

69639-4

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NO. 69639-4-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GRANDVIEW NORTH, LLC, a Washington limited liability
company,

Appellant,

v.

THE CITY OF BURLINGTON, a municipal corporation,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR SKAGIT COUNTY
THE HONORABLE JOHN M. MEYER

BRIEF OF APPELLANT

HUTCHISON & FOSTER

By: William B. Foster

WSBA #8270

P.O. Box 69

Lynnwood, Washington 98046

(425) 776-2147

Attorney for Appellant

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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INTRODUCTION

The City of Burlington (hereinafter "City") denied Grandview's application to develop its property in the City based upon traffic concerns that were factually unsupported. Traffic Impact Analysis prepared by Grandview's consultant demonstrated that the proposed improvements would not cause the Level of Service ("LOS") to degrade below standards adopted by the City. Despite demonstrating traffic concurrency, the City demanded that Grandview improve an intersection it labeled as dangerous notwithstanding the fact that it had approved the construction of that very intersection when it approved an earlier development application.

In the process of permitting the construction of a Costco store, the City ignored traffic design criteria that it now relies upon to justify the denial of Grandview's land use application. At the time Costco was permitted by the City, the City approved an access from the Costco property onto Burlington Boulevard, over a street named "Costco Drive". The intersection of Costco Drive and Burlington Boulevard (hereinafter, this intersection will be referred to as "CD-BB") is a four-way intersection, fully signaled on all four legs of the

intersection, and has been in this configuration since the Costco store was constructed.

Grandview is the owner of a 3.5 acre parcel on the east side of Burlington Boulevard, directly across the street from Costco. The eastern leg of the aforementioned intersection is partially located on Grandview's property, and partially on the property of the neighboring owner to the south. A mutual access easement exists along the boundary separating these two parcels. Even though there is no improved street on this eastern leg, the traffic signal regulating traffic to and from this eastern leg, complete with pedestrian signals, has been in place and operational since the construction of the intersection.

Grandview submitted an application to the City to improve its property for commercial development, and proposed to use as access to its property this fourth leg of the CD-BB intersection. The City denied Grandview's application. Grandview then sought relief under LUPA in Skagit County Superior Court, and the Court upheld the decision of the City. This appeal followed.

The City's denial of Grandview's application is nothing more than an attempt to require one property owner to correct a perceived

deficiency that the City created. The City labels the intersection as being dangerous to both vehicular traffic and pedestrians, notwithstanding the fact that it approved the construction of this intersection. The intersection has existed in its present condition ever since the Costco project was completed, and the evidence in the record clearly established that traffic will not be significantly impacted by the Petitioner's proposed development. But under the guise of public safety, the City now seeks to require this one property owner to bear the burden of correcting the City's mistake.

To add insult to injury the City received an application to develop a property across Burlington Boulevard, which development would include two (2) "drive through" businesses. The access to this development would also be provided through the very intersection that Grandview proposed to use. Notwithstanding the City's denial of Grandview's application, it approved this second application.

ASSIGNMENTS OF ERRORS

1. Did the trial court err in affirming the decision of the City in denying Grandview's land use application.
2. Did the trial court err in determining that the City's denial of Grandview's land use application was supported by the evidence in the record.

3. Did the trial court err in determining that the intersection improvements proposed by Grandview did not comply with City ordinance, including the comprehensive plan.
4. Did the trial court err in finding that the City's approval of the Copeland Lumber project violated Grandview's right to due process.

ISSUES PERTAINING TO ASSIGNMENTS OF ERRORS

1. The City's denial of Grandview's land use application is not supported by evidence that is substantial when viewed in light of the whole record before the court.
2. The City's denial of Grandview's land use application is a clearly erroneous application of the law to the facts.
3. The City's denial of Grandview's land use application violates Grandview's constitutional rights.

STATEMENT OF FACTS

1. The City's Comprehensive Plan and Traffic Element

The Comprehensive Plan adopted in 2005 by the City includes a Transportation section as required by the Growth Management Act ("GMA").¹

"2. The planned Level of Service is not to exceed Level of Service C except for the Burlington Boulevard corridor which is not to exceed Level of Service D.

3. Proposed projects that decrease the level of service below the planned level, because of their traffic contribution, shall be denied unless concurrent

¹ RCW 36.70.070(6)

improvements are made to prevent a decrease in level of service below the planned level for that location."²

These provisions are consistent with the GMA requirements in that they not only establish LOS, but they also dictate what effect that LOS has on proposed developments. In addition to requiring that cities that plan under GMA establish LOS, GMA further provides:

"After adoption of the comprehensive plan by jurisdictions required to plan or who choose to plan under RCW 36.70A.040, local jurisdictions must adopt and enforce ordinances which prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan, . . ."³

Notwithstanding the City's adoption of the standards required by GMA, the City chose to ignore those very standards.

2. Grandview's Application Process.

The Petitioner, Grandview North, LLC ("Grandview"), is the owner of a parcel of unimproved property located on the east side of Burlington Boulevard across from the Costco warehouse location consisting of approximately 3.5 acres.

In 2001 the former owner of the property, Burlington Land

² City of Burlington Comprehensive Plan, Chapter 10 (emphasis added)

³ RCW 36.70A.070 (6) (b) [emphasis added]

Company, LLC, submitted a proposal to the City of Burlington ("City") for the approval of a five (5) lot Binding Site Plan ("BSP") for future commercial development. (CP 465) In response to this application the City issued a Mitigated Determination of Nonsignificance ("MDNS") for the project on May 23, 2001. (CP 14) The MDNS contained six (6) separate conditions including the following:

- "2. Construct utility and access improvements as required by the City Engineer.
3. Install fourth leg of traffic signal.
5. Provide connection to the K-Mart parking lot to the east." (CP 14).

In February, 2007, Grandview submitted a development proposal for its property that was similar to the proposal submitted in 2001. (CP 466-67) Both proposals provided for access to the property to CD-BB through the access easement located between the Grandview parcel and the property to the south using the intersection at CD-BB. (CP 475-76) This access would be the "fourth leg" of the traffic signal required by the MDNS issued in 2001. Neither proposed project proposed changes to the alignment of the CD - BB intersection.

The Grandview proposal was scheduled to be considered by the City's Planning Commission at a meeting on February 21, 2007.

