

FILED
NOV 09 2009
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

No. 83611-6

**IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON**

WHATCOM COUNTY FIRE DISTRICT NO. 21,

Petitioner,

v.

WHATCOM COUNTY, a municipal corporation;
BIRCH POINT VILLAGE, L.L.C., a Washington corporation;
SCHMIDT CONSTRUCTING, INC.,
A Washington corporation; and BRIGHT HAVEN
BUILDERS, LLC, a Washington corporation;
MAYFLOWER EQUITIES, INC.; LISA SCHENK
and MIKE SUMNER,

Respondents.

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SUPREME COURT
STATE OF WASHINGTON
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CLERK

ANSWER TO PETITION FOR REVIEW

BURI FUNSTON MUMFORD, PLLC

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ORIGINAL

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INTRODUCTION

This case concerns concurrency planning under the Growth Management Act. At issue is Whatcom County's authority to adopt levels of service in its comprehensive plan and then rely on those levels while reviewing a specific project. In 2004, before the collapse of the housing market, four developers filed separate applications to erect residential or mixed-use buildings in Birch Bay, Washington. A unique Whatcom County ordinance required the developers to obtain a "concurrency letter" from "all providers of water, sewage disposal, schools, and fire protection serving the development." Whatcom County Code (WCC) 20.82.212. The letter would state whether "adequate capacity exists or arrangements have been made to provide adequate services for the development." WCC 20.82.212.

Petitioner Fire District 21 refused to give the four developers their concurrency letters unless they paid "voluntary concurrency mitigation fees." The Whatcom County Hearing Examiner struck down these fees, ruling,

since the Whatcom County Council has the authority to determine concurrency under the Growth Management Act and since the Whatcom County Council has determined within the Birch Bay Comprehensive Plan that Fire District No. [21] has

adequate current capacity and that arrangements for adequate funding are in place to provide for future growth, Fire District No. [21] cannot stop this development by refusing to issue a concurrency letter.

(Hearing Examiner's Decision at 12; CP 349) (Attached as Appendix A). The District appealed this decision to the Superior Court, Court of Appeals, and now petitions this Court for review, arguing "*nothing* in the GMA or other statutes give authority to a county to set service levels over a fire district and its separately elected board." (Petition for Review at 11).

The four developers, respondents Birch Point Village, Schmidt Constructing, Mayflower Equities, and Lisa Schenk and Mike Sumner (Birch Point Village) request the Court to deny the District's Petition for three reasons. First, this dispute involves atypical facts and is an unwieldy case to discuss concurrency planning. Second, the Court of Appeals' ruling is straightforward and uncontroversial – the County has ultimate authority for setting levels of service to judge concurrency. Third, the appropriate mechanism to change levels of service is an amendment to the comprehensive plan, not a lawsuit. Birch Point Village respectfully requests the Court to deny Fire District 21's petition for review.

I. RESTATEMENT OF ISSUES PRESENTED

A. Under WAC 365-195-510(3), “planning jurisdictions should designate the appropriate levels of service [to judge concurrency]”. The Court of Appeals ruled that Whatcom County, not the District, “determines the standard of service and adequacy of available fire service capacity.” Whatcom County Fire District 21 v. Whatcom County, 151 Wn. App. 601, 612, 215 P.3d 956 (2009) (Appendix B). Is the Court of Appeals’ ruling an issue of substantial public interest that should be determined by the Supreme Court?

B. “Any challenge to the correctness of the comprehensive plan determination that the District can meet the level of service must be done through amendment to the comprehensive plan, not by factual challenge to the project permitting.” Fire District 21, 151 Wn. App. at 613-14. The District concedes it repeatedly requested comprehensive plan changes, but they “have languished before the Whatcom County Council.” (Petition for Review at 17 n.14). Does the District’s failure to persuade Whatcom County to change the concurrency level of service present an issue requiring Supreme Court review?

II. THE COURT OF APPEALS' DECISION

This case arises from the unique workings of the Whatcom County permit process. During 2005, four applicants submitted separate plans for residential and commercial projects in Birch Bay, an urban growth area north of Bellingham near the Canadian border. (Project Summary; CP 356-373) These projects included a mixed-use condominium (Horizon's Village), a cluster long plat of single-family homes (Bay Breeze Cluster Plat), a planned residential development (Harborview Road), and a phased commercial development on 12.68 acres (Birch Bay Center). Fire District 21, 151 Wn. App. at 606. Although they applied for different sets of permits, the four developers had to obtain a concurrency letter from the local Fire District, now called Fire District 21, stating that adequate fire services existed.

This concurrency letter is the crux of the parties' dispute. Until December 2005, the Fire District issued the letters consistent with Community Plan for Birch Bay. Fire District 21, 151 Wn. App. at 606. The District then switched course, fearing a budget shortfall, and began charging voluntary mitigation fees for the letters. (Hearing Examiner's Decision at 8; CP 345) (Resolution 2005 p. 17 at CP 589) (Appendix C) When Birch Point Village

refused to pay, the District persuaded Whatcom County's SEPA official to include the fee as a new condition to the mitigated determination of non-significance. Birch Point Village appealed, and both the Hearing Examiner and County Council found that the Birch Bay Community Plan established concurrency for fire services in Birch Bay. When the Fire District appealed, the Superior Court reversed the finding of concurrency and placed all permit applications on hold. (Final Decision at 4; CP 6). The Court of Appeals reversed, upholding the Hearing Examiner. Fire District 21, 151 Wn. App. at 614.

A. Whatcom County Established The Level Of Service In the Birch Bay Community Plan

The Court of Appeals' opinion identifies the six factors that support the Hearing Examiner's decision. First, Whatcom County in the Birch Bay Community Plan established the appropriate level of fire protection service for concurrency planning.

The BBCP established that the District must meet the "gold standard" for successful emergency medical services, which "is four to six minute response times for aid services and 15 to 20 minutes for ambulance services."

Fire District 21, 151 Wn. App. at 605. This was not an urban level of service, nor was it based on a national standard. (Birch Bay Community Plan at 15-6; CP 244).

Second, the Community Plan identified how the District would fund future expansion and improvements to meet this level of service.

Increased population, particularly in the Birch Point area will necessitate manning the fire station at Semiahmoo on a 24-hour basis. Additional equipment will also need to be brought to the station to maximize its effectiveness. *These costs will be borne by taxes paid by the growing population.* The Birch Bay station now being utilized as a manned fire station must undergo substantial remodeling in the future to house firefighters and EMTs.

(Birch Bay Community Plan at 15-6; CP 244) (emphasis added).

Taxes from the new homes, not fees from developers, would fund the Fire District's operations as the area grew.

Third, under RCW 36.70B.030, the Community Plan determines for concurrency planning whether fire protection services are available and adequate.

An evaluation of RCW 36.70B.030 and WCC 20.80.212 is dispositive. Section one of RCW 36.70B.030 explains that "[f]undamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review."

Fire District 21, 151 Wn. App. At 611. Unless a development regulation sets a different concurrency standard, comprehensive plans decide whether concurrency exists for a particular project.

The fourth factor is that Whatcom County's special ordinance on concurrency, WCC 20.80.212, did not change the concurrency standards from those in the comprehensive plan.

WCC 20.80.212 is not an applicable development regulation, because it is not determinative of the availability and adequacy of public facilities, as defined in the comprehensive plan. The ordinance does not purport to establish the required criteria for the District. This was done in the comprehensive plan. Instead, it merely requires a letter attesting to the capacity of services. Because the BBCP establishes the availability and adequacy of services, the District did not have discretion under WCC 20.80.212 regarding whether to issue the letter.

Fire District 21, 151 Wn. App. at 612.

B. The County, Not The Fire District, Has Authority To Set The Level Of Service

The previous four points led the Court of Appeals to the fifth factor -- the District cannot unilaterally claim a lack of concurrency for a pending project.

Here, the BBCP, as adopted into the comprehensive plan, establishes the standard of service, the gold standard. Moreover, the County has determined that the District can meet its service obligations at the gold standard, including new equipment and demands of the growing population, through existing taxation.

The BBCP, not the District determines the standard of service and adequacy of available fire service capacity.

Fire District 21, 151 Wn. App. at 612. The County has the authority to set the standards for concurrency planning, not the District. If the District disagrees with these standards, it must persuade the County to amend the comprehensive plan. Fire District 21, 151 Wn. App. at 614 (“challenge...must be done through amendment to the comprehensive plan, not by factual challenge to the project permitting”). The District cannot unilaterally change the level of service and claim a lack of concurrency.

C. Substantial Evidence Supported The Hearing Examiner’s Decision

The sixth factor in the Court of Appeals’ ruling is that substantial evidence supported the Hearing Examiner’s findings.

[T]o the extent that the BBCP has already concluded that adequate capacity exists, we do not evaluate whether capacity exists on a project-by-project basis. The BBCP determined that the District has the capacity to meet the needs of the growing population and/or that any new expansion or improvements will be borne by the growing population. The BBCP findings are sufficient to support the hearing examiner’s finding of fact that adequate capacity exists for the District to meet the standard level of services.

Fire District 21, 151 Wn. App. at 613.

Unsatisfied with the Court of Appeals' ruling, the District petitions this Court for review. Respondent Birch Point Village respectfully requests this Court to deny the petition.

