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NO. 83611-6

SUPREME COURT
OF THE STATE OF WASHINGTON

WHATCOM COUNTY FIRE DISTRICT NO. 21,

Petitioner,

v.

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

Respondents.

SUPPLEMENTAL BRIEF OF
WHATCOM FIRE DISTRICT NO. 21

Jonathan K. Sitkin
WSBA #17604
Chmelik Sitkin & Davis P.S.
1500 Railroad Avenue
Bellingham, WA 98225
(360) 671-1796

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

Attorneys for Whatcom County
Fire District No. 21

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A. INTRODUCTION

Although the Growth Management Act, RCW 36.70A (“GMA”) does not confer preemptive authority upon counties and cities adopting comprehensive plans under GMA, over service level decisions by special purpose governments like Whatcom County Fire District No. 21 (“District”), the Court of Appeals nevertheless conferred such sweeping power upon counties like Whatcom County (“County”) in its opinion. The Court concluded that once the County set a service level planning goal for land use planning purposes in its comprehensive plan, the District was obligated to accept and meet that goal as its operational service level, effectively disregarding the District’s independent statutory authority over operational service goals and their implementation.

The Court of Appeals misread county/city authority under GMA. In so doing, the court further misapplied GMA’s concurrence requirements and the County’s implementation of those requirements in WCC 20.80.212, which required a site-specific determination that sufficient fire and emergency services were available or would soon be available before a project creating growth could go forward. The court’s misinterpretation of the County’s role also led it to simply ignore RCW 58.17.110, which requires similar service concurrency before a subdivision can proceed.

The District fully expects that the developer respondents will persist in their campaign, repeated through this case, to divert the Court from these core issues by harping on the District's efforts to resolve the issues through voluntary mitigation agreements permitted by law, issues that are not even before the Court. The Court should reject this transparent tactic. The developers have no answers to the actual issues before the Court on GMA, WCC 20.80.212, and RCW 58.17.110.

B. ISSUES PRESENTED FOR REVIEW¹

1. Under GMA, does a county in its comprehensive plan have the authority to set the operational 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 concurrency² letter to prospective

¹ 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.

² 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).

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?

C. 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.

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 529-34.³ 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

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

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 587-96.⁴ It could not meet the 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. The District appeared at a public hearing on the projects and

⁴ 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 states "that *adequate capacity* exists or arrangements have been made to *provide adequate services for the development.*" WCC 20.80.212(1) (emphasis added). A provider like the District 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.

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 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 363-64.⁵

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

⁵ 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. Moreover, the Legislature enacted House Bill 1080 in the 2010 session specifically providing impact fee authority to fire districts.

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 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 343-44.⁶ 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

⁶ The hearing examiner may have erroneously relied on the Birch Bay Plan in making this determination. The Plan seems to refer only to the Semiahmoo Station repairs. *See* Appendix.

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, 571-82.⁷

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.

On appeal, the Whatcom County Superior Court reversed the County’s decision, holding that the County ignored the testimony of

⁷ 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.

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 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 in turn reversed the trial court's decision.

D. ARGUMENT

(1) The District, Not the County, Had the Authority to Establish and Implement Operational Service Levels

The Court of Appeals determined that the County, not the District, sets service levels for fire and emergency services in its comprehensive plan by confusing the County's rôle in land use planning with the District's operational responsibilities. Under Title 52 RCW, the District's commissioners are separately elected officials with independent responsibility to their constituents regarding the establishment and

implementation of service levels. The Court's decision has wide-ranging implications, seemingly conferring authority on counties and cities planning under GMA to *supersede* service decisions by special purpose governments like school districts, water/sewer districts, or fire districts, to name only a few.

Nothing in GMA or other statutes gives authority to a county to effectively preempt service level decisions by a fire district and its separately elected board.⁸ 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

⁸ 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.

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 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.

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

The Court of Appeals opinion also misinterprets the role of concurrency in GMA by failing to address RCW 36.70A.020(12-13) or the Department of Commerce regulations, such as WAC 365-195-070(3), WAC 365-195-210 (defining concurrency) or WAC 365-195-835, that clearly articulate what a county concurrency ordinance means and what it must contain. These 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 *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)⁹ and for other services by statute and the regulations referenced above.

⁹ See also, *Boehm v. City of Vancouver*, 111 Wn. App. 711, 47 P.3d 137 (2002) (party failed to properly appeal concurrency decision); *Monilake Community Club v. Central Puget Sound Growth Mgmt. Hearings Board*, 110 Wn. App. 731, 43 P.3d 57 (2002).

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.¹⁰ In its recent ordinance

¹⁰ 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*, 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

adopting its comprehensive plan, the County refers to WCC 20.80.212 as a development regulation.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 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

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 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.