The proposal called for the construction of four (4) buildings consisting of a quick-lube facility of 1,420 square feet in size; a one story bank consisting of approximately 3,500 square feet; and two (2) two (2) story office buildings, each consisting of approximately 13,750 square feet. The development proposal was presented to the Planning Commission as two options, either A or B. (CP 468) The options differed only as to the proposed location of the quick-lube facility and the bank. (CP 468)

The staff report submitted to the Planning Commission noted that "Environmental review of a proposed five lot binding site plan was completed in 2001; no action was taken at that time." The Staff Report further observes that:

"One of the issues for the development of this site is to provide a location for a future driveway connection to the K-Mart site. This in turn connects to an easement to the east at Walnut Street." (CP 468)

After review of the proposal, City staff recommended the approval of Alternative B. (CP 468) The recommendation included the following conditions:

"Approve Option B which locates the oil change facility at least 200 feet back on the site, subject to the following conditions:

1. Compliance with landscaping and maintenance standards.
2. Provide a location for future connection through the site to the K Mart Parking lot.
3. Comply with storm drainage requirements per code." (CP 466)

There was no mention in either the Staff Recommendation or the minutes of the Planning Commission meeting as to required changes to the CD - BB intersection. The Planning Commission approved the Option B plan as submitted.

Following the approval of the proposed development by the Planning Commission Grandview began the process of designing the specific improvements to be constructed, including the access to the site from Burlington Boulevard. This included the preparation of a detailed Traffic Impact Analysis ("TIA") by Gibson Traffic Consultants ("GTC"). GTC submitted to the City a TIA on June 22, 2007. (CP 375-441) The TIA was prepared according to scoping discussions with the City and it included a Level of Service ("LOS") analysis. (CP 376; CP 394) The TIA prepared by GTC included of a nine (9) page summary, together with all of the empirical data in support of GTC's conclusions.

The GTC TIA examined both the 2007 existing conditions as well as the projected 2013 conditions, each with and without the proposed development. (CP 392) As demonstrated by the GTC TIA at none of the studied intersections, including the CD -BB intersection, does the LOS fall below the standards adopted. (CP 381)

Nearly four (4) months after the TIA was submitted to the City, the City engaged the services of Garry Struthers Associates, Inc. ("GSA") to conduct a peer review of the GTC TIA. On October 17, 2007, the City forwarded to GTC the GSA comments to the GTC TIA. (CP 370-373). The GSA response noted that the plans for the CD-BB intersection was "skewed", and therefore required the intersection to operate in "split phase" mode. (CP 370) However, the GSA response also noted that there are other intersections in the "corridor" that currently operate in split phase mode, although proposals have been made to modify these other locations to eliminate split phase operation. (CP 370) The response further noted that the creation of this fourth leg of the intersection would create a "cut through" through the Costco site whereby traffic would avoid the Burlington Boulevard/George Hopper intersection to the south. (CP 370) Notwithstanding the issues raised in the response, the City

characterized the GTC TIA as being “detailed” and “well formulated”. (CP 304).

Just one week after the City had received the GSA response to the TIA, the City concluded that the proposal presented such serious significant impacts to traffic that it was considering withdrawal of the previously issued MDNS, and issuing a Determination of Significance (“DS”). (CP 333) The issuance of a DS would require the preparation of an Environmental Impact Statement. (CP 333).

Almost immediately, GTC requested information from the City in order to respond to the GSA report. (CP 303). On October 31, 2007, GTC responded to several of the issues raised in the GSA response. (CP 301) Of particular importance is the issue of the “skewed” angle of the intersection that was approved by the City at the time it approved the Costco development. (CP 301) The most important conclusion reached, however, was that even with the split phase signal and “artificially high” and “worst case” trip generation calculations, the intersection would continue to operate at an acceptable LOS. (CP 301-302).

In response, the City insisted that any drop in LOS would have to be examined, not just a drop below accepted LOS standards. (CP

300). However, even the City acknowledged that the existing intersection was “poorly configured” from its inception. (CP 300) When GTC reminded the City that the signal at the intersection has always operated in split phase mode because it was approved in connection with the Costco project with a “double eastbound left turn from Costco as well as the alignment” (CP 292), the City acknowledged that it knew that the signal currently, and always had, operated in split phase mode. (CP 292) The City further acknowledged that split phasing was required due to the double left turn from Costco, and notwithstanding that fact the intersection operates at a high LOS. (CP 292)

So after months of analysis the City raised objections not based upon its adopted LOS standards, but instead regarding the design of the intersection that it approved when it permitted the Costco improvements. In essence the City is demanding that the Petitioner correct a problem that the City created, notwithstanding the fact that the proposed development would not result in reducing the LOS at the intersection, or any of the other intersections studied, below levels adopted by the City.

GSA then responded with the real reason behind the City's

objections to the proposed intersection improvements when it was stated:

"It has been the expressed conclusion of previous studies that split phase operation is undesirable." (CP 76)

In response GTC then specifically asked GSA if the split phase signal at CD-BB intersection will still operate at LOS D or better no matter what assumptions are used. (CP 221) GSA never responded to this very specific inquiry. GTC concluded that the CD-BB intersection would operate at an acceptable LOS D "no matter what assumptions or signal timings you try to impose on the analysis". (CP 221) In response to this GSA ignored the LOS analysis conducted on all seven (7) intersections, but instead focused on the fact that the intersection operated in split phase mode opining that:

"I do not believe that split phase operation at this location is conducive to efficient traffic circulation on the Boulevard. Because efficient circulation is crucial to the economic vitality of this area it must be preserved." (CP 75)

In response to this comment, GTC again directly asks GSA:

"The analysis we provide you shows an intersection that has type 1 arrival i.e. the worst possible coordination with the highest possible volumes and it still operates at acceptable LOS - do you agree? You talk about corridor LOS I still have not seen any reference in the city code

or policy indicating they have a corridor LOS standard please point that out to me. . . I was informed by the city that I should be able to get everything I need to answer the question from you - as of yet I have not received any of the things I have requested from you." (CP 153)

This assertion ignores the fact that the signal at CD-BB currently operates in split phase mode (CP 78; CP 78-79), and will not operate below the LOS standards adopted by the City if Grandview's project were approved.(CP 188) Notwithstanding the fact that acceptable LOS would be maintained if Grandview's project were approved, GSA continued to focus on the conclusion that "accepting a split phase operation" is not in the "best interest of the City". (CP 138)

Grandview's consultant replied that it was the applicant's "intent to continue working Gary Norris to provide the analysis that has been requested by the city and provide the appropriate mitigation." (CP 151) GTC went so far as to "use the latest WSDOT timing for the corridor per Gary's direction and the higher volumes per Gary's direction" and concluded that the intersection "still operates at an acceptable LOS". (CP 151) The only response that the City could muster to this conclusion was: "This guy is a real case". (CP 101)

Grandview continued to try to work with the City to address the City's concerns that, notwithstanding the conclusion that as proposed and using "worst case" assumptions, the intersection would continue to operate at an acceptable LOS. On January 16, 2008, the Petitioner submitted a revised plan to the City that would allow the City to undo the split phasing at the time the Bike Shop property is redeveloped. (CP 71) The City responded to this concept in the long run is "OK", but still leaves the City with a signal that operates in split phase mode. (CP 72-74).

