, the parties

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<sup>22</sup> R 5 (Order Granting in Part and Denying in Part Motions for Reconsideration, Amending Conclusions of Law, and Affirming Decisions ("Reconsideration Decision") at 3).

appeared before the assigned judge, the Honorable Thomas Felnagle, who invited them to provide preliminary comments to help focus his consideration of the parties' briefs. RP 04/08/09 at 4. In response to a question from Judge Felnagle, T&C's counsel conceded that the Examiner had erred in concluding that the traffic mitigation was invalid simply because Federal Way had identified TIP projects to address an anticipated LOS failure:

THE COURT: Are you also adhering to the argument that, because they've anticipated failure, that they're no longer able to exact fees?

MR. WILSON: No, Your Honor. Simply because they have done the planning they should have done with the capital improvement program, that's fine . . . .

RP 4/08/09 at 22: 10-15 (emphasis added). T&C's counsel also conceded that the Examiner had erred in concluding that the required traffic mitigation violated RCW 82.02.090:

MR. WILSON: [T]he Examiner ruled that part of what Federal Way and Tacoma did violated section 090 of 82.02. That's the GMA impact [fees] section. That does not apply here. . . .

RP 4/08/09 at 23: 12-14 (emphasis added).

These concessions left T&C with but a single remaining argument: that Tacoma's required traffic mitigation was unlawful because only the project that is the "straw that breaks the camel's back," and independently

causes an LOS failure, can be required to pay mitigation.

THE COURT: Are you advancing still the idea raised apparently by the Hearing Examiner that it's only the impact that tilts – I guess the straw that breaks the camel's back sort of argument? Is that one that you are adhering to?

MR. WILSON: Yes, Your Honor, that if the addition of just this much traffic from this Scarsella plat would have caused that level of service to fail, then they could be tagged for this mitigation under SEPA.

RP 4/08/09 at 21: 14-22.

Even before it had concluded reviewing the parties' briefs, however, the trial court recognized the illogic in T&C's argument:

THE COURT: I'm sure you answered this in the brief, but what do you do if there is a hundred small impacts, none of which can be shown to be the decisive one? Is government then bound not to exact any impacts because no single impact is sufficient?

RP 4/08/09 at 25: 20-24.

When the parties returned two days later for oral argument, Judge Felnagle again honed in on the "extreme" nature of T&C's argument that a city may require mitigation only for a project that is the "straw that breaks the camel's back." The trial court's questions forced T&C's counsel to concede that, in fact, there is no case supporting T&C's argument:

THE COURT: The caselaw that carries that concept of direct result to the extreme you would carry it is found where?

MR. WILSON: Well, the Court characterizes it as extreme, but I believe that it can be found in reading together SEPA and 82.02 . . . And I, therefore, contend that, no, we don't have a case directly on point with this, but unless you can show . . . that this is the straw that breaks the camel's back, there is not the showing of direct impact that is required.

RP 4/10/09 at 36: 23-25 – 37: 1-25 (emphasis added). Despite the lack of appellate precedent, T&C's counsel insisted that unless a project is the sole cause of either a level of service failure or an exceedance of the volume-to-capacity ratio of an intersection or corridor, a city may not impose traffic mitigation under SEPA. *Id.* at 44: 1-9.

Following oral argument, Judge Felnagle issued a detailed oral ruling from the bench, in which he either applied or distinguished each of the cases cited by T&C as controlling. RP 4/10/09 at 58-66, esp. at 61-63. He also specifically addressed, and rejected, T&C's "straw that breaks the camel's back" argument (*Id.* at 64: 3-10), as well as other particular findings and conclusions of the Hearing Examiner. *Id.* at 64: 18-25; at 65: 1-25. Judge Felnagle then entered detailed Conclusions of Law memorializing his oral ruling. CP 404-415.

For example, with respect to T&C's "straw that breaks the camel's back" argument, Judge Felnagle concluded:

Town & Country's arguments notwithstanding, there is no case law holding that requiring mitigation for the extent of a proposed development's contribution to cumulative, significant impacts violates either SEPA or RCW

82.02.020. The caselaw, including *Trimen*, indicate the contrary, because they hold that a development may be required to pay mitigation for the extent of its contribution to an existing level of service deficiency. The result of Town & Country's arguments would be a scenario in which no one project would independently cause a level of service failure, and therefore no mitigation at all could be required, and that is not the statutes' intent.

CP 410-11 (Concl. 9) (emphasis added).

Judge Felnagle also concluded that the Examiner's determination, that Tacoma and Federal Way had failed to document the specific number of increased vehicle trips coming from the Scarsella Plat, was not supported by substantial evidence:

Substantial evidence, in the form of exhibits and testimony admitted at the hearing before the Hearing Examiner, demonstrates that Federal Way did determine the specific impact of the proposed subdivision alone, and that impact would be 27 new PM peak hour trips contributed to the 21<sup>st</sup> / 336<sup>th</sup> intersection (out of a total of 4,945), and a total of 227 new PM peak hour trips contributed to the various segments of the 336<sup>th</sup> / 340<sup>th</sup> Street arterial corridor (out of a total of 20,032). For the same reasons, the sentence in Conclusion of Law No. 17, to the effect that "Federal Way has not identified the specific impact to these street facilities resulting from Town & Country's proposed subdivision, as it has not done a 'with the project' and 'without the project' analysis," was also not supported by evidence that is substantial when viewed in light of the whole record before the court.

CP 406 (Concl. 3) (emphasis added).

Judge Felnagle also considered and expressly rejected the Hearing Examiner's *sua sponte* conclusion that the Scarsella Plat impacts were

somehow *per se* insignificant:

This conclusion was also an erroneous interpretation of the law and a clearly erroneous application of the law to the facts. Substantial evidence shows that the traffic impacts of the Scarsella Plat are quantifiable, concentrated, consistent and re-occurring, certain to result, and part of a major cumulative impact in the form of level of service failures at the 21<sup>st</sup> / 336<sup>th</sup> intersection and the 336<sup>th</sup>/ 340<sup>th</sup> Street arterial corridor. Such a level of service failure is a significant impact for SEPA purposes, as was conceded by all parties here.

CP 410 (Concl. 8) (emphasis added).

Based on the foregoing, Judge Felnagle concluded that Federal Way had met its burden under RCW 36.70C.130(1) and was entitled to relief, in the form of an Order reversing the Decision and Reconsideration Decision, and affirming the City of Tacoma's MDNS. CP 411-412 (Concl. 12; Order at paras. 1-2).

T&C then filed its Notice of Appeal. CP 415.

#### IV. ARGUMENT

##### A. Standards of Review, Burden, and Deference.

###### 197-1. Land Use Petition Act Legal Standards.

The Court reviews the Initial and Reconsideration Decisions pursuant to the Land Use Petition Act, RCW 36.70C ("LUPA"). LUPA's substantive legal standards are set forth in RCW 36.70C.130 and authorize a court to grant relief "if the party seeking relief has carried the burden of

establishing that one of the standards set forth in (a) through (f) of this subsection has been met.” The standards in RCW 36.70C.130(1)(b) and (d) are the most relevant here.

Under LUPA, this Court applies the statutory standards of review directly to the administrative record,<sup>23</sup> and questions of law are reviewed *de novo*.<sup>24</sup> This does not mean that this Court must ignore the trial court decision; rather, it simply means that this Court applies the statutory standard of review to the administrative, fact-finding record, rather than the record of the superior court. This Court should give Judge Felnagle’s decision the same reasoned consideration that the Supreme Court would give a well-written decision from this Court in a parallel LUPA case, where the Supreme Court would also apply the applicable standard of review directly to the record of the land use decisionmaker.

## 2. Burden of Proof.

This Court’s precedents hold that a petitioner in a LUPA case has the burden of proof on appeal, even if the petitioner prevailed in superior court as Federal Way did here.<sup>25</sup> That led this Court to issue an order (unprecedented in counsel’s experience) rejecting briefs from all three

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<sup>23</sup> *Mason v. King County*, 134 Wn. App. 806, 809, 142 P.3d 637 (Div. I 2006).

<sup>24</sup> *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2002).

<sup>25</sup> *Quality Rock Products, Inc. v. Thurston County*, 139 Wn. App. 125, 134-35, 159 P.3d 1 (Div. II 2007), *rev. denied* 163 Wn.2d 1018 (2008).

parties and requiring the case be rebriefed as if Federal Way were the appellant. As this Court's decision in *Quality Rock Products v. Thurston County* establishes, however, the burden of proof is not significant where, as here, the issues being reviewed are primarily legal. Because review of legal issues is *de novo*, the issue of which party bears the burden of proof (which applies to factual issues) is essentially irrelevant.

### 3. Deference.

Here, because the decision being reviewed is the Hearing Examiner Decision, this Court must consider that the Examiner was required to grant deference to the SEPA MDNS that was on appeal before him. Under the Tacoma Municipal Code (TMC) and SEPA, a threshold environmental determination (like the MDNS here) must be accorded substantial weight, and a person challenging it bears a heightened burden of proof to demonstrate that it is "clearly erroneous in view of the public policy of the [State Environmental Policy] Act."<sup>26</sup> Even T&C acknowledged this below.<sup>27</sup>

Instead of applying this standard, the Decision concluded that the issue presented in this appeal implicates the standard of review in TMC

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<sup>26</sup> TMC 13.12.680(4)(e)(iv); *see also Clallam County Citizens for Safe Drinking Water v. Port Angeles*, 137 Wn. App. 214, 225, 151 P.3d 1079 (Div. II 2007).

<sup>27</sup> R 143, n. 3 (T&C Post-Hearing Brief at 3, n. 3) ("The *clearly erroneous* standard applies to the Examiner's review of an MDNS.").

13.12.680(4)(e)(ii), *i.e.*, whether a decision is “outside the statutory authority or jurisdiction of the City.” R 120 (Decision at Conclusion 12).<sup>28</sup> This was error. In the course of reviewing the Decision, this Court must also accord the MDNS substantial weight, and affirm the Decision only if the MDNS was “clearly erroneous.” This is the same legal standard as that employed under RCW 36.70C.130(1)(d) (relief may be granted under LUPA when land use decision is a “clearly erroneous application of the law to the facts.”).

T&C may claim that the Examiner’s legal conclusions are entitled to deference. While some appellate decisions do refer to this concept, those cases merely paraphrase RCW 36.70C.130(1)(b), which provides that a reviewing court may reverse a land use decision that is an erroneous interpretation of the law, “after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise.” Reviewing courts do not defer to erroneous interpretations of state law.<sup>29</sup> A reviewing court will defer to a city council’s or hearing examiner’s legal interpretation only when the jurisdiction has expertise in construing its

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<sup>28</sup> The Examiner did correctly conclude Town & Country bore the burden of proof, because the decision of the SEPA Responsible Official shall be presumed *prima facie* correct and shall be afforded substantial weight. Decision at 19, Conclusion 11. The Examiner, however, then departed from the correct legal standard.

<sup>29</sup> *Quadrant Corp. v. State Growth Management Hearings Bd.*, 154 Wn.2d 224, 238, 110 P.3d 1132 (2005).

own ordinances.<sup>30</sup> Here, the Decision's legal conclusions addressed SEPA and RCW 82.02.020, and cases construing those statutes, and are therefore entitled to no deference.

B. The Hearing Examiner's Decisions Were Properly Reversed, Because They Addressed the Wrong Legal Issues.

The Hearing Examiner erred, first procedurally, because he addressed the wrong legal issues. T&C's SEPA appeal challenged only the factual, engineering basis for the MDNS condition and its compliance with certain Tacoma Municipal Code provisions. R 559-561. T&C's appeal did not challenge the statutory authority or jurisdiction of the City to issue an MDNS. Because the Examiner was required to afford the MDNS "substantial weight," and because he was considering the matter in his appellate capacity, the Hearing Examiner was not entitled to *sua sponte* raise and consider new legal issues not brought as part of Town & Country's appeal. His jurisdiction was limited to the specific appeal issues contained in

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<sup>30</sup> See, e.g., *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Associates*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004) (interpretation of zoning ordinance); *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 412, 120 P.3d 56 (2005) (interpretation of grading ordinance); *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wn. App. 461, 475, 24 P.3d 1079 (2001) (interpretation of ordinance permitting height variance for wireless facilities).

Town & Country's SEPA appeal.<sup>31</sup> The Decisions' forays into RCW 82.02.020 and other matters should be reversed on this ground alone.

The Examiner's Decisions were also substantively erroneous, as explained below.

C. The Hearing Examiner Decisions Wrongly Concluded That the Traffic Mitigation Required By Tacoma's MDNS Was Inconsistent With RCW 82.02.020

RCW 82.02.020 generally prohibits a tax, fee or charge upon development, except "to mitigate a direct impact that has been identified as a consequence of a proposed development, subdivision, or plat." The Hearing Examiner wrongly concluded that the traffic mitigation required by Tacoma's MDNS was inconsistent with RCW 82.02.020, for several reasons explained below. Judge Felnagle correctly determined that the Hearing Examiner had erred, and this Court should affirm.

1. RCW 82.02.020 Allows a City to Require a Developer to Mitigate Traffic Impacts That Will Worsen Conditions at Locations For Which the City Has Planned Improvements to Address Anticipated Level-of-Service Failures.

The first substantive error committed by the Examiner – an error

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<sup>31</sup> TMC 13.12.680(1)(d) (SEPA appeals must contain "a concise statement of the legal and factual reasons for the appeal," along with "the grounds upon which the appellant relies"); *Griffin v. Dept. of Social and Health Services*, 91 Wn.2d 616, 631, 590 P.2d 816 (1979) ("Failure to raise issues during the course of an administrative hearing precludes the consideration of such issues on review"); *Leschi Imp. Council v. Wash. State Highway Comm'n.*, 84 Wn.2d 271, 273, 525 P.2d 774 (1974) ("The general rule is that objections or questions which have not been raised or urged in proceedings before the administrative agency or body will not be considered . . .").

conceded by even T&C – was the Decision’s conclusion that T&C could not be required to mitigate its traffic impacts because those impacts will occur at an intersection (21<sup>st</sup> Ave. SW/SW 336<sup>th</sup> Street) and along an arterial corridor (SW 336<sup>th</sup>/SW 340<sup>th</sup>) that Federal Way had already predicted would have failing levels of service, and for which Federal Way had planned two Transportation Improvement Program (TIP) projects to remedy them.<sup>32</sup> According to the Examiner, Federal Way’s pre-planning meant that Tacoma and Federal Way could not establish that the traffic mitigation fee imposed on the Scarsella Plat was “to mitigate a direct impact that has been identified as a consequence” of the Plat, or that the mitigation fee was “reasonably necessary as a direct result” of the Scarsella Plat, as RCW 82.02.020 required. These conclusions were erroneous interpretations of the law and correctly reversed under RCW 36.70C.130(1)(b). As Judge Felnagle explained:

Appellate decisions, including *Trimen v. King County*, hold that neither an existing level of service deficiency, nor a local jurisdiction’s plans to correct it, prevent a local jurisdiction from requiring mitigation from a developer whose project contributes additional impacts to deficiency.

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<sup>32</sup> R 11 (Decision at 10, Finding 16) and R 153-54 (Decision at 22-24, Conclusions 16 and 17). Finding 16’s language in this regard is actually a conclusion of law, not a finding of fact.

CP 419 (J. Felnagle Concl. 4) (emphasis added).<sup>33</sup> This Court should affirm Judge Felnagle's reversal on this ground.

First, T&C has conceded that this aspect of the Decision was error. T&C's counsel admitted to Judge Felnagle that the Examiner erred in concluding that Federal Way's TIP planning proved a violation of RCW 82.02.020. RP 4/08/09 at 22: 10-15. Indeed, Judge Felnagle's Conclusions expressly noted T&C's concession:

Respondent Town & Country conceded that the fact that a local jurisdiction engages in planning for projects to address existing deficiencies does not in and of itself bar a local jurisdiction from requiring mitigation from new development to fund those projects.

CP 419 (J. Felnagle Concl. 4) (emphases added).

