

NO. 39407-3-II

IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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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.

REPLY BRIEF OF PETITIONER/RESPONDENT CITY OF FEDERAL
WAY

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ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION1

II. ARGUMENT2

 A. The Hearing Examiner Applied the Wrong Standard of Review, and Improperly Addressed Issues Over Which He Lacked Jurisdiction.2

 B. The Hearing Examiner Erred in Concluding That the MDNS Traffic Mitigation Did Not Comply With RCW 82.02.020. 4

 1. T&C Does Not Dispute That the Examiner Erred in Concluding That RCW 82.02.020 Bars Mitigation Contributions Towards Already Planned Projects. 5

 2. The Examiner Erred in Applying Concepts of Nexus and Proportionality..... 6

 3. The Examiner Erred in Concluding That MDNS Mitigation Violated RCW 82.02.020 Because It Was Not Reasonably Necessary to Mitigate a Direct Impact From the Scarsella Plat. 9

 a. Scarsella Plat Traffic Contributes to Level of Service Failures..... 9

 b. The Scarsella Plat’s Direct Contribution to Expected Level of Service Failures Are “Direct Impacts” Within the Meaning of RCW 82.02.020..... 12

 C. The Tacoma MDNS Traffic Mitigation Condition Was Consistent With the State Environmental Policy Act (SEPA)..... 18

1. SEPA Authorizes Mitigation for Cumulative Impacts.	18
2. The Scarsella Plat Impacts Are Part of a Significant, Adverse Cumulative Impact.	21
3. Tacoma’s MDNS Properly Identified the Scarsella Plat’s Adverse Environmental Impacts.....	23
III. CONCLUSION.....	24

TABLE OF AUTHORITIES

TABLE OF CASES

<i>Boehm v. Vancouver</i> , 111 Wn. App. 711, 47 P.3d 137 (Div. II 2002).....	19, 20
<i>Castle Homes v. Brier</i> , 76 Wn. App. 95, 882 P.2d 1172 (Div. I 1994).....	12, 13, 14, 15
<i>Citizens for Rational Shoreline Planning (CRSP) v. Whatcom County</i> , ___ Wn. App. ___, 2010 WL 1839407 (Div. I May 10, 2010).....	17
<i>Clallam County Citizens for Safe Drinking Water v. Port Angeles</i> , 137 Wn. App. 214, 151 P.3d 1079 (Div. II 2007).....	3
<i>Hayes v. Yount</i> , 87 Wn.2d 280, 552 P.2d 1038 (1976).....	18, 20, 21
<i>Holder v. Vancouver</i> , 136 Wn. App. 10, 147 P.3d 641 (Div. II 2006).....	6
<i>In Re Custody of A.C.</i> , 137 Wn. App. 245, 153 P.3d 203 (Div. III 2007), <i>rev'd on other grounds</i> 165 Wn.2d 568 (2009).....	4
<i>Isla Verde Int'l Holdings, Inc. v. Camas</i> , 146 Wn.2d 740.....	17
<i>Lanzce G. Douglass v. Spokane Valley</i> , 154 Wn. App. 408, 225 P.3d 448 (Div. III 2010).....	19, 20, 21
<i>Miller v. Port Angeles</i> , 38 Wn. App. 904, 691 P.2d 229 (Div. II 1984); <i>rev. denied</i> , 103 Wn.2d 1024 (1985).....	14
<i>Narrowsview Preservation Ass'n v. Tacoma</i> , 84 Wn.2d 416, 526 P.2d 897 (1974).....	18
<i>Norway Hill Preservation and Protection Assoc v. King County</i> , 87 Wn.2d 267, 552 P.2d 674 (1976)	18

<i>Olympia v. Drebeck</i> , 156 Wn.2d 289, 126 P.3d 802 (2006)	7
<i>Southwick v. Lacey</i> , 58 Wn. App. 886, 795 P.2d 712 (1990)	17
<i>Trimen v. King County</i> , 124 Wn.2d 261, 877 P.2d 177 (1994).....	6, 7
<i>Tucker v. Columbia Gorge Commission</i> , 73 Wn. App. 74, 867 P.2d 686 (Div. II 1994).....	18, 20, 21

STATUTES

Revised Code of Washington (RCW)	
RCW 36.70A.070(6)(b)	10
RCW 43.21C.....	18
RCW 43.21C.060.....	24
RCW 82.02.020	4, 5, 6, 7, 9, 12, 15, 16, 17
RCW 82.02.090	6

REGULATIONS AND RULES

Washington Administrative Code (WAC)	
WAC 197-11-060(4)(d)	16, 21
WAC 197-11-060(4)(e)	21
WAC 197-11-330(2)(c)	16
WAC 197-11-330(3)(c)	19, 21
WAC 197-11-330(3)(e)	21
WAC 197-11-660(1)(c)	7
WAC 197-11-660(1)(d)	7

