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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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WHATCOM COUNTY FIRE DISTRICT NO. 21,

Petitioner,

v.

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

Respondents.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Whatcom County Fire District No. 21 (“District”)¹ asks this Court to accept review of the decisions terminating review designated in Part B below.

B. COURT OF APPEALS DECISION

The Court of Appeals filed its unpublished opinion on June 22, 2009. A copy of the opinion is in the Appendix at pages A-1 through A-12. The Court denied the District’s motion for reconsideration on July 31, 2009, but granted the District’s motion to publish on August 11, 2009. Copies of the Court’s orders are in the Appendix at pages A-13 through A-16.

C. ISSUES PRESENTED FOR REVIEW²

1. Under the Growth Management Act, RCW 36.70A (“GMA”), does a county in its comprehensive plan have the authority to

¹ The District was once known as District Number 13. CP 292-95. District Number 13 combined with the City of Blaine in 2005. CP 575, 584. It is now part of North Whatcom Fire & Rescue Services. CP 565. NWFRS serves a 147-square mile area in Whatcom County.

² The developers did not assign error below to the trial court’s finding number 7 relating to SEPA, CP 7, br. of appellants at 3, thereby *conceding* that the hearing examiner’s modification of the MDNS was illegal. In light of this concession, the trial court’s decision as to the Horizon Villages at Semiahmoo, Harborview Road, and Bay Breeze Cluster projects should have been affirmed, but the Court of Appeals decision makes no reference to this question.

set the levels of fire and emergency services to be provided by a fire district?

2. Under GMA, when a county in its comprehensive plan sets the level of fire and emergency services to be provided in a county, is a fire district then compelled to issue a concurrency³ letter to prospective developers indicating that such service levels can be met, without site-specific assessment of the impact of such development project or the district's financial ability to provide that level of services?

3. Did the County also err in approving the developers' projects where the projects so increased growth that the District's facilities and personnel could not provide adequate levels of fire and emergency services concurrently with that growth as required by RCW 58.17.110 and similar County ordinances?

D. STATEMENT OF THE CASE

While the Court of Appeals opinion sets forth the facts here, op. at 2-6, it omits numerous key facts necessary to this Court's decision. This more complete Statement of the Case is necessary.

³ WAC 365-195-210 defines concurrency as "adequate public facilities are available when the impacts of development occur." Concurrency is not a novel concept. In *Golden v. Planning Board of Town of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291 (1972), *appeal dismissed*, 409 U.S. 1003 (1972), the New York Court of Appeals upheld a local ordinance imposing concurrency requirements on residential subdivision developments. *See also, Sturges v. Town of Chilmark*, 402 N.E.2d 1346 (Mass. 1980).

Four developers sought to build large projects in Birch Bay, an area renowned for considerable tourism activity. CP 224. Birch Point Village, L.L.C. sought to develop up to 200 residential units and up to 134,000 square feet of commercial space in its Horizons Village at Semiahmoo on a 36.23 acre site. CP 325, 373. The project required County approval of a site specific rezone, a planned unit development, and a binding site plan. CP 325. The Harborview Road project involved 85 residential units, requiring County agreement on a planned unit development, a binding site plan, and a preliminary long development. CP 326, 422. Bay Breeze involved 16 units with a 47,390 square foot reserve for future development and a 16,385 square foot stormwater facility, requiring County approval of a long division. CP 325, 499. The commercial project at Birch Bay Center was to be developed in phases that included 9 parcels with 108,000 square feet of commercial space and parking, necessitating County approval of a major development permit and a binding site plan. CP 326, 464. All four projects would have added transient and/or permanent population to Birch Bay, increasing the demand for fire and emergency services.

In 2004, the County adopted its Birch Bay Community Plan ("Plan") as a part of its overall comprehensive plan required by GMA. CP 327-36. That Plan anticipated additional growth and discussed proposed

service levels for the providers of various government services. *Id.* The Plan, not the District, set a high standard for response time for fire and emergency services – a “gold standard.” CP 571, 587. The District could not meet the County’s “gold standard” levels of service for the four projects with its existing facilities or personnel. CP 539, 571, 588.

Whatcom County had previously enacted WCC 20.80.212, a development regulation requiring a concurrency determination for water, sewage, schools, and fire protection. That ordinance followed DCTED concurrency guidelines (*see* Appendix), clearly spelling out that the County must deny permits if it determines that adequate capacity does not exist at the time of review of a specific development. WCC 20.80.212 implemented the County’s “gold standard” for emergency response time set in the Plan, ensuring on a site-specific basis that growth did not so impact public facilities that the County-established service levels could not be met.

The District provides emergency fire, rescue, and medical services to a significant part of Whatcom County. CP 528-29, 575. At the time the developers sought approval from the County for the four projects, the District had limited capital facilities and a staff consisting of both full-time

firefighters and numerous volunteers. CP 529-34.⁴ The District advised the County by letter dated June 8, 2006 that it would need to spend \$2.8 million for capital improvements to provide appropriate services in the area of the four projects. CP 539. Similarly, additional staffing was necessary. CP 544. Without such expenditures, the District could not “provide an adequate level of service as identified in the Birch Bay Plan or as identified in NFPA 1710 and/or NFPA 1720 (National Fire Protection Association standards).” CP 539. The District also did not have revenue sources to meet the increased capital and staffing costs necessary to sustain the Plan’s level of fire and emergency services. CP 18-44, 534, 536.