Second, the reason T&C conceded this point below is that *Trimen v. King County*, 124 Wn.2d 261, 877 P.2d 187 (1994), establishes not only that prior planning does not invalidate later mitigation fees, prior planning is required in order to justify such fees. In *Trimen*, the Supreme Court considered a developer's challenge to a \$52,000 parks mitigation fee. The developer argued, *inter alia*, that the fee was not "reasonably necessary as

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<sup>33</sup> Additional appellate decisions with similar holdings include *Sparks v. Douglas County*, 127 Wn.2d 901, 904 P.2d 738 (1995); and *Miller v. Port Angeles*, 38 Wn. App. 904, 691 P.2d 229 (Div. II 1984); *rev. denied*, 103 Wn.2d 1024 (1985). A full explication of these decisions is contained in Federal Way's briefs below. CP 327-330 (Opening Brief); 383-84 (Reply Brief).

a direct result of the development.” *Id.* at 273-276. The Court rejected this argument, noting that the County’s parks mitigation fee was justified by a parks needs study, prepared nearly a decade prior to the development, that “indicated that there was a deficit of approximately 107 park acres . . .” *Id.* at 274. In rejecting Trimen’s argument that the fee was invalid because the developer had not agreed to the particular capital improvements upon which the fee would be spent, the Court noted that the County was required by its own code to spend the money in the same parks plan subarea that the development was located and, in this case, had allocated the money towards new tennis courts identified in the County’s plan. *Id.* at 273. This critical component of the Court’s holding in *Trimen* remains the law.<sup>34</sup>

Given these precedents, it is clear (as T&C conceded) that a city’s responsible planning for improvements to address the anticipated collective needs of new development is simply not a legal bar to imposition of traffic mitigation on new residential plats. Were it

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<sup>34</sup> See *Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 760, 49 P.3d 867 (2002) (distinguishing case before it from *Trimen* because “[I]n *Trimen*, the county conducted a comprehensive assessment of park needs in a report predating the developer’s applications for subdivision approval,” and “[t]hat report showed a deficit of park acres in the area of the proposed developments, and projected a greater deficit as population expanded.”). The continued vitality of this aspect of *Trimen*, was also noted by Division I of this Court in *Citizens’ Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 666, 187 P.3d 786 (Div. I 2008) (emphasis added).

otherwise, local jurisdictions would be unable to meet GMA requirements that they plan for and finance transportation infrastructure improvements necessary to serve new growth and development,<sup>35</sup> because the very act of planning would undercut their ability to collect mitigation fees to help finance the very same improvements necessary to establish concurrency and allow development to proceed. There is simply no legal support for such a result. Moreover, such a theory is blind to the fact (obvious to any driver) that adding additional traffic to streets already predicted to fail (as Scarsella Plat would here) can make matters worse and require mitigation – regardless of any pre-planning. Judge Felnagle correctly held that the Hearing Examiner’s determination (in Finding 16 and Concl. 16) was an erroneous interpretation of the law and a clearly erroneous application of the law to the facts. This Court should affirm.

2. RCW 82.02.020 Allows Pro Rata Share Traffic Mitigation Corresponding to the Proposed Project’s Percentage of New Vehicle Trips Using Affected Intersections.

The Examiner’s Decision also contains several errors that

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<sup>35</sup> Under RCW 36.70A.070(6), cities are required to adopt a transportation element in their comprehensive plans. The transportation element must include “facilities and service needs,” including an “[i]dentification of state and local system needs to meet current and future demands,” and a “multi-year finance plan” coordinated with the six-year plan (*i.e.*, the TIP) required under RCW 35.77.010. Cities’ finance plans typically rely at least in part on SEPA mitigation and/or traffic impact fees to finance a portion of needed improvements; mitigation fees are a critical source of “matching” funds required to obtain state and federal grants. Tr. 7/11/08 274: 20-25; 278: 14-16.

culminated in its conclusion (Conclusion 18), that the Tacoma MDNS' required traffic mitigation did not comply with what the Examiner labeled RCW 82.02.020's "nexus" and "rough proportionality" requirements. These errors, outlined below, demonstrate that the MDNS mitigation complied perfectly with RCW 82.02.020.

a. The Examiner's Decision Erred in Its Analysis of "Nexus" and "Proportionality".

The Decision erred several ways in its analysis of "nexus" and "proportionality." First, it incorrectly imported the "nexus" and "rough proportionality" concepts from federal takings jurisprudence. CP 44-45 (Decision at Concl. 17-18). As both the Washington and United States Supreme Courts have concluded, the "nexus/rough proportionality" standard derives from federal constitutional takings jurisprudence and applies only to a required dedication of land.<sup>36</sup> The word "proportionality" does not actually appear in RCW 82.02.020, and the concept of "proportionate share" appears only with respect to utility

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<sup>36</sup> See, e.g., *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 546, 125 S. Ct. 2074 (2005) (*Nollan/Dolan* framework applies to adjudicative land-use exactions where the "government demands that a landowner dedicate an easement . . ."); *McClung v. City of Sumner*, 548 F.3d 1219, 1225-28 (9th Cir. 2008); *Olympia v. Drebeck*, 156 Wn.2d 289, 302, 126 P.3d 802 (2006) ("[N]either the United States Supreme Court nor this court has determined that the tests applied in *Nollan* and *Dolan* to evaluate land exactions must be extended to the consideration of fees imposed to mitigate the direct impacts of a new development . . .").

system charges.<sup>37</sup>

Second, the Examiner erroneously concluded that Tacoma was required to comply with the definition of “proportionate share” set forth in RCW 82.02.090. R 124 (Decision at Concl. 17). As even T&C admitted below, this was error, because that statute applies only to GMA impact fees, not to mitigation imposed under SEPA. RP 4/08/09 at 23: 12-15. The Decision’s reference in Conclusion 17 to “proportionality” was also error because, as noted above, it was incorrectly based on the notion that proportionality was lacking due to Federal Way’s previously-planned TIP projects. Judge Felnagle correctly reversed the Decision due to these errors (CP 408-09 (Concl. 6-7), and this Court should affirm.

Third, the Examiner erroneously invalidated the MDNS traffic mitigation based on the Examiner’s misperception that Federal Way failed to “develop information for the two TIPs for [the] 2009 horizon year ‘without the project.’” R 112 (Finding 18). Finding 18 lacks the requisite substantial evidence to support it. The TIA expressly provides that “the

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<sup>37</sup> This is not to say that the concept of proportionality has no place whatsoever in an analysis of mitigation. As discussed *infra*, mitigation may be imposed under SEPA only “to the extent attributable to the identified adverse impacts of [a] proposal.” This requirement was clearly met where, as discussed above, the MDNS required T&C to pay the percentage of the costs of projects needed to avoid LOS failures equal to the same percentage of Scarsella Plat trips expected to use the affected intersection and arterial corridor. R 109-110 (Decision at Finding 17); CP 409 (Felnagle, J. Conclusions of Law, Order and Judgment at Concl. 7).

analysis was conducted for 2009, the anticipated year of opening of the development proposal for conditions with and without the project.” R 646 (TIA at 2) (emphasis added). The TIA assumed construction of the TIPs, so one of its analyses was “with TIPs, without the project.” Finding 18 was simply wrong. Further, at the hearing, the City provided an additional exhibit, R-40, that analyzed traffic without assuming construction of the TIPs, but “with the project.” It was precisely this analysis – to which T&C neither objected<sup>38</sup> nor responded - that demonstrated that background traffic plus traffic from new developments (including the Scarsella Plat) would cause LOS failures. Based on this, Judge Felnagle correctly reversed Finding 18 as unsupported by substantial evidence,<sup>39</sup> and this court should affirm.

b. Tacoma and Federal Way Established That the MDNS Mitigation Was “Reasonably Necessary” to Mitigate the Scarsella Plat’s “Direct Impacts.”

Rather than erroneously focusing on “nexus,” “rough proportionality,” or “proportionate share,” the Decision should have addressed the actual language of RCW 82.02.020, which allows mitigation where “reasonably necessary” to “mitigate the direct impacts” of a proposed subdivision.” Substantial evidence in the record demonstrates

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<sup>38</sup> Tr. 7/11/08 at 223: 4.

<sup>39</sup> CP 406 (Conclusions of Law, Order and Judgment at Concl. 3).

that the Tacoma MDNS mitigation was “reasonably necessary” to mitigate the Scarsella Plat’s “direct impacts.”

Federal Way’s Traffic Impact Analysis (“TIA”) set forth with precise detail the Scarsella Plat impacts, consistent with what the Examiner labeled “accepted transportation principals” [sic]. R 110 (Decision at Finding 14). The Decision determined the Scarsella Plat p.m. peak hour trip generation (58 trips), and the percentage that would travel into Federal Way (76%). R 109-110 (Decision at Findings 13 and 14). Federal Way also distributed those trips, and identified an intersection and arterial corridor that would receive more than 10 p.m. peak hour new trips, the number of new trips each would receive (27, and 27-32, respectively), and the percentage of total estimated horizon year trips (.5 percent and 1.2 percent, respectively). R 110 (Decision at Finding 15).<sup>40</sup> As T&C was forced to admit below, Federal Way “did analyze the trip assignment of the Scarsella Plat traffic, thus attempting to identify the direct impacts of the T&C plat.” CP 368 (T&C Response Brief at 23). And, it was this analysis that prompted Judge Felnagle to wryly observe:

I still wonder what it is that the City could have shown or that Mr. Perez could have shown through his analysis that would have made it more clear what the effect was with or without the project.

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<sup>40</sup> T&C did not cross-appeal these findings, which are verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 821 P.2d 549 (1992).

RP 4/10/09 at 24: 21-23. Federal Way thus identified the “direct impacts” of the Scarsella Plat as Judge Felnagle concluded. CP 407-08 (Concl. 5).

And, the mitigation required by Tacoma’s MDNS was “reasonably necessary” to address those direct impacts. The MDNS required payment towards previously-identified TIP projects whose construction would alleviate the projected LOS failures.<sup>41</sup> The cost of the TIP projects was divided by the total number of trips expected to use the intersections and arterial corridor at issue, and the MDNS required the Scarsella Plat to pay (on a per trip basis) only for the number of Scarsella Plat trips that would use the intersection / corridor. The mitigation was limited to that “reasonably necessary” to mitigate identified impacts. CP 409 (Concl. 7).

Judge Felnagle also reviewed and correctly applied applicable Washington appellate precedents concerning RCW 82.02.020. CP 407-08 (Conclusions of Law, Order and Judgment at Concl. 5). In particular, he correctly distinguished the case before him from *Castle Homes v. Brier*, 76 Wn. App. 95, 882 P.2d 1172 (Div. I 1994). There, the City’s traffic analysis was found lacking because at most, 25% of the Castle Crest II

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<sup>41</sup> R. 648; 685 (TIA at 4, 41)(“All intersections. . . would meet City of Federal Way LOS standards with programmed improvements . . .”). Proving the truth of the maxim that “no good deed goes unpunished,” T&C complained below that the TIA should not have showed that potential construction of the TIP projects would alleviate the projected LOS failures. Such a conclusion was necessary, however, to establish GMA concurrency.

subdivision's traffic would enter the City of Brier's street system, with only 8 percent staying in the City for more than two blocks; the rest exited directly into Mountlake Terrace. *Castle*, 76 Wn. App. at 107. Here, of course, the situation is the opposite: 76 percent of the Scarsella Plat trips will enter Federal Way, rather than Tacoma. And, the bulk of those trips will contribute to levels of service failures in 2009 at the 21<sup>st</sup> / 356<sup>th</sup> Avenue SW intersection, and along the 340<sup>th</sup> / 336<sup>th</sup> Street corridor – unless planned TIP projects are constructed.<sup>42</sup>

The other reason *Castle Homes* is inapplicable is that Brier's analysis did not analyze the particular trip contribution of the Castle Crest II subdivision, but rather simply apportioned the entire cost of new improvements upon the new development, then divided it by the number of new lots:

[T]he City did not acknowledge that it should pay for any of the off-site improvements in its street system. . . .The City is using a proportional share approach where it would charge the developers for the full amount of the cost, albeit proportionally by the number of lots. This does not take into account the direct impact of each separate subdivision location and the differing street distribution impacts of each. As such the decision cannot stand.

*Id.* at 107-108.

Here, as the unchallenged Findings 15 and 17 acknowledge (R

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<sup>42</sup> R. 951-54; Tr. (July 11, 2008) 218-23 (Rick Perez testimony).

124-125), Federal Way used a state-of-the-art transportation model, and followed the directions of the ITE Trip Generation Manual to calculate the Scarsella Plat precise trip generation and precise distribution of those trips along the street network within the City of Federal Way. After identifying the locations with projected failures of levels of service, Federal Way created a ratio of the Scarsella Plat trips to the total trips projected to use the intersection (including existing trips plus other new trips from other new developments). Federal Way then multiplied this ratio by the improvement's total cost, so that T&C was asked to pay only that portion of the necessary improvements that Scarsella Plat trips would use. *Id.* As Mr. Perez testified, T&C was not charged for "sins of neglect,"<sup>43</sup> or for existing trips; existing trips were included in the denominator, and therefore netted out of the amount calculated to be the Scarsella Plat pro rata share. Tr. 7/11/08 at 265-68. That is exactly the approach the *Castle Homes* court indicated should have been used.<sup>44</sup> And, again, as Judge

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<sup>43</sup> This is the phrase actually used by the Court in *Castle Homes*, not the "sins of the past" indicated in the Decision at 23, line 24. *Castle Homes*, 76 Wn. App. at 98, n. 2. It presumably refers to deferred maintenance. Federal Way's street system, however, is well-maintained; it simply does not have sufficient capacity to provide for new trips from the Scarsella Plat and other anticipated new development for which the City must plan. See RCW 36.70A.070(6). "Sins of neglect" were thus correctly omitted from Federal Way's calculations.

<sup>44</sup> 76 Wn. App. at 107-108. Indeed, the Examiner recognized that "the traffic analysis performed by Federal Way differs materially from those which the courts found lacking in *Cobb v. Snohomish County* [citations omitted] and in *Castle*. . . ."

Felnagle wondered aloud, “what it is that the City [or Mr. Perez] could have shown. . .through his analysis that would have made it more clear what the [Scarsella Plat’s] effect was . . . [?]” RP 4/10/09 at 24: 21-23.

c. RCW 82.02.020 Does Not Limit Mitigation to Only the Project That is the “Straw that Breaks the Camel’s Back.”

Given the foregoing, T&C’s primary remaining defense of the Examiner’s Decision is an argument that the Examiner himself did not make: that the Tacoma MDNS traffic mitigation violated RCW 82.02.020 because Tacoma and Federal Way did not prove that the Scarsella Plat would be the sole cause of failing LOS.<sup>45</sup> In essence, T&C argues that only the project that is the “straw that breaks the camel’s back” may be assessed mitigation. T&C’s counsel correctly admitted to Judge Felnagle, however, that there is no appellate authority for this proposition.<sup>46</sup> Accordingly, Judge Felnagle properly rejected what he characterized as an “extreme” argument:

The caselaw, including *Trimen*, indicate the contrary, because they hold that a development may be required to pay mitigation for the extent of its contribution to an existing level of service deficiency. The result of Town & Country’s arguments would be a scenario in which no one project would independently cause a level of service failure, and therefore no mitigation at all could be required,

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<sup>45</sup> This was the “centerpiece” of T&C’s argument below. RP 4/08/09 at 21: 14-22.

<sup>46</sup> “No, we don’t have a case directly on point with this . . . .” RP 4/10/09 at 36-37 (emphasis added).

and that is not the statutes' intent.

CP 410-11.<sup>47</sup>

In addition to the logic of Judge Felnagle's conclusion, T&C's argument is plainly wrong, because it equates the phrase "direct impact" as used in RCW 82.02.020 with "sole impact," contradicting the statute's plain meaning. Webster's Online English Dictionary defines "direct" as "Direct in spatial dimensions; proceeding without deviation or interruption; straight and short; "a direct route"; "a direct flight"; "a direct hit"."<sup>48</sup> Thus, "direct" as used in RCW 82.02.020 with respect to traffic impacts means that the impacts can be traced directly from the proposed project to the affected location, as opposed to being indirect impacts diffused circuitously throughout the city. "Direct" in this context does not mean "sole." When understood this way, it is clear that the Tacoma MDNS' traffic mitigation complies with RCW 82.02.020: the mitigation was imposed only for traffic impacts directly traceable (with the help of the TIA's modeling and analysis) directly from the Scarsella Plat to the affected intersections and arterial corridor in Federal Way.

Given all of the foregoing, this Court should affirm Judge Felnagle's conclusion that, in determining that the Tacoma MDNS

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<sup>47</sup> Conclusions, Judgment and Order at Concl. 9 (emphasis added).

<sup>48</sup> <http://www.websters-online-dictionary.org/definition/direct>.

condition violated RCW 82.02.020, the Examiner's Decision (R. 112, Finding 18 and R. 123-25, Concl. 16-18) were not supported by substantial evidence, were an erroneous interpretation of the law, and were a clearly erroneous application of the law to the facts.

