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No. 61431-2-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE**

WHATCOM COUNTY FIRE DISTRICT NO. 21,
Respondent,

v.

WHATCOM COUNTY, a municipal corporation; BIRCH POINT
VILLAGE LLC, 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, Appellants.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY
#06-2-02364-8

OPENING BRIEF OF APPELLANTS

BURI FUNSTON MUMFORD, PLLC

By PHILIP J. BURI
WSBA #17637
1601 F Street
Bellingham, WA 98225
(360) 752-1500

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INTRODUCTION

This appeal illustrates why a county's long-range concurrency planning should prevail over objections made to a specific project. In 1993, two respected land use lawyers identified the latent power in Growth Management Act's concurrency requirement. "Under the concurrency requirement, known in other jurisdictions as an adequate public facilities requirement, proposed development may not be approved if it would cause levels of service of public facilities and services to fall below some specified baseline." Thomas M. Walsh & Roger A. Pearce, The Concurrency Requirement of the Washington State Growth Management Act, 16 U. Puget Sound L. Rev. 1025, 1026 (1993).

They predicted concurrency would have significant consequences for land use planning.

The concurrency requirement is likely to be the provision of the GMA with the single greatest regulatory impact on real estate development, and it will probably consume the greatest amount of public agency resources for its implementation. In spite of these effects, it was one of the least heralded and least defined provisions of the GMA.

Id., at 1025-26. This case demonstrates the pitfalls of allowing a service provider define concurrency project-by-project.

To receive preliminary plat approval in Whatcom County, developers must obtain a “concurrency letter” from providers of water, sewer, education, and fire protection services. WCC 20.80.212. (Appendix A). Respondent Fire District 21 charged developers a \$2500 per unit “voluntary concurrency mitigation fee” before it would issue the letter. Appellants Birch Point Village LLC, Schmidt Constructing, Inc., Mayflower Equities, Inc., and Lisa Schenk and Mike Sumner (Birch Point Village) refused to pay the fee, and appealed to the County’s Hearing Examiner. Both the Hearing Examiner and the Whatcom County Council struck down the fee and found concurrency based on the County’s Comprehensive Plan and the Birch Bay Community Plan. (Hearing Examiner’s Decision; CP 338-353; County Council’s Decision, CP 354-519).

On review under the Land Use Petition Act, the Superior Court reversed, concluding “the County’s decision that the District could provide adequate levels of service was not supported by substantial evidence in the record.” (Final Decision ¶ 4; CP 6) (Appendix B). The trial court held that the County Code provision, WCC 20.80.212, prohibited the County from finding concurrency without a letter from the Fire District.

If the trial court's decision in this case stands, Respondent Fire District 21 has the power to impose a de facto moratorium on all development within its boundaries. Because Whatcom County, not the Fire District, has the authority and responsibility to find concurrency, Birch Point Village now appeals.

I. ASSIGNMENTS OF ERROR

Although the Fire District won in Superior Court, this Court reviews the Hearing Examiner's decision, not the Superior Court's. "Under LUPA, we stand 'in the shoes of the superior court' and limit our review to the record before the hearing examiner." Abbey Road Group, LLC v. City of Bonney Lake, 141 Wn. App. 184, 192, 167 P.3d 1213 (2007), rev. granted, 163 Wn.2d 1045, 187 P.3d 750 (July 08, 2008). The Fire District continues to carry the burden of proof on appeal. "On appeal, the party who filed the LUPA petition bears the burden of establishing one of the errors set forth in RCW 36.70C.130(1), even if that party prevailed on its LUPA claim at the superior court." Quality Rock Products, Inc. v. Thurston County, 139 Wn. App. 125, 134, 159 P.3d 1 (2007).

To the extent necessary, Birch Point Village assigns error to the Superior Court's Final Decision, Order, and Judgment on LUPA

Appeal (Final Decision; CP 6) (Appendix B). Specific assignments of error include:

A. Paragraph 1 is an error of law and not supported by substantial evidence in the record. (Final Decision at 2; CP 6).

B. Paragraph 4 and subparts a through g are errors of law and not supported by substantial evidence in the record. (Final Decision at 2-3; CP 6-7).

C. Paragraph 5 is an error of law and not supported by substantial evidence in the record. (Final Decision at 3; CP 7).

D. Paragraph 6 is an error of law and not supported by substantial evidence in the record. (Final Decision at 3; CP 7).

E. Paragraphs 1 and 2 of the trial court's Order are errors of law and not supported by substantial evidence in the record. (Final Decision at 4; CP 6).

Issues pertaining to these assignments of error are:

F. "During project review, the local government or any subsequent reviewing body shall not reexamine alternatives to [the availability and adequacy of public facilities identified in the comprehensive plan]." RCW 36.70B.030(3). Fire District 21 withheld concurrency letters for the Birch Bay developments, contradicting the Birch Bay Community Plan's provision of fire

protection services. Did the Hearing Examiner rule correctly that “State law...prohibits review of the availability and adequacy of fire protection service during project review on a specific project?” (Hearing Examiner’s Decision at 10; CP 347) (Appendix C).

G. The State Environmental Protection Act, RCW Ch. 43.21C, “should not be used as a substitute for other land use planning and environmental requirements.” 1995 Laws of Washington, Ch. 347 § 202. Fire District 21 attempted to insert as a SEPA mitigating condition “execution of an agreement in a form approved by the District obligating the Developer to pay a \$2500 per living unit concurrency mitigation fee.” (3/30/06 District SEPA Comments at 2; CP 253-260) (Appendix D) Did the Hearing Examiner appropriately strike this condition, concluding “concurrency issues ...cannot be addressed on a project by project basis through the application of the State Environmental Policy Act?” (Hearing Examiner’s Decision at 9; CP 346) (Appendix C).

H. Whatcom County Code 20.80.212 states that “no subdivision...shall be approved without a written finding that: (1)...providers of...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; and

(2) no county facilities will be reduced below applicable levels of service as a result of the development.” The Superior Court ruled that “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.” (Final Decision at 3; CP 7) (Appendix B). Did the court err by concluding WCC 20.80.212 superseded the levels of service adopted in the Birch Bay Community Plan?

I. “Where the Legislature enacts enabling legislation which vests a municipal corporation or similar entity with legislative powers, that body may not delegate its power absent specific statutory authorization.” Municipality of Metropolitan Seattle v. Division 587, Amalgamated Transit Union, 118 Wn.2d 639, 643, 826 P.2d 167 (1992). The Growth Management Act requires Whatcom County, not Fire District 21, to determine the adequacy and availability of fire services in the Birch Bay urban growth area. RCW 36.70A.020(12); RCW 36.70A.030. By giving Fire District 21 authority to block preliminary plat approval, does WCC 20.80.212 illegally delegate the County’s planning power to the District?

J. This Court may reverse the Hearing Examiner’s findings of fact only if they are “not supported by evidence that is substantial when viewed in light of the whole record before the

court.” RCW 36.70C.130(1). The Hearing Examiner concluded “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 growth, based on currently authorized funding mechanisms...and the increased taxes and fees paid by the new growth.” (Hearing Examiner’s Decision at 7; CP 344) Does substantial evidence support the Hearing Examiner’s finding?

II. STATEMENT OF FACTS

At the core of this case are the legal requirements for concurrency planning. But this issue 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) (Appendix E) 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). Although they applied for different sets of permits, the four developers all required

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. The District then switched course, fearing a budget shortfall, and began charging voluntary mitigation fees for the letters. 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 Comprehensive 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. By refusing to issue concurrency letters, Fire District 21 has halted new development in Birch Bay.

A. Whatcom County's Concurrency Planning For Fire Services in Birch Bay

The County and Birch Bay have a 30-year history of planning for growth, and Fire District 21 participated substantially in these discussions. The centerpiece of this ongoing work is the

2004 Birch Bay Community Plan, also known as the Birch Bay Subarea Plan, a program that took over three years to complete. (Birch Bay Community Plan; Exhibit A to Respondent's Brief; CP 225-248).

The planning process began on 27 January 2001 when about 300 Birch Bay property owners and residents attended a meeting to introduce the process and to invite community and citizen participation in neighborhood meetings.

