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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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COURT OF APPEALS, DIV. #1
STATE OF WASHINGTON

WHATCOM COUNTY FIRE DISTRICT NO. 21,

Respondent,

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,

Appellants.

BRIEF OF RESPONDENT
WHATCOM COUNTY FIRE DISTRICT NO. 21

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A. INTRODUCTION

The developers of four large projects in the Birch Bay area of Whatcom County appeal a trial court decision overturning decisions made by the County¹ in violation of its own Code, the Growth Management Act, RCW 36.70A and RCW 36.70B (“GMA”), and RCW 58.17.110.

The developers sought approval of the projects even though the Whatcom County Fire District Number 21 (“District”) did not have concurrently in place sufficient capital facilities and personnel to provide appropriate emergency fire and medical services to the permanent and transient population that would live in the projects or use commercial facilities contemplated by the developments. The County obliged the developers by issuing a mitigated declaration of non-significance (“MDNS”) under the State Environmental Policy Act, RCW 43.21C (“SEPA”), as modified by the County’s hearing examiner, and approving various land use decisions that allowed the projects to go forward. The trial court, however, reversed the various County decisions allowing the four projects to proceed because the projects violated the requirement under the County’s Code, GMA, and RCW 58.17.110 that vital public

¹ Under the Whatcom County Code, the County’s hearing examiner in some instances was the final decisionmaker, while the elected County Council was the final decisionmaker in others. CP 6. The Council and hearing examiner in their capacities as the final decisionmakers or appellate body are referred to as “the County.” CP 6.

services like emergency fire and medical services be available concurrently with any development.

The trial court also reversed the County's SEPA decision because the hearing examiner lacked authority to modify a MDNS.²

Rather than focus on the actual issues in this appeal, the developers set up a strawman argument regarding a voluntary concurrency mitigation fee the District proposed, *an issue that was not even a part of the District's LUPA appeal* and is therefore not an issue in this appeal.

Concurrency of vital public services is not an aspirational goal for planning under the County's Code or GMA and other statutes, it is a mandatory requirement for project review. As concurrent emergency medical and fire services did not exist to serve the population increase created by the developers' large developments, and the District's capital facilities and staff were inadequate to provide the level of services set by the County to the new population and transient tourist population created by the developers' projects, the trial court's decision must be affirmed.

B. ASSIGNMENTS OF ERROR

The District acknowledges the developers' assignments of error, but notes that the section of the developers' brief denominated

² That SEPA issue only involved the Horizon Villages at Semiahmoo, Harborview Road, and Bay Breeze Cluster decisions.

“Assignments of Error” is, in fact, nothing more than improper argument. For example, the developers use this section to *argue* the burden of proof on appeal. Br. of Appellants at 3.

Moreover, the issues pertaining to the developers’ assignments of error bear little resemblance to how issues pertaining to assignments of error should be formulated. Form 6, Rules of Appellate Procedure. Those assignments are replete with improper argument. Br. of Appellants at 4-7.³

The better formulation of the issues pertaining to the developers’ assignments of error is as follows:

1. Did the County 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 GMA and the Whatcom County Code?

2. Did the County 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

³ The District asks the Court to strike the developers brief as improper. RAP 10.7.

services concurrently with that growth as required by County ordinance and statutes pertaining to subdivisions?

The developers do not assign error to the trial court's finding number 7 relating to SEPA,⁴ br. of appellants at 3, thereby *conceding* that the hearing examiner's modification of the MDNS was illegal.⁵

C. STATEMENT OF THE CASE

In addition to providing this Court an argumentative version of the Assignments of Error, the developers offer an argumentative Statement of the Case, in violation of RAP 10.3(a)(5). (Defining a statement of the case as “[a] fair statement of the facts and procedure relevant to the issues presented for review, without argument.”). Their Statement of the Case is replete with argumentative assertions unsupported by *any citation to the*

⁴ The trial court ruled:

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 review 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.

CP 7. That ruling is now the law of the case. *King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 716-17, 846 P.2d 550 (1993).

⁵ In light of this concession, the trial court's decision as to the Horizon Villages at Semiahmoo, Harborview Road, and Bay Breeze Cluster projects must be affirmed.

record. See, e.g., Br. of Appellants at 8, 10, 11, 12, 13, 14, 15, 16, 18. The developers' Statement of the Case is particularly difficult to address because it contains so many assertions without references to the record as required by RAP 10.3(a)(5). ("Reference to the record must be included for each factual statement."). Plainly, neither the District nor this Court should have to guess the origins of the developers' record-based factual claims.⁶ The District provides a fairer, more complete Statement of the Case.

The developer appellants sought to develop four large projects within the County's Birch Bay Urban Growth Area ("UGA"), 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 Horizon's 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. Lisa Schenk and Mike Sumner wanted to develop 85 units in their Harborview Road project, requiring County agreement on a planned unit development, a binding site plan, and a preliminary long

⁶ This is another reason the developers' brief should be stricken. RAP 10.7. *See Hurlbert v. Gordon*, 64 Wn. App. 386, 399-400, 824 P.2d 1238, *review denied*, 119 Wn.2d 1015 (1992) (sanctions imposed where brief contained no virtually citations to record in support of factual statements).

development. CP 326, 422. Schmidt Constructing, Inc. wanted to develop 16 units with a 47,390 square foot reserve for future development and a 16,385 square foot stormwater facility in its Bay Breeze Cluster Plat, requiring County approval of a long division. CP 325, 499. Mayflower Equities wanted to develop a commercial project at Birch Bay Center 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.

In 2004, the County adopted a Birch Bay Community Plan (“Birch Bay Plan”) as a part of its overall comprehensive plan for the County, a comprehensive plan required by GMA. CP 327-36. That Birch Bay Plan anticipated additional growth and discussed proposed service levels for the providers of various government services. *Id.* The developers assert, again without citation to the record, that the District participated “substantially” or had a “critical role” in the development of the Plan. Br. of Appellants at 8, 9.⁷ In fact, the Plan did not have the benefit of the District’s capital facilities plan because it was not adopted until 2005. CP

⁷ More egregious yet is the unsupported statement in the developers’ brief at 10 that the District provided an inventory of its facilities and helped to write the Plan.