¹¹ In Ordinance 2009-071, adopted by the Whatcom County Council on November 24, 2009, the Council made finding of fact number 106:

Fire District 21 (aka North Whatcom Fire and Rescue), which serves the Birch Bay UGA, has completed and adopted a Capital Facilities Plan for its fire district. The capital facilities plan is adopted by reference in the comprehensive plan, and is implemented through concurrency requirements in county code (WCC 20.80.212) and through the State Environmental Policy Act (SEPA).

Development regulations generally implement comprehensive plans. *Woods v. Kittitas County*, 162 Wn.2d 597, 613, 174 P.2d 25 (2007).

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 not the evidence 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 comprehensive plan for the four projects.* CP 521, 539, 543, 561, 571, 578-79, 588.¹³

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.

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

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 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*

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.

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

(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 address RCW 58.17.110 to that 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, which long predated GMA's enactment, 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

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

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.

E. CONCLUSION

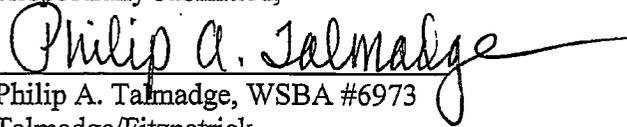
The trial court here correctly ruled that the County should not have issued the permits for the four projects. The Court of Appeals conferred preemptive power over special purpose districts' service decision to counties and cities planning under GMA, something GMA does not do. The projects violated the 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.

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.

DATED this 29th day of March, 2010.

Respectfully submitted,



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

Jonathan K. Sitkin, WSBA #17604
Chmelik Sitkin & Davis P.S.
1500 Railroad Avenue
Bellingham, WA 98225
(360) 671-1796
Attorneys for Petitioner
Whatcom County Fire District No. 21

APPENDIX

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 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 365-195-070(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 concurrency 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.

PUBLIC HEALTH AND SAFETY

location of fire stations these response times are not likely to improve. To shorten the response time requires the manning of the fire station at Point Whitehorn on a round the clock basis. The cost of such an operation is significant.

Consolidated Fire District No. 13

Existing Facilities and Services. Fire District 13 serves all of the Birch Bay community planning area north of Bay Road. They also serve the City of Blaine, as well as the Custer, and Haynie areas. The Fire District provides fire protection, emergency medical, and hazardous materials response services. Fire District #13 has entered into a Cooperative Interlocal Agreement with Fire District #3, and #5 that has resulted in the formation of the North Whatcom Fire & Rescue Services (NWFRS) organization. The NWFRS organization serves a 165 square mile total area. This agreement allows enhanced training programs and more depth in staffing, volunteers, and resources than would otherwise be possible.

North Whatcom Fire & Rescue Services organization is a combination paid and volunteer fire department. There are currently 28 paid employees, which include a fire chief, Assistant Fire Chief, 3 Division Chiefs, Training Captain, Volunteer Resource Coordinator, Finance Manager, 2 Administrative Assistants, two apparatus maintenance technicians, 1 Emergency Medicine Physician, five Career Company Officer Lieutenants, and nine Career Firefighters. The NWFRS organization also has 165 volunteer officer/fire fighters posted to 10 fire stations.

North Whatcom Fire & Rescue operates 7 staff vehicles, 14 engines, 12 aid ambulances, 5 water tenders, 1 Re-Habilitation unit, one Breathing Air response unit and 5 utility units to support requests for fire and aid services from the general public.

Fire District 13 operates 5 stations. The 3 fire stations serving the Birch Bay community are Station 1 at 4581 Birch Bay-Lynden Road, Station 2 located in Custer, and Station 4 located in Blaine. The Birch Bay Station is staffed 24 hours a day with career Firefighters/EMTS and is also served by 30 volunteer members participating in a sleeper program. The Birch Bay Station is equipped with 2 Rescue/Aid pumpers, 1 ladder truck, and 1 BLS Ambulance Aid vehicle. The Custer Station is equipped with one Rescue/Aid pumper, 1 water tender, and 1 BLS Ambulance Aid vehicle; the Blaine station has 2 Rescue/Aid pumpers and 1 BLS Ambulance.

PUBLIC HEALTH AND SAFETY

In the year 2002, the District responded to 1038 alarms. Of the total, 178 alarms were for fire, 686 for emergency medical services, 27 for hazardous conditions, and 147 for other purposes.

Within the Birch Bay Community Planning Area, the District responded to 403 alarms with a Fractal response time utilizing a 90% standard of 6 minutes or less. In the Semiahmoo area the Fire District responded to 40 alarms with a Fractal response time utilizing a 90% standard of 7 minutes and 30 seconds or less.

Standards. The gold standard for successful emergency medical services is four to six minute response times for aid services and 15 to 20 minutes for ambulance services. EMS system response times within this time period have been proven to lead to an increased number of lives being saved during medical emergencies in which time is critical. Response for fire emergencies is also time dependent and require larger numbers of personnel and fire suppression equipment. 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.

Proposed Expansions and Improvements. Increased population, particularly in the Birch Point area will necessitate the 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 by taxes paid by the growing population. The Birch Bay station now being utilized as a manned fire station must under go substantial remodeling in the future to house firefighters and EMTs.