Under a submittal dated April 15, 2008, the Petitioner submitted a civil plans to the City for the project, which included channelization and signalization plans and a revised TIA prepared by GTC. (CP 2203) This revised TIA reports that the trip generated by the proposal would be a total of 758 average daily trips (CP 2239) with a net of 587 daily trips after the application of the appropriate regression analysis. (CP 2240) The revised TIA with the additional analysis requested by the City reported that:

- All of the off-site study intersections will operate at acceptable LOS for both the standard weekday and the November-Christmas shopping peak (CP 2205)
- Internal access roads should be constructed to engineering

and design standards adopted by the City (CP 2206)

- City has no accident data, and it therefore removed this as a requirement for the TIA (CP 2208)
- 758 ADT without any credit for pass-by or internal crossover, which results in a worst case scenario (CP 2212)
- The proposed development will not cause any intersections to operate at an unsatisfactory level of service and therefore off-site mitigation improvements by the developer should not be required (CP 2218)
- The City of Burlington TIA guidelines do not require queuing analysis (CP 2220)
- Queuing is within standards⁴ (CP 2222-2223)
- Even with split phase timing, the CD-BB signal operates at LOS B or better with or without a left-turn lane on the east leg and the worst case trip generation during peak hour. Therefore, it is expected that this split phase intersection will maintain the City of Burlington standard of LOS D or better for many more years after the horizon year. Therefore, re-alignment of the intersection is not needed in the foreseeable future to maintain intersection LOS D. Thus the re-alignment and possible separate westbound left-turn lane can wait until the redevelopment of bike retail on the south side would allow for a shared east-west phasing. (CP 2225)

GSA responded to the resubmitted TIA, however, the conclusion recommending denial of the proposal focused again on the split phase signal at CD-BB, notwithstanding the fact that the

⁴ Even though queuing analysis is not required by the City's guidelines, GTC performed a queuing analysis.

existing signal, as well as other along Burlington Boulevard, presently operate in a split phase mode. (CP 1010-1013) Furthermore, the GSA response failed to identify LOS deficiencies. (CP 1010-1013) In short, the City's denial of the project application rest upon its attempt to require the Petitioner to correct an existing condition it has now concluded is less than optimal even though this same condition exists at other intersections in the corridor.

At the same time the City continued with its withdrawal of the previously issued MDNS. However, the City tipped its hand regarding the real motivation for denying this project. It admits that the use proposed by the applicant was an "allowed" use. (CP 995) Furthermore, the City states the underlying reason, however improper, for the withdrawal of the MDNS and use of the SEPA process as a means of denying the proposed development:

"The nice thing about the environmental process, specifically the environmental impact statement requirement, is that if you get the mitigation you need at any point in the process, you can bail." (CP 995; *emphasis added*)

Although discussion regarding withdrawal of the MDNS started as early as October 25, 2007, the City continued to stonewall any action on the proposed development. The Planning Director circulated

a draft of the DS on May 19, 2008, stating that it "would go out next week". (CP 997) The in which it is stated:

"Traffic analysis of the proposed development of 1720 South Burlington Boulevard for Oil Can Henry's drive through oil change facility with long range plans for additional development, has resulted in a determination that there will be a significant adverse impact on Level of Service with the addition of the fourth leg of the signal, creating a split phase signal at Costco Drive. This decrease in transportation level of service occurs with the development of the 3.5 acre site and in order to accommodate development of the remaining three vacant parcels, the traffic issues need to be resolved for all of the vacant land on the east side of Burlington Boulevard at this location. The signal does not line up properly with the site, creating a need for a split phase signal, which in turn causes a significant adverse impact on traffic." (CP 999; *emphasis added*)

However, the draft DS misstates existing facts.

- The "alignment" issue was created when the City approved the Costco project, and therefore is an existing condition. (CP 1458)
- The need "split phase" signal is not caused by the proposed project as its current operation is in the split phase mode, and has been so ever since Costco was constructed and the South Burlington Boulevard - Costco Drive intersection was created.
- The need to "accommodate development of the remaining three vacant parcels" notwithstanding that there are no development plans in the pipeline for these parcels.

The Determination of Significance was finally issued on January 11, 2007, however there are significant differences from the

draft DS and the issued DS. The original draft makes reference to an impact on LOS, yet this statement does not appear in the final version. (CP 1425) The reason that an LOS deficiency is not noted is simple: There was no empirical evidence presented in the record that would support this conclusion. However, the City continues to base its decision in part upon the project's impact on "other properties" for which no development plans have been submitted.

The very first paragraph of the Introduction to the draft EIS confirms a fact that was known from the outset; that the problem with the CD-BB intersection was known at the time that Costco was permitted and the intersection created. (CP 1458)

"The need to prepare an Environmental Impact Statement arises because the site proposed for development has serious access problems. At the time the Costco Drive signal was installed at this location, it was recognized that there were serious deficiencies with the layout of the signal relative to the existing property lines and the existing site occupied by the Bike Shop. The Costco signal was sited in an attempt to accommodate the property across Burlington Boulevard to the east, recognizing there were conflicts with the Bike Shop." (CP 1458; *emphasis added*)

However, at the same time the EIS prepared by the City concedes that the proposed development complies with the LOS standards adopted by the City.

"While the proposed split phase signal operation will fit within the existing traffic signal coordination parameters, it should be noted that the existing traffic signal timing and coordination parameters are based on the best operation that could be achieved with the split phase operation that currently exists at other intersections."
(CP 1458; *emphasis added*)

Furthermore, the EIS clearly reveals that it is the City's desire to eliminate split phase signals altogether, regardless of whether or not such signals comply with the adopted performance standards.