WAC 197-11-792.....	15
WAC 197-11-792(2)(c)	21
Tacoma Municipal Code (TMC)	
TMC 1.23.050(B)(10).....	3
TMC 13.12.680(1)(d).....	3
TMC 13.12.680(3)	3
TMC 13.12.680(4)(e)(ii).....	2
TMC 13.12.680(4)(e)(iv)	3, 4

OTHER AUTHORITIES

Laws of 1982, 1st Ex. Sess., ch. 49 § 5	15
Wash. St. Reg. 84-05-020 (Order DE 83-39)	15
Richard L. Settle, <i>The Washington State Environmental Policy Act: A Legal and Policy Analysis</i> , § 13.01[1] (rev. 2009)	16, 19
<i>Merriam Webster's Online English Dictionary</i> , 2010, Merriam-Webster, Inc.....	16

I. INTRODUCTION

Appellant Town & Country Real Estate, Inc.'s (T&C's) response brief is a study in shifting arguments. T&C tries to resuscitate arguments it conceded below, contests points and then admits them a few pages later, and even raises a few new issues for good measure. For example, although T&C never appealed any of the Examiner's findings of fact, T&C suddenly suggests that the facts of the case are disputed even while admitting the basic facts of the case: its proposed Scarsella Plat will generate 490 new vehicle trips that impact a key arterial corridor and intersection in Federal Way. T&C also argues that Federal Way and Tacoma might have been able to enter into an interlocal agreement to impose GMA impact fees upon T&C's proposal, overlooking the fact that use of GMA impact fees is optional (not required), and is wholly irrelevant to the legality of the SEPA-based mitigation fees imposed by Tacoma here.

T&C's rhetorical twists and turns seek to gloss over the plain truth: the Hearing Examiner below committed some fundamental errors, which T&C was forced to concede to the trial court. Having done so, T&C was left with the argument that only a project that is the sole cause of a failure in transportation level of service (LOS) may be assessed mitigation to pay for projects to fix it – but no case supports that radical proposition, as T&C admitted to the trial court. The reality is that Washington law clearly permits

a city to assess pro rata share mitigation upon a proposed new development that contributes to failing levels of service, and that is exactly what the City of Tacoma did here. The Hearing Examiner erred in overturning Tacoma's mitigation requirements, and this Court should affirm Judge Felnagle's conclusions to that effect.

II. ARGUMENT

A. The Hearing Examiner Applied the Wrong Standard of Review, and Improperly Addressed Issues Over Which He Lacked Jurisdiction.

As discussed in Federal Way's Opening Brief, the Hearing Examiner first erred by applying the wrong standard of review, and then *sua sponte* raising and deciding legal issues not raised by T&C's appeal and over which the Examiner lacked jurisdiction. Federal Way Opening Brief at 25-26. T&C's responds that Tacoma Municipal Code (TMC) Section 13.12.680(4)(e)(ii) allowed the Hearing Examiner to consider whether an action was "outside the statutory authority or jurisdiction" of the SEPA Responsible Official.¹ This argument overlooks the fact that Tacoma's code and Washington law expressly provide for a different standard of review for challenges to a Determination of Nonsignificance (DNS), such a T&C's

¹ Brief of Respondents / Appellants Town & Country Real Estate, Inc. ("T&C Response Brief") at 23.

appeal of the MDNS here.² This standard required the Examiner to accord substantial weight to Tacoma's Mitigated Determination of Nonsignificance (MDNS), and while it ducks the issue now, T&C admitted this below.³ By applying the "outside the statutory authority or jurisdiction" standard, however, the Examiner applied the wrong standard and thereby failed to grant the Tacoma MDNS the deference it deserved.

The Examiner compounded his error in applying the wrong standard of review when he proceeded to raise and decide new legal issues not contained in T&C's appeal. T&C's only answer to this is to claim that the "outside the statutory authority" standard of review allowed the Examiner to do so. T&C Response Brief at 23, n. 69. The Examiner only possesses jurisdiction to consider the legal issues raised in T&C's appeal.⁴ He then applies the standard of review to those appeal issues –

² TMC 13.12.680(4)(e)(iv) ("in regard to challenges to the appropriateness of a DNS," the SEPA decision may be reversed only when it is "clearly erroneous in view of the public policy of the [State Environmental Policy] Act."); *see also Clallam County Citizens for Safe Drinking Water v. Port Angeles*, 137 Wn. App. 214, 225, 151 P.3d 1079 (Div. II 2007).

³ 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.").

⁴ 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"); TMC 13.12.680(3) (SEPA Responsible Official must submit response to each specific and explicit objection contained in appeal, but not to vague or ambiguous allegations); TMC 1.23.050(B)(10) (limiting Hearing Examiner's jurisdiction to various appeals, including "[a]ppeals arising out of the City Environmental Code, Chapter 13.12").

here, the “clearly erroneous” test – as required by Tacoma’s code.⁵ The standard of review cannot bestow jurisdiction on the Examiner to consider additional legal issues that are not properly before him. And, whether T&C raised them in its prehearing brief, or whether Federal Way allegedly failed to object, as T&C claims,⁶ is irrelevant; lack of subject matter jurisdiction may be raised at any time, and the parties cannot convey jurisdiction by consent or waiver.⁷

Thus, the Hearing Examiner’s decision was erroneous for the most basic reason that the Examiner lacked jurisdiction to consider or rule upon the legal issues discussed therein, which exceeded those raised by T&C’s appeal. Judge Felnagle’s reinstatement of the MDNS should be affirmed on that ground alone.