581-82. This lack of capital facilities input from the District is critical here.⁸

The District is a municipal corporation that provides emergency fire, rescue, and medical services in a 57 square mile area of Whatcom County. CP 528-29, 575, 627.⁹ 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 529-34.¹⁰ The District advised the County by letter dated June 8, 2006 that it would need \$2.8 million in capital expenditures to provide urban level emergency to the area affected by the population growth from 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

⁸ The County has the obligation under GMA to address capital facilities in its comprehensive plan. RCW 36.70A.020(12). It was encouraged to coordinate efforts with other jurisdictions. RCW 36.70A.020(11). It was anomalous for the County to promulgate a capital facilities plan failing to take cognizance of the District’s own capital facilities planning.

⁹ 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.

¹⁰ The District’s Resolution 2007-23 indicated that the District had 3 officers, 37 full-time firefighters, and 63 volunteer firefighters. CP 38.

have revenue sources to meet the increased capital and staffing costs necessary to sustain the Plan's level of fire and emergency services. CP 534, 536.¹¹

Upon the submission of the developers' requests for approval to the County, the District issued "will serve" letters pursuant to WCC 21.05.130, verifying the availability of services, a necessary aspect of a complete land use application under the County Code. CP 249. The District, however, refused to issue "concurrency" letters pursuant to WCC 20.80.212, attesting that adequate services existed for the projects. CP 587-96.¹² Moreover, the District opposed the projects before the hearing examiner and the County Council. CP 519-96.

¹¹ In connection with the issue of stay before the trial court, the District's Chief Tom Fields provided additional information to the court on capital and staffing costs for the District. CP 18-44.

¹² 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 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.

The County staff recommended that the permits be granted to Birch Point Village, L.L.C. for Horizons Village at Semiahmoo. CP 370-402.¹³ The District sought further review of that decision, and, after a hearing before the Whatcom County hearing examiner both on the merits of the permit and on SEPA, the hearing examiner on June 29, 2006 issued extensive findings of fact and conclusions of law in his recommendation to the Whatcom County Council on the permits. CP 337-69. The hearing examiner made three key determinations with respect to fire services. He determined that the County, not the District, had 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; the District could provide adequate service levels within existing resources as the project was built out; 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.

The developers, however, offered *no evidence* that the District could provide adequate urban-level fire services mandated by the Birch

¹³ 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.

Bay Plan to their projects. The examiner summarily concluded that the rezone and development were consistent with the County's comprehensive plan and the Birch Bay community 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 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 County Council's 2004 Birch Bay community plan component of the comprehensive plan found 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 voluntary concurrency

mitigation fees were invalid, CP 348-50, any concurrency issues under GMA and SEPA were satisfied in the County's enactment of its comprehensive plan, CP 345-47, and WCC 20.80.212 did not allow the District to withhold concurrency approval 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 necessary level of emergency services in the Birch Bay area. In fact, the District's Chief, Tom Fields, testified to the contrary. CP 534-35, 571-82.

The County Council held a hearing on both matters on September 12, 2006. CP 632, 633. The Council issued findings of fact and conclusions of law on September 19 affirming the examiner's decision on the permits. CP 353-54. The Council also enacted an ordinance on that date for short term rezone in the Birch Bay UGA for the project. CP 651-57. The Council also made findings and conclusions adopting 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. The cases were

consolidated, CP 606-07, and assigned to the Honorable Charles Snyder.¹⁴ The trial court reversed the County's decision, holding that the County ignored the testimony of District Chief Tom Field regarding the actual staffing and capital facilities capabilities of the District and the County relied on speculative revenue sources. CP 6. In sum, the court found that the District could not maintain the urban levels of fire protection, emergency response, and emergency transport services set by the Birch Bay Plan to the Birch Bay UGA concurrent with the four developments as required by GMA, RCW 58.17.110, and the County's 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. This appeal followed. CP 679-86.

D. SUMMARY OF ARGUMENT

Under GMA and Whatcom County Code 20.80.212, the County could not approve land use decisions allowing four large development projects in the Birch Bay area to go forward unless vital public services like water, sewers, schools, and fire and emergency services existed

¹⁴ Judge Snyder is the former hearing examiner for Whatcom County from 1986 to 1989. www.votingforjudges.org.

concurrently with the developments to meet the levels of service set by the Birch Bay Plan to serve the populations created by such developments.

The County's concurrency ordinance is a development regulation that must be enforced as to each project in project review. Concurrency is not satisfied by the County's planning process undertaken years before the projects were proposed, in light of the County's decision to enact a concurrency development regulation.

The County's interpretation of GMA and its own concurrency ordinance was erroneous. Moreover, substantial evidence did not support the County's determination that the District had adequate capital facilities and personnel to provide urban-level fire and emergency services to meet the needs of the population increased by the four developments, or that revenue sources existed to pay for such services in the future.

Similarly, under RCW 58.17.110 and similar County ordinances, the County should have withheld approval of the projects because of the inadequacy of the fire services for the four projects.

E. ARGUMENT

(1) Standard of Review for Trial Court Decisions

Under the Land Use Petition Act, RCW 36.70C, ("LUPA"), the trial court may afford the appealing party relief if it demonstrates that certain errors attended the County's decision. RCW 36.70C.130(1). *See*

Appendix. The burden of demonstrating such error rested with the District. *Id.*; *Quality Rock Prods., Inc. v. Thurston County*, 139 Wn. App. 125, 134, 159 P.3d 1 (2007), *review denied*, 163 Wn.2d 1018 (2008).

The District here claimed four aspects of LUPA were met. CP 298-99. The District was entitled to relief when it demonstrated that, after viewing the County's decision in light of the whole record before the court, the decision was not supported by evidence that is substantial. RCW 36.70C.130(1)(c). Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement asserted. *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006).

The District further asserted it was entitled to relief when, after allowing for such deference as was due the construction of a law by the County, that the land use decision was an erroneous interpretation of the law. RCW 36.70C.130(1)(b).