"The proposed improvement plan for Burlington calls for the elimination of split phasing at all intersections such that a higher level of service for the Boulevard can be achieved." (CP 1458)

"The Boulevard is beginning to show signs of failure of level of service at service at selected locations. It is imperative that the City of Burlington take steps to ensure the long terms viability of the Boulevard as it is the life line for access to the retail core of the City. To do this, the City must maximize the capacity of the existing corridor which requires that each intersecting street and driveway must operate at maximum efficiency. Split phase operation is counter to that objective." (CP 1458)

So it boils down to this: The City has substituted for the LOS standards specifically included in the Comprehensive Plan its now stated desire to "maximize efficiency". It does so on the backs of property owners, like the Petitioner, who have demonstrated compliance with the Comprehensive Plan. Instead of adhering to the

clear and unambiguous language of the Comprehensive Plan, the City has substituted its own uncertain standard of "maximum efficiency". Not only is such contrary to the terms of the Comprehensive Plan, it is contrary to an element that GMA specifically requires be included in the Comprehensive Plan.

Because the City is unable to support its decision to deny the proposed development based upon the ordinances adopted by the City, including the Comprehensive Plan, it continued its course of foot dragging. Even though the decision to withdraw the MDNS was discussed as early as October 25, 2007, the DS was not issued by the City until June 20, 2008, at the earliest, a delay of 239 days. The initial draft of the limited scope EIS was not issued until April 10, 2009, 294 days after the issuance of the DS. (CP 1571) The final EIS was not issued until January 27, 2011, 688 days after the draft EIS was issued. (CP 1425) So between the date that the City first threatened the withdrawal of the MDNS to the date of issuance of the limited scope EIS, one thousand two hundred and twenty-one (1,221) days elapsed; over three years and four months. This is the EIS that the City states cost \$2.00 to prepare. (CP 1429)

Notwithstanding the fact that the design considered by the

Planning Commission was virtually identical to the plan considered by it in 2007, the Planning Commission recommended denial of the project application. (CP 1118-1122) At the hearing before the Planning Commission the City asserted new and different objections to the proposed development. It continued to assert that the access improvements would encroach upon the Bike Shop property to the South. (CP 1416) However, long prior to the meeting of the Planning Commission Grandview had revised the plans to provide that the entire access road would be located either entirely on its own property or within the easement. (CP 1416-1417) After receipt of the original draft EIS where this issue was raised for the first time, the Applicant, his consultant and attorney met with the Planning Director on August 10, 2010, to discuss additional alternatives. (CP 1620, ¶ 20) At this meeting the consultant (Ravnik) proposed narrowing the access which would result in all of the access improvements being located within the easement located between the two properties. (CP 1653 ¶ 12) At the close of the meeting, Ravnik indicated that he would be submitting revised drawings with these changes. (CP 1629, ¶ 21) The revised drawings were submitted to the City on September 15, 2010, by Ravnik. (CP 1629, ¶ 23) Fleek and Ravnik then met on September

20, 2010, to discuss the revisions.(CP 1630) Following this meeting, Fleek responded with an email to Ravnik outlining suggestions to the revised plan. (CP 1692) These suggestions included outlandish concepts of removal of the traffic light altogether, a concept that Costco had rejected in February of 2008 (CP 970), or that further revision to the access be made. Each of these suggestions required yet a third TIA. However, the revised plan clearly removed any encroachment upon the Bike Shop property to the south. (CP 1416-17)

Notwithstanding the fact that the revised plan removed the encroachment on the Bike Shop property, Fleek incorrectly represented to the Planning Commission that the encroachment issue remained. The Planning commission thereafter entered Findings of Fact that the proposal has two fatal flaws. These are:

"It proposes to take part of the property to the south, without agreement from the owner, and

It proposes to access the Bike Shop from a driveway located in the turn radius of the entrance."

Neither of these assertions had any basis in fact at the time the matter came before the Planning Commission

The Petitioner made a timely appeal of the decision of the

Planning Commission. The appeal was heard before the City Council on May 12, 2011. The Council entered Findings of Fact and Conclusions of Law at the time of the scheduled hearing, and denied the appeal.

Within the time required by RCW 36.70C, the Petitioner filed a timely challenge to the action of the City.

3. The Copeland Lumber Site.

At the same time that Grandview was appealing the decision of the Planning Commission, the City was receiving inquiries regarding the development of a parcel of property known as the Copeland Lumber site. (CP 2158) This site is located immediately south of Costco, and would be interconnected with the existing shopping center facilities “in and around the Costco center”. (CP 2046) The initial response to this proposal from the City’s Planning Director was that “two drive through proposals that will NEVER work with the limit on trip generation Copeland signed with Costco”. (CP 2158) However, the City considered the Copeland site a “garbage dump”, and were obviously motivated to approve the redevelopment of the site (CP 2158) In fact, the Planning Director suggested that the site could be listed as one of the “Dumps of Skagit County”, and that

the City was contemplating issuing civil citations. (CP 2164)

In support of its development application a TIA was prepared by the very same consultant that prepared the TIA for Grandview's project, GTC. (CP 2063-2157). The focus of the TIA was on the impact of the proposed development on the internal intersections and "the access intersections to George Hopper Road and Burlington Boulevard", including CD-BB. (CP 2065) The project would access Burlington Boulevard at the Costco Drive intersection, the very intersection that Grandview's project would also use. (CP 2066) The GTC report stated that the average weekday trips for this project would be 697, and weekend trips would be 780. (CP 2069) The TIA further reported that the LOS at CD-BB for weekend travel would degrade from A to B under normal conditions (CP 2077), and would remain at D under the "worst approach". (CP 2077) Interestingly enough, this same TIA reported that for weekday p.m. travel the LOS would degrade from LOS A to B under normal conditions (CP 2080), and would be at LOS E, an unacceptable LOS under the City's guidelines, under the "worst approach". (CP 2080).