ARGUMENT

III. THIS CASE, ALTHOUGH IMPORTANT TO THE PARTIES, DOES NOT PRESENT ISSUES REQUIRING FURTHER REVIEW

A. Bad Facts Make Bad Law

The District suggests “this case presents issues of first impression regarding the authority of counties and fire districts for service levels under GMA, and concurrency.” (Petition for Review at 10). But this general statement glosses over the unusual circumstances in this case that will muddle any discussion of concurrency. The dispute centers on a Whatcom County ordinance that no other county has adopted. Furthermore, the District’s “voluntary mitigation fees” cloud the analysis of concurrency, requiring the Court to decide whether this issue is or is not part of the appeal. Finally, the economic pressure that led to this dispute – the booming housing market in Birch Bay -- has collapsed. This is not an ideal case for the Court to probe the technical issues of concurrency planning.

First, the County Code at issue, WCC 20.80.212, is unique.

In 1998, the Whatcom County Council adopted WCC 20.80.212.

No subdivision, commercial development, or conditional uses shall be approved without a written finding that:

(1) All providers of water, sewage disposal, school and fire protection serving the development have issued a letter that adequate capacity exists or arrangements have been made to provide adequate services for the development.

(2) No county facilities shall be reduced below applicable level of service as a result of the development.

(WCC 20.80.212) (Ordinance 98-083 Ex. A § 58). This ordinance was a by-product of the Whatcom County Council's long-running opposition to the Growth Management Act. As the Western Washington Growth Management Hearings Board noted two years earlier,

Whatcom County's history in attempting to comply with the Act relating to IUGAs is extensive. The initial deadline for establishment of IUGAs was October 1, 1993. Whatcom County did not meet that deadline. In *Watershed Defense Fund v. Whatcom County*, WWGMHB #94-2-0003, filed March 9, 1994, petitioners challenged the County's failure to act in accordance with RCW 36.70A.110(4). The County adopted an IUGA ordinance on May 24, 1994. We dismissed the original failure to act petition. On July 25, 1994, a new petition was filed by Watershed Defense Fund and Whatcom Environmental Council under cause #94-2-0009. A Final Order was entered

November 9, 1994, finding that the County had not complied with the Act in the establishment of IUGAs. A Compliance Hearing Order was entered February 23, 1995, in which the County conceded that no action to comply with the Act had been taken and none was contemplated. We recommended to the Governor that sanctions be imposed.

C.U.S.T.E.R. v. Whatcom County, WWGMHB No. 96-2-0008, 1996 WL 671531 (September 12, 1996). The ordinance is a relic from a recalcitrant County Council.

This ordinance also taints the issues on appeal. Before the Hearing Examiner and the Superior Court, the District argued that WCC 20.80.212 required the County to assess concurrency in each project. As the Superior Court held,

the County adopted WCC 20.80.212 as the development regulation to be determinative of the levels of service at the time of application review. *See SEPA Decision, in particular Conclusions of Law III and IV.* This development regulation must be applied during project review as required by RCW 36.70B.030(2).

(Final Decision at 3; CP 5). The District reinforces this point in its petition, asserting “the County was required to apply WCC 20.80.212 to the proposed developments at the time of application, regardless of any policy statements relating to fire or emergency services in its Plan or comprehensive plan.” (Petition for Review at 15).

It makes no sense for this Court to explain concurrency planning by construing a county ordinance that exists nowhere else. Accepting review would only complicate the evolution of caselaw on the topic.

Second, the dispute over voluntary concurrency mitigation fees clouds this appeal. The case arose when the respondent developers refused to pay a \$2,500-per-unit fee to the District in exchange for a concurrency letter. The Hearing Examiner did not think highly of the fee.

In an attempt to get around this specific prohibition on impact fees, the Fire District calls their fees "concurrency mitigation fees." However, the Fire District's proposed fee clearly meets the definition of impact fee in RCW 82.02.090(3).

* * * *

To require a developer to pay money to Fire District [21] to enable Fire District [21] to deal with costs associated with new development is illegal and such fees cannot be imposed by the County, the Fire District, or through SEPA analysis of individual projects.

(Hearing Examiner's Decision at 13-14; CP 350-351). On appeal, the District did not defend the fees, calling it a straw man argument.

The developers offer several contentions in their brief regarding the District's role in the process for planning and delivering emergency services that are either unsupported in the record or the law, or are blatantly wrong. They compound such conduct by raising a

strawman argument about the District's voluntary mitigation fee, an issue the District did not even raise in its LUPA appeal, as the developers acknowledge... Despite this concession, the developers treat the issue as a live one on appeal, and devote a considerable portion of their brief to the issue. *The developers waste this Court's time on an issue that was not before the trial court.*

(Respondent's Brief at 17-18) (emphasis added).

Yet the District cannot excise mitigation fees from the case. The Hearing Examiner's decision discussed them extensively, and no evidence exists that the District has refrained from charging them to other developers. (Hearing Examiner's Decision at 13-14). Under RAP 2.4(a), the legality of mitigation fees is an act "in the proceeding below which if repeated on remand would constitute error prejudicial to the respondent." It is therefore subject to review in this Court.

Third, since this case began in 2005, the real estate market in Whatcom County has plummeted. The pressures for development that existed four years ago no longer apply, and economic conditions have changed significantly. The Court is reviewing a record created before the economic upheaval. Any ruling would have limited relevance to today's conditions. As a

consequence, this case presents far more problems than opportunities to explain and analyze concurrency planning.

B. The Court Of Appeals Decided The Case Correctly

The second reason to deny the District's petition is that the Court of Appeals reached the correct result. At the heart of the Court of Appeals' decision is this premise: "the [County], not the District determines the standard of service and adequacy of available fire service capacity." Fire District 21, 151 Wn. App. at 612. Whatcom County has sole authority to set the minimum standards for concurrency, including those for fire protection services.

The Growth Management Act delegates to the County the power to create and enforce a Comprehensive Plan and development regulations.

- Who Must Plan – RCW 36.70A.040: "The county legislative authority shall adopt a county-wide planning policy under RCW 36.70A.210.
- Comprehensive Plans – RCW 36.70A.070: "The comprehensive plan of a county shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan."
- Planning For Urban Growth Areas – RCW 36.70A.110: "Each county that is required or chooses to plan under RCW 36.70A.040 shall designate an urban growth area or areas

within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature.”

- County-Wide Planning Policies – RCW 36.70A.210: “A county-wide planning policy shall at a minimum, address the following: (a) Policies to implement RCW 36.70A.110; (b) Policies for promotion of contiguous and orderly development and provision of urban services to such development.”

Nowhere does the Act delegate authority to a public service provider like the Fire District. The County determines minimum standards after consulting with the relevant stakeholders. WAC 365-195-070; WAC 365-195-835.

The Court of Appeals correctly identified this basic legislative grant of power. Although the District disagrees with the outcome, the County as land use authority has the authority to set the levels of service for concurrency planning.

C. The Court Should Avoid Entering A Political Dispute

The final reason this Court should not accept review is that the case is really a political dispute about funding. The District adopted voluntary mitigation fees, prompting this lawsuit, because it needed more money. As the District stated in its resolution requiring mitigation fees,

Whatcom County must be made aware that development in the Birch Bay UGA will not be receiving urban levels of service as called for by

Whatcom County and national standards, unless that costs of providing the required level of service is paid for by the Developers through a mitigation fee, and that without such mitigation fee a moratorium on development in the Birch Bay UGA, and denial of any developments pending approval would be appropriate.

(Resolution No. 2005-017 at 2; CP 589). The Fire District alleged that it needed funds, which it would collect from developers.

The Hearing Examiner found concurrency regardless of the District's resolution, concluding that the County had determined that increased tax revenues would fund improvements.

Based on the record before the Hearing Examiner, the Hearing Examiner finds, on a more likely than not basis, that the Fire District will be able to continue to provide an adequate level of fire protection and emergency response services to the district, even with significant new growth, based on the currently authorized funding mechanisms available to the Fire District and the increased taxes and fees paid by the new growth.

(Hearing Examiner's Decision at 7; CP 344). From this point on, the case became a political battle between the Fire District and the County over how to fund Fire District improvements. Developers like Birch Point Village were caught in the middle, trying to avoid the stalemate.

The Court of Appeals' decision provides all the guidance necessary to resolve the political standoff. Changes to either the

concurrency level of service or planned funding sources must come from an amendment to the Community Plan. "Any challenge to the correctness of the comprehensive plan determination that the District can meet the level of service must be done through amendment to the comprehensive plan, not by factual challenge to the project permitting." Fire District 21, 151 Wn. App. at 613-14. The District concedes that it has tried to persuade the County Council to amend the comprehensive plan, with no success. (Petition for Review at 17 n.14). The Court of Appeals' decision ends the stalemate by making clear that the District must persuade the County – not the other way around.

No compelling reason exists for this Court to intervene.

IV. THE DEVELOPMENTS SATISFY RCW 58.17.110

Under RCW 58.17.110,

the city, town, or county legislative body shall inquire into the public use and interest proposed to be served by the establishment of the subdivision and dedication. It shall determine: (a) If appropriate provisions are made for, but not limited to, the public health, safety, and general welfare, for open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds, and shall consider all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school; and (b)

whether the public interest will be served by the subdivision and dedication.

RCWA 58.17.110. The statute requires the developers to make appropriate provisions for public health, safety, and general welfare. The developers satisfied this condition by obtaining a will service letter from the District.

In his May 10, 2006 letter to the Hearing Examiner, Chief Fields acknowledged that the District will provide fire protection services to the developments. "The Fire District does provide fire protection services to the Horizons Village at Semiahmoo project location and will continue to do so." (5/10/06 Fields Letter at 9; CP 528). The only dispute was whether the District could "provide or maintain the appropriate levels of service commensurate with nationally recognized standards such as NFPA 1710 and/or NFPA 1720, and the levels of service identified in the Birch Bay Community Plan..." (5/10/06 Fields Letter at 9; CP 528).