As required by the Whatcom County Code as a condition for processing a land use permit, the four developers sought “will serve” letters from the District. WCC 21.05.130. The District issued such letters verifying fire and emergency services were available. CP 249. The District, however, refused to issue “concurrency” letters pursuant to WCC 20.80.212 because it could not attest that *adequate* fire and emergency services would exist for the projects. CP 587-96.⁵ It could not meet the

⁴ The District’s Resolution 2007-23 indicated that the District had 3 officers, 37 full-time firefighters, and 63 volunteer firefighters. CP 38.

⁵ A “will serve” letter simply states that the District will provide fire and emergency response services to a certain geographical location. Such a letter is provided

County's "gold standard" 4-6 minute response time for the projects. CP 519-96.

The County staff recommended that the permits be granted to Birch Point Village, L.L.C. for Horizons Village at Semiahmoo. CP 370-402.⁶ The District appeared at a public hearing on the projects and submitted written testimony in opposition to the projects, which it contended did not meet the mandates of RCW 58.17.110 or WCC 20.80.212.

After a hearing, the hearing examiner on June 29, 2006 issued findings of fact and conclusions of law in his recommendation to the Whatcom County Council on the permits. CP 337-69. The hearing examiner determined that (1) the County, not the District, had

to allow a project to vest and speaks solely to the availability of service, not the adequacy or level of service. CP 186. These letters do not discuss, in any fashion, what level of service will be provided. *Id.*

By contrast, a concurrency letter is a letter issued by a service provider for a development which states "that *adequate capacity* exists or arrangements have been made to *provide adequate services for the development.*" WCC 20.80.212(1) (emphasis added). The provider must affirmatively state in a concurrency letter that it has adequate capacity to serve, or that other arrangements have been made to ensure adequate emergency services will be provided to a proposed development. Where a provider does not have adequate capacity to serve a proposed development to the required levels of service, that provider cannot issue a concurrency letter. CP 186.

⁶ While each of the projects received independent approval from the Council or the Council upheld the hearing examiner's decision on appeal, their approval raised similar, and often identical, legal issues. CP 325-26. The legal issues raised by each projects approval were so similar that the hearing examiner incorporated his decision from the first such development, Horizons Village at Semiahmoo, into each of the subsequent three decisions and/or recommendations. CP 185.

responsibility for setting levels of fire and emergency services in the planning process and, therefore, concurrency was a planning function rather than a project-based decision; (2) the District could provide adequate service levels within existing resources as the project was built out; and (3) the District could not exact fees from the developer to defray the impact of the growth engendered by the project on fire services. CP 363-64.⁷

The developers, however, offered *no evidence* that the District could meet the Plan's "gold standard" fire and emergency services levels for their projects. The examiner summarily concluded that the rezone and development were consistent with the County's comprehensive plan and the Plan, and "[o]ther necessary public services are capable of being made available in time to serve the new development." CP 366.

On the same date, the hearing examiner issued findings of fact and conclusions of law on the District's SEPA appeal as to Horizons Village at Semiahmoo. CP 337-54. The hearing examiner's findings addressed the conditions imposed by the County's lead SEPA official that the developers pay the District a "concurrency mitigation fee." CP 341-43. The

⁷ The developers spent a great deal of time in the Court of Appeals decrying the District's proposed voluntary concurrency mitigation fee. However, the District did not include that issue in its LUPA appeal to superior court. Accordingly, that issue is not before this Court.

examiner found “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.” CP 343. The examiner noted WCC 20.80.212 on concurrency and found that the Plan said that the District had “a number” of funding mechanisms and fire and emergency services needs would be borne by the taxes paid by the population growth engendered by development projects. CP 343-44. The examiner concluded that the District’s voluntary concurrency mitigation fees were invalid, CP 348-50, any concurrency issues under GMA and SEPA were satisfied by the County’s enactment of its comprehensive letters, CP 345-47, and WCC 20.80.212 did not allow the District to withhold concurrency letters where the County Council had determined in its comprehensive plan that the District had “adequate current capacity and that arrangements for adequate funding are in place to provide for future growth.” CP 348. The examiner then modified the MDNS for the project issued by the County’s lead SEPA official. CP 352.

Despite the examiner’s ruling, there was *no evidence* in the record to support the assertion that adequate revenue sources existed to fund the County’s “gold standard” of emergency services in the Birch Bay area.

The *only* evidence on this issue was from the District's Chief, Tom Fields, who testified no revenue sources were readily available to the District. CP 534-35, 571-82.⁸

The County Council affirmed the examiner's decision on the permits, CP 353-54, and enacted an ordinance for a short term rezone. CP 651-57. The Council also adopted the examiner's SEPA decision. CP 658-59.