The District was entitled to relief when it demonstrated that the County's decision was clearly erroneous application of the law to the facts. RCW 36.70C.130(1)(d). A court grants relief under this standard "when, after considering the entire record, the court is left with the definite and firm conviction that a mistake has been made." *Woodinville Water District v. King County*, 105 Wn. App. 897, 904, 21 P.3d 309 (2001).

The District also claimed it was entitled to relief because the County engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless. RCW 36.70C.130(1)(a).

On appeal, this Court “stands in the shoes of the superior court,” reviewing the issues de novo. *Pinecrest Homeowners Ass’n v. Glen A. Cloninger & Assoc.*, 151 Wn.2d 279, 288, 87 P.3d 1176 (2004). Review is limited to the administrative record. *Id.*; *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 483-84, 61 P.3d 1141 (2003).

In reviewing decisions arising out of RCW 58.17.110 and similar laws, the District was required to show that the County’s approval of the projects without properly addressing public safety factors was arbitrary and capricious, the product of willful, unreasoning decisionmaking, or without adequate consideration of the law or facts in the case. *Lechelt v. City of Seattle*, 32 Wn. App. 831, 835, 650 P.2d 240 (1980).

(2) Principles of Statutory Interpretation

The Court in this case is asked to interpret key provisions of GMA and other statutes pertaining to concurrency. Additionally, the Court is asked to interpret Whatcom County ordinances.

“The primary goal of statutory construction is to carry out legislative intent.” *Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). In Washington’s traditional process of statutory

interpretation, this analysis begins by looking at the words of the statute. “If a statute is plain and unambiguous, its meaning must be primarily derived from the language itself.” *Id.* The Court must look to what the Legislature said in the statute and related statutes to determine if the Legislature’s intent is plain. *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If the language of the statute is plain, that ends the Court’s role. *Cerrillo v. Esparza*, 158 Wn.2d 194, 205-06, 142 P.3d 155 (2006).

If, however, the language of a statute is ambiguous, the Court must then construe the statutory language, but the object of such construction is still to effectuate the Legislature’s intent. *Dep’t of Ecology*, 146 Wn.2d at 9-10, 11-12. A statute is ambiguous if it is subject to two or more reasonable interpretations. *State v. McGee*, 122 Wn.2d 783, 864 P.2d 912 (1993). In undertaking the construction of a statute, the Court must construe it in a manner that best fulfills the legislative intent. *State ex rel. Royal v. Board of Yakima County Comm’rs*, 123 Wn.2d 451, 459, 869 P.2d 56 (1994). But the Court should not read language into a statute even if it believes the Legislature *might* have intended it. *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). Statutes must be interpreted and construed so that all the language used is given effective, with no portion

rendered meaningless or superfluous. *Stone v. Chelan County Sheriff's Dep't*, 110 Wn.2d 806, 810, 756 P.2d 736 (1988).

The Court may resort to “principles of statutory construction, legislative history, and relevant case law” to assist it in discerning legislative intent only if the statute’s language is ambiguous. *Cerrillo*, 158 Wn.2d at 202; *Cockle*, 142 Wn.2d at 809.

Identical principles apply to the interpretation of local ordinances. *Faben Point Neighbors v. City of Mercer Island*, 102 Wn. App. 775, 778, 11 P.3d 322 (2000), *review denied*, 142 Wn.2d 1027 (2001).

In this case, it is clear from the structure of the GMA and the specific language of Whatcom County’s concurrency ordinance that concurrency is not so much a planning directive as it is a development regulation that must be applied in making site-specific decisions. That is similarly true for RCW 58.17.110 and SEPA.

(3) The District’s Role in the Planning Process for Delivery of Emergency Services

The developers offer several contentions in their brief regarding the District’s role in the process for planning and delivering emergency services that are either unsupported in the record or the law, or are blatantly wrong. They compound such conduct by raising a strawman argument about the District’s voluntary mitigation fee, an issue the

District did not even raise in its LUPA appeal, as the developers acknowledge. Br. of Appellants at 22. (“In its LUPA appeal, the Fire District did not defend charging the mitigation fee.”)¹⁵ Despite this concession, the developers treat the issue as a live one on appeal, br. of appellants at 5 (issue G), and devote a considerable portion of their brief to the issue. *See, e.g.*, Br. of Appellants at 2, 5, 15-17, 18, 19, 20-21, 22, 40; Appendix D to brief. The developers waste this Court’s time on an issue that was not before the trial court.

The developers also contend, again largely without citation to the record or pertinent legal authority, that the District and its elected commissioners were without authority to determine whether its capital facilities are adequate to deliver the appropriate levels of emergency services or to address the consequences of growth occasioned by the developers’ four large projects merely because the County adopted the Birch Bay Plan in 2004. CP 225-48.¹⁶

¹⁵ Ironically, *the developers* actually asked to pay such a fee in order to supersede the effect of the trial court’s judgment. CP 142-47. Their strawman argument rings hollow in light of that effort.

¹⁶ The developers assert, again without citation to the record, that the District did not raise concerns about the adequacy of emergency services in the Birch Bay planning process. Br. of Appellants at 10, 11-12. Those statements are flatly untrue. The District will file a RAP 9.11 motion to add to the record to demonstrate the falsity of the developers’ unsupported statements.

It is critical to note that the Birch Bay Plan, not the District, set the standard for response time for emergency services. It set that standard very high – a “gold standard” for response time. CP 571, 587. Contrary to the developers’ again unsupported assertion, br. of appellants at 14, the District did not unilaterally change that level of services. The District did express its belief by resolution that with the increased development in Birch Bay, an urban level of services was important. CP 588-89. The critical point here, however, is that *the District could not meet the County’s proposed levels of service in the Birch Bay Plan with its facilities or personnel.* CP 539, 571, 588.

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.” The trial court properly concluded that the Plan did not foreclose the District from exercising its independent authority to deliver necessary emergency services:

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 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.

CP 6.

The developers specifically contend, without authority, that the District was foreclosed by the Birch Bay Plan from establishing levels of emergency services. Br. of Appellants at 25 (“Whatcom County has the sole authority to set the minimum standards for fire protection services.”). *See also*, Br. of Appellants at 27, 37-38. The developers also contend that the hearing examiner correctly concluded the District had multiple funding sources from which to address the provision of necessary emergency services. Br. of Appellants at 39. Both contentions are wrong, betraying a fundamental lack of understanding regarding a fire district’s authority and responsibilities, and a lack of attention to the record.