D. The Examiner's Decision Erroneously Concluded That the Scarsella Plat's Impacts Were "Insignificant."

The Examiner's Decision (Concl. 17) also erroneously concluded that the Scarsella Plat's traffic impacts were "insignificant." R. 125. This was an erroneous interpretation of the law (the State Environmental Policy Act, RCW 43.21C), and a clearly erroneous application of the law to the facts.

The source for Tacoma's legal authority to require traffic mitigation is SEPA, RCW 43.21C. This is the case regardless of whether mitigation is also subject to the overarching legal requirement of RCW 82.02.020, because that statute does not provide independent authority for imposition of a mitigation fee.<sup>49</sup> Under SEPA a "threshold environmental determination" is made by the responsible official on proposed

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<sup>49</sup> See, e.g., *Castle Homes v. Brier*, 76 Wn. App. 95, 105, 882 P.2d 1172 (Div. I 1994) and *Cobb v. Snohomish County*, 64 Wn. App. 451, 462-63, 829 P.2d 169 (Div. I 1991). RCW 82.02.020 is "not an enabling statute" but rather a "taxing statute" that includes an exception to allow a local government to enter into an agreement to pay a fee "as an alternative to dedicating land or complying with a mitigation requirement which that government may impose as a result of authority granted by another statute." which includes SEPA. *Cobb*, at 462-63 (Agid, J., concurring and dissenting) (emphasis added).

development projects. TMC 13.12.004 (adopting WAC 197-11-310). This “threshold determination” decides whether a proposed project has a significant adverse environmental impact requiring an environmental impact statement (“EIS”). *Id.* (adopting WAC 197-11-300(2)). If an EIS is not required, the official may issue either a determination of nonsignificance (“DNS”) or a Mitigated Determination of Nonsignificance (“MDNS”). TMC 13.12.340; TMC 13.12.350; WAC 197-11-350. The MDNS provides the mitigation measures the applicant must take to mitigate an expected significant, adverse environmental impact. TMC 13.12.350. Ultimately, conditions in an MDNS may be imposed over an applicant’s objection. *Levine v. Jefferson County*, 116 Wn.2d 575, 578, 807 P.2d 353 (1991).

Here, Judge Felngale correctly reversed the Examiner’s Decision for wrongly concluding that the traffic impacts that would result from the Scarsella Plat were *per se* insignificant. In so concluding, the Examiner had failed to acknowledge that SEPA allows mitigation to be required for impacts that are part of a significant, cumulative impact, as the LOS failures here are. As Judge Felngale concluded, the Scarsella Plat traffic impacts are:

part of a major cumulative impact in the form of level of service failures at the 21<sup>st</sup> / 336<sup>th</sup> intersection and the 336<sup>th</sup> / 340<sup>th</sup> Street arterial corridor. Such a level of service failure

is a significant impact for SEPA purposes, as was conceded by all parties here.

CP 410 (Concl. 8) (emphasis added). This Court should affirm.

1. Cumulative Impacts are Subject to Mitigation Under SEPA.

SEPA's meaning is supplemented by the SEPA "Model Rules" adopted by the Department of Ecology and codified at WAC Ch. 197-11. Those Rules expressly provide that cumulative impacts are significant impacts.<sup>50</sup> They were adopted in recognition of long-established precedent (cited in Judge Felnagle's decision<sup>51</sup>) holding that SEPA provides the basis for requiring mitigation or even project denial if the project will have cumulative impacts, in the form of an accumulation of several, smaller impacts. *Hayes v. Yount*, 87 Wn.2d 280, 287-88, 552 P.2d 1038 (1976).<sup>52</sup> Where the overall, cumulative impact is significant, it is immaterial that a project's individual impact may be insignificant:

In addition, the finding of insignificant environmental effect and the Board's conclusion are in no way inconsistent. Logic and common sense suggest that

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<sup>50</sup> See WAC 197-11-330(3)(c) (Responsible official shall take into account that "Several marginal impacts when considered together may result in a significant adverse impact" (emphasis added).

<sup>51</sup> CP 410 (Conclusions of Law, Order and Judgment at Concl. 9).

<sup>52</sup> See also *Tucker v. Columbia Gorge Commission*, 73 Wn. App. 74, 867 P.2d 686 (Div. II 1994); *Norway Hill Preservation and Protection Assoc v. King County*, 87 Wn.2d 267, 277, 552 P.2d 674 (1976) (consideration of significant impacts must include "the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area") (emphasis added); *Narrowsview Preservation Ass'n v. Tacoma*, 84 Wn.2d 416, 423, 526 P.2d 897 (1974) (same).

numerous projects, each having no significant effect individually, may well have very significant effects when taken together.

*Hayes*, 87 Wn.2d at 287-88 (emphasis added). In *Hayes*, the Supreme Court upheld a denial of a shoreline substantial development permit for a permit that authorized filling of wetlands in the Snohomish River estuary. The Shorelines Hearings Board had concluded that the ecological impact of the proposed fill would be “insignificant,” but that “the cumulative effect of other such developments would cause irreversible damage to the ecosystem of the estuary at some unknown and unpredictable stage of development.” The Board therefore denied the permit. After a trial court reversal, the Supreme Court upheld the Board’s decision, noting that both SEPA and the Shoreline Management Act required consideration of cumulative impacts, and that “[t]his concept of cumulative environmental harm has received legislative and judicial recognition.” *Id.* at 288 (emphasis added).

Below, T&C did not cite, let alone distinguish, *Hayes* or *Tucker*, but relied instead on *Boehm v. City of Vancouver*, 111 Wn. App. 711, 47 P.3d 137 (Div. II 2002). CP 360 (T&C Response Brief at 15, n.58). *Boehm*’s holding cited by T&C, however, merely states the limits on when an agency can be required to perform a cumulative impacts analysis, based

on whether a project has been properly “phased.”<sup>53</sup> *Boehm* does not hold that cumulative impacts do not also include the aggregation of several, smaller impacts; indeed, *Boehm* itself cites *Norway Hill* and quotes WAC 197-11-330(3)(c) to the effect that “several marginal impacts when considered together may result in a significant adverse impact.” *Boehm*, 111 Wn. App. at 717, n.1. And, in *Boehm*, this Court expressly approved of Vancouver’s requirement of mitigation for exactly the type of cumulative impacts at issue here: the City required mitigation (all-way stop controls) after evidence showed that “due to pre-existing deficiencies” an intersection near the project would have a failing level of service after construction of the gas station. *Id.* at 721 (emphasis added). *Boehm* does not support T&C.

Here, like *Hayes*, “cumulative impacts” in the form of level of service failures result from the aggregation of impacts from several different new development proposals, including the Scarsella Plat as well as other projects in the “pipeline.” Unlike *Hayes*, the cumulative impact of the failure of Federal Way intersection levels of service will not occur at some “unknown and unpredictable stage of development,” but rather in the horizon year unless the TIP projects are built. This is a significant,

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<sup>53</sup> *Boehm*, 111 Wn. App. at 720-21 (discussing phasing and *SEAPC v. Cammack Orchards II*, 49 Wn. App. 609, 614-15, 744 P.2d 1101 (1987)).

cumulative impact for which Tacoma's MDNS appropriately required mitigation.<sup>54</sup> Judge Felnagle correctly recognized this as a cumulative impact requiring mitigation. CP 410 (Conclusions of Law, Order and Judgment at Concl. 8-9). This Court should affirm.

2. The Scarsella Plat Impacts are Legally Significant.

In addition to its failure to acknowledge that cumulative impacts may be considered "significant" impacts under SEPA, the Examiner's Decision also erred by failing to apply the applicable SEPA Rules for determining when an impact is "significant." Indeed, the Hearing Examiner's Decision cites no legal authority whatsoever for its conclusion that the Scarsella Plat impacts are "insignificant." R 125 (Decision at Concl. 17). The SEPA Rules, however, prescribe a definition and process for determining "significance." Under WAC 197-11-794, "'Significant' as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental quality." As the Rule continues:

Significance involves context and intensity (WAC 197-11-330) and does not lend itself to a formula or quantifiable test. The context may vary with the physical setting. Intensity depends on the magnitude and duration of an impact.

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<sup>54</sup> As Mr. Perez testified, it does not matter whether the Scarsella Plat alone will cause the level of service to fail; instead, the important consideration is "that it fails, and that the [Scarsella] project will impact these locations adversely." Tr. 7/11/08 at 273: 1-2.

WAC 197-11-794(2). Further, pursuant to WAC 197-11-794(3), “WAC 197-11-330 specifies a process, including criteria and procedures, for determining whether a proposal is likely to have a significant adverse environmental impact.” Here, that process culminated in Tacoma’s MDNS condition requiring T&C to pay traffic mitigation.

The Hearing Examiner did not even attempt to apply these legal standards for measuring “significance” to the record. Instead, despite the command of WAC 197-11-794(2), the Examiner attempted to utilize but a single quantifiable measure – the ratio of Scarsella Plat trips to total trips using the intersection and corridor. By contrast, Judge Felnagle applied the applicable legal standard to the record:

Substantial evidence shows that the traffic impacts of the Scarsella Plat are quantifiable, concentrated, consistent and re-occurring, certain to result, and part of a major cumulative impact in the form of level of service failures at the 21<sup>st</sup> / 336<sup>th</sup> intersection and the 336<sup>th</sup> / 340<sup>th</sup> Street arterial corridor. Such a level of service failure is a significant impact for SEPA purposes, as was conceded by all parties here.

CP 412 (Conclusions of Law, Order and Judgment at Concl. 8) (emphasis added).

Other evidence supports Judge Felnagle’s decision. First, although the Examiner’s Decision concluded that the percentage of Scarsella Plat traffic trips was simply too small to warrant mitigation (R 125; Decision at

Concl. 17), T&C's own expert prepared a traffic analysis on a different project (Wynstone), and concluded that percentages comparable to the Scarsella Plat's justified traffic mitigation for the Wynstone Plat.<sup>55</sup>

Second, the Examiner's conclusion that the percentage of new trips was "insignificant" was simply illogical, as Judge Felnagle noted:

And, to a certain degree, Town & Country, I believe, was hoisted on its own petard when they talk about the proportion being too small. It is small in relation to the whole project or the whole total impact and the need to mitigate the whole thing. It is, however, a significant amount of money to them. So, how can they suggest that the end result is not one of significance when the share they are asked to contribute has been shown to be proportionate? In other words, if a proportionate amount of money is significant, why isn't their proportionate impact, which is a component of that calculation, also significant?

RP 4/10/09 at 65-66 (emphasis added). Taking Judge Felnagle's approach one step further, consider a situation in which the total vehicle volumes at an affected intersection are 10,000 vehicles per hour. A project contributing a 1% increase in traffic would send an additional 1,000 cars per hour through the intersection but, using the Examiner's logic, this percentage would be "insignificant." The Examiner Decision's conclusion was simply an erroneous interpretation of the law, and a clearly erroneous application of the law to the facts, and Judge Felnagle's reversal

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<sup>55</sup> See, e.g., Tr. 7/11/08 at 82-84 (C. Brown testimony); at 278 (Perez testimony); see also R 881-884 (C. Brown Wynstone TIA).

of it should be affirmed.

## V. CONCLUSION

The Hearing Examiner's Decisions below are fundamentally flawed. They are not only unsupported by any precedent or the text of RCW 82.02.020, they are contradicted by decades-old decisions holding that the fact that a new project will add traffic to already-deficient streets or parks does not excuse the developer from mitigating its cumulative impacts. If allowed to stand, the Decisions will result in "death by a thousand cuts;"<sup>56</sup> most development will be excused from mitigating its impacts, and cities "would quickly be unable to sustain any kind of attempt to manage congestion." Tr. 7/11/08 at 257: 23-24; at 258: 7-11.

For all of the foregoing reasons, this Court should affirm the reversal of the Hearing Examiner's Decisions, and affirm the MDNS traffic mitigation fee condition.

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<sup>56</sup> Tr. 7/11/08 at 257: 23-24.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of March, 2010.

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NO. 39407-3-II

IN THE COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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*CITY OF FEDERAL WAY*, a Washington municipal corporation

Petitioner/Respondent,

vs.

*TOWN & COUNTRY REAL ESTATE, LLC*, a Washington limited liability company; *FRANK A SCARSELLA*, taxpayer; *EMIL P. SCARSELLA*, taxpayer, and the *CITY OF TACOMA*, a Washington municipal corporation,

Respondents/Appellants.

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APPENDIX TO OPENING BRIEF OF PETITIONER/RESPONDENT  
CITY OF FEDERAL WAY

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Appendix A	Verbatim Transcript of Proceedings April 8, 2009, pp. 4, 21 - 25 .....	A
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## **APPENDIX A**

1 Federal Way. I think what we contemplated is that we  
2 would both provide argument, although I think Mr. Greene  
3 has indicated that his argument would be relatively brief  
4 and that the Court would hear, for the most part, from  
5 Federal Way.

6 THE COURT: Okay, because we have to pretty  
7 much stick to the timelines I have outlined. If you go  
8 three half hours, we are going to be pushing up against  
9 the time we've got allotted. So, with the idea that it  
10 will be two one-half hours and then whatever Mr. Greene  
11 wants to add, we can probably get it done.

12 Now, I did also invite you to make any  
13 preliminary comments this morning to kind of help focus  
14 the direction of this. I have started reading the  
15 briefings, and I haven't even finished that yet, so with  
16 that in mind, I will let the petitioners say anything they  
17 want as far as kind of getting us started.

18 MR. STERBANK: Thank you, Your Honor. Again,  
19 for the record, Bob Sterbank for the petitioner, Federal  
20 Way.

21 Since the Court has begun reading the briefs,  
22 you know this case involves review of a hearing examiner  
23 decision concerning mitigation for a proposed plat, the  
24 Scarsella plat, a 51-lot subdivision in Northeast Tacoma.  
25 There are some maps in the record that our brief should

1 to demonstrate that there was this direct impact as a  
2 consequence of development. And of course, they are the  
3 appellant here, so they are the ones, under LUPA, as well,  
4 they are the ones that have to demonstrate that.

5 If the Examiner thinks it's a close question,  
6 then I think the -- I'm sorry -- the Court must affirm the  
7 Examiner if it believes the Examiner's decision was pretty  
8 close to right or it might be right, but it might not,  
9 that would be insufficient. The Court needs to be  
10 convinced that a mistake was made, and that's the definite  
11 and firm conviction, so we are distinguishing cumulative  
12 impact analysis from what's required to show that direct  
13 impact analysis, and that was not in the record.

14 THE COURT: Are you advancing still the idea  
15 raised apparently by the Hearing Examiner that it's only  
16 the impact that tilts -- I guess the straw that breaks the  
17 camel's back sort of argument? Is that one that you are  
18 adhering to?

19 MR. WILSON: Yes, Your Honor, that if the  
20 addition of just this much traffic from this Scarsella  
21 plat would have caused that level of service to fail, then  
22 they could be tagged for this mitigation under SEPA.

23 Now, again, this does not leave Federal Way  
24 without a remedy. There is a way to exact private  
25 contributions, and that's through GMA impact fees. That's

1 why the Legislature has adopted this entirely alternate  
2 form of raising money. Tacoma and Federal Way could enter  
3 into an interlocal agreement whereby Tacoma could levy  
4 Federal Way's GMA impact fees, and that wasn't done in  
5 this case. Instead, they chose to use the blunt  
6 instrument of SEPA to get that mitigation, but they don't  
7 pass the test of SEPA, which does require that higher  
8 standard of a specific adverse identified impact, as does  
9 020. So, there's a way, but that wasn't followed here.

10 THE COURT: Are you also adhering to the  
11 argument that, because they've anticipated failure, that  
12 they're no longer able to exact fees?

13 MR. WILSON: No, Your Honor. Simply because  
14 they have done the planning they should have done with the  
15 capital improvement program, that's fine, but if they want  
16 to use SEPA, they have to disregard that mitigation and  
17 show that this plat will cause that adverse impact. If  
18 it's going to happen anyway, then that is not an impact of  
19 this plat. They can get there another way under impact  
20 fees.

21 I do want to note that Federal Way asserts  
22 that Town & Country 's arguments of SEPA violations were  
23 not raised below and were not the basis of the Examiner's  
24 decision, and since we didn't cross-appeal, the Court  
25 can't consider them. I believe that is erroneous. We did

1 raise -- argue the SEPA grounds to the Examiner, and the  
2 Examiner did rule that Tacoma's SEPA condition violated  
3 SEPA in his Conclusions of Law.