The District timely appealed the County's approval of the permits to the Whatcom County Superior Court, CP 609-75, where the cases were consolidated, CP 606-07, and assigned to the Honorable Charles Snyder.⁹ The trial court reversed the County's decision, holding that the County ignored the testimony of District Chief Tom Fields regarding the actual staffing and capital facilities capabilities of the District, and the County relied on speculative revenue sources. CP 6. The trial court found that the District could not maintain the levels of fire protection, emergency response, and emergency transport services set by the Plan for the four developments as required by GMA, RCW 58.17.110, and the County's

⁸ For example, the District imposed a basic life support service fee in accordance with RCW 52.12.131 and the fee generated roughly 8% of the District's revenue. CP 534. The District submitted a special levy to its voters in November 2008, which was *rejected* by a 2-1 margin. www.co.whatcom.wa.us/purl/elections/results/2008.

⁹ Judge Snyder was the hearing examiner for Whatcom County from 1986 to 1989. www.votingforjudges.org.

Code. CP 6-7. The court also determined the hearing examiner acted beyond his authority in modifying the MDNS. CP 7. The court vacated the permits in an interim order entered on October 3, 2007. CP 181-83. A final decision, order and judgment on LUPA appeal entered on February 29, 2008. CP 5-9. *See* Appendix. The Court of Appeals reversed the trial court's decision.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The criteria governing acceptance of review by this Court are set forth in RAP 13.4(b). This case presents issues of first impression regarding the authority of counties and fire districts for service levels under GMA, and concurrency. The published decision of the Court of Appeals merits review. RAP 13.4(b)(4).

(1) The District, Not the County, Had the Authority to Set Levels of Service

The Court of Appeals determined that the County, not the District, properly set service levels for fire and emergency services in its comprehensive plan, even though under Title 57 RCW, the District's commissioners are separately elected officials with independent responsibility to their constituents regarding services levels. Review is merited. RAP 13.4(b)(4).

Nothing in GMA or other statutes gives authority to a county to set service levels over a fire district and its separately elected board.¹⁰ While GMA allows a county to set service levels for its own *land use planning* purposes, it does not allow a county to dictate service levels to be provided by special purpose units of government. In non-municipal urban areas like the Birch Bay urban growth area, Whatcom County does not *actually provide* fire and emergency services. It relies upon the District to do so. The critical function of concurrency is to assure at project review that the service levels actually exist or arrangements have been made to assure that they will be met once growth occurs. Concurrency carries heightened significance in non-municipal urban growth areas because a county does not provide most urban governmental services as defined in RCW 36.70A.030(20) (urban services include those public services provided at an intensity typically provided by cities, including storm and sanitary sewers, water systems, street cleaning, public transit, and fire and police protection).

The Court of Appeals opinion cites no authority for the proposition that a county has the authority to impose operational service levels on a

¹⁰ The Legislature required certain special purpose districts to adopt plans consistent with GMA. *See, e.g.*, RCW 57.16.010(6) (service plans of sewer/water districts must conform to requirements of GMA). The Legislature did not require that a fire district's service plan for fire and emergency services be subject to County approval or be consistent with GMA.

fire district. There is no statutory basis for the court's determination that a county has the authority to require or obligate a separate unit of government, here a fire district, to redirect its resources and service plan to meet specified levels of service established by a county for land use planning purposes, regardless of its impact on its citizens, and regardless of financial or legal limitations. Similarly, a county does not have the authority to require a fire district to affirmatively issue a concurrency letter without the district's own independent assessment of whether it can meet the services needs engendered by a particular project. *Nowhere* in GMA is there any mention of such an expansive transfer of statutory responsibility from special purpose districts, governed by independently elected boards, to counties.

This Court should grant review to definitely address the relationship between counties and special purpose districts under GMA. RAP 13.4(b)(4).

(2) The Court of Appeals Opinion Misinterprets WCC 20.80.212, and Concurrency under GMA

The Court of Appeals opinion misinterprets the role of concurrency in GMA by failing to address RCW 36.70A.020(12-13) or the DCTED regulations, such as WAC 365-195-070(3), WAC 365-195-210, or WAC 365-195-835, that clearly articulate what a county concurrency

ordinance means and what it must contain. DCTED's regulations, particularly WAC 365-195-835(3), clearly contemplate that local concurrency ordinances involve project level review. *See* Appendix.

For the Court of Appeals to opine that a comprehensive plan, adopted years before the particular projects are presented to the county for approval, may provide that such projects meet concurrency requirements without any consideration of the site-specific, *actual growth* engendered by the particular projects, *op. at 10*, negates the entire concept of concurrency articulated in the regulations set forth above and in *City of Bellevue v. East Bellevue Community Municipal Corp.*, 119 Wn. App. 405, 81 P.3d 148 (2003), *review denied*, 152 Wn.2d 1020 (2004) (addressing concurrency in transportation) and for other services by statute and the DCTED regulations. *See, e.g.*, WAC 365-195-210 (defining concurrency).