(a) Fire District Authority under Washington Law

As independent units of government with elected commissioners, fire districts have the authority to set levels of emergency and fire services and to provide for their delivery. The purpose of such districts is to provide “fire prevention services, fire suppression services, emergency medical services, and . . . the protection of life and property. . .” RCW

52.02.020(1). Such districts have extensive enumerated powers to acquire property, hire personnel, and levy taxes associated with the provision of emergency services. RCW 52.12.021; RCW 52.12.031.¹⁷ *Nothing* in these statutory provisions evidences any legislative intent to transfer the responsibility of such districts for planning and delivering emergency services to a county merely because the county has a land use planning process under GMA. Similarly, *nothing* in GMA directs such a cession of district authority to a county.

The developers misread GMA. Under GMA, only counties and cities are required to establish comprehensive plans. RCW 36.70A.040. In those plans, certain goals must be considered. RCW 36.70A.020. Certain elements in the plans are optional. RCW 36.70A.080.

Nothing in GMA, however, says that the decisions of separate units of government with elected commissioners like the District on issues entrusted to them are preempted by county/city planning under GMA. WAC 365-195-705(2) (“Absent a clear statement of legislative intent or judicial interpretation to the contrary, it should be presumed that neither the act nor other statutes are intended to be preemptive.”). The developers

¹⁷ RCW 52.26 authorizes the creation of regional fire protection services authorities. Such a regional authority must develop a plan for service delivery with “input” from cities and counties. RCW 52.25.040(1). If the County established levels of services for districts through the planning process, as the developers contend, this recent statute is plainly at odds with such an argument.

have not pointed to any statutory, regulatory, or decisional authority that supports their position that County planning, which might set minimal levels of service standards, forecloses the District's decisionmaking on levels of service.

This is not surprising. The law is contrary to the developers' position. GMA "encourages" coordination between communities and jurisdictions to reconcile conflicts. RCW 36.70A.020(11); WAC 365-195-755. GMA contains no mandate regarding reconciliation, nor is there any statement that fire district decisionmaking is preempted. Similarly, nothing in Title 52 RCW so states.¹⁸ Counties are required by GMA to establish a county-wide planning policy. RCW 36.70A.210. Special purpose governments are not even referenced in the statute addressing the establishment of a county-wide planning policy.

Indeed, the developers' argument that the District does not have the authority to set service levels and to provide the necessary facilities and personnel to meet them flies in the face of the fact that the District, not the County, would likely be liable for any failure to provide necessary

¹⁸ The Legislature knew how to subject another government body's decision to GMA. When boundary review boards make decisions about governmental boundaries, GMA goals must be considered, RCW 36.93.170, and the BRB decision must be consistent with GMA. RCW 36.93.157. Similarly, water districts must have comprehensive plans that provide for extension or location of facilities that are consistent with GMA. RCW 57.16.010(6). *See generally*, WAC 365-195-750.

emergency services to a District resident or tourist requiring such services. See, e.g., *Chambers-Castanes v. King County*, 100 Wn.2d 275, 669 P.2d 451 (1983) (county sheriff not immune from suit for failure to timely provide police services in response to 911-type call); *Beal v. City of Seattle*, 134 Wn.2d 769, 954 P.2d 237 (1998) (same); *Babcock v. Mason County Fire District No. 6*, 144 Wn.2d 774, 30 P.3d 1261 (2001) (fire district and plaintiff whose home was at risk held to be in privity because firefighter spoke with plaintiff).

In sum, the County's GMA planning process does not trump the District's statutory duty to establish necessary level of services for emergency services, and to provide the facilities and staff to deliver them.¹⁹

(b) The District Lacked Revenue Sources to Address the Growth Caused by the Developers' Projects

As previously noted, the developers argue that the District had revenue sources available to it to provide the necessary capital facilities

¹⁹ Apart from the lack of statutory authority for the developers' argument, it makes little practical sense. The record here discloses that significant changes took place between the 2004 Birch Bay Plan and the service reality of 2006. For example, the District had a new duty to transport patients to St. Joseph's Hospital in Bellingham. CP 191, 575-76. This duty substantially impinges on the District's ability to provide service regardless of the policy statements contained in the 2004 Birch Bay Plan. Moreover, District No. 13 was annexed by the City of Blaine in 2005. CP 575, 584. A policy statement made in 2004 cannot change the undeniable fact that as of 2006, the District could not provide either the levels of service set in the Birch Bay Plan or adequate urban levels of emergency services to Birch Bay.

and operating expenses resulting from their projects. They cite the hearing examiner's decision to this effect. Br. of Appellants at 39.²⁰ However, the hearing examiner was wrong. For example, the developers never provided *any evidence* before the hearing examiner that the District had any right to access funds generated by the County's EMS levy. As the trial court stated:

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 not 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.

CP 6.

²⁰ The hearing examiner opined in his SEPA decision that the District had "a number of State authorized funding mechanisms, including levies and the issuance of capital facilities bonds." CP 342. The examiner further asserted that the District might be able to capture part of the revenue from a recently enacted county EMS levy. CP 343.

The trial court was correct in determining that the hearing examiner's finding on revenue sources was entirely unsupported by substantial evidence. RCW 36.70C.130(1)(c). The *undisputed* testimony before the hearing examiner was that the District's facilities and staff could not maintain the level of services set by the Birch Bay Plan if the four projects were approved. The District did not have revenue sources available to provide the level of services mandated by the Birch Bay Plan to the population added by the developers' projects. For example, the District's Chief Tom Fields advised the hearing examiner in oral testimony that the District could not comply with the levels of service set forth in the Birch Bay Plan itself or the National Fire Protection Association standards for urban areas. CP 570-71, 578-79.²¹ The Chief indicated that there was a delay of approximately two years between new occupancy of a development and the generation of tax revenue. CP 571-72. The tax revenue from development would not be sufficient to address the capital and operating costs of a development like Horizons Village. CP 573. No other revenue sources, other than a special levy to the voters, were available to the District. CP 580.