The District's argument under RCW 58.17.110 does not differ from its concurrency argument. As the District implicitly recognized before the Court of Appeals, the general subdivision statute does not provide an independent ground to reverse the Hearing Examiner. (Response Brief at 46) ("the four developments

here failed to meet State and County requirements because the District cannot provide adequate, urban-level emergency services to the four developments for the reasons articulated *supra*). Because the Hearing Examiner correctly concluded the developments satisfied all County requirements, the District's argument under RCW 58.17.110 does not provide independent grounds for this Court to intervene.

CONCLUSION

Whatcom County makes the ultimate decision on whether concurrency exists for a specific development in its borders. Fire District 21 acted outside its authority by changing the level of fire protection services established in the County's comprehensive plan, and then claiming a lack of concurrency. Respondents Birch Point Village et al., respectfully request this Court to deny the District's petition for review.

DATED this 6th day of November, 2009.

BURI FUNSTON MUMFORD, PLLC

By 

Philip J. Buri, WSBA #17637
1601 F. Street
Bellingham, WA 98225
(360) 752-1500

DECLARATION OF SERVICE

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

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Karen Frakes
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DATED this 6th day of November, 2009.



Cathy McKenzie

APPENDIX A

RECEIVED

WHATCOM COUNTY HEARING EXAMINER

JUN 30 2006

RE: SEPA Appeal)	APL06-0069	CHMELIK SITKIN & DAVIS P.S.
Application for)		
<i>Fire District No. 13</i>)		Findings of Fact,
<i>Birch Point Village, L.L.C.</i>)		Conclusions of Law,
<i>"Horizons Village at Semiahmoo"</i>)		and Decision

SUMMARY OF APPEAL AND DECISION

Appeal: Whatcom County Fire District No. 13 and Birch Point Village, L.L.C. have appealed the Mitigated Determination of Non-significance, issued by the Whatcom County Responsible Official for SEPA, on May 3, 2006.

Summary of Decision: The Hearing Examiner concludes that mitigating conditions #1 and #2 regarding Fire District No. 13's request for financial contributions or fees from the developer should not have been included as mitigating conditions on the Determination of Non-significance and that SEPA cannot be used to require a project proponent to contribute money to Fire District No. 13 to mitigate impacts from a proposed development.

Findings of Fact

I.

Preliminary Information

Appellants: Birch Point Village, L.L.C.
Fire District No. 13

Hearing Dates: May 3, May 10, June 9, 2006
Written record remained open until June 15, 2006, for comments re: Fire District 13 Letter dated June 8, 2006, Exhibit #24, submitted at the hearing.

Parties of Record:

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Birch Point Village LLC
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Craig Parkinson
David Evans and Associates, Inc



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Tom Vuyovich
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Roger McCarthy
Division of Engineering

Martin Blackman
SEPA Responsible Official

Marilyn Bentley
Planning and Development Services

Copy of Decision to
Aubrey Cohen, Bellingham Herald

Jack Kintner, Point Roberts Press, Inc.

Exhibits

- 1 Appeal Application, with attached letter of support dated April 13, 2006, from Jon Sitkin
- 2 Letter dated April 20, 2006, from Jon Sitkin
- 3 Staff Report, dated May 3, 2006
- 4 Memo from Martin Blackman, dated May 2, 2006
- 5 Concurrency and Infrastructure Update, dated April 19-20, 2006
- 6 Letter dated August 19, 2005 from Fire District #13 to David Evans and Associates
- 7 SEPA Appeal Brief, dated May 3, 2006 from Jon Sitkin, with attachment 7(a) – County color-coded map ‘pending projects/zoning’
- 8 Brief, dated May 2, 2006 from Douglas Robertson, with attachments
 - 8(1) Table showing Taxing District/Fire District #13
 - 8(2) County Treasurers Monthly Report-Dec 2005 Fire Distr 13
 - 8(3) Map-Commercial/Residential Projects-Pending
 - 8(4) Fire Distr 13 Resolution No. 2005-017
 - 8(5) Concurrency Mitigation Agreement – County/Fire Distr 13
 - 8(6) Letter dated March 5, 2006 re: Sunrise Meadows Residential Development, from David Evans & Associates
 - 8(7) Series of Memoranda, beginning date March 29, 2006, from Doug Robertson, re: Sunrise Meadow
- 9 MDNS, dated May 3, 2006; Exhibit 9A Mr. Robertson’s letter, dated May 4, 2006

- 10 Letter dated May 4, 2006, from Jonathan Sitkin re: excluding Condition #4 from Sitkin letter dated September 15, 2005 related to police services (Staff Report Condition #11).
- 11 Brief dated May 9, 2006 from Doug Robertson, with supporting material in binder
- 12 Letter (fax) dated May 8, 2006 from Jon Sitkin
- 13 Letter dated May 8, 2006 from Jon Sitkin
- 14 Rezone Brief – Objections to Site Specific from Jon Sitkin
- 15 County’s Memorandum re: SEPA Final Decision, dated May 8, 2006
- 16 SEPA Issues – Brief from Jon Sitkin
- 17 Fire District No. 13 letter, dated May 10, 2006
- 18 Memorandum, dated May 10, 2006, from Troy Holbrook
- 19 Memorandum dated May 10, 2006 from Bob Martin
- 20 Amended SEPA Appeal, dated May 22, 2006 from Birch Point Village, LLC
- 21 SEPA Appeal, dated May 30, 2006 from Whatcom County Fire District No. 13
- 22 Supplemental Brief in Support of Appeal, SEP06-0069, dated June 8, 2006, with attachments, from Doug Robertson
- 23 Whatcom County Fire District No. 13 (“DISTRICT”) Supplemental Brief on Whatcom County Concurrency Requirements, dated June 7, 2006, with attachments, from Jon Sitkin
- 24 Fire District No. 13 Letter, dated June 8, 2006
- 25 Jon Sitkin’s Legal Citations Notebook
- 26 Letter dated June 22, 2006, from Douglas Robertson
- 27 Hearing Examiner’s Entire File for Birch Point Village, L.L.C. applications for Site Specific Rezone, ZON05-0019, Planned Unit Development, PUD05-0005, and Binding Site Plan, BSP05-0004

II.

Birch Point Village, L.L.C. is seeking approval for a Site Specific Rezone, Planned Unit Development, and General Binding Site Plan for a proposed mixed-use development of up to 200 residential units (multi-family) and up to 134,000-square feet of commercial space on a 36.23-acre site located within the Birch Bay Urban Growth Area and designated with a Long Term Planning Area Designation.

On August 19, 2005, Whatcom County Fire Protection District No. 13 responded to this proposed development with a letter indicating that the District will serve the property site for the Horizons Village development proposal.

A Mitigated Determination of Non-significance under the State Environmental Policy Act was issued by the Whatcom County Responsible Official on March 16, 2006. This SEPA Determination was appealed by Fire District No. 13 in a Notice of Appeal, dated April 13, 2006. The Fire District stated that the grounds for the appeal were that the SEPA Determination did not adequately address the impacts of the project on the District's ability to provide emergency medical response, fire response, and transport. Filed with the appeal is a letter from the District's attorney, dated April 13, 2006, containing mitigating conditions the District felt should be added to the SEPA Determination, including a Mitigation Fee of \$384.00 per vehicle average daily trip to be paid directly to the District prior to the District's issuance of a letter of concurrency or, in the alternative, a Concurrency Fee Agreement reached with the District, based on a \$2,500 per residential living unit and additional equivalency fees for the commercial parts of the development.

Pursuant to County ordinance and State law, the SEPA Appeal was scheduled for hearing at the same time as the hearing on the merits of the Horizons Village at Semiahmoo Project.

III.

The hearing was opened on both the project and on Fire District No. 13's SEPA Appeal, on May 3, 2006. Also on May 3, 2006, the SEPA Official withdrew the MDNS issued on March 16, 2006, and issued a new MDNS which included, as Conditions #1 and #2, requirements that the developer contribute to a planning study regarding the Fire District's ability to provide services for new growth and a "concurrency assessment contribution" to be made by the applicant to the District based on the results of the "concurrency planning study." MDNS Condition #2 required that, if the planning was not done prior to actual development, the applicant and Fire District No. 13 enter into a "mediated agreement based on the best current available estimates of the impacts of increased population created by the proposed development ..." to determine the project's contribution (fees) to the Fire District to mitigate impacts from the development on the Fire District.

The new SEPA Determination required a fourteen day comment period as well as a period in which to file appeals. For this reason, the hearing on the project was continued.

Both the applicant and Fire District No. 13 appealed the May 3, 2006 SEPA Determination and these appeals were heard at an open record hearing on the project proposal on June 9, 2006.

IV.

The applicant has taken the position that the fees or "contributions" requested by Fire District No. 13 cannot be required. The Fire District takes the position that the SEPA analysis was inadequate and that the Responsible Official should have required an Environmental Impact Statement regarding the impacts of this development on the Fire District's ability to provide appropriate services in the future. Previous development proposals faced with similar requests, combined with Fire District No. 13's unwillingness to provide a concurrency letter, have lead to prior "voluntary agreements" to pay "concurrency mitigation" fees to the Fire District.

In this case, the project proponents indicate that the requested fees would be in excess of one million dollars and have declined to enter into such an agreement with the Fire District. Because there was no "voluntary agreement" to pay fees, the Fire District indicates that it will not provide a Concurrency Letter stating that the District will be able to adequately serve this development and therefore the development cannot proceed. The project proponent argues that the County Council has decided the issue of concurrency in regard to fire protection in the Birch Bay Urban Growth Area through adoption of the Birch Bay Community Plan and that the County or Fire District cannot legally impose impact fees on new development within the County's Urban Growth Area to mitigate growth impacts on Fire District No. 13.

V.