(Birch Bay Community Plan at 3-11; CP 235). Fire District 21 played a critical role as a stakeholder in the process, providing expertise to create the comprehensive planning document.

The planning process was financed by a group of eleven Stakeholders. In addition to contributing their funds, the Stakeholders also contributed their expertise and in-kind services. For example, Whatcom County contributed map making and printing services, in addition to contributing their expert planning advice. The eleven Stakeholders are listed below:

- Birch Bay Chamber of Commerce
- Blaine School District
- Brown and Cole Stores
- BP – Cherry Point
- Port of Bellingham
- Trillium Corporation
- Washington State Department of Ecology
- Whatcom County Planning & Development Services
- Whatcom County Fire District #7
- Whatcom County Fire District #13
- Williams Energy

(Birch Bay Community Plan at 3-10; CP 234).^{*} The Fire District provided an inventory of its facilities, helped write the Community Plan and participated actively in the planning process. Its opinions shaped the assessment of long-term growth and concurrency planning for Birch Bay.

The Community Plan found no need for voluntary “concurrency mitigation fees” from developers to expand fire services.

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, will fund the Fire District’s operations as the area grows.

If, as the District now alleges, rapid growth was threatening the adequacy of fire services, why did the District not mention it during two years of concurrency discussions? Fire District Chief

^{*} Fire Districts 7 and 13 merged to become Fire District 21.

Tom Fields testified before the Hearing Examiner that the District had fallen behind on its paperwork.

I became chief of the fire district at June 1st of 2005. And I believe we have it on the record somewhere that when we – I'm not making excuses for North Whatcom Fire & Rescue for Fire District 13, but when we arrived or when I arrived and we discovered these issues, we immediately took action and started to working on developing a plan to – to make improvements in service.

(Hearing Transcript at 26; Exhibit J to Petitioners' Brief; CP 583).

The Fire District missed its opportunity to alter the Community Plan. As described in the next section, the Fire District used individual projects as the forum to raise these concurrency issues, rather than attempting to amend the Community Plan.

The trial court discounted the long-term planning contained in the Plan, concluding that times had changed.

The 2004 Birch Bay Community Plan itself makes only conclusory statements without any analysis and is not a capital facilities plan contemplated by RCW 36.70A.070(3). Nothing in the Birch Bay Community Plan addressed the potential changes in structure, such as a change in the Countywide EMS system, which occurred since the Birch Bay Community Plan was adopted and the hearing on this matter.

(Final Decision ¶ 4(e); CP 6). But the record suggests otherwise.

The Fire District had ample opportunity to add to the Plan and

provide for contingencies like the EMS changes. They simply did not.

The Whatcom County Council adopted the Community Plan in 2005, incorporating it into the County's Comprehensive Plan under the Growth Management Act. County planners have relied on it since then to guide concurrency evaluations and permitting decisions in Birch Bay.

B. Fire District 21's Contradictory Positions On The Developments

This appeal consolidates permit approval for four projects – Horizon's Village at Semiahmoo, Bay Breeze Cluster Plat, Harborview Road, and Birch Bay Center. In three of these four projects, Fire District 21 initially gave "will serve" letters to the developers and raised no concerns over the adequacy or availability of fire services. (Will Serve Letter; Exhibit B to Respondent's Brief; CP 250) For example, on August 19, 2005, Division Chief Jim Rutherford provided written verification of the availability of Fire Protection services for the Horizon's Village project.

Please accept this letter as verification that Whatcom County Fire District [21], a division of North Whatcom Fire and Rescue, does provide fire protection services and will serve the property site identified as Lincoln

St. Commercial, located in the vicinity of the intersection of Lincoln Road and Shintaffer Road.

Please be advised that this letter is not to be construed to be an approval nor does it indicate disapproval for your proposed project. Whatcom County Fire Protection District [21] may or may not make additional comments or have conditions on this proposed project.

(8/19/05 Rutherford Letter; CP 250). Although the letter reserves the District's right to make further comments or conditions, it satisfies WCC 20.870.212's requirement for a concurrency letter. Earlier developments had received project approval with this type of will-serve letter.

The Fire District provided similar letters for Birch Bay Center and Harborview Road. (Staff Report for Birch Bay Center at 6; Exhibit F to Petitioner's Brief; CP 470) (Staff Report for Harborview Road at 12; Exhibit E to Petitioner's Brief; CP 433). On January 23, 2006, the Fire District provided a different submission for the Bay Breeze Custer Plat. As the Staff Report explains:

The Fire District submitted a preliminary and conditional will-serve letter dated January 23, 2006 subject to the condition that the applicant agrees to pay a mitigation fee of \$2500 per unit.

(Staff Report for Bay Breeze Custer Plant at 3; Exhibit G to Petitioner's Brief). Between the will-serve letters of July and August

2005, and that of January 2006, the Fire District's position on new developments in Birch Bay changed substantially.

The source of this change was Resolution 2005-017 from Fire District 21's Board of Fire Commissioners. (Exhibit K to Petitioner's Brief; CP 588-591). On December 14, 2005, the Board decided that the Fire District "is not able 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." (Resolution 2005-017 at 1; CP 588). Despite having many opportunities during the Birch Bay planning process, the Fire District had not made this claim until now. The Fire District simply declared that it could no longer provide adequate fire protection services to the Birch Bay urban growth area without more money. It made this declaration without creating a capital facilities plan or conducting any long-term planning.

The District's resolution made a unilateral change to a critical assumption in the Birch Bay Community Plan. It increased the level of service required. The Plan defined that an adequate level of service as four to six minutes for aid services and fifteen to twenty minutes for ambulance services. (Birch Bay Community Plan at 15-6; CP 244). As the District's resolution acknowledged, this was not

an urban level. "The Whatcom County Comprehensive Plan does not include an urban level of service for fire emergency response." (Resolution 2005-017 at 1; CP 588). The Fire District decided on its own 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 minute response for urban levels of service." (Resolution 2005-017 at 2; CP 589). The Fire District then concluded it could not meet this higher level of service without more money.

To address this feared budget shortfall, the Fire Commissioners adopted a \$2500 mitigation fee and imposed it on all new developments in the Birch Bay urban growth area.

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.

(Resolution 2005-017 at 3; CP 590). In other words, no mitigation fee, no concurrency letter. And under WCC 20.80.212, if a developer cannot get a concurrency letter, he or she cannot get project approval.

No hearings, studies or capital budget plan preceded or supported this new fee. The Fire Commissioners enacted it without guidance from any County agency or the public. The Resolution provides:

The Board of Fire Commissioners of Whatcom County Fire Protection District No. [21] does demand that any 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:

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.

* * * *

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 concerns.

(Resolution No. 2005-017 at 3-4; CP 590-591). The Fire Commissioners also placed a fee of \$384 per vehicle average daily

trip for all commercial developments in the Birch Bay urban growth area. (Resolution No. 2006-01; Exhibit L to Petitioner's Brief; CP 592-301).

These mitigation fees did not apply to the entire area of Fire District 21, only the Birch Bay urban growth area. As Chief Fields testified before the Hearing Examiner, the District does not require mitigation fees from developments in Blaine, Washington, part of Fire District 21's jurisdiction.

HEARING EXAMINER: ...Have you asked any developers within the city of Blaine to pay mitigation fees; and if so, have any agreed to?

* * * *

CHIEF FIELDS: At this point no, we haven't, because the City of Blaine has a different ruling. Impact fees are appropriate within the city limits. We are currently in discussions with the City of Blaine regarding that.

HEARING EXAMINER: So have you imposed impact fees for the fire district on any developments in the city of Blaine?

CHIEF FIELDS: At this point, no.

HEARING EXAMINER: So why – why are these Birch Bay area ones the ones that I keep seeing you ask?

CHIEF FIELDS: They're the first ones that have come up on the horizon.

HEARING EXAMINER: Well, that's not true.

CHIEF FIELDS: For us, it is.

HEARING EXAMINER: Well, Mr. Douglas just built a 20-some-unit condominium building in Blaine that's not finished yet. Did you get any fire impact fees from him for that?