²¹ Chief Fields testified that the Plan set a "gold standard" basic life support response time of 4 to 6 minutes. CP 571.

Chief Fields amplified on his oral testimony in a written submission to the hearing examiner. CP 528-64. That letter described in detail the District's facilities and staff, revenues and budget, and services levels. *Id.* 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 was "lifting the tax levy limit," or the a "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 536.²² There is no support in the record for the hearing examiner's belief that the District could receive a portion of the County's EMS levy funds.

²² This financial data is further supported in Chief Fields' declaration on the trial court's supersedeas decision. CP 18-44.

In sum, the developers' contention that the growth engendered by their large projects would pay for the fire and emergency services that the projects required is unsupported and betrays a naïve understanding of how revenues and expenditures, both capital and operating, for a special purpose district like the District are handled.

(4) The Projects Here Violated GMA and the Whatcom County Code Because the District Could Not Provide Fire and Emergency Services Concurrently with the Growth from the Projects

The developers' central contention in their appeal is that the County's planning process somehow deprives the District of any ability to address the actual impact of growth within its responsibility under the County concurrency ordinance. The developers assert that while concurrency is a requirement of the *planning process*, concurrency is not required for review of actual projects, no matter how large the true impact of those projects might be nor how long after the plan the actual growth occurred. Br. of Appellants at 25-32, 34. The developers further suggest that if the District can require a particular project's developer to address concurrency, it would constitute an unlawful "delegation" of County planning authority to the District. Br. of Appellants at 33-34.

The developers are wrong. Their contentions are based on unsupported assumptions and a reading of GMA and the County Code that

is not anchored in the language of those enactments. They fail to cite *any authority* evidencing an intent on the part of the Legislature by the enactment of GMA to curtail the statutory responsibilities of fire districts. They similarly cite no such authority as to the Whatcom County Code generally or WCC 20.80.212 specifically.

(a) The GMA Process

To fully understand why the County's decisions here were wrong requires a general overview of the GMA process.

In 1990, the Legislature enacted GMA, requiring certain counties and cities to adopt comprehensive plans. RCW 36.70A. Those plans were required to identify certain critical areas initially, as well as urban growth areas. RCW 36.70A.030, .110, .170. Under the GMA, urban growth is to occur first in areas where adequate facilities and services exist to serve such development, and then in areas already characterized by urban growth that will be served adequately by a combination of both existing or readily anticipated public facilities and services. RCW 36.70A.110(3). The plans were required to generally address thirteen, often conflicting, planning goals. RCW 36.70A.020. Counties and cities were also directed to adopt development regulations²³ to implement the comprehensive plans.

²³ "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

RCW 36.70A.040(3). Any appeals from legislatively-based decisions about GMA were directed to growth management hearings boards, not the courts. RCW 36.70A.280.

The comprehensive plans mandated by GMA are “guides” or “blueprints” and are not designed for specific land use decisions, while the development regulations set enforceable 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*, 133 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.)

1995 amendments to GMA were enacted to streamline environmental and land use planning requirements of a variety of statutes and to integrate project permit review. RCW 36.70B. The Legislature

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, *review denied*, 153 Wn.2d 1020 (2004) (creek restoration ordinance was a development regulation); *Manke Lumber Co., Inc. v. Diehl*, 91 Wn. App. 793, 959 P.2d 1173, *review denied*, 137 Wn.2d 1018 (1998) (County designation of forest lands of long-term commercial significance was a development regulation).

also simplified the judicial review of site-specific land use decisions in enacting LUPA. RCW 36.70C.

Thus, while GMA directed a planning process for counties and cities, it did not state that the planning process for other government service providers like fire districts are preempted. Moreover, GMA was not limited to planning. Through the requirement that development regulations be adopted, and through its integrated project permit review process, site-specific decisionmaking was also important under GMA.

(b) GMA and the County Code on Concurrency

The concept of “concurrency,” mandating that adequate public services exist (or will be developed within a reasonable time thereafter) to serve the population growth created by a particular development,²⁴ has been a centerpiece of GMA since its enactment. The concept involves adequate and available public facilities to meet and maintain the levels of service necessary to address the growth engendered by new development.²⁵

²⁴ See WAC 365-195-210 (defining “concurrency”). The developers quote the Walsh/Pearce law review article that quite correctly observes that if a proposed development so impacts public facilities that it causes level of services to fall below planned levels, concurrency would be violated. Br. of Appellants at 1.

²⁵ WAC 365-195-210 defines adequacy of public facilities, availability of public facilities, concurrency, and levels of service:

The Legislature made concurrency mandatory for transportation services. RCW 36.70A.070(6).²⁶ In *City of Bellevue v. East Bellevue Community Municipal Corp.*, 119 Wn. App. 405, 81 P.3d 148 (2003), review denied, 152 Wn.2d 1004 (2004), this Court held that a Bellevue ordinance exempting a shopping center redevelopment from the city's transportation concurrency ordinance was invalid as it violated GMA. This Court cogently observed that "concurrency is not a goal, it is a requirement." *Id.* at 414. Plainly, concurrency was an enforceable development regulation for the particular project at issue.

"Adequate public facilities" means facilities which have the capacity to serve development without decreasing levels of service below locally established minimums.

"Available public facilities" means that facilities or services are in place or that a financial commitment is in place to provide the facilities or services within a specified time. In the case of transportation, the specified time is six years from the time of development.

"Concurrency" means that adequate public facilities are available when the impacts of development occur. This definition includes the two concepts or "adequate public facilities" and of "available public facilities" as defined above.

"Level of service" means an established minimum capacity of public facilities or services that must be provided per unit of demand or other appropriate measure of need.

²⁶ RCW 36.70A.070(6) sets forth the mandatory transportation element of a county comprehensive plan under GMA. RCW 36.70A.070(6)(b) specifically states that local jurisdictions must adopt ordinances which prohibit development approval unless transportation concurrency is met. Concurrency is there defined as improvements or strategies in place at the time of the development or a financial commitment in place to complete the improvements or strategies within six years. *See also*, WAC 365-195-510.