4 But, even if we hadn't raised those issues  
5 below, the Court is sitting in an appellate capacity in  
6 land use cases. Federal Way, itself, recognizes, since  
7 you are reviewing the record below, you can affirm on any  
8 ground adequate to sustain it, so the arguments that we  
9 advance here -- whether or not the Examiner ruled  
10 correctly in all instances should not bar the Court from  
11 affirming.

12 For example, the Examiner ruled that part of  
13 what Federal Way and Tacoma did violated section 090 of  
14 82.02. That's the GMA impact section. That does not  
15 apply here, but that is, again, harmless error, because  
16 the Court can affirm on any ground.

17 I think Mr. Sterbank has identified most of  
18 the authority the Court needs to focus on. The Castle  
19 Homes case. He did not mention the Isla Verde case, which  
20 is a crucial case there, because that establishes, again,  
21 that if there's an impact fee under Section 020, that it  
22 needs to be a specific identified impact of development.

23 The Sparks vs. Douglas County, and the recent  
24 Sims case on the King County areas ordinance are all  
25 important cases. The Sims case does recognize that a

1 determination of rough proportionality is part of the  
2 analysis under 82.02.020.

3 Mr. Sterbank and I have a disagreement as to  
4 whether or not the nexus/rough proportionality analysis  
5 factors in to fee cases as well as dedication of land  
6 cases.

7 THE COURT: Are there any cases that suggest  
8 it does factor in to fee cases?

9 MR. WILSON: Yes, Your Honor. The Sims case,  
10 in particular, goes to that rough proportionality  
11 analysis. The Sims case, Isla Verde case recognized that  
12 -- either way, fees or dedications, fees in lieu of, it's  
13 all part of the same thing. It's an exaction, and if it's  
14 under 020, you can't levy that tax fee or charge unless it  
15 falls into one of those statutory exceptions, and  
16 therefore, we believe that is an appropriate analysis.

17 The Sims case, of course, petition for review  
18 was filed with Supreme Court. Review was denied. Supreme  
19 Court had an opportunity to visit that argument if they  
20 wanted to and did not.

21 So, we believe that there is authority out  
22 there. Proper reading of the case is that rough  
23 proportionality is an issue here, and I think that's  
24 important for the Court whether it's characterized as  
25 rough proportionality or SEPA's requirement that

1 mitigation be reasonable. It goes to the same thing.

2 Is \$250,000 an appropriate mitigation for a  
3 plat that will contribute one half of 1 percent to one  
4 Federal Way intersection at the peak hour and 1.2 percent  
5 to the other intersection, an intersection that will carry  
6 thousands and thousands of vehicles? Should it be tagged  
7 for a quarter of a million dollars? Mr. Sterbank says,  
8 well, that's simply the way the chips fall. It's a large  
9 number, and so the Scarsella proportion of that is  
10 inherently large. That is what reasonable goes to. That  
11 is what rough proportionality goes to.

12 There is an equitable element. Is it fair  
13 given the impact in the case? That's what the Court needs  
14 to look at. Given this impact, this cumulative impact  
15 where levels of service will not be affected by this plat  
16 one way or the other, is it fair to tag this plat for that  
17 share when Federal Way does have another avenue of GMA  
18 impact fees available to it, to obtain private dollars for  
19 contributions toward its future programs.

20 THE COURT: I'm sure you answered this in the  
21 brief, but what do you do if there is a hundred small  
22 impacts, none of which can be shown to be the decisive  
23 one? Is government then bound not to exact any impacts  
24 because no single impact is sufficient?

25 MR. WILSON: Your Honor, that's precisely why

## **APPENDIX B**

1 preliminary matter, the Court should give little weight to  
2 Tacoma's arguments in this matter. Tacoma is respondent  
3 here. It had the right to appeal its own examiner's  
4 decision as an appellant in LUPA. It did not. It is only  
5 Federal Way that did, and it is, therefore, I think,  
6 inappropriate for Tacoma to attempt to circumvent the  
7 21-day Statute of Limitations in LUPA by now tailgating on  
8 Federal Way. That is somewhat a sideshow issue, but I  
9 note for the record that I think it's Federal Way's  
10 arguments that should be properly entertained by the  
11 Court.

12           The essential facts, I believe, highlight the  
13 unfairness, the unreasonableness of what Federal Way and  
14 Tacoma have attempted to do here. Under Federal Way's own  
15 traffic analysis, we have a 51-lot subdivision. Two of  
16 the houses in it will remain, so we've got 49 new homes,  
17 and based on the peak-hour trips from those 49 homes, we  
18 will have one half of one percent affecting one of the two  
19 intersections that Federal Way wants mitigation for, and  
20 1.2 percent of the other. That's 27 out of 4,945 trips  
21 for the first one -- almost 5,000 -- and 27 out of 2,263  
22 trips for the other. A very, very small percentage.

23           It is our contention that the City failed to  
24 make the individualized determination that it was required  
25 to make under SEPA and under 82.02 showing that it is this

1 impact of this plat that has the direct result of causing  
2 a level of service failure that would justify that kind of  
3 mitigation.

4 THE COURT: Now, where do you find the  
5 authority for the idea that they have to show that it's  
6 this project that would cause this failure?

7 MR. WILSON: It would be the language of  
8 "direct result" in 82.02 that it must --

9 THE COURT: The caselaw that carries that  
10 concept of direct result to the extreme you would carry it  
11 is found where?

12 MR. WILSON: Well, the Court characterizes it  
13 as extreme, but I believe that it can be found in reading  
14 together SEPA and 82.02. We do know from the caselaw that  
15 the real authority for imposing litigation under 82.02.020  
16 is SEPA. The SEPA rules note, under the definition of  
17 "significant," that impacts are direct, indirect, or  
18 cumulative. 82.02 uses the word "direct." It does not  
19 say an indirect or cumulative impact. It must be a direct  
20 impact.

21 And I, therefore, contend that, no, we don't  
22 have a case directly on point with this, but unless you  
23 can show, as the Court asked on Wednesday, that this is  
24 the straw that breaks the camel's back, there is not the  
25 showing of that direct impact that is required.

## **APPENDIX C**

1 197-11-060 -- which does not apply just to EISes, but to  
2 all environmental analysis -- in section 060 sub (4) (d),  
3 it's noted that impacts include those effects resulting  
4 from growth caused by a proposal, which would be the trips  
5 from the Scarsella plat, as well as the likelihood that  
6 the present proposal will serve as a precedent for future  
7 actions.

8 That's the kind of cumulative impact that's  
9 truly at issue, so I don't think the Court should be  
10 misled into assuming that cumulative impacts is Scarsella,  
11 as a result, tagging onto everything that's gone before.  
12 It has to be prospective in nature.

13 THE COURT: Thank you. This is always  
14 challenging for me for a couple of reasons. One, it's  
15 very intense and in an area that I don't particularly  
16 specialize in, so I thank you for your excellent briefing  
17 and your arguments.

18 I am going to rule right now, and I want to  
19 say a couple of things about that. Don't assume, because  
20 of that, that I am giving this short shrift or I just am  
21 doing this off the seat of my pants. My staff will tell  
22 you I have been locked away for the last couple of days  
23 doing nothing but this. It may not show in my analysis,  
24 but nonetheless, I have given it considerable attention.

25 I am going to be on recess for a week, so I

1 don't function well when I let things sit, so that's why I  
2 will rule now, even though it may not be as organized as I  
3 would like it to be, or as coherent or articulate as I'd  
4 like it to be, but you will at least get the bottom line,  
5 if nothing else.

6 The first thing I wanted to address was the  
7 argument that Town & Country makes that the SEPA  
8 requirements weren't met, that there wasn't shown a  
9 specific adverse impact identified in an environmental  
10 document. The City responds that SEPA was not even  
11 addressed by the Hearing Examiner so there's no basis to  
12 appeal that, but even if you do consider the requirements  
13 of SEPA, I do find that they were met.

14 It's clearly an issue covered by SEPA. I  
15 don't think anyone suggests that transportation and  
16 traffic impacts are not a SEPA issue, and there is  
17 adequate impact identified in the documents to get you by  
18 the SEPA requirements, so this shouldn't be stricken  
19 outright because SEPA wasn't appropriately raised.

20 The next thing I want to address is this  
21 question of nexus and proportionality from City of Olympia  
22 vs. Drebeck. You know, there's a question of whether  
23 nexus and rough proportionality apply or don't apply.  
24 Clearly, it's not been applied yet. The City emphasizes  
25 the fact, well, it's not been applied and, therefore, it's

1 not going to be applied and you need to consider that it's  
2 not a requirement.

3 Mr. Wilson points out that what they are  
4 saying is it hasn't really been addressed yet and,  
5 therefore, it's an open question.

6 I do find instructive a couple of things out  
7 of the City of Olympia vs. Drebeck, not the least of which  
8 is their finding that SEPA has differing requirements to  
9 it and that it requires mitigation of specific adverse  
10 environmental impacts. So, to me, some degree of nexus  
11 and proportionality is going to be required. I reject the  
12 idea that the City raises that, once you've found the  
13 appropriate impact, the proportionate amount is not really  
14 at issue.

15 There's going to be some requirement, and I  
16 don't pretend to know where to draw the line exactly, nor  
17 do I think the cases require one to draw the line exactly,  
18 but the real question here is, has there been a showing of  
19 a relationship and proportionality to the degree that the  
20 cases seem to suggest is required.

21 For that, we have to turn to what the Hearing  
22 Examiner determined, and the Hearing Examiner started with  
23 the idea that the calculations of trip distributions were  
24 appropriate. He found, I believe, that the trips  
25 appropriately projected to specific sites. So, the key

1 becomes his Finding of Fact 18, which reads, "Federal Way,  
2 in its analysis of the traffic distribution of peak-hour  
3 vehicle trips expected to be generated by Town & Country's  
4 proposed subdivision, did not develop information on the  
5 two TIPS for 2009 horizon year 'without the project.'  
6 Thus, Federal Way did not actually determine the specific  
7 impact of the proposed subdivision alone since it is  
8 'lumped' into all trips expected to be using the two  
9 street facilities at the 2009 horizon year." And he cites  
10 to the Perez testimony on cross-examination. That's one  
11 of the critical things that needs to be examined in some  
12 detail.

13 The requirements, then, are somewhat in doubt,  
14 and I think you have to look to the caselaw to determine  
15 what is required to show this specific impact. And Town &  
16 Country suggests in their brief that the controlling  
17 caselaw authority should be principally Isla Verde, Sims,  
18 and Castle Homes, so I think we need to look at those  
19 three cases a little more closely to see if the Hearing  
20 Examiner was right as to his concerns about the defects in  
21 the showing.

22 And I look first at Sims, and in the Sims  
23 case, there was a set-aside of land, which, of course, is  
24 different than our case. And Sims indicates that there  
25 needs to be an individualized determination of the impact.

1 But, the distinction between our case and Sims is that,  
2 unlike the ordinance in Sims, the City in our case did  
3 show both an impact and a calculated proportion of the  
4 impact to the total need to mitigate.

5 So, there was, in our case, the specifics that  
6 Sims lacked, so I don't think Sims answers the question in  
7 the way that Town & Country would like it answered.

8 When you look at Isla Verde, it also required  
9 a set-aside of open space, and it particularly cited to  
10 Trimen as a case that was distinguished from Isla Verde.  
11 And they said that, in Trimen, there was the appropriate  
12 showing. They said what was appropriately shown in Trimen  
13 was, one, that they had projected population from the  
14 subdivision, and it seemed to me that, in our case, we had  
15 a showing of projected traffic trips, which was, in my  
16 opinion, the equivalent or near equivalent of the  
17 projected populations that would come from the  
18 subdivisions.

19 And then, second, Trimen indicated that there  
20 was a showing of fees based on value of the land needed to  
21 be set aside, and our case has a showing of the cost of  
22 traffic mitigation, which to me, again, is the equivalent  
23 or at least rough equivalent of the value of the land  
24 needed to be set aside.

25 So, it looks to me like our case lines up more

1 with Trimen, which was actually set up in Isla Verde as an  
2 example of how to do it right, as opposed to the defects  
3 in the Isla Verde case, itself. So, the bottom line is  
4 that, under Isla Verde, the City's case would have failed  
5 had they not shown the specific impacts by way of the  
6 number of trips.

7 And in like fashion, Castle Verde (sic), which  
8 is, in my opinion, the closest case factually to ours, the  
9 mitigation of the traffic impact was computed on a fair  
10 share basis, meaning that each lot was assessed a dollar  
11 amount due to the cumulative effects of all of the  
12 development. And the key there was that the court said  
13 that the defect was the failure to utilize traffic  
14 distribution analysis, which we have in our case.

15 So, again, while Castle Verde didn't find in  
16 favor of the governmental entity's position, it did give  
17 us a roadmap for what needs to be shown, and it appears it  
18 was shown in this particular case.

19 MR. WILSON: Excuse me, Your Honor. Sorry to  
20 interrupt. Are you talking about the Castle Homes case?

21 THE COURT: Castle Homes. I'm saying Castle  
22 Verde. Yes, Castle Homes, I'm sorry.

23 Now, the two specific points in addition  
24 raised by the Hearing Examiner were that his concern was  
25 the level of service was going to reach failure with or

1 without the development, it wasn't shown that the project  
2 caused the failure, and this is what Mr. Wilson has been  
3 arguing today. But, as the City has pointed out, there's  
4 really no caselaw that suggests this cumulative effects  
5 analysis, which the City is advancing, is not appropriate.

6 And the end result, as we've talked about on a  
7 number of occasions, if you follow Town & Country's line  
8 of argument, is that no one project may cause the failure,  
9 and thus, no mitigation could be recovered at all, and  
10 that can't be the intent of the statutory scheme.

11 The next thing that the Hearing Examiner talks  
12 about is that there was no showing of the impact without  
13 the project, and again, Mr. Wilson has argued this, and  
14 thus, no showing of any direct impact by the project.

15 The defect the Hearing Examiner found was that  
16 all the projects were lumped together to produce an  
17 ultimate impact, but again, I don't see that as being the  
18 case, because by showing the specific number of increased  
19 vehicle trips, you know what the effect of both with or  
20 without the project is. I still wonder what it is that  
21 the City could have shown or that Mr. Perez could have  
22 shown through his analysis that would have made more clear  
23 what the effect was with or without the project. So, I  
24 don't find that either of those two premises by the  
25 Hearing Examiner are appropriate.

1           The last one is probably the most troublesome,  
2           and that is the Hearing Examiner's indication that the  
3           impact is not shown to be significant. And we have thrown  
4           around here what needs to be shown for significance and  
5           what doesn't need to be shown for significance. And  
6           rather than try and articulate a test, I will tell you  
7           what I think was shown which convinces me that the impact  
8           was significant and that the Hearing Examiner is wrong.

9           The impact has been shown to be quantifiable,  
10          concentrated, consistent, and reoccurring, almost certain,  
11          if not certain, to result in part of a major cumulative  
12          effect. I think all of those things, taken together, are  
13          considerations in determining significance or  
14          non-significance, and they all lean towards significance.

15          And to a certain degree, Town & Country, I  
16          believe, was hoisted on their own petard when they talk  
17          about the proportion being so small. It is small in  
18          relation to the whole project or the whole total impact  
19          and the need to mitigate the whole thing. It is, however,  
20          a significant amount of money to them. So, how can they  
21          suggest that the end result is not one of significance  
22          when the share that they are asked to contribute has been  
23          shown to be proportionate? In other words, if their  
24          proportionate amount of money is significant, why isn't  
25          their proportionate impact, which is a component of that

1 calculation, also significant?

2 Taking all these things together, I find that  
3 the Hearing Examiner was mistaken in those three areas  
4 that I have indicated. I am prepared to reverse the  
5 Hearing Examiner and affirm the mitigated determination of  
6 non-significance.

7 MR. STERBANK: Thank you, Your Honor. Given  
8 the timing of your imminent recess, what would the Court  
9 like in the way of presentation of the order?

10 THE COURT: I am gone for a week, so you can  
11 note it at your convenience for whenever --

12 MR. STERBANK: When you have returned?

13 THE COURT: Yes. And I don't know that  
14 there's going to be a need for a great deal of argument,  
15 so I would say just note it on the motion docket for a  
16 Friday morning.

17 MR. STERBANK: Okay. We, of course, will do  
18 our best to avoid the need for argument, if that can be  
19 accomplished.