CHIEF FIELDS: No, we did not.

(Hearing Transcript at 21-22; Exhibit J to Petitioner's Brief; CP 578-579).

In late 2005, Fire District 21 decided that it did not have enough money to provide urban levels of fire protection services in the Birch Bay urban growth area. To remedy this perceived shortfall, the District began charging developers \$2500 per proposed residential living unit to obtain a concurrency letter for subdivision approval. Four developers, the Appellants this case, refused to pay the mitigation fees, prompting this lawsuit.

C. SEPA Review And The Subsequent Appeals

Birch Point Village's project, Horizon's Village at Semiahmoo, served as the test case for the Fire District's new concurrency mitigation fee. On March 16, 2006, the County's Responsible Official for SEPA review issued a mitigated determination of non-significance for Horizon's village. (Summary of Application and Recommendation at 3; Exhibit D to Petitioner's

Brief; CP 358). This MDNS did not mention or require the developer to pay a concurrency mitigation fee to the Fire District. On March 30, 2006, Counsel for the Fire District wrote the SEPA official, stating "the District has not and will not issue a letter of concurrency as required by WCC 20.80.212 until such time as the project proponent and property owner (i.e. Developer) expressly accepts the conditions set forth herein." (3/30/06 Counsel Letter; Exhibit C to Respondents' Brief; CP 253-260). The conditions included payment of the \$2500 per unit mitigation fee. On April 13, 2006, the Fire District appealed the MDNS, which did not require the fee, to the Hearing Examiner.

While the appeal was pending, the County's SEPA official withdrew the March 16, 2006 MDNS and amended it to include payment of the mitigation fees as additional conditions. (Summary of Application and Recommendation at 3; Exhibit D to Petitioner's Brief; CP 358). Birch Point Village appealed this revised MDNS to the Hearing Examiner.

On May 3, May 10, and June 9, 2006, the Hearing Examiner held a combined hearing on Birch Point Village's request for a site specific rezone and project approval, as well as the SEPA appeal. (Hearing Examiner's Decision (SEPA Appeal); Exhibit C to

Petitioner's Brief; CP 338) (Summary of Application and Recommendation (Rezone Decision); Exhibit D to Petitioner's Brief; CP 356). In both decisions, the Hearing Examiner ruled in favor of Birch Point Village.

First, the Examiner concluded the concurrency fee was simply an impact fee under a different name.

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; Exhibit C to Petitioner's Brief; CP 350-351).

Second, the Hearing Examiner ruled that the concurrency mitigation fee was not voluntary.

As is clear in this situation, this developer has not been willing to enter into a voluntary mitigation agreement with Fire District [21]. 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.

(Hearing Examiner's Decision at 15; CP 352).

Third, the Hearing Examiner concluded that the County should not conduct long-term concurrency planning for fire services during review of a specific development project.

If Fire District [21] 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.

(Hearing Examiner's Decision at 9; CP 346).

Finally, fourth, the Hearing Examiner found that the Fire District could provide adequate levels of service without the mitigation fee.

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). Because the Fire District had not prepared a capital facilities plan, the Examiner concluded the District's claimed "*crisis can be best characterized only as speculation.*" (Hearing Examiner's Decision at 6; CP 343) (emphasis added).

The Hearing Examiner made similar decisions in the three other developments. (Exhibits E-G to Petitioner's Brief; CP 404-519). The Examiner approved the developments and struck down the Fire District's required payments of concurrency mitigation fees.

D. The Trial Court's Finding Of A Lack Of Concurrency

In its LUPA appeal, the Fire District did not defend charging the mitigation fee. Instead, it argued that the County had to reassess concurrency during project review and that the District could not provide adequate levels of fire protection. (Petitioner's Brief; CP 300-02). The trial court agreed, halting work on the pending development applications and permits. (Final Decision at 4; CP 6).

The trial court's ruling relies on two premises. First, "the County's decision that the District could provide adequate levels of

service was not supported by substantial evidence on the record.” (Final Decision ¶ 4; CP 6). Evidence from the Fire District Chief, according to the trial court, proved that the District lacks adequate funding, staff, and stations to provide adequate service.

Second, WCC 20.80.212 requires the County to reevaluate its concurrency planning during review of each project.

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... This development regulation must be applied during project review as required by RCW 36.70B.030(2).

(Final Decision ¶ 5; CP 7). The County could not rely on the levels of service adopted in the Birch Bay Community Plan.

Because the Fire District may not unilaterally alter the levels of service from the Community Plan and then claim a lack of concurrency, Birch Point Village appeals.

ARGUMENT

III. STANDARD OF REVIEW

Under RCW 36.70C.130(1), this Court must uphold the Hearing Examiner’s decision unless the District establishes one of four errors:

- (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.

RCW 36.70C.130.

This Court reviews the facts in the light most favorable to the County and Birch Point Village.

Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement asserted. Our deferential review requires us to consider all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority. Here, that was the hearing examiner.

Cingular Wireless, LLC v. Thurston County, 131 Wn. App. 756, 768, 129 P.3d 300 (2006).

IV. THE GROWTH MANAGEMENT ACT PROHIBITS ADOPTING NEW LEVELS OF SERVICE DURING PROJECT REVIEW

A. Concurrency Requires Long-Term Planning

The Growth Management Act established concurrency as one of thirteen planning goals.

Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

RCW 36.70A.020(12). Concurrency has two components: (1) the availability of public services – does a fire district exist to serve the development; and (2) the adequacy of services – does development reduce fire services below locally established minimum standards. WAC 365-195-210. The dispute in this case is over the adequacy of services.

Whatcom County has sole authority to set the minimum standards 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.

Regulations from the Department of Community, Trade, and Economic Development recommend the County set minimum levels of service for fire protection in the Comprehensive Plan.

Recommendations for meeting requirements. The capital facilities element should serve as a check on the practicality of achieving other elements of the plan. The following steps are recommended in preparing the capital facilities element:

- (a) Inventory of existing capital facilities showing locations and capacities, including an inventory of the extent to which existing facilities possess presently

unused capacity. Capital facilities involved should include water systems, sanitary sewer systems, storm water facilities, schools, parks and recreational facilities, police and fire protection facilities.

(b) *The selection of levels of service* or planning assumptions for the various facilities to apply during the planning period (twenty years or more) and which reflect community goals.

WAC 365-195-315 (emphasis added).

Whatcom County complied with this recommendation in the Birch Bay Community Plan, providing an inventory of existing facilities and services, proposed expansions and improvements, and the level of service. “The gold standard for successful emergency services is four to six minute response times for aid services and 15 to 20 minutes for ambulance services.” (Birch Bay Community Plan at 15-4, 15-6; CP 331, 333). The Plan did not adopt an urban level of service. Fire District 21 imposed that level on its own.

B. Concurrency Planning Should Not Occur During Project Review

By significantly increasing the level of service beyond that in the Community Plan, the Fire District created the financial shortfall and lack of concurrency it alleges now. For good reason, the Growth Management Act prohibits service providers from setting

their own levels of service. The Growth Management Act makes clear that concurrency plans are part of the long-term planning for growth, and counties should not amend the plans to satisfy a particular party during project review.

First, the choices made in the 2004 Birch Bay Community Plan are the foundation for review of specific development projects.

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.

RCW 36.70B.030(1). When the County determined in the 2004 Community Plan that costs for expanding fire service "will be borne by taxes paid by the growing population", that became a "fundamental land use planning choice". So, also, the level of service.

Second, neither the Fire District nor the County can abandon these choices during project review and decide that impact fees will be the more appropriate funding source. The Community Plan takes precedent during the review of specific projects.

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:*

...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). The Community Plan concluded that Birch Bay has concurrent fire services because the growth of population will create a growing tax base from which the District can draw money. After more than two years of discussion, the citizens and stakeholders in Birch Bay, including Fire District 21, decided that tax revenues were sufficient to provide adequate levels of service for the urban growth area.

Third, the Fire District may not scrap the Community Plan and insert new concurrency levels during the review of a specific project.

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.