B. The Hearing Examiner Erred in Concluding That the MDNS Traffic Mitigation Did Not Comply With RCW 82.02.020.

As discussed in detail in Federal Way’s Opening Brief, the Hearing Examiner erred in concluding that the traffic mitigation imposed by Tacoma’s MDNS did not comply with RCW 82.02.020.⁸ T&C’s Response

⁵ TMC Section 13.12.680(4)(e)(iv).

⁶ T&C Response Brief at 22, n. 67. It did not become clear that T&C was actually pursuing new issues, or that the Examiner was considering them, until the Examiner ruled. At that point, Federal Way objected by filing its motion for reconsideration. R 68 – R 84.

⁷ *In Re Custody of A.C.*, 137 Wn. App. 245, 253, 153 P.3d 203 (Div. III 2007), *rev’d on other grounds* 165 Wn.2d 568 (2009).

⁸ Federal Way Opening Brief at 28-41.

Brief does not address the specifics of the Examiner's findings and conclusions; instead, T&C offers its own freewheeling exposition on RCW 82.02.020, to support its mantra that only a project that is the sole cause of a level-of-service failure may be assessed mitigation. But T&C conceded below that the central portion of the Examiner's ruling below was error, and there is no case law supporting T&C's arguments here. Judge Felnagle's reversal of the Examiner should be affirmed.

1. T&C Does Not Dispute That the Examiner Erred in Concluding That RCW 82.02.020 Bars Mitigation Contributions Towards Already Planned Projects.

As Federal Way explained in its Opening Brief, the Hearing Examiner erred in determining (in Finding 16 and Concl. 16) that the Tacoma MDNS violated RCW 82.02.020 because it imposed mitigation for projects for which Federal Way had already planned improvements. Federal Way Opening Brief at 28-32. T&C admitted this to Judge Felnagle below. RP 4/08/2009 at 22:10-15; CP 406-07 (J. Felnagle Concl. 4). T&C's Response Brief does not contest this point, although it does backhandedly highlight this portion of the Examiner's decision. T&C Response Brief at 35, n. 104 and 107. Because T&C conceded this point below, and because a party abandons an argument when it fails to make a legal argument in its

brief,⁹ this Court should affirm Judge Felnagle's reversal of the Examiner on this issue. *See* CP 406-07 (Concl. 4).

2. The Examiner Erred in Applying Concepts of Nexus and Proportionality.

The Examiner also erred in applying concepts of nexus and rough proportionality. The Examiner wrongly concluded that proportionality was required by RCW 82.02.090, but as T&C conceded (again), this was error, because that statute does not apply to mitigation imposed under SEPA. RP 4/08/09 at 23:12-15. This Court should affirm Judge Felnagle's reversal of the Examiner on this issue as well. CP 408 (Concl. 6).

T&C argues for an expansive application of the concepts of "nexus" and "rough proportionality" borrowed from federal takings jurisprudence but in so doing, asks this Court to follow a dissent from our Supreme Court, rather than the (controlling) majority opinion.¹⁰ This Court should decline T&C's invitation to error. "Nexus" and "rough proportionality" do not apply to RCW 82.02.020; instead, the standard under that statute is whether a fee is "reasonably necessary" to "mitigate a direct impact that has been identified as a consequence of a proposed subdivision." While T&C cites *Trimen v. King County*, 124 Wn.2d 261, 877 P.2d 177 (1994) as support for its

⁹ *Holder v. Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641 (Div. II 2006).

¹⁰ T&C Response Brief at 44-46, esp. n. 136.

claim, *Trimen* actually applied the language of RCW 82.02.020 to hold that “the fees imposed in lieu of dedication were reasonably necessary as a direct result of Trimen’s proposed development.” It cited only by analogy to the U.S. Supreme Court decision in which “rough proportionality” originated. 124 Wn.2d at 274. And, *Trimen* has been superseded by the Supreme Court’s subsequent, more direct holding that “nexus” and “rough proportionality” do not apply to fees imposed under either the GMA or SEPA / RCW 82.02.020.¹¹

In any event, as noted in Federal Way’s Opening Brief, a proportionality-related standard nevertheless applies here, because this case involves a mitigation fee imposed under SEPA, and the applicable SEPA Rules limit mitigation to “the extent attributable to the proposal.”¹² Even so, the Examiner’s specific conclusion regarding proportionality (CP 32 (Finding 18); CP 45, Concl. 17), that Federal Way had not performed a “with project, without project” analysis, plainly lacks substantial evidence to support it, and was an erroneous application of the law to the facts. As documented in Federal Way’s Opening Brief, the TIA did include a “with project, without the project analysis.”¹³ Not even T&C argues otherwise.