The TIA then concluded that all of the intersections analyzed, including CD-BB would operate within acceptable LOS, and that the

queue lengths were satisfactory. (CP 2080) The TIA did note that the queues may extend just beyond the storage for movement, but “that single observation is almost identical to today’s condition”. (CP 2080)

The City issued a Staff Report to the Planning Commission in which it recommended approval of the application. (CP 1998) In making this recommendation the City noted that “This site is in need of new development.” (CP 1998) The Staff Report further observes that:

“The site today consists of an old abandoned lumber yard and structure that are in terrible condition and should be demolished. The proposed design is compatible with other uses in the retail shopping area and will provide a quality development.” (CP 2000)

Unlike Grandview’s proposal, the City did not obtain a peer review of the GTC TIA submitted for the Copeland site even though it had strenuously questioned GTC’s analysis of these very same intersections in relation to the Grandview application.

The Planning Commission accepted the recommendation of the Planning Commission, and approved the Copeland project on December 11, 2011, even though it had denied the Grandview proposal only eight (8) months earlier. (CP 1992; CP 1407)

EXCEPTIONS TO FINDINGS OF FACT

The Petitioner takes exception to the following Findings of

Fact made by the City Council:

Finding of Fact No. 2. On February 21, 2007, the Planning Commission reviewed the land use concept only, including the location of the location of the building on the site and access to the east. The Commission approved the proposed use as being consistent with the City's zoning code, and approved the conceptual layout of the building on the site, including a 200 foot minimum setback from Burlington Boulevard. (CP 1349)

Finding of Fact No. 4. Upon receipt of the Gibson study, the City engaged Garry Struthers Associates, Inc. ("Struthers") to conduct a peer review of Gibson's study. In a study dated October 16, 2007, Struthers identified several significant shortcomings of Gibson's study, including potentially dangerous conflicts between pedestrians and vehicles. In addition, the Public Works Department identified additional discrepancies between the design for the project as submitted, and the City's engineering standards. In particular, the City Engineer determine (sic) that the proposal envisioned access to the adjacent southern property (parcel No. P24256) via a driveway located within the southern turning radius of the proposed main access to the applicant's development, which was characterized by the engineer as dangerous and unworkable. Moreover, the City Engineer identified encroachments onto the adjacent, southern parcel envisioned by the project applicant, consisting of utilities, access driveways, and sidewalks. (CP 1349)

Finding of Fact No. 6. The traffic studies led the City's SEPA responsible official to conclude that the revised land use permit application submitted by the

project applicant on February 13, 2007 contained substantial changes to the BSP proposal that had been submitted in 2001; and these substantial changes would likely have significant adverse environmental impacts. On October 25, 2007, the City's SEPA responsible official to withdrew (sic) the 2001 MDNS pursuant to WAC 197-11-340. (CP 1350)

Finding of Fact No. 12. City staff met with the applicant on August 10, 2010, at which time the applicant indicated that it would revise the project design, and specifically the site access. On September 15, 2010, the City received a Letter of Transmittal from the applicant's agent, John Ravnik, which included a draft copy of a drawing that illustrated another new revised entry plan for the project. The draft plan was the first plan presented to the City which showed the proposed development as being located entirely on the applicant's property, and not encroaching on neighboring property; to do so, the applicant "squared off" the entry drive, and reduced the width of that drive. By squaring off the entry drive, the applicant exacerbated the angle of the skew between the entry driveway and Burlington Boulevard. (CP 1353)

Finding of Fact No. 16. The City Council concurs in the Planning Commission's finding that the earlier proposal, dated April 15, 2008, contains at least 2 fatal flaws that preclude development as depicted in the proposal:

- A. It proposes to take part of the property to the south, without agreement from the owner, and
- B. It proposes access to the Bike Shop from a driveway located in the turn radius of the entrance.

Finally, the entire access plan, in addition to the fatal flaws identified above, represents extremely poor

judgment in traffic engineering and would create additional traffic delay at this intersection. (CP 1355)⁵

Finding of Fact No. 17. The City Council concurs in the Planning Commission's finding that the proposal dated September 15, 2010, does not allow fire department access to the site, in violation of BMC Section 12.28.100 et. seq., and Art. 503.1 of the International Fire Code.

ARGUMENT AND AUTHORITIES

1. The Standard of Review.

RCW 36.70C.130 sets forth the proper standard for the Superior Court to grant the relief requested by a LUPA petitioner.

"RCW 36.70C.130 Standards for granting relief--Renewable resource projects within energy overlay zones

(1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:

(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

⁵ There are two (2) Findings of Fact numbered 16. This exception is to the second of those paragraphs.

the construction of a law by a local jurisdiction with expertise;

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

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

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

(f) The land use decision violates the constitutional rights of the party seeking relief."⁶

In the instant case the Petitioner submits that subsections (b), (c), (d) and (f) require reversal of the City's decision. There are four separate categories to be considered: (1) an erroneous interpretation of the law; (2) the land use decision is not supported by evidence that is substantial when viewed in light of the entire record; (3) the land use decision is a clearly erroneous application of the law to the facts; and (4) the approval of the Copeland project is a violation of Grandview's constitutional rights.

2. The Decision is not Supported by Substantial Evidence.

2.1 The Substantial Evidence Standard of Review. The court's review of the decision is considered according to the

⁶ *City of Univ. Place v. McGuire*, 144 Wash.2d 640, 647, 30 P.3d 453 (2001).

substantial evidence standard, which is a question of law that is reviewed de novo.⁷ Substantial evidence exists where there is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order, or that the declared premise is true.⁸

2.2 The Evidence Considered. Grandview supplied not one, but two, detailed TIA's, that included empirical analysis in support of its conclusions. The conclusions contained in these TIAs were clear and concise. Based upon either of the GTC TIAs, the inescapable conclusion is that the Grandview project would not have a significant impact upon the traffic at CD-BB, or any of the other studied intersections. In fact, the TIA concludes that at none of the studied intersections does LOS degrade below levels the City has adopted as acceptable.

In response to the very detailed, data supported TIA, the peer review of GSA consists of slightly more than four (4) pages, and lacks

⁷ *Phoenix Development, Inc. v. City of Woodinville*, 171 Wash.2d 820, 829, 256 P.3d 1150 (2011)

⁸ *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wash.2d 38, 46, 959 P.2d 1091 (1998) (quoting *Callegod v. State Patrol*, 84 Wash.App. 663, 673, 929 P.2d 510, review denied, 132 Wash.2d 1004, 939 P.2d 215 (1997)); *Isla Verde Intern. Holdings, Inc. v. City of Camas*, 146 Wash.2d 740, 751-752, 49 P.3d 867 (2002); *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wash.2d 169, 176, 4 P.3d 123 (2000).

any of the support data included in the GTC TIA. Conspicuously absent from the first GSA response is any opinion that any of the studied intersections will suffer from LOS deficiencies. To the contrary, the first and most glaring statement is that the signal at CD-BB, due to its skewed alignment, will have to operate in split phase mode. However, even GSA response concedes that the GTC TIA has shown that “the Boulevard will operated at LOS D” (CP 1013), which is an acceptable LOS.