RCW 36.70B.030. Once the County adopted a comprehensive plan, parties may not amend it during the permit process. This makes sense, given the Legislature's desire that counties engage in comprehensive planning for growth rather than piecemeal decisions while reviewing particular developments. "It is in the public interest that citizens, communities, local governments, and the private sector cooperate and coordinate with one another in comprehensive land use planning." RCW 36.70A.010.

The Hearing Examiner ruled appropriately that the 2004 Community Plan was binding.

The Birch Bay Comprehensive Plan indicates that adequate fire service facilities will be funded by the 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. [21].

(Hearing Examiner's Decision at 11; Exhibit C to Petitioner's Brief; CP 348). The Fire District chose the wrong forum to attempt to amend this Plan.

If Fire District [21] 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 revisited 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. [21] cannot assert a lack of ability to do so on a project by project basis.

(Hearing Examiner's Decision at 11; CP 348).

C. Whatcom County Code 20.80.212 Does Not Reopen The Community Plan To Amendment

The Whatcom County Council adopted WCC 20.80.212, titled concurrency, to ensure that all developments comply with the concurrency requirements in the Comprehensive Plan.

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). If a proposed development conflicted with the terms of the comprehensive plan, this zoning provision allows the service provider to flag it in a concurrency letter and authorizes the County to deny permits under paragraph 2. The section *enforces*

the concurrency provisions of the Community Plan; it does not allow service providers to rewrite them.

The trial court ruled to the contrary, concluding that WCC 20.80.212 requires the County to revisit the appropriate level of service for each proposed development.

RCW 36.70B.030(2) states that the development regulations “shall be determinative” of the availability and adequacy of public facilities (emphasis added). 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*.

(Final Decision ¶ 5; CP 7)(emphasis added). This expansive reading of WCC 20.80.212 is incorrect for three reasons.

First, this provision does not “define...the availability and adequacy of public services” under RCW 36.70B.030, but rather enforces the levels set by the Birch Bay Community Plan. The Growth Management Act gives special status to development regulations that set the substantive levels of a public service or facility, like levels established in the Comprehensive Plan. Although the Fire District argued repeatedly that WCC 20.80.212 qualifies as such a development regulation, the zoning provision does not set levels of acceptable service – it enforces standards established elsewhere. The Community Plan, not WCC 20.80.212,

defines the availability and adequacy of fire protection services in Birch Bay.

Second, the trial court's reading of WCC 20.80.212 would unlawfully delegate concurrency planning from the County to the affected service providers. The Fire District, not the County through the planning process, set the level of service. The Hearing Examiner criticized the Fire District for using concurrency letters to trump the County's long-term planning decisions.

[I]n the case of growth within the Birch Bay Urban Growth Area and within Fire District [21]'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 [21] has adequate current capacity and that arrangements for adequate funding are in place to provide for future growth, Fire District [21] *cannot stop this development by refusing to issue a concurrency letter.*

(Hearing Examiner's Decision at 12; CP 349) (emphasis added).

If the Fire District's position were correct, any service provider could enact a building moratorium by refusing to issue concurrency letters. This would unlawfully undercut the County

Council's authority to adopt and enforce the Comprehensive Plan and its concurrency elements. Municipality of Metropolitan Seattle vs. Division 587, Amalgamated Transit Unit, 118 Wn.2d 639, 643, 826 P.2d 167 (1992); citing Lutz vs. Longview, 83 Wn.2d 566, 520 P.2d 1374 (1974); Rural vs. PUD 1, 43 Wn.2d 214, 261 P.2d 92 (1953).

Third, project-by-project concurrency planning does not work. As Chief Fields' testimony to the Hearing Examiner illustrates, specific projects do not provide the best opportunity to plan for an entire district. The configuration of a particular project may change depending on who buys or leases the units.

The figures that we're talking about right now are for the residential occupancy only. We're not prepared, due to lack of knowledge of the – of the entire commercial development, as to what the impact for those – for the total number of people that are going to be occupying that at any given time, we don't have that information. We can, however, accurately that one out of ten. On the average, for every ten people, there's going to be one request for service annually.

(Hearing Transcript at 13; Exhibit J to Petitioner's Brief; CP 570).

Project-by-project concurrency planning leads to incomplete, piecemeal results.

D. SEPA Does Not Allow the Fire District To Amend The Community Plan

1. The Fire District Has Failed To Show Probable Significant Adverse Environmental Impacts.

For a project to be denied or conditioned upon SEPA, the responsible official must determine that there will be “probable significant adverse environmental impacts.” RCW 43.21C.060; WAC 197-11-340. Without this finding, the procedures in SEPA can not be invoked for any reason, including concurrency issues.

SEPA does not apply here -- there has been no showing that this project creates a probable adverse significant environmental impact with regard to the Fire District’s ability to provide service. All the information submitted by the District shows this development will have no more impact upon public safety than any other similarly situated project. The Fire District does not assert that this project will create a significant adverse environmental impact. Instead, the information from the Fire District simply says that development in the general area could affect levels of service.

Testifying before the Hearing Examiner, the County SEPA official, Martin Blackman, confirmed that the County received no factual information establishing a “probable significant adverse environmental impact” being caused by the Horizon’s project.

MR. BLACKMAN:- The letter we get before a project says service will be provided. By getting the appeal letter, that meant that would no longer be available; therefore, I have to assume at this point, the way things would stand, is that the Fire District would not provide -- provide services.

HEARING EXAMINER: Well, they didn't say that. Not only that, they have to provide services. What you would need, if you can even do this with SEPA, and I'm not convinced you can, you would need factual information that would indicate that there would be inadequate fire service if this was approved. That's factual information. Did you get any factual information like that?

MR. BLACKMAN: None that I can verify.

(Hearing Transcript at 12; Exhibit D to Respondent's Brief; CP 262-291). Accordingly, SEPA cannot be used to invoke "concurrency regulations" because no factual information establishing a significant environmental impact was ever submitted.

2. The Community Plan Controls Probable Impacts.

Under RCW 43.21C.240, a county may not impose additional mitigation under SEPA during project review if sub-area plans adequately address a project's probable specific adverse environmental impacts. The purpose of that statute is identified in the legislative intent behind its adoption.

The legislature intends that a primary role of environmental review under Chapter 43.21C RCW is

to focus on the gaps and overlaps that may exist in applicable laws and requirements related to a proposed action... Chapter 43.21C RCW should not be used as a substitute for other land use planning and environmental requirements.

1995 Laws of Washington, ch. 347 § 202. These noted changes under SEPA correspond with specific regulations under the Growth Management Act as RCW 36.78.470(1) provides,

project review, which shall be conducted pursuant to provisions of Chapter 36.70B RCW, shall be used to make individual project decisions, not land use decisions.”

SEPA does not create an alternative method to amend the Community Plan.

V. SUBSTANTIAL EVIDENCE SUPPORTS THE HEARING EXAMINER'S FINDINGS

Viewing the facts in favor of the County and Birch Point Village, the Hearing Examiner had ample reason to discount Fire District 21's claim it could not provide adequate levels of service.

First, the Fire District premised its calculations on the wrong level. The District's evidence consisted of two letters from Fire Chief Tom Fields and his testimony before the Hearing Examiner. (Exhibits H, I and J to Petitioner's Brief; CP 520-587). His calculations assumed a higher level of service – National Fire

Protection Association (NFPA) standard 1710 that calls for a four minute response for urban levels of service.

The Board of Fire Commissioners, the elected body that governs the fire district, has identified that:

1. It is their goal to provide a level of service to the Birch Bay Urban Growth Area commensurate with the Birch Bay Community Plan and NFPA 1710 and/or NFPA 1720.

2. To provide an adequate level of service for the proposed development within the BBUGA, the fire district must:

a. Complete a Capital Facilities Plan as required in GMA planning.

b. Increase staffing by a minimum of one full paid crew (twelve additional firefighters) to staff the second station.

c. Modify or remodel, if not replace out dated facilities or add additional facilities as deemed necessary.

d. Add and/or replace apparatus and equipment due to the increased utilization of existing equipment.

3. The cost of the above Capital Improvement items must be paid as a mitigation fee by the developer and should not be a cost passed on to existing tax payers.