In *City of Bellevue*, the court made clear that concurrency was assessed on a site-specific basis under RCW 36.70A.070(6)(b). No project could proceed if it "caused the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan. . ." *Id.* at 411-12. Similarly, WCC 20.80.212 provides that a development shall not be approved without a "written finding" that service providers "have issued a

letter that adequate capacity exists or arrangements have been made to provide *adequate services for the project.*” (emphasis added). This is a site-specific requirement because WCC 20.80.212 is a development regulation under GMA, not a planning ordinance.¹¹

If the 2004 Birch Bay Plan was the County’s determination of concurrency, then WCC 20.80.212 has no purpose. This is inconsistent with basic rules of statutory construction that give meaning to all words in a legislative body’s enactment. Instead, by its terms, WCC 20.80.212

¹¹ The Court of Appeals’ determination that WCC 20.80.212, Whatcom County’s concurrency ordinance, was not a development regulation, op. at 10, is inconsistent with the definition of a development regulation in RCW 36.70A.030(7). “Development regulations” are “controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances, together with any amendments thereto.” RCW 36.70A.030(7). See, e.g., *City of Seattle v. Yes for Seattle*, 122 Wn. App. 382, 93 P.3d 176 (2004), review denied, 153 Wn.2d 1020 (2005) (creek restoration ordinance was a development regulation); *Manke Lumber Co., Inc. v. Diehl*, 91 Wn. App. 793, 959 P.2d 1173 (1998), review denied, 137 Wn.2d 1018 (1999) (County designation of forest lands of long-term commercial significance was a development regulation).

The comprehensive plans mandated by GMA are “guides” or “blueprints” and are not designed for specific land use decisions, while the development regulations set enforcement standards. *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 126, 118 P.3d 322 (2005); *Citizens for Mount Vernon v. City of Mount Vernon*, 113 Wn.2d 861, 873-74, 947 P.2d 1208 (1997). As the *Viking Properties* court succinctly stated: “Neither the GMA nor the comprehensive plans adopted pursuant there to directly regulate site-specific land use activities. Instead, it is local development regulations, including zoning regulations enacted pursuant to a comprehensive plan, which act as a constraint on individual landowners.” 155 Wn.2d at 126 (citations omitted).

Division I’s published decision here is at odds with Division II’s implied determination in *East County Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 438, 105 P.3d 94, review denied, 155 Wn.2d 1005 (2005) that a comparable concurrency ordinance was a development regulation under GMA to which a developer’s rights vested.

requires a concurrency determination at the time of project approval. The County was required to apply WCC 20.80.212 to the proposed developments at the time of the application, regardless of any policy statements relating to fire or emergency services in its Plan or comprehensive plan.¹²

Finally, the Court of Appeals determination that the hearing examiner's findings were supported by substantial evidence relies virtually exclusively on the County's comprehensive plan, and does not reflect the actual testimony before the hearing examiner. The Birch Bay Plan made wishful statements about the District's necessary expansion of facilities and staff being borne by taxes paid by a growing population. CP 244. ("These costs will be borne by taxes paid by the growing population.") Such wishful statements are far from "planning." *No testimony presented by the developers contradicted Chief Fields' testimony that the District could not meet the County's "gold standard" level of services set in the*

¹² The Court of Appeals never invalidated WCC 20.80.212. That court reasoned that because the County's comprehensive plan set a "gold standard," WCC 20.80.212 was merely a planning ordinance. However, the court fails to articulate how WCC 20.80.212 is a planning ordinance when it states that no project "shall be approved" without a finding that adequate services exist or will exist "to provide adequate services for the development." This is project level review. This is the language of a development ordinance.

comprehensive plan for the four projects. CP 521, 539, 543, 561, 571, 578-79, 588.¹³

For example, the Court of Appeals determined that the County's EMS tax levy for emergency services might defray the District's increased costs, op. at 11, but this statement is at odds with the language of the EMS ordinance itself. By its terms, the District received *none* of the EMS levy from Whatcom County. WCC 3.35.040 (levy proceeds are 60% for County, 40% for cities in the County). Moreover, since Whatcom County adopted its comprehensive plan, the District faced serious property tax restrictions like the 1% limit of Initiative 747, CP 522, 534, significant

¹³ Chief Fields amplified on his oral testimony in a written submission to the hearing examiner describing in detail the District's facilities and staff, revenues and budget, and services levels. CP 528-64. In particular, the letter identified with specificity how the developments would affect response time, increased equipment use, and staffing, potentially impacting fire insurance rates in the area. CP 543-45. As for revenues available to the District, the District is subject to the 1% lid on property tax revenues set by Initiative 747, and it has imposed virtually the maximum levy rate which it may impose. CP 534. Chief Fields stated no other reasonable and consistent funding sources are available to the District:

There are no additional revenue sources available to fire districts without seeking voter approval. Depending on the type of additional taxation requested, the approval of such a request may require a simple majority "yes" vote such as the case with "lifting the tax levy limit," or the a [sic] "super majority" for additional "special tax levies." There does exist a means for acquiring funds through donation, but historically, donations are not sufficient to warrant using them as a reliable planned revenue source.

CP 536. This financial data is further supported in Chief Fields' declaration on the trial court's supersedeas decision. CP 18-44.

growth in its service area, and increased service demands, CP 521, that led it to deny the four developers a concurrency letter.

The Court of Appeals' reliance upon a statement in the County's 2004 comprehensive plan that "the costs of improvements to serve new development would be borne by the growing population," op. at 11, is remarkable for the fact that it bears no relationship to the District's *actual experience* in 2006, and negates any hearing process on the District's decision. No evidence, other than the County's comprehensive plan itself, will now be relevant after the Court of Appeals decision, no matter how much growth has occurred or circumstances changed since 2004.¹⁴

The Court of Appeals opinion destroys any concept of concurrency and site-specific analysis of a project's impact on growth, defeating a vital, significant aspect of GMA. Review is merited. RAP 13.4(b)(2, 4).