With respect to other public services, the Legislature authorized local jurisdictions to establish concurrency requirements for other key public services such as schools, parks, and emergency services when it included public facilities and public services among GMA's planning goals. RCW 36.70A.020(12-13).

The Department of Community, Trade, and Economic Development ("DCTED") adopted WAC 365-195-070(3) on concurrency, suggesting concurrency is more broadly required under GMA and is not limited to transportation:

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 concurrency is not maintained.

The application of concurrency regulations to a specific development is also supported by DCTED Guidelines related to Concurrency. WAC 365-195-835 states:

(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.

These regulations plainly contemplate that concurrency may be a development regulation under GMA, and contemplate that where adequate public facilities to serve the development are not in place, the county or city may condition approval on developer mitigation of the development impacts or deny the development application. WAC 365-195-835(3)(d)(iii).

Growth management hearings boards like the board for Western Washington, which has jurisdiction over Whatcom County, have applied concurrency principles to other public services. *See, e.g., Taxpayers for Responsible Government v. City of Oak Harbor* (WWGMHB No. 96-2-0002) (concurrency requirements arise of RCW 36.70A.020(12) and involve both adequate and available public facilities; concurrency applies beyond transportation services); *Abenroth v. Skagit County* (WWGMHB No. 97-2-0060c) (board determines subarea plan failed to provide

sufficiently updated information on adequate levels of fire service to meet concurrency mandate of GMA). *See also, McVittie v. Snohomish County*, 2000 WL 227844 (Central Puget Sound GMHB No. 99-3-0016C, February 9, 2000); (RCW 36.70A.020(12) requires local governments to establish a level of service standard for facilities and services, and an enforcement mechanism to ensure that the standard is met; a specific concurrency provision is not mandated, but it is not prohibited by GMA as such a decision is clearly within local discretion).

Such concurrency requirements are not novel. 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 concurrence requirements on residential subdivision developments. *See also, Sturges v. Town of Chilmark*, 402 N.E.2d 1346 (Mass. 1980). Florida enacted legislation in 1985 requiring local jurisdictions to adopt concurrence requirements. Fla. Stat. Ann. §§ 163.3161-163.3215. *See generally, Thomas G. Pelham, Adequate Public Facilities Requirements: Reflections on Florida's Concurrency System for Managing Growth*, 19 Fla. St. Univ. L. Rev. 973 (1992).²⁷

²⁷ Concurrency is distinct from the concept of impact fees:

GMA required the County to ensure that public facilities are in place or planned for at the time of development approval. See RCW 36.70A.020(12) – GMA Goal number 12 regarding Public facilities and services.²⁸ The County adopted an integrated planning approach to address RCW 36.70A.020(12) for its capital facilities, but it also specifically provided for a project-based requirement of concurrency of vital public services before permits could be issued.

Whatcom County chose to enact a development regulation requiring a concurrency determination for water, sewage, schools, and fire protection. WCC 20.80.212 follows the DCTED concurrency guidelines,

Subject to certain limitations on its authority, a municipality may require a developer to pay impact fees to mitigate the impacts of a proposed project. If there is no concurrency requirement, the development may proceed once the developer pays the impact fees, regardless of whether or when the improvements to public facilities are implemented. For example, if the municipality concludes that a development would degrade the level of service at an intersection to an unacceptable level, the developer may be assessed a proportionate share of the costs of a new traffic signal, turning lane, or other improvement, before the development may proceed. If and when the municipality later raises sufficient funds from public and/or private sources to pay for the improvement, the improvement will be installed. However, if there is a concurrency requirement, the development may not proceed until the necessary funds are raised and the improvement is installed or until commitments are in place to ensure that the improvement will be installed within a reasonable period of time.

Thomas M. Walsh, Roger A. Pearce, *The Concurrency Requirement of the Washington State Growth Management Act*, 16 Univ. Puget Sound L. Rev., 1025, 1026 (1993).

²⁸ That provision states: “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.”

and it clearly spells 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 states:

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. . . .

(emphasis added). The language of that ordinance, ignored by the developers in their brief, is unmistakable. It says that permits could not be issued to the developers unless and until a service provider like the District stated services for the projects existed or would shortly exist.

The very language and structure of WCC 20.80.212 confirms that it is a development regulation. As previously noted, the County had the authority to enact such an ordinance to implement RCW 36.70A.020(12).

WCC 20.80.212 does not supersede the levels of service (the gold standard for emergency response time) set in the Birch Bay Plan, it *implements* those planning standards. It is site-specific enforcement mechanism to ensure that growth does not so impact public facilities that the necessary result of such growth is that the levels of service cannot be met. Chief Fields here explicitly testified the District could not meet the

levels of service set by the Birch Bay Plan or national response standards if the projects proceeded. CP 539.

This integrated approach to capital facilities employed by the County does not mean that concurrency has no place in planning under GMA. Such an approach is also consistent with RCW 36.70B.030(2) requiring the County to perform concurrency analysis *during project review*.²⁹ RCW 36.70B.030(2) requires Whatcom County to engage in a two-tiered analysis to determine the availability and adequacy of the public facilities identified in a comprehensive plan. First, the local government (or any reviewing body) must determine if any development regulation applicable to the proposed project addresses the availability and adequacy of public facilities. When development regulations address availability and adequacy of public facilities, the County does not examine the comprehensive plan to make a determination on those services.

²⁹ RCW 36.70B.030(2) states:

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.

Second, if such development regulations do exist, then those development regulations are to be applied to a project at the project review stage to determine if there is availability and adequacy of public facilities and services.

The developers argue that review of the availability and adequacy of public facilities at the project review stage was barred by RCW 36.70B.030(3). Br. of Appellants at 29-30. However, the limitations of project review under RCW 36.70B.030(3) only apply *in the absence of a development regulation*. Such is not the case here because WCC 20.80.212 was a development regulation, given the fact that it was a direct control on land use activities described in RCW 36.70A.030(7).