Police Services

Police services to the residents and business of the Birch Bay area are provided by the Whatcom County Sheriff's Department. The Sheriff's Department headquarters are located in the Whatcom County courthouse in Bellingham. Table 15-2 presents overall Sheriff's Department calls in Whatcom County from 1996 through 2000. The statistics in the table indicate that the incidents calls have decreased slightly over the last five year period.

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.



Resp. appeal due (ibany) on 3/31

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 1) That the District's appeal of the permits and approvals set forth in Exhibit "A," is
2 hereby granted, overturning the approvals granted therein, and remanding the
3 same to the County.
- 4 2) The parties, by agreement, consolidated four (4) pending projects into this
5 appeal in the interests of judicial economy as each of those appeals raised
6 similar, and in some cases identical, issues. All of the approvals under appeal
7 as set forth in the Land Use Petition are referred to herein as the Decisions,
8 including the SEPA appeal decisions.
- 9 3) The County (the County Council and the Hearing Examiner in their capacities
10 as the final decision makers and/or as appellant body are collectively referred to
11 herein as the "County") in granting the permits and approvals issued the
12 Decisions.
- 13 4) The County's decision that the District could provide adequate levels of service
14 was not supported by substantial evidence on the record.
- 15 a. District Chief Tom Field's testimony that the District lacks adequate
16 funding, staff, and stations to provide adequate service was reliable
17 evidence of the District's capacity limitations.
- 18 b. There is no evidence in the record supporting the finding that the state
19 legislature may act in the future to grant the District additional revenue
20 raising authority to provide adequate services.
- 21 c. There is no evidence in the record to support the finding that the District
22 receives any revenue from the EMS levy.
- 23 d. Other revenue sources referenced were purely speculative and/or not shown to
24 be available to the District.
- 25 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

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
6 the projects under appeal had been met.

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

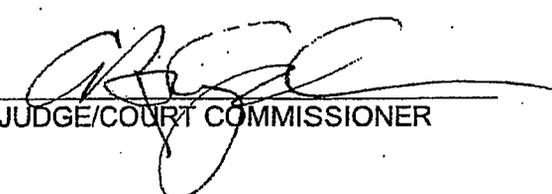
19 6) The Examiner's Decision findings of fact and conclusions of law were clearly
20 erroneous application of law to the facts, and were an error of law as to
21 the criteria for approval (RCW 58.17.110; Whatcom County Long Subdivision
22 criteria - WCC 21.05.030(1)(h); Planned Development - WCC 20.85.335,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

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

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

1500 Railroad Avenue Bellingham, Washington 98225
phone 360.671.1796 • fax 360.671.3781

1 Copy Received By:

2 BURI FUNSTON MUMFORD, PLLC

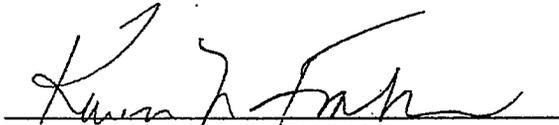
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4

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

6 Copy Received By:

7 WHATCOM COUNTY PROSECUTOR'S OFFICE

8 

9

Karen Frakes, WSBA #13600
10 Attorney for Whatcom County

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FINAL DECISION, ORDER AND JUDGMENT
ON LUPA APPEAL - 5

CHMELIK SITKIN & DAVIS P.S.
ATTORNEYS AT LAW

1500 Railroad Avenue Bellingham, Washington 98225
phone 360.671.1796 • fax 360.671.3781

DECLARATION OF SERVICE

On this day stated below, I emailed and deposited in the U.S. Mail a true and accurate copy of the Supplemental Brief of Whatcom County Fire District No. 21 in Supreme Court Cause No. 83611-6 to the following parties:

Brian K. Snure
Snure Law Office
612 S. 227th Street
Des Moines, WA 98198-6826

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

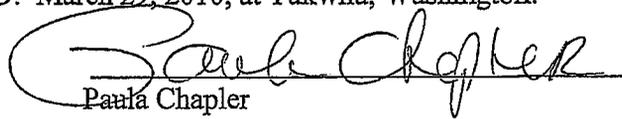
Karen Frakes
Whatcom County Prosecutor's Office
311 Grand Avenue
Bellingham, WA 98225-4048

Jonathan Sitkin
Seth Woolson
Chmelik Sitkin & Davis PS
1500 Railroad Avenue
Bellingham, WA 98225-4542

Original efiled with:
Washington Supreme Court
Clerk's Office
415 12th St. W.
Olympia, WA 98504

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: March 29, 2010, at Tukwila, Washington.


Paula Chapler
Talmadge/Fitzpatrick

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STATE OF WASHINGTON
10 MAR 29 PM 4:19
BY RONALD R. CARPENTER
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FILED AS
ATTACHMENT TO EMAIL

DECLARATION

ORIGINAL