The evidence in this case is similar to that presented in *Benchmark Land Co. v. City of Battle Ground*⁹. In *Benchmark* the city required that the developer make offsite improvements to a street that the developer contended would not be impacted by the development. Just like the case here, Battleground’s traffic engineer noted that the existing street it required be improved was “substandard”, and did “not meet current safety and efficiency standards for width and lane configuration as specified by the Battle Ground Transportation Plan”.¹⁰ In response to this contention the developer’s traffic consultant noted that the proposed project would result in an increase in traffic over the

⁹ *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 49 P.3d 860 (2002)

¹⁰ *Id.* at 690.

adjacent street that would be “virtually indistinguishable to the average motorist and has no effect on overall intersection and roadway level of service”.¹¹ In the face of these two studies, the city required as a condition of project approval that the developer make offsite improvements to the adjacent street notwithstanding the proposal’s lack of impact upon that adjacent street.

The developer challenged this condition, and despite the fact that the city had prevailed at the highest forum with fact finding authority¹², the court held that the conditions imposed upon the development were not supported by substantial evidence. In rejecting the improvement of the adjacent road as a condition of development the court noted that the adjacent street did not meet City roadway standards even before the development was proposed. Therefore, the required expenditure for street improvements was not directly related to the traffic generated by the development.¹³ Instead, the required

¹¹ *Id.*

¹² Inferences are viewed in a light most favorable to the party that prevailed at the highest forum exercising fact finding authority. *Schofield v. Spokane County*, 96 Wn. App. 581, 588, 980 P.2d 277 (1999)

¹³ See *Miller v. City of Port Angeles*, 38 Wn. App. 904, 910, 691 P.2d 229 (1984)

improvements would relieve a preexisting deficiency.¹⁴ As a result, the court in *Benchmark* determined that the condition requiring the improvement of the adjacent street was not supported by substantial evidence, even in light of the burden imposed upon the developer.

Just like the city's traffic consultant in *Benchmark*, even GSA concedes that Grandview's project will not cause LOS to degrade below the acceptable LOS D, but instead the "Boulevard will operate at LOS D" in post-development conditions. (CP 1013)

The decision of the City in this case ignores all of the evidence in the record regarding the impacts of traffic resulting from this proposed project. After considering the detailed TIA prepared by GTC there can be no serious question that the proposed project is in complete compliance with the requirements imposed by the comprehensive plan pertaining to LOS. The decision of the City was not based upon substantial evidence that the impacts of the proposed development were contrary to City adopted standards, but instead aimed at correcting an existing deficient condition, a condition that was approved by the City.

2.3 The Copeland Evidence. Further evidence that the

¹⁴ *Benchmark* at 695.

denial of Grandview's project is not supported by substantial evidence is found in the City's approval of the Copeland project. The two projects involve the very same intersection in the very same corridor. Yet the approach undertaken by the City was vastly different. Unlike the Grandview project, the City required no "peer review" of the Copeland project. Instead, the City relied heavily upon the fact that "All concerns vis a vis traffic have been worked out with Costco". (CP 1993) The number of average daily trips is nearly identical, and the impacts are upon the very same intersection. The City was more concerned that the property owners' did not consider traffic impacts to be an issue than it was with insuring compliance with its own development regulations. You can't have it both ways; no reasonable person can justify the approval of the Copeland project and at the same time justify the denial of the Grandview project.

The only basis for the approval of one project and the denial of the other could not be based upon the TIAs prepared for either project, as each TIA reaches the same conclusion, but instead was based upon the City's desire to alleviate an unsightly land use. The Findings of Fact adopted by the City to support the denial of Grandview's project ignored LOS entirely. Instead, the City relied

upon facts that are clearly contrary to the record. Finding of Fact No. 12 acknowledges that the proposal was redesigned by the applicant to alleviate encroachment upon the neighboring property. (CP 1353) However, despite this acknowledgment, Finding of Fact No. 16 states:

"It (the proposal) proposes to take part of the property to the south without agreement from the owner".

This statement is not only unsupported by substantial evidence, it is directly contrary to Finding of Fact No. 16.

3. An Erroneous Interpretation of the Law - The City Cannot Ignore its Adopted LOS Standards. As noted above, the inclusion of the transportation element is a requirement under GMA.¹⁵ One of the items that must be included in the transportation element is the inclusion of LOS standards.¹⁶ A city is not allowed to create exception to its concurrency ordinance.¹⁷ In *Bellevue v. East Bellevue*, the City approved a proposed development by exempting the development from the application of its concurrency ordinance. The court in *Bellevue* reversed the project's approval, holding that the concurrency

¹⁵ RCW 36.70A.070.

¹⁶ RCW 36.70A.070 (6)(b)

¹⁷ *City of Bellevue v. East Bellevue Community Mun. Corp.*, 119 Wash.App. 405, 81 P.3d 148 (2003)

ordinance, and its application, were a requirement of GMA which can not be ignored by the City.

That is precisely what the City has done in this case, although in reverse fashion. The City is unable to establish that Grandview's project is not in compliance with its concurrency ordinance, yet it claims that its denial of project approval is justified by unidentified traffic impacts. By adopting its own LOS standards as required by GMA, the City has set the benchmark for developers. The City cannot later change the standard to some nebulous standard that is unknown.

It is anticipated that the City will argue that compliance with the comprehensive plan is merely a starting point for project approval, and that the approval may be further constrained by duly adopted development regulations. That was exactly the argument made by the city in *Bellevue v. East Bellevue*, where the city argued that concurrency was merely one element that must be considered, but that it did not “trump” other provisions of GMA. As stated above, the court rejected this contention and held just the opposite, that concurrency was, in fact, a requirement.

Development regulations must be consistent with the

comprehensive plan.¹⁸ If the City were to argue that the LOS standards are superseded by development regulations, those development regulations would be impermissibly inconsistent, and therefore contrary to the clear mandates of GMA.