(3) The Court of Appeals Failed to Address RCW 58.17.110 Which Requires That Health, Safety and Welfare Services Be in Place before Project Approval

The Court of Appeals published opinion focuses only on GMA and does not address the independent basis for the trial court's decision found in the subdivision statute, RCW 58.17.110. CP 7, finding no. 6; br. of resp't at 43-47. When the District brought the fact that its opinion did not

¹⁴ The District has repeatedly sought comprehensive plan changes by the County. All of those requests have languished before the Whatcom County Council.

address RCW 58.17.110 to the court's attention by a motion for reconsideration, the court denied the motion. The Court of Appeals opinion is entirely *silent* on this statutory basis, distinct from GMA, to sustain the trial court's decision.

RCW 58.17.110 requires that before a subdivision can occur, "appropriate provision" must be made for "the public health, safety, and general welfare." This statutory requirement is mirrored in the County's Code. *See* WCC 21.05.030(h) (subdivisions); WCC 21.07.030(h) (binding site plans). For example, in connection with a site specific rezone, the County's code requires that the rezone conform to "public health, safety, morals, general welfare, or community needs, and will not adversely affect the surrounding neighborhood as a whole." WCC 20.90.063(2)(b). WCC 20.90.063(2)(d) required the County to make affirmative findings stating that the development engendered by the rezone will be:

serviced adequately by necessary public facilities such as highways, streets, public and *fire protection*, drainage structures, refuse disposal, water and sewers, and schools; or that the persons or agencies responsible for the establishment of the proposed use shall be able to provide adequately any such services. . .

(emphasis added). *See also*, WCC 20.80.335-.345 (criteria for approval of planned unit development).

Under RCW 58.17.110, a statute first enacted in 1969, a local government must deny applications for a subdivision of land if appropriate provisions are not made by the developer for vital public services including public safety. *See, e.g., HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 481, 61 P.3d 1141 (2003); *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002); *Southwick, Inc. v. City of Lacey*, 58 Wn. App. 886, 892, 795 P.2d 712 (1990); *Miller v. City of Port Angeles*, 38 Wn. App. 904, 909-10, 691 P.2d 229 (1984), *review denied*, 103 Wn.2d 1024 (1985).¹⁵

As the trial court determined, the four developments here failed to meet State and County requirements because the District cannot provide adequate fire and emergency services to the four developments for the reasons articulated *supra*. The District lacks the capital facilities and the personnel necessary to serve the growth engendered by the four developments. The Court of Appeals refused to even address the trial court's basis, independent of GMA, for reversing the hearing examiner. Review is merited. RAP 13.4(b)(1-2).

¹⁵ This is a site-specific decision, further undercutting the Court of Appeals' GMA analysis that "appropriate provisions" are instead addressed in the County's planning process.

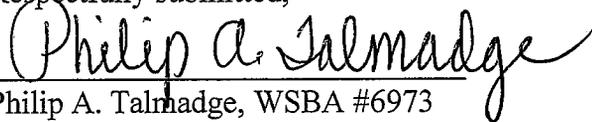
F. CONCLUSION

This Court should grant review of the Court of Appeals' published opinion. RAP 13.4(b). The trial court here correctly ruled that the County should not have issued the permits for the four projects. The projects violated the GMA/Whatcom County Code requirement that concurrent fire and emergency services exist before the projects could proceed. The projects also did not comply with RCW 58.17.110 and similar County ordinances.

This Court should affirm the trial court's decision. Costs on appeal should be awarded to the District.

DATED this 3d day of September, 2009.

Respectfully submitted,



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Whatcom County Fire District No. 21

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WHATCOM COUNTY FIRE DISTRICT)
NO. 21,)
)
Respondent,)
)
v.)
)
WHATCOM COUNTY, a municipal)
corporation,)
)
Defendant,)
)
BIRCH POINT VILLAGE, LLC, a)
Washington corporation; SCHMIDT)
CONSTRUCTING, INC., a Washington)
corporation; BRIGHT HAVEN BUILDERS,)
LLC, a Washington corporation;)
MAYFLOWER EQUITIES, INC.; LISA)
SCHENK and MIKE SUMNER,)
)
Appellants.)

No. 61431-2-1
DIVISION ONE
UNPUBLISHED OPINION

FILED: June 22, 2009

APPELWICK, J. — The Growth Management Act, chapter 36.70A RCW, vests counties with the primary authority to plan future development, including concurrency planning with providers of public services. Because the Whatcom County Comprehensive Plan establishes the standards for service and finds that the fire district has the capacity to meet that standard, the fire district is foreclosed from evaluating concurrency with new development on a project-by-project basis and requiring a

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concurrency mitigation fee. We reverse the Whatcom County Superior Court and reinstate the permit approvals.

FACTS

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

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

In 2001, the County began developing the Birch Bay Community Plan (BBCP), as part of the County's long term planning process. For this appeal, the relevant parts of the BBCP are its discussions of fire protection facilities and services. Fire District No. 13¹ (District) contributed expertise and in kind services, as a stakeholder in the BBCP planning process. The BBCP established that the District must meet the "gold standard" for successful emergency medical services, which "is four to six minute response times for aid services and 15 to 20 minutes for ambulance services." Further, the BBCP determined that:

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

¹ District #13 is now known as District #21.