(6/8/06 Fields Letter; Exhibit I to Petitioner's Brief; CP 529)

(emphasis original). This was not the level of service in the Community Plan.

Second, the District *chose* not to use its primary funding source, taxing authority under RCW 52.26.050. This conflicts with the Legislature's mandate for fire protection service authorities.

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.

RCW 52.26.010(4). The Hearing Examiner found correctly that the District had multiple funding sources.

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 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 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.

(Hearing Examiner's Decision at 6-7; CP 343-344).

Third, the District failed to raise the foreseeable effects of growth during the three-year preparation of the Birch Bay Community Plan. With some exasperation, the Hearing Examiner noted “if Fire District [21] 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.” (Hearing Examiner’s Decision at 9; CP 346). Substantial evidence proves the Fire District failed to use the planning mechanisms available.

Finally, substantial evidence supports the Hearing Examiner’s finding that the District required developers pay a mitigation fee to receive a concurrency letter. Resolution 2005-017 expressly says so. (Resolution 2005-017 at 3; CP 590) (“The District will not issue a letter pursuant to WCC 20.80.212...unless the Developers in the Birch Bay UGA pay or agree to pay the concurrency mitigation fee set forth herein”). The trial court’s finding to the contrary has no support in the record. (Final Decision ¶ 4(f); CP 6).

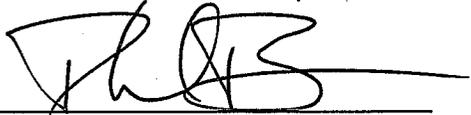
The trial court erred by failing to give these findings the deference they deserve. On appeal, this Court has compelling grounds to affirm the Hearing Examiner.

CONCLUSION

For concurrency planning to work, Whatcom County must maintain final authority to set the appropriate level of service. Fire District 21 unilaterally changed the level of service to the Birch Bay Urban Growth Area and then halted all development by refusing to issue concurrency letters. Because the Hearing Examiner correctly ruled this tactic illegal, Appellants Birch Point Village, Schmidt Constructing, Mayflower Equities, and Lisa Schenk and Mike Sumner respectfully request this Court to affirm the Hearing Examiner and reverse the Superior Court.

DATED this 9th day of October, 2008.

BURI FUNSTON MUMFORD, PLLC

By 

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

DECLARATION OF SERVICE

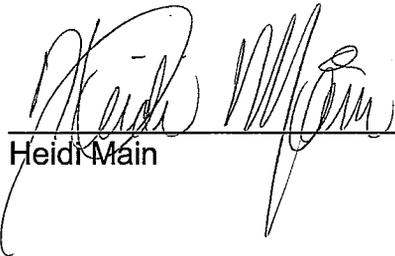
The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of Opening Brief of Appellants to:

Jonathan Sitkin
Chmelik Sitkin & Davis
1500 Railroad Ave.
Bellingham, WA 98225

Karen Frakes
311 Grand Ave. #201
Bellingham, WA 98225

Philip Talmadge
Talmadge Fitzpatrick
18010 Southcenter Pkwy
Tukwila, WA 98188-4630

DATED this 9th day of October, 2008.



Heidi Main

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 OCT 13 AM 10:24

APPENDIX A

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, 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. (Ord. 98-083 Exh. A § 58, 1998).
-

APPENDIX B

SCANNED 5

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2/29 20 08
WHATCOM COUNTY CLERK

By [Signature]
Deputy

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HONORABLE CHARLES R. SNYDER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM

WHATCOM COUNTY FIRE)
DISTRICT NO. 21,)

No. 06-2-02364-8

Petitioner,)

FINAL DECISION, ORDER AND
JUDGMENT ON LUPA APPEAL

vs.)

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.)

THIS CONSOLIDATED MATTER having come before the Court on appeal of
Whatcom County Fire District No. 21 on September 24, 2007; the Court having reviewed
the papers, administrative records and pleadings filed herein; and the Court being duly
advised on the premises; NOW, THEREFORE, the Court makes the following findings of
fact, conclusions of law, and further ORDERS, ADJUDGES, AND DECREES as follows:

FINAL DECISION, ORDER AND JUDGMENT
ON LUPA APPEAL - 1

CHMELIK SITKIN & DAVIS P.S.
ATTORNEYS AT LAW
1500 Railroad Avenue Bellingham, Washington 98225
phone 360.671.1796 • fax 360.671.3781

77

- 1) That the District's appeal of the permits and approvals set forth in Exhibit "A," is hereby granted, overturning the approvals granted therein, and remanding the same to the County.
- 2) The parties, by agreement, consolidated four (4) pending projects into this appeal in the interests of judicial economy as each of those appeals raised similar, and in some cases identical, issues. All of the approvals under appeal as set forth in the Land Use Petition are referred to herein as the Decisions, including the SEPA appeal decisions.
- 3) The County (the County Council and the Hearing Examiner in their capacities as the final decision makers and/or as appellant body are collectively referred to herein as the "County") in granting the permits and approvals issued the Decisions.
- 4) The County's decision that the District could provide adequate levels of service was not supported by substantial evidence on the record.
- a. District Chief Tom Field's testimony that the District lacks adequate funding, staff, and stations to provide adequate service was reliable evidence of the District's capacity limitations.
 - b. There is no evidence in the record supporting the finding that the state legislature may act in the future to grant the District additional revenue raising authority to provide adequate services.
 - c. There is no evidence in the record to support the finding that the District receives any revenue from the EMS levy.
 - d. Other revenue sources referenced were purely speculative and/or not shown to be available to the District.
 - e. The 2004 Birch Bay Community Plan itself makes only conclusory statements without any analysis and is not a capital facilities plan contemplated by RCW 36.70A.070(3). Nothing in the Birch Bay Community Plan addressed potential changes in structure, such as a change in the Countywide EMS system, which occurred since the Birch Bay Community Plan was adopted and the hearing on this matter. That EMS system change placed Basic Life Support transport requirements on the District without funding from the EMS Levy. The facts have substantially changed since the 2004 Birch Bay Community Plan and no substantial evidence was presented by developers or the County rebutting the testimony of the District Fire Chief Tom Fields.
 - f. The Decision found that the District would not issue a "concurrency letter" due to a failure to execute a voluntary agreement. See *SEPA Decision, Finding of Fact IV*. This finding is unsupported by substantial evidence on the record. The record indicates that the District would not

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1 issue a "concurrency letter" due to the District's inability to provide an
2 urban level of fire protection, emergency response, and emergency
3 transport services to the Birch Bay UGA. See *letters of Chief Tom*
4 *Fields*.

5 g. The record lacks substantial evidence to support the County's finding of
6 fact and/or a conclusion of law that the criteria for approval for each of
7 the projects under appeal had been met.

8 5) The County erred as a matter of law in interpreting RCW 36.70B.030, and, by
9 failing to properly apply WCC 20.80.212 to the application, its decision was a
10 clearly erroneous application of the law to the facts. RCW 36.70B.030(2) states
11 that the development regulations "shall be determinative" of the availability and
12 adequacy of public facilities (emphasis added). The County adopted WCC
13 20.80.212 as the development regulation to be determinative of the levels of
14 service at the time of application review. See *SEPA Decision, in particular*
15 *Conclusion of Law III and IV*. This development regulation must be applied
16 during project review as required by RCW 36.70B.030(2). The Examiner's
17 interpretation that RCW 36.70B.030(3) bars the application of a development
18 regulation to review adequacy of public facilities required by RCW
19 36.70B.030(2), RCW 36.70A.040, and other statutes and county code
20 provisions is in error.

21 6) The Examiner's Decision findings of fact and conclusions of law were clearly
22 erroneous application of law to the facts, and were an error of law as to
23 the criteria for approval (RCW 58.17.110; Whatcom County Long Subdivision
24 criteria - WCC 21.05.030(1)(h); Planned Development - WCC 20.85.335, WCC
25 20.85.340, and WCC 20.85.345; Major Development - WCC 20.88.130(5); Site
Specific Rezone - WCC 20.90.63(2)(b) and WCC 20.90.063(2)(d)(i-ii); and
Binding Site Plan - WCC 21.08a) for each of the projects under appeal had
been met.