Fire District No. 13 has not completed a Capital Facilities Planning Process. Fire District No. 13 believes that completion of such a Capital Facilities Plan would "... result in an Interlocal Agreement between the County and the District to ensure that prior to development occurring in the Birch Bay Area, the appropriate mitigation fee related to urban levels of service would be paid."

The District states that it will not be able to provide the current level of service to future development without such a concurrency mitigation or impact fee. However, since the Fire District has not completed its planning process, the District's position can be best characterized only as speculation. The District has a number of State authorized funding mechanisms, including levies and the issuance of capital facilities bonds. Central to the District's arguments about its potential inability to provide an adequate level of service to meet the demands of new growth without "concurrency mitigation fees," the District cites the increased burden on the District's ability to provide Emergency Medical Services to a

growing population and cites the financial impact that these increased EMS services will have on the District's ability to provide fire protection to the district. At no point does the District discuss the fact that Whatcom County voters increased the sales tax to provide a separate funding mechanism for Emergency Medical Services county-wide. This funding source is in addition to the other specific authorized funding mechanisms that the State has provided to fire districts.

Based on the record before the Hearing Examiner, the Hearing Examiner finds, on a more likely than not basis, that the Fire District will be able to continue to provide an adequate level of fire protection and emergency response services to the district, even with significant new growth, based on the currently authorized funding mechanisms available to the Fire District and the increased taxes and fees paid by the new growth.

Fire District No. 13, as an "interim measure," has passed resolutions calling for a \$2,500 per living unit, "concurrency mitigation fee," for new development within the district. Since this proposed development is a mixed-use development, the District also feels that it should obtain such a fee for the retail and commercial development proposed.

VI.

Whatcom County was and is required to do concurrency planning under the Growth Management Act. Concurrency planning is aimed at ensuring that necessary public services are available to serve new developments as they come on line. The Whatcom County Council has addressed fire services in the Birch Bay Community Plan Component of the Whatcom County Comprehensive Plan. On pages 15-5 and 15-6, the Birch Bay Comprehensive Plan describes the existing facilities and services of Fire District No. 13, addresses the standards for response time, indicates proposed or needed expansions and improvements, and states that the cost of the necessary expansions and improvements to meet further growth, "...will be born by taxes paid by the growing population."

The only time concurrency is addressed in the Whatcom County Zoning Ordinance is in WCC 20.80.212, which reads as follows:

20.80.212 Concurrency.

No subdivision, commercial development, or conditional uses shall be approved without a written finding that:

- (1) All providers of water, sewage disposal, school, and fire protection serving the development have issued a letter that adequate capacity exists or arrangements have been made to provide adequate services for the development.**
- (2) No county facilities shall be reduced below applicable level of service as a result of the development.**

Fire District No. 13 has refused to provide a Concurrency Letter under WCC 20.80.212 until such time the project proponent enters into a "voluntary agreement" to provide fees as described above to the Fire District. Fire District No. 13 argues that their requested "concurrency mitigation fee," requiring the developer to pay the fire district fees for the purported impacts of the development on the fire district should be either the subject of an Environmental Impact Statement to determine the impacts from the proposed development and the need for such a fee, or should be imposed by mitigating conditions attached to the SEPA Determination of Non-significance.

The project proponent argues that the Fire District's request for fees is contrary to law, that their proposed development is entitled to proceed without payment of any such fees to the Fire District, and that the Responsible Official for SEPA should not have included any requirements regarding payments or contributions to Fire District No. 13 as part of the MDNS issued.

VII.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following

Conclusions of Law

I.

The issues raised by these appeals deal with meshing of the State Environmental Policy Act, the Growth Management Act, the Washington Administrative Code Provisions regarding both SEPA and GMA, the Whatcom County Comprehensive Plan, and Whatcom County Zoning Ordinance. Also involved in the analysis are sections of the Revised Code of Washington relating to fire districts, RCW 58.17 regarding subdivisions, and RCW 82.02, which allows impact fees on development.

WCC 16.08.170 allows appeals of a Final Determination of Non-significance.

This section also states that the SEPA Determination under the Responsible Official "...shall carry substantial weight in any appeal proceeding."

The Hearing Examiner is given the right to reverse a threshold determination "...when, although there is evidence to support it, the Hearing Examiner, on the entire evidence is left with a definite and firm conviction that a mistake has been committed."

WAC 197-11-680 allows Administrative Appeals on SEPA procedures only "...to review a Final Threshold Determination and Final EIS." The project proponents suggest that the Responsible Official's withdrawal of the original SEPA Determination (MDNS) was in error, that the Hearing Examiner should rule that the revised or second MDNS determination does not have any legal weight, and that the original determination applies.

The Washington Administrative Code gives the Responsible Official the power to withdraw a SEPA Determination and re-issue it. A decision to withdraw a SEPA Determination made by the Responsible Official is not a Final Threshold Determination and therefore it cannot be appealed to the Hearing Examiner. The Final Threshold Determination in this case was the second Mitigated Determination of Non-significance issued by the Responsible Official on May 3, 2006.

The SEPA issue before the Hearing Examiner is to decide if, as argued by Fire District No. 13, an Environmental Impact Statement should have been required to determine the impacts of this proposal on the Fire District's ability to provide adequate services in the future, or, as argued by the project proponent, that the SEPA Official erroneously included conditions #1 and #2 related to requiring the project proponent to contribute toward the cost of preparing a Capital Facilities Plan and, based on this plan, to contribute monies to mitigate impacts on the ability of the Fire District to provide adequate services as a result of on-going development within the district.

II.

The State Environmental Policy Act preceded the Growth Management Act by a number of years. The adoption of the Growth Management Act and associated statutes and WACs have revised the way SEPA is applied to land use issues, including subdivision and new residential and non-residential development. Fire District No. 13 is attempting to impose fees upon development to mitigate impacts of development on the Fire District's ability to provide adequate services, based on SEPA. Fire District No. 13 argues that these are not impact fees, but are instead "concurrency mitigation fees" required to ensure that the concurrency requirements of the Growth Management Act are met; and, that an Environmental Impact Statement is required, because, without such fees, on-going growth will lead to significant adverse impacts because the District will not have the funds to provide adequate services. Adoption of Fire District No. 13's position would require fire services concurrency planning and the imposition of impact fees through the process of an Environmental Impact Statement for each project proposed within the District's boundaries. The Growth Management Act requires Whatcom County to do the concurrency planning as part of its Comprehensive Plan and development regulation responsibilities pursuant to the Growth Management Act. Whatcom County addressed fire protection concurrency when it adopted the Birch Bay Comprehensive Plan and concluded that the funding needs of Fire District No. 13 could adequately be met by taxes generated by the new growth.

If Fire District No. 13 felt that Whatcom County's concurrency planning for fire services within the district was inadequate, the Fire District needed to raise these issues during the planning process and, if an acceptable result was not reached, the Fire District needed to appeal the concurrency planning undertaken by Whatcom County to the Growth Management Hearings Board. Based on State law, concurrency issues cannot be raised outside of the Growth Management Act planning process and cannot be addressed on a project by project basis through the application of the State Environmental Policy Act.

Fire District No. 13's argument that concurrency should be addressed in an Environmental Impact Statement on a project by project basis fails to recognize that the comprehensive planning done by Whatcom County pursuant to the Growth Management Act has already undergone an environmental analysis pursuant to SEPA and that State law under the Growth Management Act requires county-wide concurrency planning.

III.

State law, in fact, prohibits review of the availability and adequacy of fire protection service during project review on a specific project. RCW 36.70B.030 reads as follows:

- (1) **Fundamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review. The review of a proposed project's consistency with applicable development regulations, or in the absence of applicable regulations the adopted comprehensive plan, under RCW 36.70B.040 shall incorporate the determinations under this section.**
- (2) **During project review, a local government or any subsequent reviewing body shall determine whether the items listed in this subsection are defined in the development regulations applicable to the proposed project or, in the absence of applicable regulations the adopted comprehensive plan. At a minimum, such applicable regulations or plans shall be determinative of the: [emphasis added]**
 - (a) **Type of land use permitted at the site, including uses that may be allowed under certain circumstances, such as planned unit developments and conditional and special uses, if the criteria for their approval have been satisfied;**
 - (b) **Density of residential development in urban growth areas; and**
 - (c) **Availability and adequacy of public facilities identified in the comprehensive plan, if the plan or development regulations provide for funding of these facilities as required by chapter 36.70A RCW. [emphasis added]**
- (3) **During project review, the local government or any subsequent reviewing body shall not reexamine alternatives to or hear appeals on the items identified in subsection (2) of this section, except for issues of code interpretation. As part of its project review process, a local government shall provide a procedure for obtaining a code interpretation as provided in RCW 36.70B.110. [emphasis added]**
- (4) **Pursuant to RCW 43.21C.240, a local government may determine that the requirements for environmental analysis and mitigation measures in**

development regulations and other applicable laws provide adequate mitigation for some or all of the project's specific adverse environmental impacts to which the requirements apply.

- (5) Nothing in this section limits the authority of a permitting agency to approve, condition, or deny a project as provided in its development regulations adopted under chapter 36.70A RCW and in its policies adopted under RCW 43.21C.060. Project review shall be used to identify specific project design and conditions relating to the character of development, such as the details of site plans, curb cuts, drainage swales, transportation demand management, the payment of impact fees, or other measures to mitigate a proposal's probable adverse environmental impacts, if applicable.
- (6) Subsections (1) through (4) of this section apply only to local governments planning under RCW 36.70A.040.