The examiner erroneously interpreted RCW 36.70B.030(3)³⁰ and ignored RCW 36.70B.030(2) to determine that adequacy of fire protection services may not be evaluated on a project review basis, stating that the “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. . . CP 670. RCW 36.70B.030(3), when read as a whole, *only* refers to the reliance upon, or use of

³⁰ RCW 36.70B.030(3) provides that “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.”

comprehensive plan for determination of available and adequate facilities *where there is an absence of development regulations*. Because the County chose to adopt a development regulation WCC 20.80.212, there was a development regulation in place. Moreover, RCW 36.70B.040, referred to in RCW 36.70B.030(1), lends credence to the District's statutory interpretation. It specifically states that a proposed project's consistency with development regulations "shall be decided by the local government *during project review by consideration of . . . (c) Infrastructure, including public facilities and services needed to serve the development. . .*" (emphasis added).

The hearing examiner's interpretation of RCW 36.70B.030(3) would have effectively eliminated concurrency because once the County Council adopted a capital facilities plan, *regardless of whether it complies with GMA*, the County need not apply its concurrency ordinance. This is neither the purpose nor the intent of RCW 36.70B.030(3).

Here, the trial court correctly discerned that WCC 20.80.212 required a determination of fire service concurrency with respect to the four development projects that was not satisfied by the Whatcom County Council's adoption of its comprehensive plans two years before. The planning process required under GMA does not trump the requirement that

there be vital services in place to address the impact of the projects' anticipated growth.³¹

(c) The Trial Court Was Correct in Determining That Adequate Services Did Not Exist at the Time the County Approved the Projects

The County erroneously concluded that the policy language contained in the 2004 Birch Bay Community Plan was sufficient to satisfy WCC 20.80.212 for 2006 development applications. CP 671. As noted, the hearing examiner erred as a matter of law in considering the policy statements on adequacy of facilities and services or funding contained in the Birch Bay Plan to be a requirement under the County's comprehensive plan. Further, the examiner's conclusion that policy statements contained in the 2004 comprehensive plan makes review of the developments' 2006 impact unnecessary was a clearly erroneous application of the law to the facts. The examiner confused the nature of a comprehensive plan under GMA with a development regulation.

The section of the Birch Bay Plan upon which the County relied to find that adequate funding existed to provide the County designated levels

³¹ A GMA-mandated planning process will not necessarily satisfy concurrency. One commentator has observed, for example, that a GMA-mandated transportation concurrency requirement will not satisfy SEPA's requirement that environmental impacts be considered. Keith H. Hirokawa, *The Prima Facie Burden and the Vanishing SEPA Threshold: Washington's Emerging Preference for Efficiency over Accuracy*, 37 Gonz. L. Rev. 403, 425-26 (2001-02).

of service to the development, br. of appellants at 10 (“These costs will be borne by taxes paid by the growing population.”) was not a “requirement” but is, at most, an aspirational statement. CP 332. In no way was such statement a “requirement” of the comprehensive plan or the Birch Bay Plan. The comprehensive plan, including the Birch Bay Plan, does not make the determination that concurrency exists for any particular development. It was an error of law, and clearly erroneous for the hearing examiner to find and conclude that the 2004 Birch Bay Plan determined that adequate fire protection services and facilities exist for a future proposed development in 2006. This is because the comprehensive plan, including the Birch Bay Plan is a *planning document*, not a development regulation for a particular project detailing what specific development requirements must be satisfied for approval. Planning documents do not set enforcement standards, only development regulations do so. *Viking Properties, Inc., supra.*

If the 2004 Birch Bay Plan was the County’s determination of concurrency, then WCC 20.80.212 would have no purpose. This is inconsistent with basic rules of statutory construction. WCC 20.80.212 requires a concurrency determination at the time of project approval. The County was required to fully comply with its development regulation, by applying WCC 20.80.212 to the developments under conditions in

existence at the time of the application, regardless of any policy statements relating to fire services in the 2004 comprehensive plan.

The County also concluded that the projects could go forward because the District had adequate resources to address the services necessary for the projects. But as the trial court found, CP 6, and as indicated in the record (*see* section 3(b), *supra*), the County's determinations about services and revenues were unsupported on the record.

(d) WCC 20.80.212 Does Not Constitute an Unlawful Delegation of Authority to the District

The developers assert that WCC 20.80.212, if applied to specific projects, would constitute an unlawful delegation of County planning authority to the District. Br. of Appellants at 3, 33-34. They offer a "parade of horrors" argument that "any service provider could enact a building moratorium by refusing to issue concurrency letters." *Id.* at 33.³² Their argument is wrong.³³

³² The counter-argument to the developers' inflammatory assertion is that they apparently prefer to press ahead with large-scale developments knowing quite well that emergency services are not available unbeknownst to the purchasers of units in the projects, whose health and safety will be placed at risk by overtaxed, understaffed, underfunded providers of emergency services.

³³ The County retains the authority in its comprehensive plan to change levels of service or to assist public service providers to provide adequate facilities and services to allow concurrency standards to be met.

The developers cite no specific authority for their argument because there is no authority for it. Under GMA, planning must be undertaken by counties and cities, but *nothing* in GMA evidences a legislative intent to undermine the statutory authority of special purpose districts to plan and provide services as demanded and paid for by their constituents, or to deprive a county of the ability to enact a development regulation requiring concurrency. Moreover, while the District's concurrency letter is powerful evidence of a violation of WCC 20.80.212, nothing prevents a developer from producing other evidence to the County, as the land use decisionmaker, regarding satisfaction of the concurrency mandate in the ordinance.

In any event, there is something inherently contradictory in the developers' analysis in any event. They contend that the District must issue a concurrency letter, *acknowledging that the District had the authority in the first place to issue it*. This assertion is at odds with the notion that the County improperly "delegated" such authority.

- (5) The County's Approval of the Projects Violated State and County Standards for Permit Approval That Mandate Appropriate Health, Safety, and Welfare Services Be in Place before Project Approval

The trial court here found that in addition to concurrency, the County's approval of the projects could not stand on the basis of several State and County land use laws:

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

CP 7.

While the developers assigned error to this conclusion of law by the trial court, br. of appellants at 4, they fail to articulate an issue pertaining to the assignment of error, *id.* at 4-6, and fail to address RCW 58.17.110 and the Whatcom County Code provisions *anywhere* in their brief. The developers' failure to offer any argument or authorities on the assignment of error constitutes a waiver of any error. *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 630, 733 P.2d 182 (1987).