However, the real problem here is that the City has enacted no development regulations that contradict the LOS standards. Instead, the City bases its denial upon the "skewed" nature of the intersection, notwithstanding the fact that such intersections are permitted under City ordinance.¹⁹ Likewise, it bases its decision upon its "desire" to eliminate split-phase signal operation, yet nowhere in city code is this desire codified. In fact, the signal at this location and several other locations in the immediate vicinity currently operate in split-phase mode, yet the City has singled out this intersection in furtherance of its unwritten policy to phase out this type of signal operation.

The erroneous interpretation of law that plagues the City's actions in this case is that it chose to ignore the mandates of GMA and its duly adopted comprehensive plan and development

¹⁸ *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wash.2d 542, 958 P.2d 962 (1998)

¹⁹ BMC 12.28.110(D) provides: "D. Whenever possible new streets shall align with the existing street grid. New streets shall intersect existing streets at an approximate 90-degree angle;" [*emphasis added*]

regulations. Instead, the City based its denial of Grandview's application upon other standards that are nowhere found in the City's development regulations, and are, in fact directly contrary to those regulations. The City is obligated to adhere to its comprehensive plan and the development regulations promulgated thereunder. It cannot substitute its own "desires", "wishes" or "policies" in place of its comprehensive plan and development regulations. To the extent that the City believed it was at liberty to ignore the provisions of its comprehensive plan it erroneously interpreted the law with regard to GMA and the comprehensive plan adopted thereunder.

4. An Erroneous Application of the Law to the Facts.

The clearly erroneous test under RCW 36.70C.130 (d) involves applying the law to facts.²⁰ Under subsection (d) a finding is clearly erroneous when, although there is evidence to support it, the court on the record is left with the definite and firm conviction that a mistake has been committed.²¹

²⁰ *Cingular Wireless, LLC v. Thurston County*, 131 Wash.App. 756, 768, 129 P.3d 300 (2006) (citing *Citizens to Pres. Pioneer Park, LLC v. The City of Mercer Island*, 106 Wash.App. 461, 24 P.3d 1079 (2001)).

²¹ *Wenatchee Sportsmen Assn. v. Chelan County*, 141 Wash.2d at 176, 4 P.3d 123 (2000); (citing *Norway Hill Pres. & Prot. Ass'n v. King County Council*, 87 Wash.2d 267, 274, 552 P.2d 674 (1976)).

The LOS issue is not an optional element which may be adopted at the discretion of the City, but instead is a requirement under GMA. RCWA 36.70A.070 (6)(b) provides:

"After adoption of the comprehensive plan by jurisdictions required to plan or who choose to plan under RCW 36.70A.040, local jurisdictions must adopt and enforce ordinances which prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development."²²

Accordingly, not only is the City required to adopt LOS standards, it is also required to adhere to the standards adopted. It is nonsensical to conclude that a City is required to reject a proposal unless the adopted standards are met, and at the same time the City is free to reject a proposal that complies with the adopted standards. Furthermore, the LOS standards adopted by the City are not general, but in fact impose specific standards by which traffic impacts are measured. GMA requires that comprehensive plans be specific

²² *Emphasis added.*

enough so as to prevent ad hoc decisions by the jurisdiction.²³ In *Anderson*, for example, the court rejected the city's denial of a development application based upon the perceived failure to adhere to aesthetic standards imposed by the city. The court held that the standards, if they existed, were too vague to serve as the basis of the rejection of the proposed project.

The law that is to be considered is the comprehensive plan adopted by the City, and in particular, its adoption of LOS standards. There is no dispute that the duly adopted LOS standard for Burlington Boulevard at the property location is LOS D. Any proposed development that results in a LOS of D or less meets the standards adopted by the City. In the instant case there is no question that Grandview's project met this standard by a significant amount. According to the GTC TIA the LOS for the CD - BB intersection is, at worst, D, and therefore in compliance with the duly adopted standards.²⁴

By comparison, the TIA prepared for the Copeland project

²³ *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Associates*, 115 Wash.App. 611, 62 P.3d 938 (2003); *Anderson v. City of Issaquah*, 70 Wash.App. 64, 76, 851 P.2d 744 (1993)

²⁴ See Tables B-2 B -3, CP 2237-2238; and Tables B - 6, B - 7 & B - 8, CP 2241-2243.

includes similar if not worse results. The Copeland analysis concludes that the LOS is B at this intersection, or even E under the "worst approach" analysis. Yet, despite the apparent failure to comply with the LOS standards the City approved the Copeland project.

So one would then ask when presented with this evidence why would the Grandview project present significant adverse impacts when the Copeland project did not? The only reasonable answer is that the City ignored the evidence presented in either or both of the projects. There is no doubt that the Grandview project presented substantial evidence that the LOS standards were in full compliance with the comprehensive plan, whereas the Copeland project did not meet these same criteria. An examination of the data used in reaching its conclusions contained in the TIA should have lead to similar results for the two projects. The average daily trips for the Grandview project were 758²⁵ whereas the average daily trips for the Copeland project ranged from 697 to 789²⁶.

The only explanation for the City's disparate treatment for the two projects is that it evaluated the two projects according to different

²⁵ CP 2239, Table 3A, page B-4

²⁶ CP 2069

standards. It rejected Grandview's proposal not based upon its failure to meet the duly adopted GMA LOS standard, but instead based upon a desire to align the intersection and eliminate split phase signal operation. Although the elimination of the unaligned intersection may be a worthwhile endeavor, the alignment of the intersection was a condition that the City created when it permitted Costco. At that time it could have required Costco to move Costco Drive further to the north, which would have resulted in an intersection that aligned with the property lines across the street. However, that would have resulted in relocating the footprint of the Costco building further to the north. Furthermore, even though an aligned intersection may be desirable, it is not a requirement according to the City's own ordinances.²⁷

The City's error here is its failure to apply the undisputed facts (the LOS calculations) to the applicable law (the adopted LOS standards). There is simply no evidence in this record that the impacts of the Grandview project will result in a LOS that does not comply with the comprehensive plan. To deny Grandview's project based upon its impacts upon traffic when that conclusion is unsupported by any

²⁷ See footnote 19.

evidence is clearly erroneous, and warrants the reversal of the decision.