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

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

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

Whatcom County Code (WCC) requires that applications for development contain written verifications of the availability of fire protection services. WCC 21.05.120(3)(b). In August 2005, the District issued a letter confirming that it provided fire protection services to the Birch Bay area and that it would serve the listed property.²

² The record contains a will serve letter for a proposed project at Lincoln Road and Shintaffer Road, but does not identify the project more precisely. Appellants identify it as the Horizon's Village project. Two other projects received similar letters.

But, the District reserved the right to make additional comments or conditions on the proposed project.

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

Birch Point Village, LLC, applied for a site specific rezone, planned unit development, and binding site plan for its Horizon's Village at Semiahoo development. County staff recommended that the permits be granted, but did not recommend mitigation fees.³ The Whatcom County Hearing Examiner also recommended approval.

The County issued a MDNS for the project pursuant to SEPA on March 16, 2006. The District appealed on April 13, 2006. The District claimed that the SEPA determination did not adequately address the impacts of the project on the District's

³ A staff report found that the District had provided a concurrency letter dated September 15, 2005. The staff report noted that the concurrency letter contained the following conditions: (1) a fire flow requirement for water access, (2) District access shall meet the requirements of Article 81 of the International Fire Code, (3) the proposal shall comply with all applicable codes and ordinances adopted by the County.

ability to provide medical response, fire response, and transport. The District argued that it was appropriate for the developer to pay a mitigation fee of \$384 per vehicle average daily trip, to be paid directly to the District or, in the alternative, a \$2,500 fee per residential living unit and that the commercial parts of the development pay a proportionate fee.

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

The Whatcom County Hearing Examiner reversed and revised the SEPA official's MDNS. He found that the District's argument, under WCC 20.80.21, that individual projects cannot be approved unless the District has issued a concurrency letter erroneous. The hearing examiner stated, "[i]n this case, since the Whatcom County Council has the authority to determine concurrency under the Growth Management Act and since the Whatcom County Council has determined within the Birch Bay Comprehensive Plan that Fire District No. 13 has adequate current capacity and that arrangements for adequate funding are in place to provide for future growth,

Fire District No. 13 cannot stop this development by refusing to issue a concurrency letter." He also found that neither the County nor the District have the legal authority to exact fees from developers. He found that RCW 82.02.020 prohibits such fees. Regarding SEPA, the hearing examiner concluded that a threshold determination of non-significance may be issued as a MDNS pursuant to WAC 97-11-350. The hearing examiner found that the SEPA official's determination regarding mitigation was unsupported by the record. In reviewing the application, the Whatcom County Council adopted the hearing examiner's findings of fact and conclusions of law and recommendation.

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

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

ANALYSIS

I. Standard of Review

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

Judicial review of land use decisions is governed by LUPA. RCW 36.70C. This court is to stand in the shoes of the superior court and review the hearing examiner's

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

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

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

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

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

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

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

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

Questions of statutory interpretation are reviewed de novo. W. Telepage, Inc. v. City of Tacoma Dep't of Fin., 140 Wn.2d 599, 607, 998 P.2d 884 (2000). A court's objective in construing a statute is to determine the legislature's intent; if a statute's meaning is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent. State v. Chang, 147 Wn. App. 490, 499-500, 195 P.3d 1008 (2008). Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. State v. Elmore, 143 Wn. App. 185, 188, 177 P.3d 172 (2008), review denied, 164 Wn.2d 1035, 197 P.3d 1185 (2008). These principles

apply to interpretation of local ordinance. Faben Point Neighbors v. City of Mercer Island, 102 Wn. App. 775, 778, 11 P.3d 322 (2000).

II. Concurrency Planning under the Growth Management Act

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

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

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

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

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

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

RCW 36.70B.030(2).

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

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

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

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

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

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

III. Sufficiency of the Evidence

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

persuade a fair-minded person of the order's truth or correctness. Benchmark, 146 Wn.2d at 694.

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

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

Because the BBCP determined that the costs of improvements to serve new development would be borne by the growing population, the hearing examiner's finding is supported by substantial evidence. The District has an obligation to meet the adopted standard. Any challenge to the correctness of the comprehensive plan determination that the District can meet the level of service must be done through amendment to the comprehensive plan, not by factual challenge to the project

permitting. We reverse the superior court and reinstate the County's approval of the permits.

Appelwick, J.

WE CONCUR:

Jan, J.

Becker, J.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

WHATCOM COUNTY FIRE DISTRICT)
NO. 21,)
Respondent,)
v.)
WHATCOM COUNTY, a municipal)
corporation,)
Defendant,)
BIRCH POINT VILLAGE, LLC, a)
Washington corporation; SCHMIDT)
CONSTRUCTING, INC., a Washington)
corporation; BRIGHT HAVEN BUILDERS,)
LLC, a Washington corporation;)
MAYFLOWER EQUITIES, INC.; LISA)
SCHENK and MIKE SUMNER,)
Appellants.)