If the Court, however, determines to reach the merits of the issue, the trial court's conclusion of law is amply supported. 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 re-zone 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 20.85.335-345 (criteria for approval of planned unit development).

In the case law implementing RCW 58.17.110, a statute first enacted in 1969, it is clear that principles similar to concurrency have emerged: a local government has substantial discretion to deny applications for a subdivision of land if appropriate provisions are not made by the developer for vital public services including public safety. This rule has been repeatedly articulated by Washington courts. *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).

Simply stated, it is beyond purview in Washington law that a municipality has the authority to withhold approval of a land use decision such as a plat where “appropriate provisions” are not made by the developer to mitigate the public health, public safety, and welfare problems created by the particular development. This is a site-specific decision that entirely undercuts the developer’s contention here that “appropriate provisions” are instead provided for in the County’s planning process.

The four developments here failed to meet State and County requirements because the District cannot provide adequate, urban-level emergency services to the four developments for the reasons articulated *supra*. The District lacks the capital facilities and the personnel necessary to serve the growth engendered by the four developments. The County made inadequate and/or flatly erroneous findings that the District could serve the four projects. Under RCW 58.17.110 and similar County

ordinances, the trial court correctly concluded that the County should have denied approval to the four projects.

F. CONCLUSION

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.³⁴ Costs on appeal should be awarded to the District.

DATED this 8th day of December, 2008.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630
(206) 574-6661

³⁴ Nothing, of course, bars the developers from resubmitting their requests to the County once adequate fire and emergency services can be provided by the District.

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Bellingham, WA 98225
(360) 671-1796
Attorneys for Respondent
Whatcom County Fire District No. 21

APPENDIX

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.

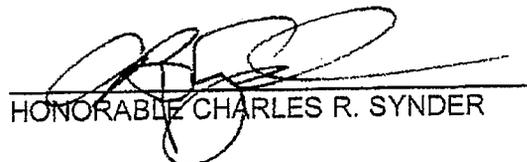
- 1) No final ~~plat~~ ^{building}, specific or binding site plan approvals, occupancy permit or any other permits or approvals shall be issued or granted by Whatcom County related to any of the projects or approvals under appeal herein.

This Interim Order shall be in effect until a final order is issued by the Court. This Interim Order is not a final order for the purposes of appeal.

The Petitioner shall submit proposed findings of fact and conclusions of law within seven (7) business days of receipt of the verbatim transcript of the oral ruling issued by the Court on September 24, 2007.

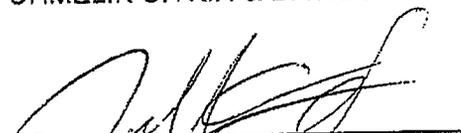
Any party may note on the civil motion calendar entry of findings of fact, conclusions of law, and final order on shortened notice at a time mutually convenient to the parties.

DATED this 3 day of October, 2007.


HONORABLE CHARLES R. SYNDER

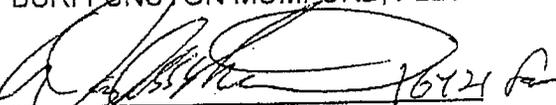
Presented By:

CHMELIK SITKIN & DAVIS P.S.


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

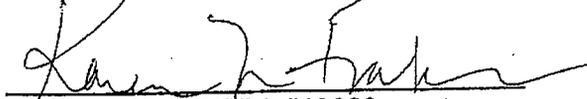
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Philip Buri, WSBA #17637
Attorney for Developer Respondents

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2 WHATCOM COUNTY PROSECUTOR'S OFFICE

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4 Karen Frakes, WSBA #13600
5 Attorney for Whatcom County

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7 F:\FIRE DISTRICTS\WCFD #23\WCFD #131\Concurrence\Consolidated LUPA Petitions\Pleadings\Interim Order_v3_10-2-07.doc

FILED IN OPEN COURT
2/29 20 08
WHATCOM COUNTY CLERK

By _____
Deputy

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

- 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 initials: "PS" and "KB" 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.

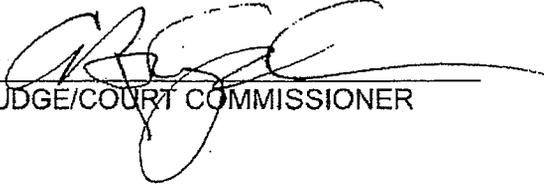
13 6) The Examiner's Decision findings of fact and conclusions of law were clearly
14 erroneous application of law to the facts, and were an error of law as to
15 the criteria for approval (RCW 58.17.110; Whatcom County Long Subdivision
16 criteria - WCC 21.05.030(1)(h); Planned Development - WCC 20.85.335, 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

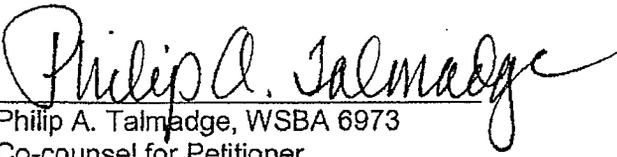
13 Presented By:

14 CHMELIK SITKIN & DAVIS P.S.

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

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

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FINAL DECISION, ORDER AND JUDGMENT
ON LUPA APPEAL - 4

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9 Karen Frakes, WSBA #13600
10 Attorney for Whatcom County

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DECLARATION OF SERVICE

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

Douglas K. Robertson
Belcher Swanson Law Firm PLLC
900 Dupont Street
Bellingham, WA 98225-3105

Phil J. Buri
Buri Funston Mumford, PLLC
1601 F Street
Bellingham, WA 98225-3011

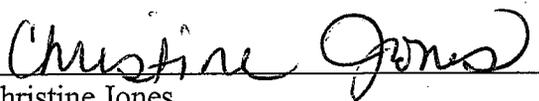
Karen Frakes
Whatcom County Prosecutor's Office
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Seth Woolson
Chmelik Sitkin & Davis PS
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Bellingham, WA 98225-4542

Original sent for filing with:
Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101-4170

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: December 8, 2008, at Tukwila, Washington.


Christine Jones
Talmadge/Fitzpatrick

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 DEC -8 PM 3:30