It appears to be the City's argument that it may reject a proposal based upon traffic impacts if there is any reduction in LOS as a result of the proposal.²⁸ Such a contention has no support in the law for two reasons. First, every project that is proposed will generate traffic, and if this fact alone was a sufficient reason to deny project approval there would be no reason for LOS standards. One of the underlying purposes of GMA was to require jurisdictions to adopt standards for the development of property, and to provide some degree of predictability to project proponents. The converse of this principle is to allow permitting agencies to decide, on an ad hoc basis, which projects merit approval and which projects do not. The requirement that projects conform to duly adopted standards protects both the public and the project proponent.

5. Grandview's Equal Protection Rights were Violated.

This Court has the ability to reverse the decision of the City if

²⁸ See Finding of Fact No. 16, wherein it is stated ". . . [t]he entire access plan . . . would create additional traffic delay at this intersection."

that decision violates Grandview's constitutional rights.²⁹ Grandview contends that the denial of its project application violates the equal protection clauses of both the Federal and State constitutions. Grandview has established that by denying its permit application and at the same time approving the Copeland application, the City intentionally treated Grandview differently from others similarly situated, and that there is no rational basis for the difference in treatment.³⁰ There can be no rational basis for state action that is malicious, irrational, or plainly arbitrary.³¹

In *Laurel Park* landowners challenged a zoning ordinance claiming disparate treatment by including its mobile home park in a certain zoning category while excluding others. Although the landowners claim was rejected, the decision is instructive. The court recognized that the landowner's claim could succeed if they established that the city intentionally treated them differently from others similarly situated, and that there is no rational basis for the

²⁹ RCW 36.70C.130(1)(f)

³⁰ *Laurel Park Community, LLC v. City of Tumwater*, 790 F.Supp.2d 1290 (W.D.Wash.,2011) (Citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000)).

³¹ *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944 (9th Cir.2004), overruled on other grounds by *Lingle*, 544 U.S. 528, 125 S.Ct. 2074.

difference in treatment. However, the court denied the claim because the City offered legitimate reasons why certain mobile home parks were excluded from the zoning classification.

Willowbrook, on the other hand, is very similar to the facts presented here. In *Willowbrook* the city had demanded a 33 foot easement as a condition of connecting the landowner's property to sewer. The landowner made an equal protection claim against the city, claiming that a smaller easement would be sufficient, and that the city had approved a smaller easement previously for other property owners. The court recognized the landowner's claim when the actions of the city were for reasons wholly unrelated to any legitimate state objective.

In the instant case, the City's denial of Grandview's permit application were based upon its requirement that Grandview correct a pre-existing deficient condition, i.e. the alignment of the intersection. The City cannot condition its approval of a development application upon a pre-existing condition.³² Any attempt to require a developer to correct a pre-existing condition is not, by definition, a legitimate objective. To add insult to injury, to require correction of an existing

³² *Benchmark at 695*

deficient condition by one developer and not another similarly situated certainly fails to advance an legitimate objective. To the contrary, it advances the objective of only the City at the expense of only one of the developers.

In the instant case there is no rational basis for treating the two proposals differently, and the City can offer no rational basis for the difference in treatment. The only basis for the difference in treatment is the City's desire to cure a problem it created, in the case of Grandview's application, and the correction of an unsightly condition in the case of the Copeland application. There is no factual basis for the difference in treatment, and there is no rational basis for imposing a different set of standards upon Grandview than it imposed on Copeland.

The denial of Grandview's project and the subsequent approval of the Copeland project amounts to nothing more than the disparate application of its own ordinances. When presented with two separate TIAs that pertain to the very same intersection, similar vehicle trips and similar conclusions with regard to LOS, the City approved one project and not the other. Common sense dictates that the impact upon Burlington Boulevard and the Costco Drive intersection would

be equally affected by either project so long as the projects are similar in scope, which they clearly are. Why, then, was Grandview subject to "peer review" when no similar requirement was imposed upon Copeland. The answer to this question is clearly found in the record where the City acknowledged that the problem with the intersection was an "existing" problem. The reality is that the City used the Grandview proposal as a method to extort from Grandview a resolution to a problem that it created when it approved the original configuration of the intersection. On the other hand, the City approved the Copeland application to solve another existing condition unrelated to traffic: the unsightly condition of the Copeland site.

6. Grandview is Entitled to an Award of Reasonable Attorney's Fees. The prevailing party is entitled to an award of reasonable attorney's fees in an appeal of a land use decision.³³

CONCLUSION

Grandview has demonstrated that it complies in all respects to the requirements of the comprehensive plan, and the development regulations promulgated thereunder. Substantial evidence does not support the denial of Grandview's application, especially in light of the

³³ RCW 4.84.370(1)

City's approval of the Copeland application. Furthermore, the City ignored the fact that Grandview's project conformed to the duly adopted LOS standards, and its denial of Grandview's project is contrary to law.

The decision of the City to deny Grandview's project application should be reversed, and the City directed to approve Grandview's development application.

Respectfully submitted,



William B. Foster WSBA #8270
of Hutchison & Foster
Attorneys for Petitioner

NO. 69639-4-1
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GRANDVIEW NORTH, LLC, a Washington limited liability
company,

Appellant,

v.

THE CITY OF BURLINGTON, a municipal corporation,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR SKAGIT COUNTY
THE HONORABLE JOHN M. MEYER

CERTIFICATE OF SERVICE

HUTCHISON & FOSTER
By: William B. Foster
WSBA #8270
P.O. Box 69
Lynnwood, Washington 98046
(425) 776-2147
Attorney for Appellant

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COURT OF APPEALS
STATE OF WASHINGTON
DIV I

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date I caused a true and correct copy of the Appellant's Opening Brief to be delivered to the counsel of record listed below in the manner described:

Mr. Scott G. Thomas, Esq.
City of Burlington
833 South Spruce Street
Burlington, Washington 98233

Via first-class U.S. Mail
 Via Certified Mail
 Via Overnight Courier
 Via Legal Messenger
 Via Email
sthomas@ci.burlington.wa.us

Ms. Stephanie E. Croll, Esq.
Keating, Bucklin & McCormack, Inc.
800 Fifth Avenue, Suite 4141
Seattle, Washington 98104

Via first-class U.S. Mail
 Via Certified Mail
 Via Overnight Courier
 Via Legal Messenger
 Via Email
scroll@kbmlawyers.com

DATED this 25th day of April, 2013, at Lynnwood, Washington.



Elaine M. Wilkinson, Legal Assistant