20 THE COURT: Okay. Anything more we need to  
21 address this afternoon?

22 MR. STERBANK: Not from the City of Federal  
23 Way.

24 THE COURT: Okay. If not, and nothing from  
25 Town & Country, we are adjourned.

## **APPENDIX D**



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Honorable Thomas F. Lehagle  
DEPT. 15  
IN OPEN COURT  
MAY 18 2009  
Pierce County Clerk  
By *[Signature]*  
Deputy

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

CITY OF FEDERAL WAY, a Washington  
municipal corporation,

Petitioner,

vs.

TOWN & COUNTRY REAL ESTATE,  
LLC, a Washington limited liability  
corporation; FRANK A. SCARSELLA,  
taxpayer; EMIL P. SCARSELLA, taxpayer;  
and the CITY OF TACOMA, a Washington  
municipal corporation,

Respondents.

NO. 08-2-14874-8

CONCLUSIONS OF LAW,  
ORDER AND JUDGMENT  
GRANTING LAND USE  
PETITION

[PROPOSED]

I. JUDGMENT SUMMARY

- |                                     |  |
|-------------------------------------|--|
| 1. Judgment Creditor:               | City of Federal Way  |
| 2. Judgment Debtor:                 | Town & Country Real Estate, LLC;<br>Frank A. Scarsella; and Emil P.<br>Scarsella |
| 3. Total Judgment:                  | \$3,801.95   |
| 4. Judgment Interest Rate:          | 12 percent per annum   |
| 5. Attorneys for Judgment Creditor: | Bob Sterbank and Kenyon Disend,<br>PLLC  |
| 6. Attorneys for Judgment Debtor:   | Richard R. Wilson and Hillis Clark<br>Martin & Peterson PS                       |

This matter came before the Court on Federal Way's Land Use Petition pursuant to Chapter 36.70C RCW. The Land Use Petition challenged the Tacoma Hearing

CONCLUSIONS OF LAW, ORDER AND JUDGMENT  
GRANTING LAND USE PETITION - 1  
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Judgment and Order - Revised Final.doc\SAL\05/14/09

**ORIGINAL**

KENYON DISEND, PLLC  
THE MUNICIPAL LAW FIRM  
11 FRONT STREET SOUTH  
ISSAQUAH, WASHINGTON 98027-3820  
(425) 392-7090 FAX (425) 392-7071

1 Examiner's Findings of Fact, Conclusions of Law and Decision dated September 5, 2008  
 2 ("Initial Decision"), and the Order Granting in Part and Denying in Part Motions for  
 3 Reconsideration, Amending Conclusions of Law and Decisions, dated October 29, 2008  
 4 ("Reconsideration Decision"). The Court reviewed the pleadings and court files in this  
 5 matter, reviewed the record certified by the City of Tacoma and the transcript prepared  
 6 by the City of Federal Way, heard oral argument of the parties on April 8 and April 10,  
 7 2009 and, being fully advised in the premises, does hereby enter the following:

## 8 II. CONCLUSIONS OF LAW

9 1. The Hearing Examiner's Findings of Fact were unchallenged and are accepted  
 10 as verities on appeal to this Court, except for Findings of Fact 16 and 18 as discussed  
 11 further below.

12 2. The City of Tacoma's Mitigated Determination of Nonsignificance (MDNS)  
 13 issued for the Scarsella Plat complied with all requirements of the State Environmental  
 14 Policy Act, RCW 43.21C (SEPA), and the Department of Ecology Model Rules  
 15 implementing SEPA and codified at WAC Chapter 197-11. The MDNS required  
 16 mitigation for specific, adverse traffic impacts that the Scarsella Plat would impose on the  
 17 intersection of 21<sup>st</sup> Avenue SW and SW 336<sup>th</sup> Street, and along the arterial street corridor  
 18 of SW 336<sup>th</sup> / SW 340<sup>th</sup> Streets between Hoyt Road and 26<sup>th</sup> Place SW within the City of  
 19 Federal Way, and those adverse traffic impacts were identified in environmental  
 20 documents, including the MDNS itself, as well as the Traffic Impact Analysis the City of  
 21 Federal Way submitted to the City of Tacoma. The mitigation required in the MDNS  
 22 was based on valid City of Tacoma SEPA policies identified in the MDNS and adopted  
 23 by the City of Tacoma, and was therefore consistent with RCW 43.21C.060 and WAC  
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197-11-660.

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3. Finding of Fact No. 18 of the Initial Decision is not supported by evidence that is substantial when viewed in light of the whole record before the court. Finding No. 18 states that Federal Way "did not develop information on the two TIPs [Transportation Improvement Program (TIP) projects] for 2009 horizon year "without the project" and, therefore, "did not actually determine the specific impact of the proposed subdivision alone since it is 'lumped' into all trips expected to be using the two street facilities at the 2009 horizon year." Substantial evidence, in the form of exhibits and testimony admitted at the hearing before the Hearing Examiner, demonstrates that Federal Way did determine the specific impact of the proposed subdivision alone, and that impact would be 27 new PM peak hour trips contributed to the 21<sup>st</sup> / 336<sup>th</sup> intersection (out of a total of 4,945), and a total of 227 new PM peak hour trips contributed to the various segments of the 336<sup>th</sup> / 340<sup>th</sup> Street arterial corridor (out of a total of 20,032). For the same reasons, the sentence in Conclusion of Law No. 17, to the effect that "Federal Way has not identified the specific impact to these street facilities resulting from Town & Country's proposed subdivision, as it has not done a 'with the project' and 'without the project' analysis," was also not supported by evidence that is substantial when viewed in light of the whole record before the court.

4. The Initial Decision's Conclusion of Law No. 16 is an erroneous interpretation of the law, and/or a clearly erroneous application of the law to the facts. Conclusion of Law No. 16 states that the MDNS' traffic mitigation requirement is contrary to RCW 82.02.020, because "Federal Way failed to establish that the required intersection and arterial corridor improvements . . . are reasonably necessary to mitigate the direct impact

1 of Town & Country's proposed 51-lot subdivision . . . or to mitigate specific  
 2 environmental impacts which are identified in environmental documents . . . ." As  
 3 support, Conclusion No. 16 states that "both TIPs to which Federal Way is seeking  
 4 contributions from Town & County, have been planned for some time by Federal Way  
 5 and well before Town & Country's subdivision was proposed," because "Federal Way  
 6 intends to proceed with the TIPs regardless of whether Town & Country proceeds with  
 7 the development of its proposed subdivision since the identified intersection and arterial  
 8 corridor are expected to achieve LOS F (failing LOS) by the 2009 horizon year."  
 9 Appellate decisions, including *Trimen v. King County*, hold that neither an existing level  
 10 of service deficiency, nor a local jurisdiction's plans to correct it, prevent a local  
 11 jurisdiction from requiring mitigation from a developer whose project contributes  
 12 additional impacts to deficiency. Respondent Town & Country conceded that the fact  
 13 that a local jurisdiction engages in planning for projects to address existing deficiencies  
 14 does not in and of itself bar a local jurisdiction from requiring mitigation from new  
 15 development to fund those projects. The rationale stated in the Initial Decision's  
 16 Conclusion No. 16 was an erroneous interpretation to the law and/or a clearly erroneous  
 17 application of the law to the facts. For these same reasons, the last sentence of Finding of  
 18 Fact No. 16 was an erroneous interpretation to the law and/or a clearly erroneous  
 19 application of the law to the facts.  
 20

21 5. The MDNS' mitigation requirement complies with RCW 82.02.020's  
 22 requirement that mitigation be reasonably necessary to mitigate the direct impact of a  
 23 proposed development. According to the cases cited by respondent Town & Country,  
 24 (*Citizens' Alliance v. Sims, Isla Verde, and Castle Homes v. Brier*), and the *Trimen* case  
 25

1 discussed by *Isla Verde* and *Sims*, RCW 82.02.020 requires a local jurisdiction to produce  
 2 a study or analysis linking the proposed development to the identified impacts and the  
 3 site where they will occur. In particular, the *Castle Homes* decision indicates that with  
 4 respect to traffic impacts, a failure to provide a trip distribution analysis demonstrating  
 5 the routes of a new development's vehicle trips can result in invalidation of required  
 6 mitigation. In this case, however, as the Hearing Examiner found, Federal Way did  
 7 provide a trip distribution analysis, and did document that new trips from the proposed  
 8 Scarsella Plat would contribute to and/or exacerbate a transportation level of service  
 9 failure at the identified intersection and arterial corridor. Federal Way's analysis was  
 10 distinguishable from the absence of analysis in *Castle Homes*, was equivalent to the  
 11 analysis the Supreme Court upheld in *Trimen*, and therefore complied with RCW  
 12 82.02.020. Statements to the contrary in Finding of Fact No. 16 and Conclusion of Law  
 13 No. 16 were not supported by substantial evidence when the record taken as a whole is  
 14 considered, were erroneous interpretations of the law and a clearly erroneous application  
 15 of the law to the facts.  
 16

17 6. The Initial Decision, Conclusion of Law No. 17, states that RCW  
 18 82.02.020 also requires a showing of "rough proportionality, based on RCW 82.02.090  
 19 and *Sims*. This was an erroneous interpretation of the law, because it mistakenly  
 20 identifies the source of the proportionality requirement. As Town & Country conceded,  
 21 RCW 82.02.090 applies only to GMA impact fees, and not to SEPA mitigation even if  
 22 imposed via a voluntary agreement subject to RCW 82.02.020. Nevertheless, because  
 23 SEPA (specifically WAC 197-11-660(1)(c) and (d)) requires that mitigation must be  
 24 reasonable and may be imposed "only to the extent attributable to the identified adverse  
 25

1 impacts” of the proposal, the mitigation required by the MDNS must be proportionally  
 2 related to the extent of the identified traffic impacts attributable to the proposed Scarsella  
 3 Plat.

4 7. Conclusion of Law No. 17 also states that Federal Way failed to make the  
 5 required showing of proportionality. This conclusion was an erroneous application of the  
 6 law to the facts. Findings of Fact Nos. 15 and 17, which were unchallenged on appeal,  
 7 show that the required mitigation of \$250,123 was proportionally related to the extent of  
 8 the identified traffic impacts, because the Scarsella Plat would contribute 1.2% and .5%  
 9 respectively of the total trips using the 21<sup>st</sup> / 336<sup>th</sup> intersection and the 336<sup>th</sup> / 340<sup>th</sup> Street  
 10 corridor, and that the \$250,123 in mitigation is 1.2% and .5% of the total estimated costs  
 11 of the TIP projects identified as being necessary to correct the anticipated level of service  
 12 failures. This proportional relationship between the amount of the required mitigation  
 13 and the number of new trips generated by the Scarsella Plat that would use the  
 14 intersection and arterial corridor in question was reasonable, and did not exceed the  
 15 extent of traffic impacts attributable to the Scarsella Plat. The Hearing Examiner’s  
 16 conclusion that proportionality was lacking, because “TIPs are required whether or not  
 17 Town & Country’s subdivision is developed,” was an erroneous application of the law to  
 18 the facts. The foregoing statement failed to recognize that individual developments such  
 19 as the Scarsella Plat have impacts that, considered as part of the cumulative impacts of  
 20 new development, create the need for transportation improvements. Likewise, the  
 21 Examiner’s conclusion in Conclusion No. 17 that the TIPs are “presumably” required as a  
 22 result of the “sins of neglect” (or the “sins of the past”) was also an erroneous application  
 23 of the law to the facts. The record demonstrated that it is new growth (including the  
 24  
 25

1 Scarsella Plat), not existing deficiencies, that will cause level of service failures and  
 2 thereby require construction of the TIP projects. Federal Way's analysis demonstrated  
 3 that, while current conditions at the two intersections are currently tolerable, both  
 4 intersections will reach a LOS "F" with the addition of projected growth including the  
 5 Scarsella Plat.

6 8. The Initial Decision's Conclusion of Law No. 17 also stated that "the  
 7 percentage of trips using the identified intersection and arterial corridor from Town &  
 8 Country's plat is insignificant." This conclusion was also an erroneous interpretation of  
 9 the law and a clearly erroneous application of the law to the facts. Substantial evidence  
 10 shows that the traffic impacts of the Scarsella Plat are quantifiable, concentrated,  
 11 consistent and re-occurring, certain to result, and part of a major cumulative impact in the  
 12 form of level of service failures at the 21<sup>st</sup> / 336<sup>th</sup> intersection and the 336<sup>th</sup> / 340<sup>th</sup> Street  
 13 arterial corridor. Such a level of service failure is a significant impact for SEPA  
 14 purposes, as was conceded by all parties here.  
 15

16 9. Appellate decisions, including the *Hayes v. Yount* and *Tucker v. Columbia*  
 17 *Gorge Commission*, establish that cumulative impacts may be considered and mitigation  
 18 for them required. Town & Country's arguments notwithstanding, there is no case law  
 19 holding that requiring mitigation for the extent of a proposed development's contribution  
 20 to cumulative, significant impacts violates either SEPA or RCW 82.02.020. The  
 21 caselaw, including *Trimen*, indicate the contrary, because they hold that a development  
 22 may be required to pay mitigation for the extent of its contribution to an existing level of  
 23 service deficiency. The result of Town & Country's arguments would be a scenario in  
 24 which no one project would independently cause a level of service failure, and therefore  
 25

1 no mitigation at all could be required, and that is not the statutes' intent.

2 10. Conclusion of Law No. 18 is an erroneous interpretation of the law, and a  
3 clearly erroneous application of the law to the facts, for the reasons discussed above.

4 11. Because the Reconsideration Decision did not correct the errors identified  
5 above, it was an erroneous interpretation of the law, and a clearly erroneous application  
6 of the law to the facts.

7 12. Because it has established that the Initial Decision and Reconsideration  
8 Decision were not supported by substantial evidence, were an erroneous interpretation of  
9 the law, and a clearly erroneous application of the law to the facts, Federal Way has met  
10 its burden under RCW 36.70C.130(1) and is therefore entitled to relief.

11 13. RCW 36.70C.110(4) provides that the costs of preparation of the record  
12 necessary for review of a land use petition shall be equitably assessed among the parties  
13 taking into account, *inter alia*, the extent to which each party prevailed. Federal Way  
14 fully prevailed on its land use petition, and is therefore entitled to be reimbursed for all of  
15 the costs it incurred in obtaining the record and preparing the transcript of the  
16 proceedings below, totaling \$3,206.95 (\$2,238.10 transcript preparation plus \$968.85  
17 record preparation and copying).

18 14. RCW 4.84.030 provides that a prevailing party in any action in superior  
19 court shall be entitled to an award of costs, which include a statutory attorney's fee, the  
20 filing fee, and service of process fees. The case of *Brown v. Seattle* holds that an award  
21 of such costs is appropriate in a Land Use Petition Act case, in addition to the record  
22 preparation costs allowable under RCW 36.70C.110(4). Federal Way is therefore entitled  
23 to an award of its costs in the amount of \$595.00 (\$200 statutory attorney's fee, \$200  
24  
25

CONCLUSIONS OF LAW, ORDER AND JUDGMENT  
GRANTING LAND USE PETITION - 8

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Judgment and Order - Revised Final.doc\SAL\05\14\09

KENYON DISEND, PLLC

THE MUNICIPAL LAW FIRM

11 FRONT STREET SOUTH

ISSAQUAH, WASHINGTON 98027-3820  
(425) 392-7090 FAX (425) 392-7071

filing fee, and \$195 service of process fee).

Based on the foregoing Conclusions of Law, it is hereby ORDERED as follows:

III. ORDER

1. The City of Federal Way's Land Use Petition is granted, and the Tacoma Hearing Examiner's Findings of Fact, Conclusions of Law and Decision dated September 5, 2008, and the Order Granting in Part and Denying in Part Motions for Reconsideration, Amending Conclusions of Law and Decisions, dated October 29, 2008, shall be and hereby are REVERSED;

2. The Mitigated Determination of Nonsignificance's requirement that Town & Country pay traffic mitigation to the City of Federal Way in the amount of \$250,123 is hereby affirmed;

3. This matter is remanded to the Tacoma Hearing Examiner pursuant to RCW 36.70C.140 for modification consistent with this Judgment and Order;

4. The City of Federal Way is hereby awarded its record preparation and statutory costs in the amount of \$3,801.95; and

5. Judgment shall be entered in favor of the City of Federal Way and against Town & Country Real Estate, LLC and Frank A. and Emil P. Scarsella consistent with the foregoing Conclusions of Law and this Order.