7) The Hearing Examiner's SEPA determination modifying the Mitigated
Determination of Non-Significance (MDNS) was an unlawful procedure. The
Examiner has no authority under the County's SEPA Ordinance (WCC 16.08),
the SEPA Rules (WAC 197-11), or in SEPA (RCW 43.21C.) to revise and issue
a SEPA determination. The County Code states that the Examiner may
"reverse" a determination of a County Official. See *WCC 16.08.170 (4)*. The
Hearing Examiner, having reversed the County SEPA determination, was
required to remand the matter back to the County SEPA Official rather than
issue his own SEPA determination.

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Based upon the foregoing, it is FURTHER ORDERED as follows:

- 1) All permit applications, plat applications, binding site plan applications and/or any other building permits or similar approvals filed with or issued by Whatcom County related to the projects under appeal herein are to be placed on hold by Whatcom County with no further action or approvals to be taken by Whatcom County.
- 2) No final plat, specific or binding site plan approvals or any other building permits or similar approvals shall be issued or granted by Whatcom County related to any of the projects or approvals under appeal herein.

DONE IN OPEN COURT this 29 day of February, 2008.


JUDGE/COURT COMMISSIONER

Presented By:

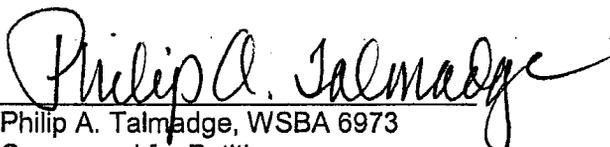
CHMELIK SITKIN & DAVIS P.S.



Jonathan K. Sitkin, WSBA #17604
Seth A. Woolson, WSBA #37973
Attorneys for Petitioner

Copy Received By/Notice of Presentation Waived By:

TALMADGE/FITZPATRICK



Philip A. Talmadge, WSBA 6973
Co-counsel for Petitioner

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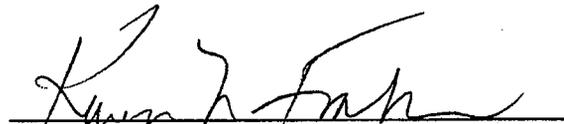
BURI FUNSTON MUMFORD, PLLC



Phil J. Buri, WSBA #17637
Attorney for Respondent Developers

Copy Received By:

WHATCOM COUNTY PROSECUTOR'S OFFICE



Karen Frakes, WSBA #13600
Attorney for Whatcom County

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APPENDIX C

RECEIVED

WHATCOM COUNTY HEARING EXAMINER

JUN 30 2006

RE: SEPA Appeal)
Application for)

CHMELIK SITKIN & DAVIS P.S.
APL06-0069

Fire District No. 13)
Birch Point Village, L.L.C.)
"Horizons Village at Semiahmoo")

Findings of Fact,
Conclusions of Law,
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:

Fred Bovenkamp
Birch Point Village LLC
3975 Irongate Road
Bellingham, WA 98225

Craig Parkinson
David Evans and Associates, Inc



119 Grande Avenue, Suite D
Bellingham, WA 98225

Douglas Robertson
900 Dupont Street
Bellingham, WA 98225

Jon Sitkin
1500 Railroad Avenue
Bellingham, WA 98225

Royce Buckingham
Whatcom County Civil Deputy Prosecutor

Chief Tom Fields
Whatcom County Fire District No. 13
307 -19th Street
Lynden, WA 98264

Meg Grable and Ralph Falk
Birch Bay Village Community Club
8055 Cowichan Road
Blaine, WA 98230

Kathy Berg
7585 Sterling Avenue
Birch Bay, WA 98230

Trevor Hoskins
8686 Great Horned Owl
Blaine, WA 98230

Leanne Smith
8396 Grouse Crescent
Blaine, WA 98230

James Kawa
8395 Richmond Park Road
Blaine, WA 98230

Tom Vuyovich
8422 Shintaffer
Blaine, WA 98230

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 D

H. Hart
B. Martin
M. Blackman

Jonathan K. Sitkin
ATTORNEY
jsitkin@chmelik.com

March 30, 2006

FAXED
3:38 PM
3/30/06

VIA FACSIMILE & REGULAR MAIL
(360) 738-2525

Martin Blackman, Deputy SEPA Official
Whatcom County Planning and Development Services
5280 Northwest Road., Suite B
Bellingham, WA 98226

Re: SEP2006-0023, LSS2005-00010, ZON2005-00019, PUD2005-00005, BSP2005-0004;
200 Residential Units and 134,000 Sq. Feet of Commercial Space;

Craig Parkinson, P.E. Applicant

SEPA and Concurrency Comments

Our Client: WCFD#13 (the "District")

Dear Mr. Blackman:

As we have discussed previously, projects within the Birch Bay Urban Growth Area such as the project identified above presents significant concurrency (WCC 20.80.212) issues and SEPA issues for the District. The District is not able to provide urban levels of service to this development without this and other developers in the Birch Bay area addressing the necessary upgrade of existing facilities to meet this level of service standard.

This letter is provided on behalf of our client with regard to the above referenced matter as its comments in response to the Mitigated Determination of Nonsignificance, and to advise that the District has not and will not issue a letter of concurrency as required by WCC 20.80.212 until such time as the project proponent and property owner (i.e. Developer) expressly accepts the conditions set forth herein.

The District has by Resolutions established two concurrency mitigation fees, one for residential development and one for commercial development. These are set forth in Resolution Numbers 2005-0017 and 2006-01 (see attached). Additionally, the District would recommend that as a SEPA mitigating condition, the project owner provide funding for a District capital facilities analysis and plan related to the District required facilities, staffing and upgrade requirements to serve this and other

MAILED

3/31/06
WCFD#13 Commissioners
Tom Fields

1500 Railroad Avenue
Bellingham, WA 98225
W 360.671.1796
F 360.671.3781
www.stmoh.com

projects in the Birch Bay urban growth area, and thereafter comply with any mitigation measures adopted by the District following the adoption of the capital facilities plan. This report would be required to also consider the planned road and traffic improvements, and the effect or impact on those improvements (or lack of improvements) on District response times to the site.

In the interim, prior to the District's adoption of a capital facilities plan, the District has established interim Concurrency and SEPA mitigating measures as set forth in the above-referenced Resolutions.

The basis for the residential concurrency mitigation fee and SEPA mitigation is set forth in Resolution 2005-0017, and below.

The interim methodology for commercial uses established in Resolution 2006-01 is based upon the per living unit concurrency mitigation fee established for residential developments. This analysis adopts relative average daily trip on traffic for residential development based upon the ITE traffic manual. Once the per residential average daily trip is determined, then commercial development would pay the same mitigation fee as residential development based upon a residential equivalency determined by average daily trips as set forth in the ITE traffic manual or the developer's traffic engineer. The District does provide the developer with an option of providing their own study and analysis to present to the District for the purposes of the commercial concurrency mitigation fees.

The District is not generally opposed to developments such as that proposed here. However, the District cannot provide a letter indicating that it has capacity or capabilities to provide urban levels of service to this residential and commercial development without participation by all commercial and residential developers in the Birch Bay area in the necessary upgrade to existing District facilities, equipment and staffing.

As mentioned, the District has recommended and advised with regard to other projects within the Birch Bay Urban Growth Area, the District is not able to provide a letter of concurrency unless the Developer agrees to accept the concurrency mitigation fee as set forth in District Resolutions discussed herein.

The District conditions for concurrency and recommended conditions for SEPA are as follows:

1. RESIDENTIAL USES

- a. Execution of an agreement in a form approved by the District obligating the Developer to pay a \$2,500.00 per living unit concurrency mitigation fee to be paid to the District on or before the issuance of a certificate of occupancy, including a temporary occupancy permit. Alternatively, the developer can pay this amount up front. This requirement should be a SEPA condition, as well as a condition of approval for all necessary permits and approvals for this development. If, as part of a subsequently adopted District capital facilities plan, a lower fee is determined to be required, then this fee would be adjusted downward to that level for this project, unless the fee has already been paid, then no refund would occur. If a higher fee is determined to be warranted and required, the District agrees that this fee would be capped at the \$2,500.00 per living unit figure if the Developer has executed the aforementioned agreement.