¹¹ *Olympia v. Drebeck*, 156 Wn.2d 289, 302, 126 P.3d 802 (2006).

¹² WAC 197-11-660(1)(c) and (d).

¹³ Federal Way Opening Brief at 34 - 35, citing R 646 (TIA at 2); Tr. 7/11/08 at 223:4.

Instead, T&C now claims that Federal Way should have analyzed the impact of the Scarsella Plat with and without the project, but without construction of any TIP projects. T&C Response Brief at 34. Even that would exceed what the Examiner held, and there is no legal basis to assert that such a comparison was necessary to demonstrate an adverse impact, or to demonstrate proportionality. And, had Federal Way omitted the analysis showing that the TIP projects would remedy the LOS failures, T&C would complain that Federal Way had not proven that the TIP projects were “reasonably necessary.” The bottom line is that Federal Way did exactly what the Examiner concluded had not been done. Its analysis showed: (1) a “with project, without project” results (CP 406, Concl. 3); (2) that levels of service would fail with the Scarsella Plat project, causing a cumulative, significant adverse impact (CP 410, Concl. 8); (3) the precise number of trips from the Scarsella Plat that would contribute to those failures (CP 406, Concl. 3); and (4) that construction of the TIP projects would successfully mitigate those failures. Nothing more was required. As Judge Felnagle mused:

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.

RP 4/10/09 at 24: 21-23. This Court should affirm.

3. The Examiner Erred in Concluding That MDNS Mitigation Violated RCW 82.02.020 Because It Was Not Reasonably Necessary to Mitigate a Direct Impact From the Scarsella Plat.

As demonstrated in Federal Way's Opening Brief at 35-42, the Examiner erred in concluding that the MDNS' traffic mitigation violated RCW 82.02.020, because the mitigation was "reasonably necessary" to mitigate a "direct impact" from the Scarsella Plat. In response, T&C makes two, misleading factual arguments, in an effort to show that Scarsella Plat traffic will not actually be part of any impact. T&C then turns to its unsupported legal argument that the MDNS's mitigation must somehow violate RCW 82.02.020, because the cities cannot prove that traffic from the Scarsella Plat will be the sole cause of LOS failures in Federal Way. T&C Response Brief at 25-40. These unsupported arguments are contradicted by T&C's own admissions.

a. Scarsella Plat Traffic Contributes to Level of Service Failures.

T&C's first misleading factual argument is its claim at pages 29-31 of its Response Brief that the cities did not prove the existence of an adverse impact because the 2007 Transportation Impact Analysis (TIA) showed that the result of the Scarsella Plat "would be no change in the level of service of any of the 113 intersections and road segments studies .

. . .” This argument is pure sophistry. The Examiner himself found that Scarsella Plat’s trips are part of cumulative impacts in the form of LOS failures at a key Federal Way arterial corridor and intersection, which T&C eventually admits.¹⁴

The reason that T&C now makes the bogus claim that the TIA shows “no impact” is that Federal Way’s TIA assumed that the City’s planned TIP projects would be constructed, so as to alleviate the documented impacts of Scarsella Plat and other developments. R 648 (TIA at 4). Federal Way conducted its analysis in this manner 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).¹⁵ Federal Way planned the TIP projects in the first place because traffic 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

¹⁴ CP 30 (Examiner Finding 15) (two areas to which Scarsella Plat would send trips will operate at LOS F in 2009). T&C Response Brief at 33 (admitting anticipated LOS failures from growth including Scarsella Plat); at 40 (admitting Scarsella Plat trips are part of cumulative impact).

¹⁵ T&C’s counsel is well aware of this, because T&C’s so-called expert, Christopher Brown, was forced to admit that he initially based his analysis on the incorrect assumption that the TIA did not include construction of the TIP projects. Tr. 7/11/08 at 80-82 (C. Brown testimony).

projected to fail “ intersections would be affected by 10 or more p.m. peak hour trips in the horizon year. R 638 (TIA cover letter); R 685 (TIA at 41). That Federal Way can demonstrate that construction of the TIP projects will in fact provide needed traffic capacity does not show that the Scarsella Plat will have “no impact,” as T&C claims; instead, it demonstrates Federal Way’s compliance with GMA planning requirements.

T&C’s second bogus factual argument is its unsupported suggestion that the cause for the MDNS mitigation are existing poor levels of service, rather than impacts from anticipated future growth. As support, for its first statement, T&C cites to R 952, but this document is Exhibit R 40, which is a horizon year analysis showing the LOS impacts of future growth. Ex. R 40 is not an existing conditions analysis, and does not support T&C’s claim. The existing conditions analysis is Ex. R 39, which depicts nearly uniformly acceptable levels of service. R 947-950. T&C’s second reference to existing traffic conditions, at pages 35-36, is simply unsupported by any record citation whatsoever. T&C’s attempt to blame existing traffic levels is utterly bogus: it is traffic from future developments such as the Scarsella Plat that will cause the anticipated LOS failures. This Court should affirm Judge Felnagle’s conclusion to this effect. CP 409-10 (Concl. 7).

b. The Scarsella Plat's Direct Contribution to Expected Level of Service Failures Are "Direct Impacts" Within the Meaning of RCW 82.02.020.