As indicated in paragraph 2 above, the County's Comprehensive Plan and development regulations "... shall be determinative of the (c) availability and adequacy of public facilities identified in the Comprehensive Plan, if the plan or development regulations provide for funding of these facilities"

The Birch Bay Comprehensive Plan indicates that adequate fire service facilities will be funded by fire district's taxing authority. This Comprehensive Plan statement is determinative of the availability and adequacy of funding for fire protection services inside the boundaries of Fire District No. 13.

Even if these public facilities are not available, adequate, or are inadequately funded, paragraph 3 of RCW 36.70B.030 indicates that a reviewing body for a specific project "...shall not re-examine alternatives or hear appeals on the items identified in subsection (2) of this section, except for issues of code interpretation." This means that in reviewing this pending proposal, Whatcom County is not allowed to re-examine or hear appeals regarding the availability and adequacy of public facilities when those facilities are addressed in the Comprehensive Plan and when the plan indicates a funding mechanism for those facilities.

If Fire District No. 13 believes that the current Comprehensive Plan is inadequate to meet its funding needs in order to allow it to provide adequate services for future growth, the Fire District can docket the issue on the County's yearly Growth Management Act review calendar and have the issue re-visited. The issue cannot be re-visited at the specific project approval phase, as the Fire District is attempting to do here. Until, and unless, the Comprehensive Plan for Birch Bay is amended to remove the statement that the fire district will be able to provide adequate services based on its current taxing abilities, Fire District No. 13 cannot assert a lack of ability to do so on a project by project basis.

IV.

WCC 20.80.212 requires concurrency letters prior to approval of any project, and reads as follows:

20.80.212 Concurrency.

No subdivision, commercial development, or conditional uses shall be approved without a written finding that:

- (1) All providers of water, sewage disposal, school, and fire protection serving the development have issued a letter that adequate capacity exists or arrangements have been made to provide adequate services for the development.**
- (2) No county facilities shall be reduced below applicable level of service as a result of the development.**

The Fire District is contending that individual projects cannot be approved unless the Fire District has issued a letter pursuant to paragraph #1 above, which states, "...that adequate capacity exists or arrangements have been made to provide adequate services for the development." However, in the case of growth within the Birch Bay Urban Growth Area and within Fire District No. 13's boundaries, the Whatcom County Council has already determined that adequate capacity exists for current development and that adequate funding arrangements have been made to service future development within the Urban Growth Area. The Fire District cannot unreasonably refuse to issue a concurrency letter. In this case, since the Whatcom County Council has the authority to determine concurrency under the Growth Management Act and since the Whatcom County Council has determined within the Birch Bay Comprehensive Plan that Fire District No. 13 has adequate current capacity and that arrangements for adequate funding are in place to provide for future growth, Fire District No. 13 cannot stop this development by refusing to issue a concurrency letter.

V.

Neither Whatcom County nor Fire District No. 13 have the legal authority to require fees from developers for new development to off-set the impacts of increased growth on fire districts. In fact, imposition of such fees to benefit fire districts is specifically prohibited.

RCW 82.02 strictly limits the ability of municipal corporations to impose fees on new development by Preemption of certain taxing and fee imposition rights pursuant to RCW 82.02.020, which reads in relevant part as follows:

"Except as provided in RCW 82.02.050 through 82.02.090, no county, city, town, or other municipal corporation shall

impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space or appurtenance thereto, or on the development, subdivision, classification, or reclassification of land. [emphasis added]

RCW 8.02.050 specifically gives counties, cities, and towns that are required or choose to plan under the Growth Management Act the authority to impose impact fees on development activity to benefit public facilities as defined in RCW 82.02.090, subject to limitations. **The definition of public facilities in RCW 82.02.090(7) limits the right to impose impact fees for fire protection to "... (d) fire protection facilities in jurisdictions that are not part of a fire district.** [emphasis added]

Only jurisdictions required to plan under the Growth Management Act are entitled to impose impact fees. Impact fees cannot be imposed for fire protection facilities in jurisdictions that are part of a fire district. Pursuant to RCW 82.02 impact fees may not be imposed by any municipal corporation to off-set development costs for fire protection within a fire district.

Even if impact fees to benefit fire districts were allowed pursuant to RCW 82.02, impact fees can only be established through ordinance and may be collected and spent only for public facilities defined in RCW 82.02.090 [As indicated above, fire districts are specifically excluded as a public facility in this definition.], which have been addressed by a Capital Facilities Element of a Comprehensive Plan adopted pursuant to the Growth Management Act. RCW 82.02.050.

In addition, any local ordinance imposed to collect an impact fee must include addressing the availability of other means of funding public facility improvements. In the case of Fire District No. 13, the Whatcom County Council has already concluded that the funding mechanisms available to the Fire District will be adequate to allow it to provide a high level of service to future growth.

In an attempt to get around this specific prohibition on impact fees, the Fire District calls their fees "concurrency mitigation fees." However, the Fire District's proposed fee clearly meets the definition of impact fee in RCW 82.02.090 (3), which reads as follows:

- (3) "Impact fee" means a payment of money imposed upon development as a condition of development approval to pay for public facilities needed to serve new growth and development, and that is reasonably related to the new development that creates additional demand and need for public facilities, that is a proportionate share of the cost of the public facilities, and that is used for facilities that reasonably benefit**

the new development. "Impact fee" does not include a reasonable permit or application fee.

Even if the Fire District fee was not an "impact fee" as defined in RCW 82.02, the imposition of such a fee on new development is specifically prohibited by the State's Preemption Clause in RCW 82.02.020, as discussed above.

To require a developer to pay money to Fire District No. 13 to enable Fire District No. 13 to deal with costs associated with new development is illegal and such fees cannot be imposed by the County, the Fire District, or through SEPA analysis of individual projects.

The State of Washington provides for the funding of fire districts through the statutory granting of taxing and other funding mechanisms.

The State has recognized the need for emergency and fire protection services and for funding to provide new services necessitated by growth. RCW 52.26 addresses this issue, stating the legislature's finding in RCW 52.26.010, as follows:

The legislature finds that:

- (1) The ability to respond to emergency situations by many of Washington state's fire protection jurisdictions has not kept up with the state's needs, particularly in urban regions;**
- (2) Providing a fire protection service system requires a shared partnership and responsibility among the federal, state, local, and regional governments and the private sector;**
- (3) There are efficiencies to be gained by regional fire protection service delivery while retaining local control; and**
- (4) Timely development of significant projects can best be achieved through enhanced funding options for regional fire protection service agencies, using already existing taxing authority to address fire protection emergency service needs and new authority to address critical fire protection projects and emergency services. [emphasis added]**

The State does not allow imposition of impact fees on new development to assist fire districts in meeting financial needs resulting from growth. Instead, the State has recognized the need, and has addressed it by providing the statutory authority to allow these needs to be met through specific funding mechanisms authorized by the State.

VI.

Fire District No. 13 argues that their requested monetary payments for mitigation of development impacts is sought as a part of a voluntary agreement, which is allowed pursuant to RCW 82.02.020, and which reads in relevant part, as follows:

“This section does not prohibit voluntary agreements with counties, cities, towns, or other municipal corporations that allow a payment to mitigate a direct impact that has been identified as a consequence of a proposed development, subdivision, or plat.”

As is clear in this situation, this developer has not been willing to enter into such a voluntary mitigation agreement with Fire District No. 13. The Fire District's attempt to obtain such an agreement by its refusal to provide the concurrency letter required by WCC 20.80.212 just serves to emphasize the lack of voluntary agreement. The requested payments cannot be justified by the District as a “concurrency mitigation fee” voluntarily agreed to by the developer.

VII.

In regard to this project, the Responsible Official under SEPA for Whatcom County has issued a Mitigated Determination of Non-significance. Two of the mitigating conditions deal with the mitigations of financial impacts to Fire District No. 13 from this proposed development.

A Threshold Determination of Non-significance may be issued as a Mitigated DNS pursuant to WAC 97-11-350. The purpose of a Mitigated Determination of Non-significance is to impose upon a project conditions which, if included as conditions of any approval, would result in a project which will not have a significant adverse impact on the environment. The Responsible Official for Whatcom County determined that there would be a probable significant adverse impacts on Fire District No. 13 if conditions were not included which would require the developer to contribute to capital facilities planning by the Fire District, and to enter into a “mediated agreement” for the payment of impact fees resulting from any increased service demands created by the development. Setting aside issues of the legality of any such impact fees, the Threshold Determination would have had to have been a result of a determination by the Responsible Official that there would be a significant adverse impact on fire protection services within the district if such planning was not done and such fees were not imposed upon this development. Such a conclusion is not supported by the record. The Hearing Examiner concludes, based on the record, that there is not a reasonable probability of significant adverse impacts even if mitigation conditions #1 and #2 are removed from the DNS. The record as a whole supports a conclusion at this time that the Fire District will be able to provide adequate services as a result of their current funding authorization from the State, which includes user fees, property taxes, and authority to issue bonds,

along with any new funding sources made available by the State legislature in the future, should the legislature determine additional funding sources are needed.

The Hearing Examiner concludes that Conditions #1 and #2 are not required to mitigate a probable significant adverse environmental impact and should not have been part of a Mitigated Determination of Non-significance. The Hearing Examiner should enter a decision on the SEPA Appeal which removes Conditions #1 and #2 from the list of Mitigated Conditions required by the Responsible Official.

VIII.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following

DECISION

No mitigation fees can be obtained from this project proponent for possible impacts on fire protection services within Fire District No. 13 absent a voluntary agreement by the developer. Since there is no voluntary agreement, it is illegal to impose any kind of monetary payment or fees for fire protection on this development. For these reasons, the Responsible Official erred in including Conditions #1 and #2, related to mitigation of impacts on fire protection, as part of the Mitigated Determination of Non-significance on this proposal. Conditions #1 and #2 are deleted from the Mitigated Determination of Non-significance. The remaining MDNS conditions, which were not objected to, should be included by the Whatcom County Council as conditions of any approval on the underlying permits.