- i. For clarification, if prior to the Developer obtaining a temporary occupancy permit for their development and the Developer has not previously paid the concurrency mitigation fee, and the District adopts a capital facilities plan that results in a lower concurrency mitigation fee, then the lower concurrency mitigation fee will apply. If the District adopts a capital facilities plan that results in a higher concurrency mitigation fee, then the \$2,500.00 concurrency mitigation fee set forth herein shall be the applicable per living unit concurrency mitigation fee. However, if the Developer has paid the concurrency mitigation fee, and the District later adopts a capital facilities plan that calls for a lower concurrency mitigation fee, the Developer shall not be entitled to a lower fee.

2. COMMERCIAL USES

- a. A mitigation fee of \$384 per VADT based upon the ITE manual for the particular land use and factored to reflect the proposed building size based upon the methodology of determining VADT in the ITE manual for the particular use (i.e. gross leasable floor area, or gross floor area, for example). Prior to the District's issuance of a letter of concurrency, such fee shall be paid directly to the District, or the development applicant shall execute a binding agreement in a form approved by the District. Any County fee to administer this assessment would be additional. As an alternative, a developer may submit to the District Board of Fire Commissioners for the Board's consideration and possible approval, an alternate commercial concurrency mitigation fee proposal based upon an analysis of the proposed commercial use demand for urban levels of service and the pro rata share of the District's cost to bring its facilities to a condition to be able to deliver that service on a 7 day 24 hour basis considering existing district facilities and surrounding circumstances such as existing and proposed traffic conditions and improvements with the pro rata share considering a \$2,500.00 per living unit residential equivalency.

3. ALL USES

- a. The driveway and parking area would have to maintain a minimal travel way between the ends of each parking space of twenty five (25) feet. Again, this area excludes parking spaces. This is necessary to assure that the District's ladder truck with its outriggers extended has access to any proposed buildings. The Developer has not provided copies of any proposed plans to the District. Thus the District is not able to ascertain if the existing proposal meets this requirement, or even if a ladder truck is necessary to serve the multi-family units.
- b. The internal roadways on the site would have to be designed and constructed to bear the weight and load of the District ladder truck when parked, estimated to be a load bearing capacity of 60,000 to 65,000 pounds.

- c. The internal circulation design would not be changed without consultation and acceptance by the District to assure maneuvering and stopping areas necessary for District apparatus.
- d. The applicant would provide electronic copies of final drawings to enable District pre-response planning.
- e. No changes in the height or structure dimensions, including walkway and stairway locations without District acceptance.
- f. The building must be designed and constructed according to the applicable sprinkler fire suppression and ingress and egress requirements of the occupancy designation applied pursuant to the applicable building code, as well as any requirements of the Whatcom County Fire Marshall not inconsistent with these requirements.
- g. Execution of an agreement with the District implementing these conditions prior to the issuance of any building permits.

With the Developer and the County's agreement to the foregoing mitigation measures, the District would comment that it can adequately provide services to this development.

Rationale

For the record, we are including in this letter, the analysis previously provided to the County Planning Department and the County Hearing Examiner on this issue of District ability to serve at urban levels of service and concurrency related issues within the Birch Bay UGA.

The District is the designated provider of fire protection, fire suppression and emergency medical response for nearly all of the Birch Bay area, including the site for this project.

The issues here are related to the capital facilities, including equipment, as well as staffing required to accommodate the anticipated population in the Birch Bay area. Factored into this issue are the following factors, among others: (a) the District will be providing transport to St. Joseph's Hospital for Basic Life Support (BLS); (b) the District has limited access in some circumstances due to existing station location and the manning of certain stations; and (c) access to homes is further impeded by traffic, both automobile and trains, stopped for custom inspection. The BLS transport alone will take two (2) fire fighters out of service for a minimum of two (2) hours each per call out for Emergency Medical Services (EMS). Further, circumstances related to the Homeland Security inspection of trains crossing the US-Canada border are stopped for x-ray inspection. In the process, the trains block access to the Birch Bay area from the manned Blaine O'Dell Station. This severely impairs response to the Birch Bay area.

With the understanding that the information above and below is based upon assumptions and are thus are rough estimates only, the following information is provided.

Example Of One Area Of Demand Increase

As of early fall, it was estimated that there were 1,100 new units pending approval. At an average of 2.8 people per unit, a total of approximately 3,080 new residences are anticipated in Birch Bay.

An example of the problem with new development in the Birch Bay area, such as that proposed follows based upon the assumptions above.

3,080 new people will result in 300 new call outs per year. 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 estimate above is low, than these call out numbers would be obviously higher.

Examination of the Birch Bay Subarea Plan adopted by the County Council in September 2004 indicates that over the next 20 years there will be approximately 5,000 people, 2,000 more than the people indicated that are arriving based upon the units in the queue at this time. It must be noted that a higher population figure serves to increase the demand on services, necessitating more equipment, stations or station upgrades. A higher rate of growth would accelerate the demand for the services.

Thus it would appear that over the current planning period, the population numbers assumed in the above example are low by approximately 2,000 people. This would add approximately 96 more callouts per year with attending transports to St. Joseph's Hospital.

Standards

The NFPA 1710 is the national standard. It calls for a four (4) minute response for urban levels of service. See Attached.

The Birch Bay Community Plan, page 15-6, provides the standard that Whatcom County has adopted. It states that the "gold 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. It does not provide a standard for fire emergencies. It merely states a figure that it believes was what Whatcom Fire District #13 was capable of providing at the time of adoption.

With the growth demands in the Birch Bay area, the anticipated assumption of transport to St. Joseph's Hospital, and other factors, the District cannot meet this standard in the Birch Bay area without significant revenue increases, including mitigation of impacts arising from developments.

Staffing

In order to serve the Birch Bay area at urban levels consistent with NFPA 1710 and the County Standards, it is estimated that significant upgrades to existing stations, the addition of approximately eleven (11) new fire fighters, and possibly a new station in the Birch Bay area will be required to serve this area.

An entry level fire fighter has approximately a \$60,000.00 per year cost in his/her first year total compensation and increases thereafter. A lieutenant is at a higher cost of about a total of \$75,000.00 per year in total compensation. Some of these new fire fighters will have to be lieutenants. Thus, in salaries alone, it is estimated that there will be a \$700,000.00 cost for the first year, increasing annually thereafter.

Station Improvements

At a minimum, substantial station improvements, and likely a new station will be required to serve the Birch Bay area.

The necessary improvements to the Birch Bay station to man this station on a 24 hour 7 day a week basis for the fire fighter requirements are noted above. 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.

However, the scale and pace of the development of Birch Bay at urban level densities may require not only these improvements, but a new station as well. *A new station has not been calculated in the figures herein.*

Equipment

Much of the existing equipment is required to be replaced within the next five (5) years, according to the insurance rating bureau. The existing ladder truck (75' ladder) is scheduled for replacement in 2007 (a thirty year life on the 1977 ladder truck). A new ladder truck with a 100' ladder is estimated at \$800,000.00, based upon WCFD#7's recent acquisition. The engines have a 20 year life. Three engines are anticipated to be replaced between 2005-2009. A basic engine is \$350,000.00. The figure is \$400,000.00 per engine after specialized equipment is added. Thus, a total of \$2 million dollars is necessary for these replacements.

Additional equipment will be required for these new stations, in addition to the replaced equipment. It is also likely that new engines will be required, in addition to the replacement engines.

These figures do not address other new and replacement equipment needs from air packs, to boots, etc, etc.

Tax Revenue

It is recognized that additional revenue will come to the District from property taxes assessed valuation increases. However, revenue in the form of taxes takes approximately two (2) years after the construction of the residence to be fully realized.

More importantly, the additional assessed valuation will not generate sufficient revenue to support the additional capital needs or operational costs associated with urban development in Birch Bay.