IV. JUDGMENT

Based on the foregoing Conclusions of Law and Order, it is hereby ADJUDGED AND DECREED as follows:

1. Judgment is hereby entered in favor of the City of Federal Way and against Town & Country Real Estate, LLC and Frank A. and Emil P. Scarsella,

1 REVERSING the Tacoma Hearing Examiner's Findings of Fact, Conclusions of Law and  
2 Decision dated September 5, 2008, and the Order Granting in Part and Denying in Part  
3 Motions for Reconsideration, Amending Conclusions of Law and Decisions, dated  
4 October 29, 2008; and AFFIRMING the Mitigated Determination of Nonsignificance's  
5 requirement that Town & Country pay traffic mitigation to the City of Federal Way in the  
6 amount of \$250,123; and

7 2. Respondents Town & Country Real Estate, LLC and Frank A. and Emil P.  
8 Scarsella shall pay to the City of Federal Way the amount of \$3,801.95 within thirty days  
9 of the date of this Judgment.

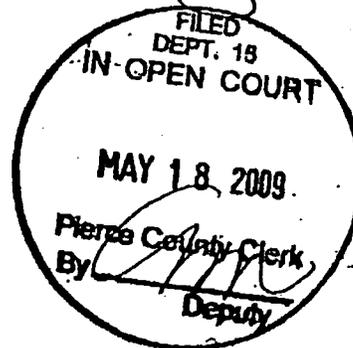
10 DONE IN OPEN COURT this 18<sup>th</sup> day of May, 2009.

11  
12   
13 \_\_\_\_\_  
14 Judge Thomas Felnagle

15 Presented by:

16 KENYON DISEND, PLLC

17 By   
18 \_\_\_\_\_  
19 Bob C. Sterbank  
20 WSBA No. 19514  
21 Attorneys for Petitioner City of  
22 Federal Way  
23  
24  
25



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Copy Received; Approved for Entry;  
And Notice of Presentation Waived:

HILLIS CLARK MARTIN &  
PETERSON PS

By *Richard R. Wilson* per email authorization for:  
Richard R. Wilson  
WSBA No. 6952  
Attorneys for Respondents Town &  
Country Real Estate and Scarsella

GORDON DERR LLP

By *Duncan M. Greene* per email authorization for:  
Duncan M. Greene  
WSBA No. 36718  
Jay Derr  
WSBA No. 12620  
Attorneys for Respondent City of  
Tacoma

## **APPENDIX E**

1  
2 **OFFICE OF THE HEARING EXAMINER**

3  
4 **CITY OF TACOMA**

5  
6 **In the Matters of:**

7 **TOWN & COUNTRY**  
8 **REAL ESTATE, LLC,**

9 **Applicant for Preliminary**  
10 **Plat Approval,**

11 **AND**

12 **TOWN & COUNTRY**  
13 **REAL ESTATE, LLC,**

14 **Appellant,**

15 **vs.**

16 **CITY OF TACOMA,**

17 **Respondent,**

18 **and**

19 **CITY OF FEDERAL WAY,**

20 **Intervenor.**

21 **File Nos. PLT2006-40000087245**  
22 **("Scarsella Plat") AND**  
23 **HEXAPL2008-00006**  
24 **(SEP2006-40000087246)**

25 **FINDINGS OF FACT,**  
26 **CONCLUSIONS OF LAW,**  
**AND DECISIONS**

**COPY**

**FINDINGS OF FACT,**  
**CONCLUSIONS OF LAW,**  
**AND DECISIONS**

**ORIGINAL**

City of Tacoma  
Office of the Hearing Examiner  
Tacoma Municipal Building  
747 Market Street, Room 720  
Tacoma, WA 98402-3768  
(253)591-5195 FAX (253)591-2003

102



1 averaging 5,601 square feet in area, with the smallest lots being 5,000 square feet. The  
2 resulting density of the proposed subdivision would be approximately 7.78 dwelling units per  
3 acre. A stormwater tract, is depicted on the preliminary plat drawing as Tract A.<sup>3</sup> Access to  
4 lots within the proposed subdivision would be provided by two public streets within the  
5 subdivision, 42<sup>nd</sup> Street NE and 50<sup>th</sup> Avenue NE, and three private access tracts, Tracts B, D,  
6 and E. A third tract, Tract C, would provide space for guest parking benefitting proposed Lots  
7 17 through 22.  
8

9  
10 3. The east boundary of the subdivision site is co-terminus with the municipal  
11 boundary between Tacoma and the City of Federal Way (Federal Way). The property is  
12 relatively flat with a slight downhill slope from the southeast to the northwest. Two homes  
13 and a detached accessory building currently are situated on the site. Those improvements  
14 would be removed to accommodate the proposed subdivision development.  
15

16 4. Single-family residential development is situated west, south, and east of the  
17 subdivision site and the Northshore Shopping Center is located to the north.  
18

19 5. Tacoma's *Comprehensive Plan* locates the subdivision site within a Tier I  
20 Primary Growth Area and applies a "Low Intensity – Single-Family Detached Housing Area"  
21 land use plan designation to the property. Tier I Growth Areas are intended to be developed at  
22 urban levels of development due to their urban character and the availability of infrastructure  
23 and services necessary to support urban levels of development. The "Low Intensity – Single-  
24

25 <sup>3</sup> Apparently, after forming a belief that Tacoma's stormwater regulations did not require on-site detention for  
26 stormwater, Town & Country has abandoned its proposal to provide on-site stormwater flow detention.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND DECISIONS**

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1 Family Detached Housing Area” designation is intended for areas which are either developed  
2 primarily with single-family dwellings or are planned for future single-family home  
3 development. Typically, residential densities within “Low Intensity – Single-Family  
4 Detached Housing” areas range up eight dwelling units per acre. The proposed subdivision,  
5 providing lots for single-family homes at a density of approximately 7.78 dwelling units per  
6 acre, is consistent with applicable growth tier and land use plan designations of Tacoma’s  
7 *Comprehensive Plan*.

8  
9 6. Zoning of the subdivision site is “R-2” One-Family Dwelling District which was  
10 established in 1953. The “R-2” zone permits single-family homes on individual lots  
11 containing a minimum of 5,000 square feet. The proposed subdivision complies with the use  
12 and area regulations of the “R-2” zone.

13  
14 7. The proposed subdivision application has been submitted in accordance with  
15 Tacoma’s Subdivision Code (*Tacoma Municipal Code [TMC] 13.04*). The applicant is  
16 apparently seeking the designation of the private access tracts (Tracts B, D, and E) as  
17 “officially approved accessways” pursuant to *TMC 13.04.140.B*. There has been no issue  
18 presented in these proceedings regarding the proposed private accessways not complying with  
19 the standards for “officially approved accessways.” Thus, the Hearing Examiner finds the  
20 preliminary plat to be generally consistent with the standards of development for new  
21 subdivisions.  
22

23  
24 8. The preliminary plat submitted by Town & Country, along with accompanying  
25  
26

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND DECISIONS**

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1 environmental information submitted pursuant to SEPA, was reviewed by numerous  
2 governmental agencies, including Federal Way. As a result of the review by agencies,  
3 numerous conditions were recommended concerning grading and erosion control; storm and  
4 sanitary sewer facilities; measures to protect adjacent properties; street, driveway, and  
5 sidewalk improvements; street lighting; power and water utilities; fire protection; solid waste  
6 disposal; and miscellaneous matters. Exhibit R19 at 9 through 16.

8 9. Subsequent to completion of its environmental review pursuant to SEPA, Tacoma  
9 issued a Mitigated Determination of Nonsignificance (MDNS) on April 9, 2008. Exhibit R11.  
10 The MDNS issued set forth the following condition in regard to traffic:  
11

12 The proposed development will either construct all TIP projects  
13 impacted by ten or more vehicular trips or voluntarily contribute  
14 \$266,344 to the City of Federal Way in pro-rata share contributions.<sup>4</sup>

15 10. Town & Country in these proceedings contests recommended Condition 2.g to  
16 preliminary plat approval, which provides as follows:

17 The applicant shall provide on-site detention of stormwater to meet  
18 the following standard: two-year and ten-year peak flows leaving the  
19 site under the developed condition shall not exceed the two-year and  
20 ten-year peak flows for the pre-developed condition.<sup>5</sup> As an

21 <sup>4</sup> Tacoma, at hearing, conceded that it could not, as a matter of law, require Town & Country to construct all TIP  
22 projects in Federal Way to which Town & Country's proposed subdivision would be expected to contribute  
23 traffic and asked that such portion of the mitigating measure be eliminated. Federal Way, after discussions  
24 with Town & Country, subsequent to issuance of the MDNS, revised the amount of pro-rata share contribution  
25 to \$250,123.00.

26 <sup>5</sup> During these proceedings, Tacoma proposed striking Condition 2.i which reads as follows and to replace it  
with Condition 2.g, above:

This project will contribute stormwater via the City of Tacoma storm sewer to the City of  
Federal Way. The more restrictive of City of Tacoma and City of Federal Way requirements  
shall apply to this project.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND DECISIONS**

1 alternative to on-site detention, the applicant may provide for  
2 detention of stormwater in the City of Federal Way's SW 340<sup>th</sup> Street  
3 Regional Detention Pond by paying a fee in lieu of on-site detention  
4 to the City of Federal Way in the amount of \$70,120.31.

5 The effect of imposition of the above condition would be to either require Town &  
6 Country to provide on-site stormwater detention in accordance with Federal Way storm  
7 drainage control standards or pay Federal Way a fee of \$70,120.31 to use Federal Way's  
8 Regional Stormflow Basin (RSF Basin) located at the headwaters of Joe's Creek situated  
9 within Federal Way.<sup>6</sup>

10 Also, Town & Country appeals the traffic mitigation condition contained in the MDNS  
11 issued by Tacoma and set forth in Finding of Fact 9 above, as amended by Federal Way  
12 reducing the amount of monetary mitigation to \$250,123.00 and as amended by Tacoma  
13 eliminating the requirement for actual construction of the TIPS (traffic improvement projects)  
14 within Federal Way.

15  
16  
17 11. Appearing at hearing and testifying, was a resident who lives on the west side  
18 of 49<sup>th</sup> Avenue NE, across from the Northshore Shopping Center which is located  
19 immediately north of the subdivision site. Said resident testified that most traffic in the area  
20 was directed toward Federal Way; during morning and evening traffic peaks, there is at times  
21 substantial traffic congestion on 49<sup>th</sup> Avenue NE in the vicinity of the proposed subdivision;  
22  
23

24  
25 <sup>6</sup> During the course of these proceedings, Town & Country and Federal Way reached agreement regarding a  
26 condition relative to water quality control, which is also a requirement of Federal Way's storm drainage  
regulations.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND DECISIONS**

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1 development of the proposed subdivision would exacerbate peak traffic conditions on 49<sup>th</sup>  
2 Avenue NE; and Town & Country should provide a second route in and out of the proposed  
3 subdivision. Also appearing in writing, were the Puget Creek Restoration Society (PCRS) and  
4 Patrick Gemar. PCRS in its comments recommended that: a) as many large trees as possible  
5 be retained on the site; b) a variety of native plant stock be used in landscaping; c) low impact  
6 development be incorporated; d) environmentally friendly lawn care product be used; e)  
7 establishment of an local improvement district (L.I.D.) to help defray costs for water usage  
8 and storm water conveyance; and f) use of the Puget Sound Action Team L.I.D. Manual as a  
9 reference by the developer. Exhibit R20. Mr. Gemar indicated his desire for permanent  
10 fencing between his and the Town & Country's property (proposed Lots 13 through 20) to  
11 protect his privacy and to prevent trespassers who might want to use his property as a short-  
12 cut from King County to the Northshore Shopping Center area. Exhibit R46. Town &  
13 Country in response to the above comments indicated that the property did not have large trees  
14 on it, that it would comply with Tacoma's development standards, and that it was intending to  
15 fence the subdivision.  
16  
17  
18

19 12. In reviewing Town & Country's preliminary plat proposal and participating in  
20 Tacoma's environmental review, Federal Way prepared its own traffic analysis for the  
21 proposed subdivision as it would affect Federal Way streets. Exhibits R7 and R19.4. After  
22 several iterations of its traffic analysis, each iteration resulting in a decrease in the traffic  
23  
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26

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND DECISIONS**

1 impact fee calculation, Federal Way concluded that \$250,123.00 was the amount of  
2 contribution necessary by Town & Country for street corridors and intersections within  
3 Federal Way impacted by the proposed subdivision.  
4

5 13. Federal Way in its traffic analysis, using Institute of Transportation Engineers  
6 (ITE) trip generation data, determined that Town & Country's proposed 51-lot subdivision  
7 would generate 58 PM peak hour trips. Federal Way employed a transportation model which  
8 is based on a transportation model developed by the Puget Sound Regional Council (PSRC).  
9 The PSRC's basic transportation model covers King, Kitsap, Pierce, and Snohomish Counties  
10 and is employed by most local jurisdictions in western Washington. Developer of the PSRC  
11 model also developed Federal Way's model. Federal Way's model is currently used to predict  
12 traffic distribution and trip assignments to specific intersections within Federal Way. It has  
13 not been shown by appellant that the transportation model used by Federal Way is a model  
14 that has not been developed in accordance with accepted transportation modeling practices or  
15 has been improperly utilized by Federal Way in its analysis of Town & Country's subdivision  
16 proposal. In fact, the weight of the evidence is to the contrary.  
17  
18

19 14. Federal Way's model predicts that 76 percent of the vehicle trips generated by the  
20 Town & Country's proposed subdivision would travel north from the proposed site to Federal  
21 Way and 24 percent would travel south to Tacoma. This projection is generally supported by  
22 census tract data which shows that 72.9 percent of the work trips from the site would directed  
23 north, outside of Pierce County. Exhibit R41. Further, the PSRC's employment forecast for  
24  
25  
26

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND DECISIONS**

109

1 2010, indicates that 73.1 percent of employment opportunities within a 30 mile radius of the  
2 subject property would be in Federal Way, or at locations north of Federal Way, and by 2020,  
3 72.9 percent would be in Federal Way or locations to the north. Exhibit R42. According to  
4 ITE's preferred equation method, the proposed subdivision would general 58 PM peak hour  
5 trips with 70 percent of those trips using Federal Way streets. Testimony of Federal Way's  
6 Traffic Engineer Richard Perez (Perez). The Hearing Examiner finds such methodology and  
7 calculations of trip distribution to be consistent with accepted transportation principals.  
8

9 15. Using its transportation model, Federal Way determined that two areas within  
10 Federal Way would receive ten or more vehicle trips during the PM peak hour from the  
11 proposed subdivision. Thus, according to Federal Way, the proposed subdivision would  
12 adversely impact those two areas. The areas of concern are the intersection of 21<sup>st</sup> Avenue  
13 SW and SW 336<sup>th</sup> Street and the arterial corridor extending along SW 336<sup>th</sup> Way/SW 340<sup>th</sup>  
14 Street/26<sup>th</sup> Place SW and Hoyt Road. Both of the referred to intersection and arterial corridor  
15 are expected to operate at Level of Service (LOS) F (a failing LOS), in 2009. Exhibits R39  
16 and R40. Using accepted transportation methodologies, Federal Way calculated that Town &  
17 Country's proposed 51-lot subdivision would contribute 27 new PM peak hour trips to the  
18 321<sup>st</sup> Avenue SW/SW 336<sup>th</sup> Street intersection at a horizon year of 2009, with expected  
19 volumes of 4,945 vehicle trips during the PM peak hour or stated another way, approximately  
20 one-half of one percent contribution to that intersection. In regard to the SW 336<sup>th</sup> Street/SW  
21 340<sup>th</sup> Street to 26<sup>th</sup> Place SW and Hoyt Road arterial corridor, Federal Way, again using  
22  
23  
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**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND DECISIONS**

110

1 accepted transportation methodology, calculated Town & Country's proposed subdivision  
2 would contribute 27 to 32 PM peak hour trips to this corridor. By 2009, the referred to  
3 corridor would be expected to experience traffic volumes during the PM peak ranging from  
4 2,263 to 2,682 vehicle trips, which would result in an LOS F for that arterial corridor. Exhibit  
5 R40. The proposed vehicle trip contribution to the corridor in 2009 by Town & Country's  
6 proposed subdivision, would represent 1.2 percent of the vehicle trips using that corridor by  
7 2009.  
8