DATED this 29th day of June 2006.


Michael Bobbink, Hearing Examiner

APPENDIX B

Westlaw

215 P.3d 956
 151 Wash.App. 601, 215 P.3d 956
 (Cite as: 151 Wash.App. 601, 215 P.3d 956)

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H

Court of Appeals of Washington,
 Division I.
 WHATCOM COUNTY FIRE DISTRICT NO. 21,
 Respondent,
 v.
 WHATCOM COUNTY, a municipal corporation,
 Defendant,
 Birch Point Village, LLC, a Washington corpora-
 tion; Schmidt Constructing, Inc., a Washington corpora-
 tion; Bright Haven Builders, LLC, a Washing-
 ton corporation; Mayflower Equities, Inc.; Lisa
 Schenk and Mike Sumner, Appellants.
No. 61431-2-I.

June 22, 2009.

Publication Ordered Aug. 13, 2009.

Background: County fire district, which asserted it was not equipped to serve more new structures, appealed from county's issuing of a Mitigated Determination of Non-Significance (MDNS) for a housing development project pursuant to the State Environmental Policy Act (SEPA), in which the hearing examiner had concluded that a threshold determination of non-significance could be issued as a MDNS, and that because the comprehensive plan stated the fire district was able to provide adequate services based on its current taxing abilities, the district was precluded from asserting a lack of ability to do so on a project by project basis. The Superior Court, Whatcom County, Charles Russell Snyder, J., reversed the county, in favor of the district. The developers appealed.

Holdings: The Court of Appeals, Appelwick, J., held that:

- (1) comprehensive plan was determinative of adequacy of county fire district's service for proposed development and not county code, and
- (2) evidence was substantial and sufficient to support examiner's finding that fire district had capacity to provide services to new developments.

Superior Court reversed, permit approvals reinstated.

West Headnotes

[1] Zoning and Planning 414 ↪745.1

414 Zoning and Planning
 414X Judicial Review or Relief
 414X(E) Further Review
 414k745 Scope and Extent of Review
 414k745.1 k. In General. Most Cited Cases

In reviewing administrative land use decisions, an appellate court is to stand in the shoes of the Superior Court and review the hearing examiner's action de novo on the basis of the administrative record. West's RCWA 36.70C.130.

[2] Municipal Corporations 268 ↪120

268 Municipal Corporations
 268IV Proceedings of Council or Other Governing Body
 268IV(B) Ordinances and By-Laws in General
 268k120 k. Construction and Operation. Most Cited Cases
 Principles of statutory construction apply to interpretation of local ordinances.

[3] Zoning and Planning 414 ↪30

414 Zoning and Planning
 414II Validity of Zoning Regulations
 414II(A) In General
 414k30 k. Comprehensive Plan. Most Cited Cases
 Comprehensive plans adopted by counties under the Growth Management Act (GMA) serve as guides or blueprints to be used in making land use decisions. West's RCWA 36.70A.020(12), 36.70A.040(3).

[4] Environmental Law 149E ↪595(2)

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151 Wash.App. 601, 215 P.3d 956

(Cite as: 151 Wash.App. 601, 215 P.3d 956)

149E Environmental Law

149EXII Assessments and Impact Statements

149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements

149Ek595 Particular Projects

149Ek595(2) k. Land Use in General.

Most Cited Cases

Comprehensive plan was determinative of adequacy of county fire district's service for proposed development, in county fire district's appeal from county's issuing of Mitigated Determination of Non-Significance (MDNS) for a housing development pursuant to State Environmental Policy Act (SEPA), in which hearing examiner ruled that, because comprehensive plan stated fire district was able to provide adequate services, district was precluded from asserting lack of ability to do so on a project by project basis; county code provision was not determinative of adequacy of public facilities, and merely required its letter attesting to capacity of services, so that district had no discretion as to letter because comprehensive plan had established adequacy of services. West's RCWA 36.70B.030(2).

[5] Environmental Law 149E ↪ 595(2)

149E Environmental Law

149EXII Assessments and Impact Statements

149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements

149Ek595 Particular Projects

149Ek595(2) k. Land Use in General.

Most Cited Cases

Evidence was substantial and sufficient, in action before county hearing examiner for Mitigated Determination of Non-Significance (MDNS) for a housing development project pursuant to the State Environmental Policy Act (SEPA), to support examiner's finding that fire district had capacity to provide services to new developments; examiner determined that the District had the capacity to meet the needs of the growing population or that

any new expansion or improvements would be borne by taxing the growing population.

**957 Philip J. Buri, Buri FunstonMumford PLLC, Bellingham, WA, for Appellant.

Jonathan K. Sitkin, Chmelik Sitkin & Davis PS, Bellingham, WA, Philip A. Talmadge, Talmadge/Fitzpatrick, Tukwila, WA, for Respondent.

APPELWICK, J.

*605 ¶ 1 The Growth Management Act, chapter 36.70A RCW, vests counties with the primary authority to plan future development, including concurrency planning with providers of public services. Because the Whatcom County Comprehensive Plan establishes the standards for service and finds that the fire district has the capacity to meet that standard, the fire district is foreclosed from evaluating concurrency with new development on a project-by-project basis and requiring a concurrency mitigation fee. We reverse the Whatcom County Superior Court and reinstate the permit approvals.

FACTS

¶ 2 This appeal concerns four proposed development projects located in Whatcom County's (County) Birch Bay area. Although the developers of the projects applied individually for permit approvals from the County, the superior court consolidated the appeals.

¶ 3 Birch Bay is an area six miles south of the Canadian border and seventeen miles north of the City of Bellingham. The County has designated Birch Bay an urban growth area.

¶ 4 In 2001, the County began developing the Birch Bay Community Plan (BBCP), as part of the County's long term planning process. For this appeal, the relevant parts of the BBCP are its discussions of fire protection facilities and services. Fire District No. 13 ^{FNI} (District) contributed expertise and in kind services, as a stakeholder in the BBCP

planning process. The BBCP established that the District must meet the "gold standard" for successful emergency medical services, which "is four to six minute response times for aid services and 15 to 20 minutes for ambulance services." Further, the BBCP determined that:

FN1. District # 13 is now known as District # 21.

Fire District # 13 responds between five to six minutes. To shorten the response time the fire District has career and volunteer firefighters and emergency medical technicians manning the fire station in Birch Bay 24 hours a day.

*606 Further, regarding future proposed expansions and improvements, the BBCP notes that:

Increased population, particularly in the Birch Point area will necessitate the [sic] manning the fire station at Semiahmoo on a 24-hour basis. Additional equipment will also need to be brought to the station to maximize its effectiveness. These costs will be born [sic] by taxes paid by the growing population. The Birch Bay station now being utilized as a manned fire station must under go [sic] substantial remodeling in the future to house firefighters and EMTs.

¶ 5 Four applicants submitted separate plans for residential and/or commercial developments in Whatcom County. The proposals include Horizon's Village at Semiahmoo, a mixed use development consisting of 200 residential units, commercial, and retail space. A second proposed project, from Schmidt Constructing, Inc., includes the Bay Breeze Cluster Plat, consisting of 16 single family lots, a 47,390 foot reserve area, and a storm water facility. The third proposed project, at Harborview Road, is a residential development of a total of 85 units. The fourth proposed project is the Birch Bay Center, a commercial development consisting of a total of 108,000 square feet of building area. The County approved site specific rezones, binding site plans, preliminary long subdivision permits, and binding site plans for these projects.

**958 ¶ 6 Whatcom County Code (WCC) requires that applications for development contain written verifications of the availability of fire protection services. WCC 21.05.120(3)(b). In August 2005, the District issued a letter confirming that it provided fire protection services to the Birch Bay area and that it would serve the listed property.^{FN2} But, the District reserved the right to make additional comments or conditions on the proposed project.

FN2. The record contains a will serve letter for a proposed project at Lincoln Road and Shintaffer Road, but does not identify the project more precisely. Appellants identify it as the Horizon's Village project. Two other projects received similar letters.

*607 ¶ 7 The District passed Resolution 2005-017 and Resolution 2006-01. Both resolutions sought to advise Whatcom County on the need for mitigation under the State Environmental Policy Act (SEPA), because it was unable to provide services at "an urban level in a manner consistent with urban levels of service as established by the Whatcom County Birch Bay Community Plan and national fire standards." Because it anticipated growth in residential populations, which it would not be able to adequately serve, the District demanded that the County impose mitigation measures in the form of fees prior to approval of a SEPA Mitigated Determination of Non-Significance (MDNS), a Final Environmental Impact Statement, or project permits for residential development.

¶ 8 Birch Point Village, LLC, applied for a site specific rezone, planned unit development, and binding site plan for its Horizon's Village at Semiahmoo development. County staff recommended that the permits be granted, but did not recommend mitigation fees.^{FN3} The Whatcom County Hearing Examiner also recommended approval.

FN3. A staff report found that the District had provided a concurrency letter dated September 15, 2005. The staff report noted

that the concurrency letter contained the following conditions: (1) a fire flow requirement for water access, (2) District access shall meet the requirements of Article 81 of the International Fire Code, (3) the proposal shall comply with all applicable codes and ordinances adopted by the County.

¶ 9 The County issued a MDNS for the project pursuant to SEPA on March 16, 2006. The District appealed on April 13, 2006. The District claimed that the SEPA determination did not adequately address the impacts of the project on the District's ability to provide medical response, fire response, and transport. The District argued that it was appropriate for the developer to pay a mitigation fee of \$384 per vehicle average daily trip, to be paid directly to the District or, in the alternative, a \$2,500 fee per residential living unit and that the commercial parts of the development pay a proportionate fee.