The Scarsella Plat trips' contribution to future level of service failures is a direct impact within the meaning of RCW 82.02.020. While T&C's argues vigorously to the contrary, claiming that such impacts may not constitute "direct impacts" unless they are the sole cause of a level of service failure, T&C offers little in the way of authority for this radical notion. For example, T&C conceded to Judge Felnagle that no appellate authority supports this argument.¹⁶ Consequently, T&C's argument rests on two things: (1) a twisted reading of *Castle Homes v. Brier*; and (2) the argument that "direct" impacts under RCW 82.02.020 cannot include cumulative impacts under SEPA. Both arguments are wrong.

First, T&C's reading of *Castle Homes v. Brier*, 76 Wn. App. 95, 882 P.2d 1172 (Div. I 1994), does not help T&C. In *Castle*, Division I of this Court invalidated mitigation imposed for the Castle Crest II subdivision, because the City in that case had apportioned 100 percent of the costs of new traffic improvements upon all new development in the area, including Castle Crest II, even though "most of the traffic from Castle Crest II will enter Mountlake Terrace directly, or within a short

¹⁶ RP 4/10/09 at 36-37 ("No, we don't have a case directly on point with this . . .") (emphasis added).

distance.” *Id.* at 107.¹⁷ By contrast here, 76 percent of the Scarsella Plat traffic will enter Federal Way and help cause LOS failures at a particular intersection and arterial corridor, as the Examiner found. CP 30 (Finding 15).

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. The City did not apportion any cost to existing development, and did “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 108 (emphasis added). Here, as the Examiner himself found, “the traffic analysis performed by Federal Way differs materially from those which the courts found lacking in *Castle*. CP 43 (Examiner Finding 16).

T&C’s attempts to apply *Castle* here by claiming that, similar to the fee in *Castle*, the Tacoma MDNS mitigation fee was based solely on the basis of cumulative impacts, without attempting to derive the specific

¹⁷ *Castle Homes*’ expert testified that “at most, 25 percent of the traffic would enter the City’s street system, with only 8 percent staying in the City [of Brier] for more than two blocks.” *Id.* at 101.

impact of T&C's plat. T&C Response Brief at 37.¹⁸ T&C's quotations, however, support Federal Way's reading of *Castle*, above. The portion of *Castle* cited by T&C involves the Court's concern that the Brier traffic analysis did not analyze the particular trip distribution and assignment of the Castle Crest II trips, but rather, simply took the entire cost of a number of new projects, and divided that total by the number of lots – regardless of where the Castle Crest II trips went, and regardless of whether Castle Crest II produced fewer trips than other developments.¹⁹ *Castle* does not say, as T&C would like, that mitigation fees may be imposed only when a new subdivision is the sole cause of LOS failures.

And, *Castle* is distinguishable here, as Judge Feltnagle expressly recognized: the Hearing Examiner found that Federal Way did provide a trip distribution analysis, did document that new Scarsella Plat trips would contribute to LOS failures at a specified corridor and intersection, and did

¹⁸ T&C also points to a portion of *Castle Homes* which does mention that whether new development occurs or whether there is no development at all, the need for safety improvements on the City's streets would remain, but the Court did not hold that this fact precluded the City of Brier from charging any traffic mitigation at all. Rather, this reference followed the Court's comment concerning the lack of specific analysis of the Castle Crest II traffic impacts, upon which it then elaborated during the course of discussing *Miller v. Port Angeles*, a case in which the Court specifically upheld a traffic mitigation requirement despite pre-existing deficiencies. *Castle*, 76 Wn. App. at 107, citing *Miller v. Port Angeles*, 38 Wn. App. 904, 691 P.2d 229 (Div. II 1984); *rev. denied*, 103 Wn.2d 1024 (1985).

¹⁹ T&C Response brief, citing *Castle*, 76 Wn. App. at 106 (Castle Crest II had smaller impacts than other developments; fees charged based on total cumulative cost, not specific impacts of Castle Crest II project).

limit the fee to a per trip share of the cost of projects at those locations, with the City to bear the costs due to existing trips. CP 407-08 at Concl. 5. As such, that portion of the Examiner's decision relying upon *Castle* (Finding 16 and Concl. 16) were an erroneous interpretation of the law and erroneous application of the law to the facts, and must be reversed.