9  
10 16. Testimony by Federal Way's Traffic Engineer Perez established that the TIPs for  
11 the improvements of the 21<sup>st</sup> Avenue SW/336<sup>th</sup> Street intersection and the SW 336<sup>th</sup>  
12 Street/340<sup>th</sup> Street to 26<sup>th</sup> Place SW and Hoyt Road corridor have been planned for some time  
13 by Federal Way due to the expected LOS failure; that the reduction in service level to LOS F  
14 would occur with or without Town & Country's proposed subdivision; and Federal Way, if  
15 funding became available, would proceed with both TIPs even if the proposed subdivision was  
16 not developed.<sup>7</sup> Thus, the evidence establishes that the need for improvements planned for the  
17 21<sup>st</sup> Avenue SW/336<sup>th</sup> Street intersection and the 336<sup>th</sup> Street/340<sup>th</sup> Street to 26<sup>th</sup> Place SW and  
18 Hoyt Road arterial corridor are not a direct result of the traffic expected to be contributed by  
19 Town & Country's proposed subdivision.  
20

21 17. Federal Way calculated Town & Country's mitigation fee by using the total  
22  
23

24  
25 <sup>7</sup> Currently, Federal Way does not have funding for either of the referred to TIPs and acknowledges that, if  
26 funding was not obtained within six years for those TIPs, it would be obligated to return any mitigation fees  
paid by Town & Country plus interest.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND DECISIONS**

1 number of trips using the two street facilities at the 2009 horizon year as the denominator of a  
2 fraction and placing the number trips contributed by Town & Country's proposed subdivision  
3 as the numerator of the fraction and then multiplied the fraction by the total project cost – in  
4 this case, for the 21<sup>st</sup> Avenue SW/336<sup>th</sup> Street intersection \$12,348,000.00 and in the case of  
5 the SW 336<sup>th</sup> Street/ SW 340<sup>th</sup> Street to 26<sup>th</sup> Place SW and Hoyt Road arterial corridor,  
6 \$15,312,000.00.  
7

8 18. Federal Way, in its analysis of the traffic distribution of peak hour vehicle trips  
9 expected to be generated by Town & Country's proposed subdivision, did not develop  
10 information on the two TIPs for 2009 horizon year "without the project." Thus, Federal Way  
11 did not actually determine the specific impact of the proposed subdivision alone since it is  
12 "lumped" into all trips expected to be using the two street facilities at the 2009 horizon year.  
13 Perez testimony on cross-examination.  
14

15 19. Town & Country's proposed subdivision would discharge its stormwater run-off  
16 into Tacoma's stormwater system and specifically, into a large stormwater line located in 49<sup>th</sup>  
17 Avenue NE. Eventually, Tacoma's stormwater storm line in 49<sup>th</sup> Avenue NE discharges into  
18 the RSF Basin constructed by Federal Way at the headwaters of Joe's Creek located within  
19 Federal Way.  
20

21 20. Joe's Creek supports fish, such as spawning salmon and a trout population and,  
22 thus, is considered a "resource stream" under Federal Way's storm drainage regulations.  
23 Since Joe's Creek is a "resource stream," Federal Way's regulations require both stormwater  
24

25  
26  
**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND DECISIONS**

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1 flow and water quality controls. These requirements are more stringent than those of  
2 Tacoma's stormwater regulations. Under Tacoma's stormwater regulations, since the plat's  
3 storm drainage would be directly discharged to a major Tacoma storm line, neither stormwater  
4 detention, nor water quality controls are required. Under certain enumerated conditions,  
5 Tacoma's Director of Public Works may impose additional or more stringent requirements  
6 than those set forth in its stormwater regulations. Exhibit R24, Surface Water Management  
7 Manual (SWM), Volume I § 1.4.  
8

9 21. At the request of Federal Way, Tacoma staff recommended the following  
10 condition to preliminary plat approval:  
11

12 This project will contribute stormwater via the City's storm sewer to  
13 the City of Federal Way. The more restrictive of City of Tacoma and  
14 City of Federal Way requirement shall apply. Exhibit R19 at 11,  
15 Condition 2.i.<sup>8</sup>

16 22. Town & Country and Federal Way have agreed to revise language to the  
17 foregoing condition concerning Town & Country's proposed water quality control. Exhibit  
18 R22. Town & Country's objection to providing flow control remains.  
19

20 23. Use of Federal Way's storm drainage requirements would require Town &  
21 Country to provide on-site stormwater detention consistent with Federal Way's standards or, if  
22 Town & Country wishes to utilize Federal Way's RSF Basin located at the headwaters of  
23 Joe's Creek for stormwater detention, Town & Country would have to pay a fee of  
24 \$70,120.31, to Federal Way.  
25

26 <sup>8</sup> See Footnote 5.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND DECISIONS**

113

1           24. The drainage basin for Joe's Creek is located both within Federal Way and  
2 Tacoma. R21. Stormwater, both within Federal Way and Tacoma, flows into Joe's Creek and  
3 is contained in Federal Way's RSF Basin which was constructed a number of years ago to  
4 address flooding, water quality, and other impacts to Joe's Creek. *Id.* At least in part, moneys  
5 used by Federal Way to construct the regional basin were obtained from stormwater system  
6 charges imposed on properties within Federal Way. No moneys were contributed by Tacoma  
7 to assist in defraying the cost of constructing the Joe's Creek RSF Basin and no inter-local  
8 agreement has been entered into between the two cities to address use of the basin by Tacoma  
9 or charges to properties within Tacoma that contribute stormwater flows to the basin.  
10

11  
12           25. Tacoma's SWM Manual does not require stormwater detention for Town &  
13 Country's proposed subdivision since the development would not discharge directly to a  
14 stream, but rather discharges to a large Tacoma storm sewer line located in 49<sup>th</sup> Avenue NE.  
15

16           26. Federal Way calculated the charge to Town & Country for discharge of storm  
17 drainage to its RSF Basin by dividing the acreage of the proposed subdivision by the acreage  
18 contained in the entire basin served by Federal Way's RSF Basin and multiplying that number  
19 by the cost of construction of the RSF Basin which results in the \$70,120.31 charge to Town  
20 & Country for use of Federal Way's RSF Basin.  
21

22           27. The Department of Public Works' Preliminary Report, as entered into this record  
23 as Exhibit R19, accurately describes the proposal, general and specific facts about the site,  
24 applicable sections of the *Generalized Land Use Element (GLUE)*, and applicable regulatory  
25 codes. The report is incorporated herein by reference as though fully set forth.  
26

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND DECISIONS**

-13-

City of Tacoma  
Office of the Hearing Examiner  
Tacoma Municipal Building  
747 Market Street, Room 720  
Tacoma, WA 98402-3768  
(253)591-5195 FAX (253)591-2003

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1 28. A public notice of the subject plat application and public hearing has been mailed  
2 to all property owners of property within 400 feet of the site on February 28, 2008. A public  
3 notice sign has been posted on the site and notice of hearing was published in a newspaper of  
4 general circulation.  
5

6 29. Any conclusion herein which may be deemed a finding is hereby adopted as such.

7 From these Findings of Fact come the following:

8 **CONCLUSIONS OF LAW:**

9 **PRELIMINARY PLAT**

10  
11 1. The Hearing Examiner has jurisdiction over the parties and subject matter in this  
12 proceeding. *See TMC 1.23.050.B.1.*

13 2. *RCW 58.17*, Subdivision Act, provides that, in reviewing subdivision proposals,  
14 local governments must determine if appropriate provisions are made for necessary services  
15 and infrastructure to support the development and whether the public interest would be served  
16 by such subdivision. *See RCW 58.17.110.*  
17

18 Further, *RCW 36.70.B.030* and *RCW 36.70B.040* provide in pertinent part:

- 19 1) Fundamental land use planning choices made in adopted  
20 comprehensive plans and development regulations shall serve as the  
21 foundation for project review. . .
- 22 2) . . . at a minimum such applicable regulations or plans shall be  
23 determinative of the "(a) type of land uses permitted at the site  
24 including uses that may be allowed under certain circumstances,  
25 such as planned unit developments and conditional and special uses,  
26 if the criteria for their approval has been satisfied; (b) density of  
residential development in urban growth areas; and (c) availability  
and adequacy of public facilities identified in the comprehensive

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND DECISIONS**

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1 plans, if the plan or development regulations provide for funding of  
2 these facilities as required by Chapter 36.70A RCW.

3 3) During project review, the local government or any subsequent reviewing  
4 body shall not reexamine alternatives or to hear appeals on the items  
5 identified in Subsection (2) of this section, except for issues of code  
6 interpretation. . .

7 3. The applicant bears the burden of proving by a preponderance of the evidence that  
8 its request for preliminary plat approval conforms to applicable legal standards for approval of  
9 the land use permit requested. *See TMC 1.23.070.A.*

10 4. There is no dispute that Town & Country's proposed 51-lot single-family  
11 residential subdivision conforms to applicable zoning requirements and is generally consistent  
12 with Tacoma's development standards for new subdivisions. What is in dispute is whether  
13 Tacoma, as a condition to plat approval, can require Town & Country to either provide on-site  
14 detention of stormwater drainage generated by its subdivision or pay to Federal Way the  
15 amount of \$70,120.31 for use of Federal Way's RSF Basin. The burden of establishing that a  
16 condition to a land use permit approval is reasonably necessary as a direct result of the  
17 proposed development, is on the local government seeking to impose the condition. Isla  
18 Verde Int'l v. City of Camas, 146 Wn. 2d 740, 755-56, 49 P.3d 867 (2002), citing RCW  
19 82.02.020.

20  
21 5. The parties agree that, by its express language, Tacoma's SWM Manual does not  
22 require Town & Country to provide stormwater detention for its subdivision since stormwater  
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**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND DECISIONS**

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1 discharge from the subdivision would not be directly discharged to a receiving water body (in  
2 this case, Joe's Creek), but would be discharged to a large Tacoma storm sewer line having  
3 adequate capacity to carry stormwater flows generated by the subdivision.  
4

5 6. Tacoma and Federal Way argue that Tacoma's SWM Manual authorizes  
6 Tacoma's Director of Public Works to modify the requirements of Tacoma's SWM Manual:

7 "...to protect the health, safety or welfare of the public on the basis  
8 of information regarding threatened water quality, erosion problems  
9 or potential habitat destruction, flooding protection of  
uninterruptable services, or endangerment of property."

10 Exhibit R24, SWM Manual, Volume I § 1.4.

11 Here, the record does not establish that stormwater run-off from Town & Country's  
12 proposed subdivision would threaten water quality,<sup>9</sup> result in erosion problems, potential  
13 habitat destruction, flooding protection of uninterruptable services, or endangerment to  
14 property. To the contrary, Federal Way has designed and constructed its RSF Basin at the  
15 headwaters of Joe's Creek to avoid these impacts to Joe's Creek for stormwater expected to be  
16 generated by development within the Joe's Creek Basin. The Hearing Examiner does not find  
17 that this provision within Tacoma's SWM Manual provides a basis, under the facts of this  
18 case, to impose the recommended storm drainage condition in dispute.  
19  
20

21 7. Tacoma and Federal Way also point, as another basis for Tacoma's recommended  
22 preliminary plat condition, to a provision in Tacoma's SWM Manual, Volume I § 1.4, that  
23 states:  
24

25 \_\_\_\_\_  
26 <sup>9</sup> See Finding of Fact 22.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND DECISIONS**

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1 "The Director also shall have the authority to modify requirements  
2 based upon increases in requirements imposed by state or federal  
3 agencies, where existing requirements are not applicable to the  
particular site, or other pertinent factors."

4 There has been no showing that the recommended drainage condition in dispute is the result  
5 of increased requirements imposed by federal or state agencies.

6 8. Finally, Tacoma and Federal Way urge that the following provision of the  
7 Tacoma's SWM Manual, Volume I § 1.4 allows Tacoma to condition plat approval on  
8 compliance with the more restrictive of Tacoma's or Federal Way's requirements for  
9 stormwater flow control:  
10

11 "Where requirements in this manual are also mandated by any other  
12 law, ordinance, resolution, rule or regulation, the more restrictive  
13 requirement shall apply."

14 Tacoma's SWM Manual does not require stormwater control for Town & Country's  
15 proposed subdivision, but Federal Way's SWM Manual does. Since stormwater flow from  
16 Town & Country's subdivision would ultimately discharge to Federal Way's storm drainage  
17 system, it would seem reasonable that Federal Way's SWM Manual would constitute  
18 "requirements mandated by any other law, ordinance, resolution, rule, or regulation." Thus, to  
19 the extent that Federal Way's SWM Manual requires stormwater detention for Town &  
20 Country's proposed subdivision, there is a sufficient basis to impose, under the terms of  
21 Tacoma's SWM Manual, such a condition. However, the alternative of using Federal Way's  
22 RSF Basin to satisfy the requirements of Federal Way instead of on-site detention and  
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**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND DECISIONS**

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1 imposing a cost on Town & Country for such use, should be left to Federal Way and Town &  
2 Country.<sup>10</sup> Consistent with this conclusion, the recommended storm drainage condition  
3 should be revised to read as follows:  
4

5 The applicant shall provide on-site detention of stormwater  
6 consistent with the requirements of Federal Way's SWM Manual.  
7 Should Federal Way and Town & Country agree on Town &  
8 Country's discharge of stormwater flow from its subdivision to  
9 Federal Way's Joe's Creek RSF Basin, on-site detention shall not  
10 be required.

11 SEPA APPEAL:

12 9. The Hearing Examiner has jurisdiction in the challenge by Town & Country to the  
13 MDNS issued by Tacoma and in particular, the traffic mitigation imposed, i.e., payment to  
14 Federal Way of \$250,123.00 for improvements to identified street intersections and corridors  
15 within Federal Way. *TMC 13.12.680(1)(a)*.

16 10. The review of a Determination of Nonsignificance or MDNS, or the adequacy of  
17 an environmental impact statement (EIS), is subject to the following standards:

18 **Appeals of SEPA threshold determination and adequacy of  
19 final environmental impact statement.**

20 \* \* \*

21 (4) Public Hearing.

22  
23 <sup>10</sup> There is a whole body of statutory and case law concerning the operation of public sewer systems (*see e.g.*,  
24 RCW 35.67) that has not been argued and briefed in regard to this issue and without proper briefing by the  
25 parties, the Hearing Examiner will not address the issue of whether Federal Way has the authority to charge  
26 Town & Country for use of its Joe's Creek RSF Basin. Further, this issue could have been avoided if Tacoma  
and Federal Way, at the time plans were being made for a regional storm drainage system for Joe's Creek  
Basin, had entered into an inter-local agreement to address contributions to that system by the those properties  
within the basin that are located in Tacoma.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND DECISIONS**

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1                   \* \* \*

2                   (e) Standards of Review. The Hearing Examiner may affirm the  
3                   decision of the responsible official or the adequacy of the  
4                   environmental impact statement, or remand the case for further  
5                   information; or the Examiner may reverse the decision if the  
6                   administrative finding, inferences, conclusions, or decision are:

7                   (i) In violation of constitutional provisions as applied; or

8                   (ii) The decision is outside the statutory authority or jurisdiction  
9                   of the City; or

10                  (iii) The responsible official has engaged in unlawful procedure  
11                  or decision-making process, or has failed to follow a prescribed  
12                  procedure; or

13                  (iv) In regard to challenges to the appropriateness of the issuance of a DNS  
14                  clearly erroneous in view of the public policy of the Act.

15                  (v) In regard to challenges to the adequacy of an EIS shown to be inadequate  
16                  employing the "rule of reason".

17                  TMC 13.12.680(4)(e).

18                  11. Town & Country bears the burden of proof in the determination that the  
19                  Responsible Official shall be presume prima facie correct and shall be afforded substantial  
20                  weight. TMC 13.12.680(4)(f).

21                  12. The issue presented in this appeal appears to implicate TMC 13.12.680(4)(e)(ii) of  
22                  the standards of review for SEPA appeals which provide that the Hearing Examiner may  
23                  reverse the administrative decision if:

24                  (ii) The decision is outside the statutory authority or jurisdiction of  
25                  the City.

26                  **FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND DECISIONS**

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1           13. The parties agree that Tacoma has an obligation under SEPA to mitigate the  
2 extra-territorial impacts of development in Tacoma on neighboring jurisdictions. *See e.g.,*  
3 Save v. Bothell, 89 Wn. 2d 862, 576 P.2d 401 (1978).

4  
5           14. The parties engaged in much discussion regarding Tacoma's authority to impose  
6 conditions to mitigate the impacts associated with new development. SEPA at RCW  
7 43.21C.060 provides in pertinent part as follows:

8                   ...[A]ny governmental action may be conditioned or denied pursuant to  
9 this chapter...such action may be conditioned only to mitigate  
10 specific adverse environmental impacts which are identified in the  
11 environmental documents prepared under this chapter. (Emphasis  
supplied.)