No. 61431-2-I

ORDER DENYING MOTION
FOR RECONSIDERATION
AND CALLING FOR AN
ANSWER ON THE MOTION
TO PUBLISH

FILED
COURT OF APPEALS DIV. 1
STATE OF WASHINGTON
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The respondent, Whatcom County Fire District Number 21, having filed its motion for reconsideration and motion to publish, and a panel of the court having determined that the motion for reconsideration should be denied and that an answer to the motion to publish should be called for;

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied. It is further

ORDERED that the clerk mail to counsel for appellant, a copy of the original motion to publish, and with a request that an answer thereto be filed within 15 days of the date of this order, and that a copy thereof be served on opposing counsel.

DATED this 31st day of July, 2009.


Judge

8/11/10

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

WHATCOM COUNTY FIRE DISTRICT)	No. 61431-2-1
NO. 21,)	
)	ORDER GRANTING MOTION
Respondent,)	TO PUBLISH
)	
v.)	
)	
WHATCOM COUNTY, a municipal)	
corporation,)	
)	
Defendant,)	
)	
BIRCH POINT VILLAGE, LLC, a)	
Washington corporation; SCHMIDT)	
CONSTRUCTING, INC., a Washington)	
corporation; BRIGHT HAVEN)	
BUILDERS, LLC, a Washington)	
corporation; MAYFLOWER EQUITIES;)	
INC.; LISA SCHENK and MIKE)	
SUMNER,)	
)	
Appellants.)	

The hearing panel having reconsidered its prior determination not to publish the opinion filed for the above entitled matter on June 22, 2009, and finding that it is of precedential value and should be published. Respondent, Whatcom County Fire

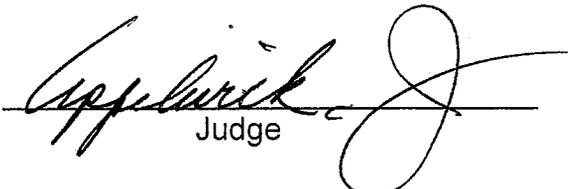
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District No. 21, having filed a motion to publish and appellants having filed their response to the respondent's motion to publish herein, and a panel of the court having determined that the motion should be granted.

Now, therefore, it is hereby

ORDERED that the written opinion filed June 22, 2009, shall be published and printed in the Washington Appellate Reports.

DATED this 11th day of August, 2009.


Judge

FILED
COURT OF APPEALS
STATE OF WASHINGTON
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A-16

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

Handwritten notes: "PS 1/8" and "TB" with a signature.

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
Fields.

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

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

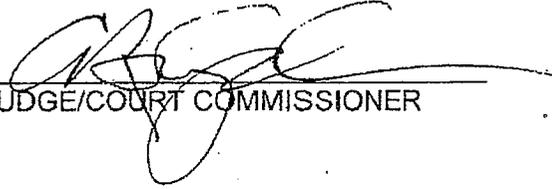
13 6) The Examiner's Decision findings of fact and conclusions of law were clearly
14 erroneous application of law to the facts, and were an error of law as to
15 the criteria for approval (RCW 58.17.110; Whatcom County Long Subdivision
16 criteria - WCC 21.05.030(1)(h); Planned Development - WCC 20.85.335, WCC
17 20.85.340, and WCC 20.85.345; Major Development - WCC 20.88.130(5); Site
18 Specific Rezone - WCC 20.90.63(2)(b) and WCC 20.90.063(2)(d)(i-ii); and
19 Binding Site Plan - WCC 21.08a) for each of the projects under appeal had
20 been met.

21 7) The Hearing Examiner's SEPA determination modifying the Mitigated
22 Determination of Non-Significance (MDNS) was an unlawful procedure. The
23 Examiner has no authority under the County's SEPA Ordinance (WCC 16.08),
24 the SEPA Rules (WAC 197-11), or in SEPA (RCW 43.21C.) to revise and issue
25 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.

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

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

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

11 
12 JUDGE/COURT COMMISSIONER

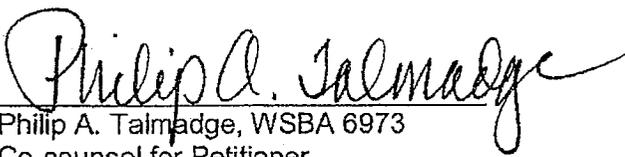
13 Presented By:

14 CHMELIK SITKIN & DAVIS P.S.

15 
16 Jonathan K. Sitkin, WSBA #17604
17 Seth A. Woolson, WSBA #37973
18 Attorneys for Petitioner

19 Copy Received By/Notice of Presentation Waived By:

20 TALMADGE/FITZPATRICK

21 
22 Philip A. Talmadge, WSBA 6973
23 Co-counsel for Petitioner

24 //

25 //

FINAL DECISION, ORDER AND JUDGMENT
ON LUPA APPEAL - 4

CHMELIK SITKIN & DAVIS P.S.
ATTORNEYS AT LAW

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BURI FUNSTON MUMFORD, PLLC



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

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WHATCOM COUNTY PROSECUTOR'S OFFICE



Karen Frakes, WSBA #13600
Attorney for Whatcom County

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WCC 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.

RCW 36.70B.030:

(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:

(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.

(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.

(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.