¶ 10 On May 3, 2006, the County SEPA official issued a new MDNS with two conditions. First, it conditioned that *608 the developer contribute to a planning study regarding the District's ability to provide services for new growth and the need for a concurrency assessment contribution, to be made by the applicant and paid to the District. Second, if the planning study was not completed prior to actual development, it required the applicant and the District to enter into a mediated agreement to determine the project's fees to the District to mitigate impacts of development, based on available estimates of the impacts of increased population created by the proposed development.

¶ 11 The Whatcom County Hearing Examiner reversed and revised the SEPA official's MDNS. He found that the District's argument, under WCC 20.80.21, that individual projects cannot be approved unless the District has issued a concurrency letter erroneous. The hearing examiner stated, "[i]n this case, since the Whatcom County Council has the authority to determine concurrency under the Growth Management Act and since the Whatcom

County Council has determined within the Birch Bay Comprehensive Plan that Fire District No. 13 has adequate current capacity and that arrangements for adequate funding are in place to provide for future growth, Fire District No. 13 cannot stop this development by refusing to issue a concurrency letter." He also found that neither the County nor the District have the legal authority to exact fees from developers. He found that RCW 82.02.020 prohibits such **959 fees. Regarding SEPA, the hearing examiner concluded that a threshold determination of non-significance may be issued as a MDNS pursuant to WAC 97-11-350. The hearing examiner found that the SEPA official's determination regarding mitigation was unsupported by the record. In reviewing the application, the Whatcom County Council adopted the hearing examiner's findings of fact and conclusions of law and recommendation.

¶ 12 Although this appeal encompasses four developments, each receiving independent approval from the County, the hearing examiner incorporated his decision in Birch Point into the other three.

*609 ¶ 13 The District petitioned to the Whatcom County Superior Court for review of the County's approval of the permits. By agreement of the parties, the cases were consolidated. In its final decision, order and judgment on the Land Use Petition Act (LUPA) appeal, the superior court reversed the County, in favor of the District. The developers appeal.

ANALYSIS

I. Standard of Review

¶ 14 This appeal involves the Whatcom County Council's decision to approve an application for a site specific rezone for a planned development unit and an MDNS.

[1] ¶ 15 Judicial review of land use decisions is governed by LUPA. RCW 36.70C. This court is to

stand in the shoes of the superior court and review the hearing examiner's action de novo on the basis of the administrative record. *Girton v. City of Seattle*, 97 Wash.App. 360, 363, 983 P.2d 1135 (1999). We review alleged errors of law de novo. *Id.* Under RCW 36.70C.130, an appellate court may grant relief from a land use decision if the petitioner carries its burden of establishing at least one of the following six standards:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) The land use decision 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;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

***610** (f) The land use decision violates the constitutional rights of the party seeking relief.

Benchmark Land Co. v. City of Battle Ground, 146 Wash.2d 685, 693-94, 49 P.3d 860 (2002).

[2] ¶ 16 Questions of statutory interpretation are reviewed de novo. *W. Telepage, Inc. v. City of Tacoma Dep't of Fin.*, 140 Wash.2d 599, 607, 998 P.2d 884 (2000). A court's objective in construing a statute is to determine the legislature's intent; if a statute's meaning is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent. *State v. Chang*, 147 Wash.App. 490, 499-500, 195 P.3d 1008 (2008). Plain meaning is discerned from the ordinary meaning of the lan-

guage at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. *State v. Elmore*, 143 Wash.App. 185, 188, 177 P.3d 172 (2008), *review denied*, 164 Wash.2d 1035, 197 P.3d 1185 (2008). These principles apply to interpretation of local ordinance. *Faben Point Neighbors v. City of Mercer Island*, 102 Wash.App. 775, 778, 11 P.3d 322 (2000).

II. Concurrency Planning under the Growth Management Act

[3] ¶ 17 Under the Growth Management Act (GMA), counties must adopt development regulations to implement the comprehensive plan. RCW 36.70A.040(3). Thus, the GMA indirectly regulates local land use decisions through comprehensive plans and development**960 regulations, both of which must comply with the GMA. *See* former RCW 36.70A.130(1)(a), (b) (2002). Comprehensive plans serve as guides or blueprints to be used in making land use decisions. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wash.2d 861, 873, 947 P.2d 1208 (1997). Counties that are required to develop comprehensive plans pursuant to 36.70A.040, shall "[e]nsure that those public facilities and services necessary to support development" will be "adequate to serve the development at the time the development*611 is available for occupancy and use without decreasing current service levels below locally established minimum standards." RCW 36.70A.020(12).

¶ 18 The central issue in this appeal is whether the County erred when it adopted the hearing examiner's conclusion that "[u]ntil, and unless, the Comprehensive Plan for Birch Bay is amended to remove the statement that the fire district will be able to provide adequate services based on its current taxing abilities, Fire District No. 13 cannot assert a lack of ability to do so on a project by project basis." According to the District, WCC 20.80.201 mandates that concurrency planning occurs on a project-by-project basis, requiring the County to as-

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sess whether services are available, and adequate, for the growing population prior to individual permit approval. Thus, the determination of the adequacy of fire services occurs at project review stage, not during adoption of the county comprehensive plan.

¶ 19 An evaluation of RCW 36.70B.030 and WCC 20.80.212 is dispositive. Section one of RCW 36.70B.030 explains that “[f]undamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review.” Further, the statute requires that:

During project review, a local government or any subsequent reviewing body shall determine whether the items listed in this subsection are defined in the development regulations applicable to the proposed project or, in the absence of applicable regulations the adopted comprehensive plan. At a minimum, such applicable regulations or plans shall be determinative of the:

...

(c) Availability and adequacy of public facilities identified in the comprehensive plan, if the plan or development regulations provide for funding of these facilities as required by chapter 36.70A RCW.

RCW 36.70B.030(2).

*612 ¶ 20 The District contends that WCC 20.80.212 is the applicable development regulation that defines the availability and adequacy of public facilities. WCC 20.80.212 states that the county shall not approve a subdivision, commercial development, or conditional use permit without a written finding that:

(1) All providers of water, sewage disposal, schools, and fire protection serving the development have issued a letter that adequate capacity exists or arrangements have been made to provide adequate services for the development.

(2) No county facilities will be reduced below applicable levels of service as a result of the development.

[4] ¶ 21 But, WCC 20.80.212 is not an applicable development regulation, because it is not determinative of the availability and adequacy of public facilities, as defined in the comprehensive plan. The ordinance does not purport to establish the required criteria, for the District. This was done in the comprehensive plan. Instead, it merely requires a letter attesting to the capacity of the services. Because the BBCP establishes the availability and adequacy of services, the District did not have discretion under WCC 20.80.212 regarding whether to issue the letter.

¶ 22 At best, the second section of WCC 20.80.212 prevents county facilities from falling below applicable levels of service as a result of the proposed development. This section does not itself define what the applicable levels of service are. It does, however, require the District to meet the applicable level of service in the face of the proposed development.

¶ 23 Here, the BBCP, as adopted into the comprehensive plan, establishes the standard **961 of service, the gold standard. Moreover, the County has determined that the District can meet its service obligations at the gold standard, including new equipment and demands of the growing population, through existing taxation. The BBCP, not the District determines the standard of service and adequacy of available fire service capacity. We affirm the County's issuance of the permits.

*613 III. *Sufficiency of the Evidence*

[5] ¶ 24 The District argues that the hearing examiners findings of fact, pertaining to the capacity of the District to provide services to the new developments at the gold standard, were not supported by substantial evidence. We review the hearing examiner's findings of fact for substantial evidence, that

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is, evidence sufficient to persuade a fair-minded person of the order's truth or correctness. *Benchmark*, 146 Wash.2d at 694, 49 P.3d 860.

¶ 25 The District directs this court mainly to the testimony of Chief Fields and other materials he submitted. But the District's argument obscures the limited focus of the Court's factual inquiry: to the extent that the BBCP has already concluded that adequate capacity exists, we do not evaluate whether capacity exists on a project-by-project basis. The BBCP determined that the District has the capacity to meet the needs of the growing population and/or that any new expansion or improvements will be borne by the growing population. The BBCP determinations are sufficient to support the hearing examiner's finding of fact that adequate capacity exists for the District to meet the standard level of services.

¶ 26 Likewise, the District argues that insufficient evidence supports the hearing examiner's finding of fact that the District had access to funding sources, other than the proposed concurrency fee. The hearing examiner found that County voters increased the sales tax to provide a separate funding mechanism for emergency medical services county wide. Further, he found "[t]his funding source is in addition to the other specific authorized funding mechanisms that the State has provided for fire districts."

¶ 27 Because the BBCP determined that the costs of improvements to serve new development would be borne by the growing population, the hearing examiner's finding is supported by substantial evidence. The District has an obligation to meet the adopted standard. Any challenge to the correctness of the comprehensive plan determination *614 that the District can meet the level of service must be done through amendment to the comprehensive plan, not by factual challenge to the project permitting. We reverse the superior court and reinstate the County's approval of the permits.

¶ 28 WE CONCUR: BECKER and LAU, JJ.

Wash.App. Div. 1, 2009.