T&C's reliance upon the distinction between RCW 82.02.020's reference to "direct" impacts, on the one hand, and the WAC 197-11-792 (2)(c) description of SEPA impacts as "direct, indirect or cumulative," is also unhelpful. First, while T&C claims that SEPA and RCW 82.02.020 must be read in *pari materia*, because they address allegedly related subject matter, T&C is relying upon DOE's SEPA Rule – not an enactment of the Legislature. Second, RCW 82.02.020's requirement that mitigation be "reasonably necessary as a direct result" of a proposed development was adopted in 1982 - before the 1984 adoption of WAC 197-11-792's definition of "impact." *Compare* Laws of 1982, 1st Ex. Sess., ch. 49 § 5; *with* Wash. St. Reg. 84-05-020 (Order DE 83-39). T&C can hardly contend that in using the term "direct impacts" in 1982, the Legislature somehow anticipated and incorporated the meaning of an administrative agency's rule adopted two years later in a different (SEPA) statutory context.

Third, as discussed in more detail below, WAC 197-11-792 does

not prescribe that “direct” and “indirect” have independent meanings from “cumulative.”²⁰ Instead, some cumulative impacts may also be “direct,” in the sense that they flow “directly” (rather than indirectly) from the project to the affected location. “Cumulative” means “made up of accumulated parts,” or “increasing by successive addition.” Merriam Webster’s Online English Dictionary. “Cumulative” is thus a quantitative term, referring not to direction, but rather to the incremental accumulation of smaller impacts.²¹ In this case, the Scarsella Plat impacts are “direct” within the meaning of RCW 82.02.020, because the unchallenged findings below demonstrate that they flow directly (without intervention) to the intersection and arterial corridor in question. That they are also “cumulative” because, taken together with the impacts of other development, they will cause a level-of-service failure, does not make them any less “direct,” nor does it mean that the MDNS mitigation condition violated RCW 82.02.020.

²⁰ See, e.g., WAC 197-11-060(4)(d) (“A proposal’s effects include direct and indirect impacts caused by a proposal,” while also noting that “impacts include those effects resulting from growth caused by a proposal, as well as the likelihood that the present proposal will serve as a precedent for future actions.”(Emphasis added.)

²¹ See, e.g., WAC 197-11-330(2)(c) (“[S]everal marginal impacts when considered together may result in a significant adverse impact.”); see also Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, at 13-5 – 13-6 (“[E]ven action which qualitatively conforms to existing uses and impacts may be environmentally ‘significant’ because its impacts, alone or in combination with those of other similar actions, might be the “straw that breaks the camel’s back.””) (emphasis added).

This point is supported by *Citizens for Rational Shoreline Planning (CRSP) v. Whatcom County*, ___ Wn. App. ___, 2010 WL 1839407 (Div. I May 10, 2010), the most recent decision interpreting RCW 82.02.02. In *CRSP*, Division I emphasized that the point of RCW 82.02.020 is to “stop the imposition of general social costs on developers, while at the same time allowing the continued imposition of costs that are directly attributable to the development.”²² The purpose of RCW 82.02.020 is not to block mitigation for all but the project that is the sole cause of a LOS failure. Here, the MDNS was consistent with RCW 82.02.020’s purpose as articulated in *CRSP*, because it limited T&C’s percentage share of the TIP improvement costs to the percentage of Scarsella Plat trips – namely, .05 percent and 1.2 percent – directly attributable to the Scarsella Plat project.

Given the foregoing, there is simply no legal or factual support for T&C’s claim that the MDNS was improper because mitigation may be lawfully imposed only upon projects that are sole cause of a degradation in levels of service. As Judge Felnagle concluded, “that is not the statutes’ intent.”

²² “*CRSP* at *2 (emphasis added), citing *Isla Verde Int’l Holdings, Inc. v. Camas*, 146 Wn.2d 740, at 760 n. 14 (quoting *Southwick v. Lacey*, 58 Wn. App. 886, 893-94, 795 P.2d 712 (1990)).

C. The Tacoma MDNS Traffic Mitigation Condition Was Consistent With the State Environmental Policy Act (SEPA).

The traffic mitigation condition in Tacoma's MDNS was also consistent with the requirements of the State Environmental Policy Act, RCW 43.21C (SEPA), because it imposed mitigation for specific, adverse impacts – the significant, cumulative impacts of LOS failure – identified in the MDNS and other environmental documents. This Court should affirm the reversal of the Examiner's erroneous and unsupported conclusion that the Scarsella Plat impacts were "insignificant" and therefore incapable of mitigation.

1. SEPA Authorizes Mitigation for Cumulative Impacts.

As Judge Felnagle correctly concluded, "Appellate decisions, including *Hayes v. Yount* and *Tucker v. Columbia Gorge Commission*, establish that cumulative impacts may be considered and mitigation for them required." CP 410 (Concl. 9). Judge Felnagle was correct. It has long been the law in Washington that mitigation may be required under SEPA for cumulative impacts.²³ The Department of Ecology (DOE) SEPA Model

²³ Federal Way Opening Brief at 43-45, citing *Hayes v. Yount*, 87 Wn.2d 280, 287-88, 552 P.2d 1038 (1976); 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); *Narrowsview Preservation Ass'n v. Tacoma*, 84 Wn.2d 416, 423, 526 P.2d 897 (1974).