RCW 36.70C.130(1):

(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; [or]

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

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

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

RCW 58.17.110:

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

(2) A proposed subdivision and dedication shall not be approved unless the city, town, or county legislative body makes written findings that: (a) Appropriate provisions are made for the public health, safety, and general welfare and for such open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreations, playgrounds, schools and schoolgrounds and all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school; and (b) the public use and interest will be served by the platting of such subdivision and dedication. If it finds that the proposed subdivision and dedication make such appropriate provisions and that the public use and interest will be served, then the legislative body shall approve the proposed subdivision and dedication. Dedication of land to any public body, provision of public improvements to serve the subdivision, and/or impact fees imposed under RCW 82.02.050 through 82.02.090 may be required as a condition of subdivision approval. Dedications shall be clearly shown on the final plat. No dedication, provision of public improvements, or impact fees imposed under RCW 82.02.050 through 82.02.090 shall be allowed that constitutes an unconstitutional taking of private property. The legislative body shall not as a condition to the

approval of any subdivision require a release from damages to be procured from other property owners.

(3) If the preliminary plat includes a dedication of a public park with an area of less than two acres and the donor has designated that the park be named in honor of a deceased individual of good character, the city, town, or county legislative body must adopt the designated name.

WAC 365-195-073(3):

The achievement of concurrency should be sought with respect to public facilities in addition to transportation facilities. The list of such additional facilities should be locally defined. The department recommends that at least domestic water systems and sanitary sewer systems be added to concurrency lists applicable within urban growth areas, and that at least domestic water systems be added for lands outside urban growth areas. Concurrency describes the situation in which adequate facilities are available when the impacts of development occur, or within a specified time thereafter. With respect to facilities other than transportation facilities and water systems, local jurisdictions may fashion their own regulatory responses and are not limited to imposing moratoria on development during periods when concurrence is not maintained.

WAC 365-195-835:

(1) Each planning jurisdiction should produce a regulation or series of regulations which govern the operation of that jurisdiction's concurrency management system. This regulatory scheme will set forth the procedures and processes to be used to determine whether relevant public facilities have adequate capacity to accommodate a proposed development. In addition, the scheme should identify the responses to be taken when it is determined that capacity is not adequate to accommodate a proposal. Relevant public facilities for these purposes are those to which concurrency applies under the comprehensive plan. Adequate capacity refers to the maintenance of concurrency.

...

(3) The variations possible in designing a concurrency management system are many. However, such a system could include the following features:

(a) Capacity monitoring – a process for collecting and maintaining real world data on use for comparison with evolving public facility capacities in order to show at any moment how much of the capacity of public facilities is being used.

(b) Capacity allocation procedures – a process for determining whether proposed new development can be accommodated within the existing or programmed capacity of public facilities. This can include preassigning amounts of capacity to specific zones, corridors or areas on the basis of planned growth. For any individual development this may involve:

(i) A determination of anticipated total capacity at the time the impacts of development occur.

(ii) Calculation of how much of that capacity will be used by existing developments and other planned developments at the time the impacts of development occur.

(iii) Calculation of the amount of capacity available for the proposed development.

(iv) Calculation of the impact on capacity of the proposed development, minus the effects of any mitigation provided by the applicant. (Standardized smaller developments can be analyzed based on predetermined capacity impact values.)

(v) Comparison of available capacity with project impact.

(c) Provisions for reserving capacity – a process of prioritizing the allocation of capacity to proposed developments. This might include:

(i) Setting aside a block or blocks of available or anticipated capacity for specified types of development fulfilling an identified public interest.

(ii) Adopting a first-come, first-served system of allocation, dedicating capacity to applications in the order received.

(iii) Adopting a preference system giving certain categories or specified types of development preference over others in the allocation of available capacity.

(d) Provisions specifying the response when there is insufficient available capacity to accommodate development.

(i) In the case of transportation, an ordinance must prohibit development approval if the development causes the level of service of a transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan unless improvements or strategies to accommodate the impacts of development are made concurrent with development.

(ii) If the proposed development is consistent with the land use element, relevant levels of service should be reevaluated.

(iii) Other responses could include:

(A) Development of a system of deferrals, approving proposed developments in advance but deferring authority to construct until adequate public facilities become available at the location in question. Such a system should conform to and help to implement the growth phasing schedule contemplated in the land use and capital facilities elements of the plan.

(B) Conditional approval through which the developer agrees to mitigate the impacts.

(C) Denial of the development, subject to resubmission when adequate public facilities are made available.

(e) Form, timing and duration of concurrency approvals. The system should include provisions for how to show that a project has met the concurrency requirement, whether as part of another approval document (e.g., permit, platting decisions, planned unit development) or as a separate certificate of concurrency, possibly a transferable document. This choice, of necessity, involves determining when in the approval process the concurrency issue is evaluated and decided. Approvals, however made, should specify the length of time that a concurrency determination will remain effective, including requirements for development progress necessary to maintain approval.

(f) Provisions for interjurisdictional coordination.

DECLARATION OF SERVICE

On this day said forth below, I emailed and deposited with the U.S. Postal Service a true and accurate copy of the Petition for Review in Cause No. 61431-2-I to the following parties:

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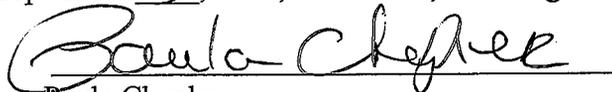
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Clerk's Office
600 University Street
Seattle, WA 98101

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

DATED: September 3, 2009, at Tukwila, Washington.



Paula Chapler
Talmadge/Fitzpatrick