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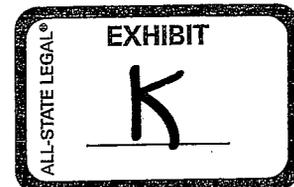
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APPENDIX C

Whatcom County Fire Protection District No. 13
307 19th Street
Lynden, WA 98264

ORIGINAL



RESOLUTION NUMBER 2005-017

A RESOLUTION OF THE BOARD OF FIRE COMMISSIONERS OF WHATCOM COUNTY FIRE PROTECTION DISTRICT NO. 13 ADVISING WHATCOM COUNTY OF THE NEED FOR MITIGATION FOR WHATCOM COUNTY FIRE PROTECTION DISTRICT NO.13 TO PROVIDE URBAN LEVELS OF SERVICE ESTABLISHED BY WHATCOM COUNTY AND NATIONAL STANDARDS AND REQUESTING MITIGATION OF SUCH IMPACTS UNDER THE STATE ENVIRONMENTAL POLICY ACT.

WHEREAS, Whatcom County Fire Protection District No. 13 ("District") is the designated provider of fire protection, fire suppression and emergency medical response services ("Services") for nearly all of the Birch Bay Urban Growth Area ("Birch Bay UGA").

WHEREAS, the District, as discussed below, is not able to provide these Services at an urban level in a manner consistent with urban levels of service as established by the Whatcom County Birch Bay Community Plan and national fire standards.

WHEREAS, as of mid September 2005, it was estimated that there were currently at least 1100 new living units within the Birch Bay UGA pending approval by Whatcom County. At an average of 2.8 people per unit, a total of approximately 3080 new residences are anticipated in Birch Bay. Collectively, all proposed and potential residential development in the Birch Bay UGA are referred to herein as the "Development", and all owners, proponents, and applicants of Development are referred to herein as "Developers".

WHEREAS, based upon historical trends, the District estimates that 3080 new people will result in 300 new call outs per year from the Birch Bay UGA. Of those 300 call outs, based upon historical information, it is estimated that 240 of those will be EMS responses. Of those 240 EMS responses, 60%, or 144 call outs, will require BLS and transport to St. Joseph's hospital. Thus, a conservative estimate would be that for two (2) hours each day, two (2) fire fighters would be unavailable for other responses. If the population growth that occurs is higher than the figure estimated above, than these call out numbers would be obviously higher.

WHEREAS, the Birch Bay Community Plan adopted by the County Council in September 2004 indicates that over the next 20 years there will be approximately 5000 additional people will be living in Birch Bay, 2000 more than the people indicated that are arriving based upon the units in the queue for approval at this time. This higher population figure serves to increase the demand on services, necessitating more equipment, stations and/or station upgrades. A higher rate of growth would accelerate the demand for the services. Further, this figure will add an additional approximately 96 callouts to the 144 estimated (totaling 240 call outs and transports to St. Joseph's hospital) additional callouts per year.

WHEREAS, Whatcom County through its adopted Birch Bay Community Plan, page 15-6, provides the standard for levels of service for emergency medical services as follows: the "...standard for successful emergency medical services is four (4) to six (6) minute response times for aid services and fifteen (15) to twenty (20) minutes for ambulance services."

WHEREAS, The Whatcom County Comprehensive Plan does not include an urban level of service for fire emergency response.

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WHEREAS, the District believes that the appropriate urban level of service standard for urban development is as set forth in the National Fire Protection Association (NFPA) standard 1710 that calls for a four (4) minute response for urban levels of service.

WHEREAS, in order to provide the Services to the Birch Bay UGA at urban levels of service consistent with NFPA 1710 and the adopted County Standards, it is estimated that significant upgrades to existing stations, the addition of approximately 11 new fire fighters, and possibly a new station in the Birch Bay UGA will be required due to the population allocated to the Birch Bay UGA by Whatcom County.

WHEREAS, the minimum necessary improvements to the Birch Bay and Semiahmoo stations to man these stations on a 24 hour 7 day a week basis for the fire fighter requirements to provide urban levels of service to the Birch Bay UGA are estimated to be as follows:

Birch Bay station improvements are estimated to cost in excess of \$500,000.00;

The Semiahmoo station will require an additional bay and other changes totaling another \$300,000.00.

Thus, the improvements to the existing stations alone would be roughly \$800,000.00.

WHEREAS, the scale and pace of the development of Birch Bay at urban level densities may require a new station as well, in addition to the above station improvements. A new station has not been calculated in the figures herein.

WHEREAS, additional equipment will be required for these new stations, in addition to the replacement equipment that is currently required by 2009 to maintain current levels of service without any new developments occurring in the Birch Bay area. It is also likely that new engines will be required, in addition to the replacement engines.

WHEREAS, presently the District cannot meet the urban levels of service standard established by Whatcom County and NFPA 1610 in the Birch Bay area and cannot provide any comments with regard to the Development without significant revenue increases, including mitigation of impacts arising from developments.

WHEREAS, the District is undergoing a capital facilities planning process that would ideally result in an Inter-local agreement between the County and the District to assure that prior to development occurring in the Birch Bay area the appropriate mitigation fee would be paid related to assuring that the District would be capable of providing urban levels of service to the Birch Bay UGA at County and national standards.

WHEREAS, Whatcom County must be made aware that development in the Birch Bay UGA will not be receiving urban levels of service as called for by Whatcom County and national standards, unless that costs of providing the required level of service is paid for by the Developers through a mitigation fee, and that without such mitigation fee a moratorium on development in the Birch Bay UGA, and denial of any developments pending approval would be appropriate.

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Lynden, WA 98264

WHEREAS, The District has not, to date, issued a letter that it has *adequate capacity* to serve or that arrangements have been made to provide adequate services to any developments within the Birch Bay UGA. The District will not issue a letter pursuant to WCC 20.80.212 indicating that adequate capacity exists or arrangements have been made to provide adequate services for the development or any other new development in the Birch Bay UGA, unless the Developers in the Birch Bay UGA pay or agree to pay the concurrency mitigation fee set forth herein.

WHEREAS, The District is currently reviewing what interim mitigation fee is appropriate to be sought to allow the District to be able to provide a "concurrency" letter indicating that the District anticipates being able to provide urban levels of service as established by Whatcom County and national standards if all new development paid this mitigation fee. At this time, subject to change as better information is collected, the District would require a \$2500.00 per living unit fee to be charged or paid directly to the District prior to the District's issuance of a letter of concurrency. Any County fee to administer this assessment would be additional.

WHEREAS, With the Developer and the County's written agreement to the forgoing mitigation measures, the District would comment that it can adequately provide services to the Development. If the County and the Developer cannot so agree, and an alternative proposal is not presented that is acceptable to the District, the District would not be able to provide fire protection, fire suppression and emergency medical response at urban levels of service at the Whatcom County or national standards.

WHEREAS, the County may require mitigation measures under the State Environmental Policy Act ("SEPA") SEPA process to mitigate impacts of such a development on the District's ability to provide fire suppression response and other emergency response services to such unknown future developments, and the impact of such developments on the District to be able to continue to provide the current level of fire and emergency response services within the District; and,

WHEREAS, WAC 197-11-350 allows the County to adopt mitigating measures as part of a mitigated determination of non-significance; and

WHEREAS, based upon this information contained in this resolution, the District believes that it is appropriate for the County SEPA Official to withdraw any SEPA determination issued for development in the Birch Bay area and amend that SEPA determination to include the mitigation proposed herein as a condition of SEPA.

WHEREAS, the County may identify, adopt and require mitigating measures for a proposal through the development of a Final Environmental Impact Statement or a Mitigated Determination of Non-Significance.

NOW THEREFORE BE IT RESOLVED as follows:

1. The Board of Fire Commissioners of Whatcom County Fire Protection District No.13 does demand that any a SEPA Mitigated Determination of Non-Significance or a Final Environmental Impact Statement, and all project permit or approval for any type of residential development in the Birch Bay Urban Growth area, include as required mitigation and as a condition of development as follows:

Whatcom County Fire Protection District No. 13

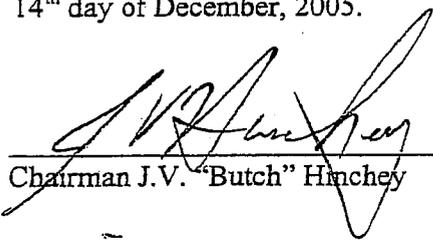
307 19th Street

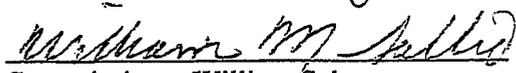
Lynden, WA 98264

A mitigation fee of \$2500.00 per proposed living unit shall be paid directly to the District prior to the issuance of a letter of concurrency by the District, unless the property owner and/or developer has executed a concurrency mitigation agreement and said agreement has been approved by the District Commission.

2. The purpose of this mitigation measure is to mitigate impacts from this development and assures that the District is able to maintain the efficiency and continuity of fire suppression service and emergency medical services to the subject property at current service levels, and can meet the levels of service standard adopted by Whatcom County and national standards.
3. This mitigation measure does not include separate requirements that may be imposed by the County Fire Marshall's office related to building code compliance and structural issues.
4. The District reserves the right to seek mitigation measures and the right to comment on future commercial, industrial and other non-residential projects in the Birch Bay area.
5. With the payment of the fee or execution of the agreement as outlined in section 1, the District would enter comments into the record of any development proposal such that the proposal would then meet all of the criteria for approval for all required permits for this proposal, including that adequate capacity exists or arrangements have been made to provide adequate services for the development or any other new development in the Birch Bay area consistent with WCC 20.80.212, and would offer no objections based upon SEPA procedural concerns.
6. Resolution 2005-10, and any other prior resolution inconsistent with the forgoing conditions is hereby rescinded.

Passed By The Board Of Fire Commissioners Of Whatcom County Fire Protection District No. 13 on the
14th day of December, 2005.


Chairman J.V. "Butch" Hinchey


Commissioner William Salter

Commissioner Eddie Lathers

Tom Fields
Board Secretary