12           On the other hand, RCW 58.17.110 requires local governments to ensure that  
13 appropriate provisions are made for the public health, safety, and welfare. Isla Verde at 763.  
14 The courts have interpreted this provision of the subdivision statute as allowing conditions  
15 only where the purpose is to mitigate the problems caused by the particular development. Isla  
16 Verde at 763-64, citing Southwick v. City of Lacy, 58 Wn. App. 886, 892-93, 795 P.2d 712  
17 (1990).

18  
19           All the parties agree that in this case the monetary mitigation sought by Federal Way,  
20 i.e., \$250,123.00 for street improvements in Federal Way, is subject to the following  
21 limitation set forth at RCW 82.02.020:

22                   Except only as expressly provided in chapters 67.28 and 82.14 RCW,  
23 the state preempts the field of imposing taxes upon retail sales of  
24 tangible personal property, the use of tangible personal property,  
25 parimutuel wagering authorized pursuant to RCW 67.16.060,

26  
**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND DECISIONS**

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1 conveyances, and cigarettes, and no county, town, or other municipal  
2 subdivision shall have the right to impose taxes of that nature. Except  
3 as provided in RCW 64.34.440 and 82.02.050 through 82.02.090, no  
4 county, city, town, or other municipal corporation shall impose any  
5 tax, fee, or charge, either direct or indirect, on the construction or  
6 reconstruction of residential buildings, commercial buildings,  
7 industrial buildings, or on any other building or building space or  
8 appurtenance thereto, or on the development, subdivision,  
9 classification, or reclassification of land. However, this section does  
not preclude dedications of land or easements within the proposed  
development or plat which the county, city, town, or other municipal  
corporation can demonstrate are reasonably necessary as a direct result of  
the proposed development or plat to which the dedication of land or  
easement is to apply.

10 This section does not prohibit voluntary agreements with counties, cities,  
11 towns, or other municipal corporations that allow a payment in lieu of a  
12 dedication of land or to mitigate a direct impact that has been identified as a  
13 consequence of a proposed development, subdivision, or plat. A local  
14 government shall not use such voluntary agreements for local off-site  
15 transportation improvements within the geographic boundaries of the area or  
16 areas covered by an adopted transportation program authorized by chapter  
17 39.92 RCW. Any such voluntary agreement is subject to the following  
18 provisions: (Emphasis supplied)

\*\*\*

19 The term "voluntary agreement" as used in the foregoing statutory provision, has  
20 been construed in the case of Cobb v. Snohomish County, 64 Wn. App. 452, 457, 829 P. 2d  
21 169 (1991), to include an agreement involving a choice between paying a fee to mitigate  
22 direct impacts or not obtaining plat approval.

23 15. As limited by RCW 82.02.020 and the authority provided under RCW  
24 43.21C.060 and RCW 58.17.110, only mitigation that is intended to mitigate or cure specific

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**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND DECISIONS**

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1 identified adverse impacts or problems created by a proposed a development is authorized.  
2 Thus, it does not appear that there is a substantive difference between the authority granted by  
3 SEPA or the subdivision statute in regard to conditioning project actions.  
4

5 16. In this case, Federal Way has, using accepted transportation engineering  
6 methodologies, determined the number of vehicle trips generated by Town & Country's  
7 proposed 51-lot subdivision; determined the direction of PM peak hour trips generated by the  
8 proposed subdivision; assigned those PM peak hour trips to street corridors within Federal  
9 Way; and determined which street corridors and intersections would receive 10 or more PM  
10 peak hours trips generated by the proposed subdivision. Findings of Facts 13 through 15.  
11 The traffic analysis performed by Federal Way differs materially from those which the courts  
12 found lacking in Cobb v. Snohomish County, 64 Wn. App. 451, 829 P.2d 169 (1991) and in  
13 Castle Homes v. Brier, 76 Wn. App. 95, 882 P.2d 1172 (1994). However, Federal Way has  
14 failed to establish that the required intersection and arterial corridor improvements, which it is  
15 seeking Town & Country's contribution in the amount of \$250,123.00, are reasonably  
16 necessary to mitigate the direct impact of Town & Country's proposed 51-lot subdivision (*see*  
17 Castle Homes v. Brier at 107, citing Southwick v. City of Lacey at 895); or "to mitigate  
18 specific environmental impacts which are identified in environmental documents prepared  
19 under this chapter." RCW 43.21C.060. Both TIPs to which Federal Way is seeking  
20 contributions from Town & Country, have been planned for some time by Federal Way and  
21 well before Town & Country's subdivision was proposed. Further, Federal Way plans to  
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**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND DECISIONS**

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1 proceed with the TIPs regardless of whether Town & Country proceeds with the development  
2 of its proposed subdivision since the identified intersection and arterial corridor are expected  
3 to achieve LOS F (failing LOS) by the 2009 horizon year.  
4

5 17. Also, RCW 82.02.020, in addition to requiring a nexus between the mitigation  
6 sought and direct impacts caused by the development also requires a showing of rough  
7 proportionality. Citizen's Alliance for Property Rights v. Ron Sims, No. 59416-8-1 @ 18,  
8 citing Trimen Development Co. v. King County, 124 Wn. 2d 261, 877 P.2d 187 (1994).

9 The court noted in Castle Homes at 98, Footnote 2, the definition of "proportionate  
10 share" at RCW 82.02.090(5) (at the time a recently enacted statute) more closely aligned with  
11 term "fair share" as used by the parties in Castle Homes which in Footnote 2 at 98, the court  
12 describes as "...as the total separate project cost less a share amount subtracted for the  
13 existing use of the street system and also for a share due to the 'sins of neglect' of the street  
14 system as it existed." Here, Federal Way calculated Town & Country's traffic mitigation fee  
15 by multiplying the entire estimated project cost for each TIP by a fraction whose denominator  
16 is the total number of trips predicted to use the identified intersection and arterial corridor, and  
17 whose numerator is the number of trips from Town & Country's proposed subdivision  
18 predicted to use the identified facilities. This methodology is inconsistent with the  
19 proportionality mandated by RCW 82.02.090, since it does not take into account the fact that  
20 these TIPs are required whether or not Town & Country's subdivision is developed,  
21 presumably due to the "sins of the past" as noted by the court in Castle Homes.  
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**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND DECISIONS**

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1 Finally, Federal Way has not identified the specific impact to these street facilities  
2 resulting from Town & Country's proposed subdivision, as it has not done a "with the  
3 project" and "without the project" analysis. Moreover, the evidence establishes that the  
4 percentage of trips using the identified intersection and arterial corridor from Town &  
5 Country's plat, is insignificant. See Finding of Fact 15.

7 18. Since the traffic mitigation condition set forth by Tacoma in its MDNS does not  
8 comport with the nexus requirements of RCW 82.02.020, 58.17.110, and 43.21C.060, and  
9 does not satisfy the rough proportionality requirements of RCW 82.02, it cannot be sustained  
10 and should be stricken.

12 SUMMARY:

13 19. In summary, the Hearing Examiner concludes that the preliminary plat proposed  
14 by Town & Country should be approved subject to the conditions set forth below, including  
15 the condition language concerning stormwater detention set forth at Conclusion of Law 8  
16 herein, and Town & Country's appeal of the MDNS condition requirement of payment of a  
17 traffic mitigation fee to Federal Way should be granted and, that condition to issuance of the  
18 MDNS and preliminary plat approval, should be stricken.

20 20. The preliminary plat should be approved, subject to the following conditions:

21 A. SPECIAL CONDITIONS:

22 1. GRADING AND EROSION CONTROL

- 23 a. Grading and erosion control plans shall be provided and approved prior to  
24 any grading in excess of 50 cubic yards taking place on the site.

25  
26 **FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND DECISIONS**

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1 **B. USUAL CONDITIONS:**

- 2 1. THE DECISION SET FORTH HEREIN IS BASED UPON  
3 REPRESENTATIONS MADE AND EXHIBITS, INCLUDING  
4 DEVELOPMENT PLANS AND PROPOSALS, SUBMITTED AT THE  
5 HEARING CONDUCTED BY THE HEARING EXAMINER. ANY  
6 SUBSTANTIAL CHANGE(S) OR DEVIATION(S) IN SUCH  
7 DEVELOPMENT PLANS, PROPOSALS, OR CONDITIONS OF  
8 APPROVAL IMPOSED SHALL BE SUBJECT TO THE APPROVAL OF  
9 THE HEARING EXAMINER AND MAY REQUIRE FURTHER AND  
10 ADDITIONAL HEARINGS.
- 11 2. THE AUTHORIZATION(S) GRANTED HEREIN IS/ARE SUBJECT TO  
12 ALL APPLICABLE FEDERAL, STATE, AND LOCAL LAWS,  
13 REGULATIONS, AND ORDINANCES. COMPLIANCE WITH SUCH  
14 LAWS, REGULATIONS, AND ORDINANCES ARE CONDITIONS  
15 PRECEDENT TO THE APPROVALS GRANTED AND ARE  
16 CONTINUING REQUIREMENTS OF SUCH APPROVALS. BY  
17 ACCEPTING THIS/THESE APPROVALS, THE APPLICANT  
18 REPRESENTS THAT THE DEVELOPMENTS AND ACTIVITIES  
19 ALLOWED WILL COMPLY WITH SUCH LAWS, REGULATIONS,  
20 AND ORDINANCES. IF, DURING THE TERM OF THE APPROVALS  
21 GRANTED, THE DEVELOPMENTS AND ACTIVITIES PERMITTED  
22 DO NOT COMPLY WITH SUCH LAWS, REGULATIONS, OR  
23 ORDINANCES, THE APPLICANT AGREES TO PROMPTLY BRING  
24 SUCH DEVELOPMENTS OR ACTIVITIES INTO COMPLIANCE.

25 21. Any conclusion herein which may be deemed a finding is hereby adopted as such.

26 From these Conclusions of Law come the following:

**DECISIONS:**

**PRELIMINARY PLAT**

The requested preliminary plat is approved, subject to conditions set forth herein.

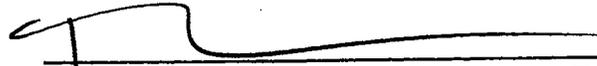
**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND DECISIONS**

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1 SEPA APPEAL

2 The appeal of the MDNS filed by Town & Country shall be granted and the mitigating  
3 measure requiring payment of a traffic mitigation fee to Federal Way shall be stricken.

4 DATED this 5th day of September, 2008.

5  
6   
7 \_\_\_\_\_  
8 **RODNEY M. KERSLAKE, Hearing Examiner**

9  
10 NOTICE

11 Pursuant to RCW 36.70B.130, you are hereby notified that affected property owner(s) receiving this  
12 notice of decision may request a change in valuation for property tax purposes consistent with  
13 Pierce County's procedure for administrative appeal. To request a change in value for property tax  
14 purposes, you must file with the Pierce County Board of Equalization on or before July 1<sup>st</sup> of the  
15 assessment year or within 30 days of the date of notice of value from the Assessor-Treasurer's  
16 Office. To contact the board, call (253)798-7415 or [www.co.pierce.wa.us/boe](http://www.co.pierce.wa.us/boe).

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**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND DECISIONS**

**ORIGINAL**

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**APPENDIX F**

1  
2 **OFFICE OF THE HEARING EXAMINER**

3  
4 **CITY OF TACOMA**

5  
6 **In the Matters of:**

7  
8 **TOWN & COUNTRY  
REAL ESTATE, LLC,**

9 **Applicant for Preliminary  
Plat Approval,**

10  
11 **AND**

12 **TOWN & COUNTRY  
REAL ESTATE, LLC,**

13 **Appellant,**

14  
15 **vs.**

16 **CITY OF TACOMA,**

17 **Respondent,**

18  
19 **and**

20 **CITY OF FEDERAL WAY,**

21 **Intervenor.**

22 **File Nos. PLT2006-40000087245  
("Scarsella Plat") AND  
HEXAPL2008-00006  
(SEP2006-40000087246)**

23  
24  
25 **ORDER GRANTING IN  
PART AND DENYING  
IN PART MOTIONS FOR  
RECONSIDERATION,  
AMENDING CONCLUSIONS  
OF LAW, AND AFFIRMING  
DECISIONS**

26 **ORDER GRANTING IN PART  
AND DENYING IN PART MOTIONS  
FOR RECONSIDERATION, AMENDING  
CONCLUSIONS OF LAW, AND  
AFFIRMING DECISIONS**

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1           **THESE MATTERS** came before the undersigned Hearing Examiner for the City of  
2 Tacoma, Washington, on motions filed by the parties seeking reconsideration of the decisions  
3 entered by the Hearing Examiner on September 5, 2008, in the above-captioned cases.

4           The parties have responded to opposing parties' motions.

5           Having reviewed the parties' lengthy motions and responses thereto, having reviewed  
6 the file in the matter, and being otherwise fully advised, the Hearing Examiner grants Tacoma's  
7 motion as it relates to an additional basis for imposing a stormwater drainage condition  
8 requiring on-site detention for Town & Country Real Estate, LLC's preliminary plat and  
9 conforming the language of Conclusion 17 to the court's language used in Castle Homes v.  
10 Brier, 76 Wn. App. 95, 98, 882 P.2d 1172 (1994), as noted in City of Federal Way's Motion for  
11 Reconsideration. The motions for reconsideration are **HEREBY** denied in all other respects.

12           Accordingly, Conclusion of Law 7 at page 17, starting on line 4, is **HEREBY** amended  
13 to read as follows:

14           "There has been no showing that the recommended drainage  
15 condition indisputably is the result of increased requirements imposed  
16 by federal or state agencies or because existing requirements are  
17 not applicable to the site. However, the fact that storm drainage  
18 flow from Town & Country's proposed subdivision enters Federal  
19 Way's storm drainage system a short distance north of the  
20 subdivision site and is then detained in and released from Federal  
21 Way's Joe's Creek RSF Basin constitutes 'other pertinent factors'  
22 supporting Tacoma's recommended condition that would require  
23 compliance with Federal Way's stricter SWM Manual standards  
24 for flow control."

25           **ORDER GRANTING IN PART**  
26 **AND DENYING IN PART MOTIONS**  
**FOR RECONSIDERATION, AMENDING**  
**CONCLUSIONS OF LAW, AND**  
**AFFIRMING DECISIONS**

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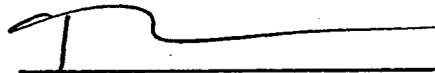
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1 And, the language of Conclusion of Law 17 at page 23, line 24, is HEREBY amended to read  
2 as follows:

3 “...sins of neglect”...

4 Except for the foregoing amendments, the Hearing Examiner HEREBY affirms the  
5 Findings of Fact, Conclusions of Law, and Decisions entered in the matters on September 5,  
6 2008.  
7

8 **SO ORDERED** this 29<sup>th</sup> day of October, 2008.

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11 **RODNEY M. KERSLAKE, Hearing Examiner**

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**ORDER GRANTING IN PART  
AND DENYING IN PART MOTIONS  
FOR RECONSIDERATION, AMENDING  
CONCLUSIONS OF LAW, AND  
AFFIRMING DECISIONS**

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NO. 39407-3-II

IN THE COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

---

*CITY OF FEDERAL WAY*, a Washington municipal corporation,

Petitioner/Respondent,

vs.

*TOWN & COUNTRY REAL ESTATE, LLC*, a Washington limited liability company; *FRANK A SCARSELLA*, taxpayer; *EMIL P. SCARSELLA*, taxpayer, and the *CITY OF TACOMA*, a Washington municipal corporation,

Respondents/Appellants.

FILED  
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DECLARATION OF SERVICE

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(253) 835-7000  
Attorneys for Respondent  
City of Federal Way

ORIGINAL

I, Sheryl Loewen, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 29th day of March, 2010, I served a true copy of the *Opening Brief of Petitioner/Respondent City of Federal Way*, as well as a true copy of the *Appendix to Opening Brief of Petitioner/Respondent City of Federal Way*, and this *Declaration of Service*, also filed herewith, on the following counsel of record using the method of service indicated below:

Richard R. Wilson  
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500 Galland Building  
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- First Class, U.S. Mail, Postage Prepaid
- Legal Messenger
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- First Class, U.S. Mail, Postage Prepaid
- Legal Messenger
- Overnight Delivery
- Facsimile
- E-Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 29th day of March, 2010, at Issaquah, Washington.

  
\_\_\_\_\_  
Sheryl Loewen