Rules expressly recognize this,²⁴ as does Professor Settle's SEPA treatise,²⁵ upon which T&C now relies.²⁶ Even the case upon which T&C relies, *Boehm v. Vancouver*, recognizes the vitality of precedents cited here allowing mitigation for cumulative impacts; *Boehm* itself affirmed a similar mitigation requirement.²⁷

All of this is confirmed in the recently-issued holding in *Lanzce G. Douglass v. Spokane Valley*, 154 Wn. App. 408, 423-25, 225 P.3d 448 (Div. III 2010).²⁸ In *Douglass*, Division Three affirmed the reversal of an MDNS on the grounds that it failed to impose enough mitigation for a subdivision's cumulative traffic impacts, after a hearing examiner concluded that a "significant volume" of traffic from the project area "cannot be evacuated from the area in 30 minutes," (the relevant fire evacuation standard), and the underlying fire evacuation analysis "failed to

²⁴ 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).

²⁵ Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, § 13.01[1] (rev. 2009) ("But even action which qualitatively conforms to existing uses and impacts may be environmentally "significant" because its impacts, alone or in combination with those of other similar actions, might be the "straw that breaks the camel's back.") (emphasis added).

²⁶ T&C Response Brief at 41, n. 123.

²⁷ Federal Way Opening Brief at 44-45; *Boehm v. Vancouver*, 111 Wn. App. 711, 717 n. 1, 720-21, 47 P.3d 137 (Div. II 2002) (affirming use of all-way stop controls to address existing traffic deficiencies plus traffic from proposed gas station).

²⁸ T&C's Response Brief cites *Douglass* but, disappointingly, only concerning the standard of review. T&C fails to acknowledge *Douglass's* holding with respect to SEPA and cumulative impacts.

consider the additional traffic generated by the Ponderosa development and other projects that had been approved in the Ponderosa area,” which were “relevant in determining the cumulative impact on community egress during an evacuation, and the ability of project traffic to timely evacuate.” *Douglass* 154 Wn. App. at 423; see also discussion at 425.

T&C’s Response Brief never addresses *Hayes*, *Tucker*, or even that portion of *Boehm* recognizing the appropriateness of requiring mitigation for cumulative impacts.²⁹ Instead, T&C lamely asserts that cumulative impact “is not a *direct* impact under SEPA,” as if that assertion somehow proves that mitigation may not be required for cumulative impacts. T&C Response Brief at 41 (*italics in original*). T&C is wrong on both counts.

Although T&C correctly observes³⁰ that DOE’s SEPA Rule, WAC 197-11-792(2)(c), recognizes that impacts may be direct, indirect or cumulative, T&C overlooks the fact that, at the core, SEPA contemplates two basic types of impacts: direct and indirect.³¹ But direct impacts may also be cumulative, as the facts of this case demonstrate: the Scarsella Plat’s traffic impacts flow directly to the affected arterial corridor and intersection in Federal Way, where they will combine with trips from

²⁹ Federal Way highlighted this in its Opening Brief at 44-45.

³⁰ T&C Response Brief at 40.

³¹ WAC 197-11-060(4)(d) (“A proposal’s effects include direct and indirect impacts caused by a proposal.”).

other pending and future development to cause LOS failures. SEPA is clear that such impacts must be analyzed and where adverse (as here), mitigated.³² Were it otherwise, *Hayes, Tucker*, and the recently decided *Douglass* simply could never have affirmed the requirement for mitigation of cumulative impacts in those cases. T&C's interpretation of the SEPA Rules is both belied and undercut by the decades of case law that it fails to address,³³ and upon which Judge Felnagle correctly relied.

2. The Scarsella Plat Impacts Are Part of a Significant, Adverse Cumulative Impact.

Judge Felnagle correctly reversed the Examiner's finding that the Scarsella Plat impacts were *per se insignificant*, on the ground that such a finding was unsupported by substantial evidence. CP 410 (Concl. 8). As Judge Felnagle explained, the Scarsella Plat impacts are "part of a major cumulative impact in the form of level of service failures" that are "a significant impact for SEPA purposes, as was conceded by all parties here." CP 410 (Concl. 8) (emphasis added). T&C's response to this conclusion is schizophrenic: T&C first asserts that "the Scarsella Plat traffic will not

³² WAC 197-11-060(4)(e) (EIS must analyze direct, indirect and cumulative impacts); *Compare* 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)) *with* -330(3)(e) (proposal may "establish a precedent for future actions with significant effects . . .").

³³ T&C essentially admits the futility of its arguments, claiming that "parsing the precise meaning of *cumulative impacts* is ultimately a sideshow." T&C Response Brief at 42 (italics in original).

create any cumulative adverse impact,” but admits in the next breath that “the impacts of the Scarsella plat . . . are cumulative impacts.” which “properly include” the “effects of pending and future proposals.” T&C Response Brief at 37; 41-42; at 48.