Assuming an additional 1,100 units with an average value of \$300,000.00 assessed valuation, assessed at the maximum levy rate of \$1.50/1,000 (which is .02); future tax revenue from these new residences is estimated to be \$495,000.00.

Recall that the annual staffing requirements will require \$700,000.00 additional revenue on an annual basis

Shortfall

	EXPENSES		
Station Improvements	-\$800,000.00	One time	
Staffing	-\$700,000.00	Annual cost	
Equipment Replacement	-\$2,000,000.00	One time	
New Equipment	Not Included here		
New Station(s)	Not included here		
Tax Revenue		+\$495,000.00	Two years to arrive
Total Deficiency		(\$3,100,000.00)	
			PER 1,100 UNITS = \$ 2,713.82 PER UNIT DEFICIENCY

Mitigation agreed upon or required through the SEPA process, or required as a finding of concurrency can assure that the capital financing and operational demands to meet the fire and emergency response standards adopted by the County and consistent with national fire standards for urban levels of service arising from new development are met and the developer pays their share of these required improvements and requirements.



Planning Process

The District is undergoing a capital facilities planning process that would ideally result in an interlocal agreement between the County and the District to assure that prior to development occurring in the Birch Bay area, the appropriate mitigation fee related to urban levels of service would be paid. Alternatively, the County Council will need to be made aware that development in the Birch Bay area will not be receiving urban levels of service as called for by national standards, unless paid for by the developers. Thereafter the County Council will have to determine if urban levels of development without adequate urban levels of fire protection or a plan to pay for those necessary facilities and staffing is appropriate.

Interim solution

The District has approved as an interim measure a Resolution calling for a \$2,500.00 per living unit concurrency mitigation fee. With a multi-family development such as that proposed, the District does not object that this fee be paid prior to the issuance of an occupancy permit of any type. The District also has indicated that if it later determines on either an interim or final basis that the concurrency mitigation fee should be higher, that the fee would not be raised for this development. However, if the concurrency mitigation fee is determined that it should be lowered, the District would agree to lower the fee, unless the fee has already been paid.

With the Developer and the County's agreement to the foregoing concurrency mitigation measures, the District would comment that it can adequately provide services to this 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 a national standard.

Without Mitigation, the County Cannot Make the Required Findings for Approval

Without the above referenced agreed upon concurrency mitigation, the County cannot make the required concurrency findings, or that the application meets the applicable criteria.

Concurrency

With the Developer's acceptance of these requirements, the County can reasonably make a finding of concurrency related to this development. Without that agreement, the County cannot reasonably make such a finding.

WCC 20.80.212 Concurrency requires that no subdivision, commercial development or conditional uses shall be approved 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....

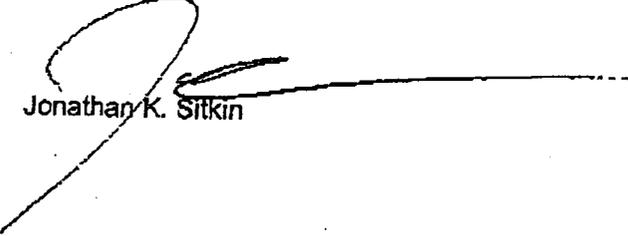
If necessary, the District believes that it is entirely appropriate for you to withdraw the MDNS based upon the information provided to you yesterday until appropriate mitigation measures can be identified by the District and the County, which may include among other things, the developer's funding of the District's capital facilities plan, and payment of other concurrency mitigation fees. I do not believe the District would be opposed to a credit towards the concurrency mitigation fee for the upfront expenditures of the developments examination of the District's capital facilities requirements to serve the proposal at urban levels of service.

Thank you for your attention to this matter. The District reserves the right to further supplement its SEPA comments and concurrency comments at a later date.

If you have any questions regarding the foregoing, please do not hesitate to contact me.

Sincerely,

CHMELIK SITKIN & DAVIS P.S.


Jonathan K. Sitkin

JKS/jh
Encls.

cc: WCFD#13 Commissioners (w/out encls.)
WCFD#13 Chief (w/out encls.)
Hal Hart (w/out encls.)
Bob Martin (w/out encls.)

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APPENDIX E

Whatcom County Fire District No. 21 (the merged Whatcom County Fire Districts No. 13 and 3) timely filed a Land Use Petition of the matters set forth below. The County and the Applicants have all agreed that the records in these matters are consolidated for the purposes of judicial economy:

- 1) HORIZON'S VILLAGE AT SEMIAHMOO, Birch Point Village, Inc., Applicant.
 - a. Land Use Approvals: AB2006-286; Site Specific Rezone (ZON05-0019); Planned Unit Development (PUD05-0005); Binding Site Plan (BSP05-0004).

On September 19, 2006, the Whatcom County Council approved the application of Birch Point Village, LLC for a Site Specific Rezone, Preliminary Planned Unit Development, and General Binding Site Plan for a Mixed-Use Development.

See *Exhibit "B" attached hereto*. The Horizon's Village at Semiahmoo project includes of up to 200-residential units and up to 134,000 square feet of commercial space on a 36.23-acre site located south of Semiahmoo Parkway, north of Birch Bay Drive, and west of Shintaffer Road, within the Birch Bay Urban Growth Area. Approximately 16-acres of the site is zoned General Commercial and approximately 20-acres of the site is zoned Urban Residential (UR4). The approval includes a Site Specific Rezone to change the designation of the site from a Long Term Planning Area Designation to a Short Term Planning Area Designation. The Horizon's Village at Semiahmoo project included commercial, retail, single family residential and multi-family residential uses.

- b. SEPA Appeal (SEP06-00069).

On June 29, 2006, the Whatcom County Hearing Examiner denied the SEPA appeal of Whatcom County Fire District No. 21. See *Exhibit "C" attached hereto*. The District appealed the Hearing Examiner's decision to the Whatcom County Council. The Whatcom County Council denied the District's SEPA Appeal. See *Exhibit "D" attached hereto*.

- 2) BAY BREEZE CLUSTER PLAT, Applicant Schmidt Constructing.
 - a. Land Use Approvals: AB2006-324; Preliminary Long Subdivision, Whatcom County Permit application number LSS06-0002.

On July 13, 2006, the Whatcom County Hearing Examiner approved the Preliminary Long Subdivision for a cluster long plat consisting of 16 single-family lots, a 47,390-square foot reserve area, and a 16,385-square foot stormwater facility on a 5.01-acre parcel in the Urban Residential (UR4) zoning designation.



3) HARBORVIEW ROAD, Lisa Schenk and Mike Sumner, Applicants.

- a. Land Use Approvals: AB2006-368; Planned Unit Development (PUD05-0008); Binding Site Plan (BSP05-0008); Preliminary Long Subdivision (LSS05-0013).

On September 20, 2006, the Whatcom County Council granted preliminary approval of a residential development consisting of 41 single-family lots, two multi-family lots containing 44-units, and one open space reserve tract for a total of 44-lots with a maximum of 85 units. General and Specific Binding Site Plan approvals, after the Preliminary Binding Site Plan is approved, will establish the specifics of the multi-family development.

- b. SEPA Appeal (SEP06-0022).

On September 20, 2006, the Whatcom County Hearing Examiner denied the SEPA appeal of Whatcom County Fire District No. 21. The District appealed the Hearing Examiner's decision to the Whatcom County Council. The Whatcom County Council denied the District's SEPA Appeal.

4) BIRCH BAY CENTER, Mayflower Equities, Applicant.

- a. Land Use Approvals: AB2006-365; Major Development Permit (MDP05-0001); Binding Site Plan (BSP05-0003); SEPA Appeal (SEP06-0006).

On October 31, 2006, the Whatcom County Council approved a Preliminary Binding Site Plan and Major Development Permit for a 2-phased commercial development on three parcels totaling 12.68-acres. The project is located within the General Commercial (GC) zone. The first phase consists of four buildings including an approximately 45,000-square foot grocery store, and 24,800-square feet of retail and commercial area, and associated parking. The second phase consists of five buildings including approximately 38,200-square feet of retail area with associated parking. Total building area will be 108,000-square feet. There are nine total parcels, which will be individually owned or leased, with all other areas held in common.