T&C’s second statement is the correct one. As T&C itself admits, the “upshot” of Ex. R 40 is that “existing Federal Way traffic plus the addition of traffic attributable to annual growth in the city – presumably including Scarsella Plat . . .” will cause “two city street locations [to] eventually operate at LOS F.” T&C Response Brief at 33. This is “unsurprising,” as T&C again admits, because “common sense dictates that adding traffic from all projected annualized growth to an existing street network, without making any improvements to the network, will eventually degrade levels of service.” *Id.* Yet, Federal Way did not add Scarsella Plat’s traffic to “all projected annualized growth,” but only to that growth projected to occur by the year when the Scarsella Plat was projected to be built.³⁴ The bottom line is that, though Federal Way’s street networks operate acceptably under existing conditions, the Examiner found that the Scarsella Plat’s trips will combine with trips from other proposed development to cause LOS failures during the year the plat

³⁴ Tr. 7/11/08 at 261 (Perez testimony); see also R 951-54 (showing “Horizon [year] without TIP).

is built – unless improvements are constructed.³⁵ Compare R 947-950 (Ex. R 39) with R 951-54 (Ex. R 40). This is a major cumulative impact.³⁶ T&C’s support for the Examiner’s finding that the Scarsella Plat impacts are “insignificant” is limited to a last-page footnote asserting that a .05 percent and 1.2 percent increase, respectively, are properly characterized as insignificant. T&C Response Brief at 49, n. 149. As already noted, this overlooks the fact that the Scarsella Plat traffic will combine with traffic from other proposed development to cause LOS failures. Because SEPA authorizes mitigation for such cumulative impacts, Judge Felnagle correctly determined that the Hearing Examiner’s finding that the Scarsella Plat’s impacts were *per se* insignificant was not supported by substantial evidence and should be reversed. CP 410 (Concl. 8). This Court should affirm.

3. Tacoma’s MDNS Properly Identified the Scarsella Plat’s Adverse Environmental Impacts.

T&C makes an additional collateral attack on the MDNS, claiming it and other environmental documents failed to specifically identify the adverse environmental impacts for which mitigation was required. T&C Response

³⁵ To its credit, Federal Way dropped from its request mitigation for projects at intersections that would fail some time in the future, but would not fail in the Scarsella Plat’s horizon year. Tr. 7/11/08 at 181, lines 1-9 (testimony of Rick Perez).

³⁶ T&C conceded this below, as Judge Felnagle concluded. CP 410, Concl. 8.

Brief at 46-48. T&C confuses “identify” with “prove.”³⁷ All that RCW 43.21C.060 requires is that environmental documents “identify” the impact to be mitigated, and T&C’s own environmental checklist and Tacoma’s MDNS clearly complied. The environmental checklist acknowledges that “the completed project will generate 510 vehicular trips per day (490 new trips).” R 337a. Tacoma’s MDNS likewise identified the specific adverse environmental impacts, in the form of impacts to Federal Way’s street system, at page 4, under the heading “Transportation.” R 555, concluded that “additional mitigating measures” are necessary to address those impacts and, the MDNS referred to Exhibit C, Federal Way’s TIA, which identified the impacts of more than 10 p.m. peak hour trips to the specified corridor and intersections. R 555-56; R 638 (TIA cover letter); R 685 (TIA at 41). This clearly – and sufficiently for SEPA purposes – identified the environmental impact. T&C’s complaint is that the environmental documents did not contain a full analysis proving that impacts would occur and be the sole cause of a level of service failure, but this is not required by SEPA.

III. CONCLUSION

Washington law clearly allows a city to impose pro rata share

³⁷ T&C Response Brief at 46-47 (claiming the only document cited as “support” or “justification” for the MDNS mitigation was the 2007 TIA).

mitigation to the extent of a subdivision's contribution to failures in transportation levels of service. In failing to recognize this, the Hearing Examiner committed a number of fundamental errors, most of which are conceded by T&C. T&C's remaining contention – that only a project which by itself causes a change in level of service can be required to mitigate – is not supported by appellate authority. The result of such a policy would be, in the words of the City Engineer, “death by a thousand cuts,” and Judge Felnagle correctly recognized that such a result is “not the statutes’ intent.” His well-documented, well-reasoned reversal of the Hearing Examiner’s decision should be affirmed.

RESPECTFULLY SUBMITTED this 13th day of May, 2010.

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NO. 39407-3

IN THE COURT OF APPEALS, DIVISION II
OF THE 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.

DECLARATION OF
SERVICE

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 13th day of May, 2010, I served a true copy of the *Reply Brief of Petitioner/Respondent City of Federal Way*, as well as a true copy

ORIGINAL

of this *Declaration of Service*, also filed herewith, on the following
counsel of record using the method of service indicated below:

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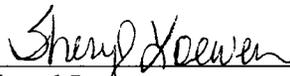
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I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED this 13th day of May, 2010, at Issaquah, Washington.



Sheryl Loewen

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