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COURT OF APPEALS

DIVISION II

OF THE STATE OF WASHINGTON

RICHARD KRAMER,

Appellant,

v.

CLARK COUNTY, a political subdivision of the State of Washington; and

I-205 COMMERCE PARK, L.L.C., an Oregon limited liability company;

Respondents.

APPELLANT'S REPLY BRIEF

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This brief is submitted in reply to: (i) *Respondent I-205 Commerce Park's Response Brief* (the "Commerce Park Brief"), received at the offices of Mr. Kramer's counsel on April 12, 2006; and (ii) *Brief of Respondent Clark County* (the "County Brief"), received at the offices of Mr. Kramer's counsel on April 20, 2006.[1]

FACTUAL MISSTATEMENTS

Throughout its brief, Commerce Park repeatedly refers to "continuance" of the August 26, 2004 hearing. This reference is misleading because *no* hearing was held on August 26, 2004. As noted in the hearing examiner's *Final Decision*, "[n]o testimony was taken on August 26, 2004." *CP 22*. This statement differs from Commerce Park's allegation that "[a]bsolutely no public testimony was presented on the application." *Commerce Park Brief* at 4. No one testified on August 26, neither the applicant nor County staff. The entire *matter* was continued to October 14, 2004, where the public failed to testify. While it is true that the examiner's decision speaks in terms of continuing the hearing, *CP 22*, it would be incorrect to infer that evidence or testimony were presented on August 26, 2004, and it is misleading for Commerce Park to raise such inference.

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[1]Clark County was granted an extension for filing its brief under a letter from the Court Clerk dated April 20, 2006.

Procedural Posture

Both the County and Commerce Park present such a state of confusion that it becomes necessary to recount the procedural posture in order to identify the issues properly before this Court:

Examiner Hearing. Mr. Kramer signed the "Parties of Record Register" under the subject matter heading in which he was interested: "APPLICATION: I-205 COMMERCE PARK SUBDIVISION." *CP 184, 376.*

Board of County Commissioners. Mr. Kramer filed a timely appeal to the Board of County Commissioners, alleging as follows:

> This appeal challenges the failure, on the part of the hearings examiner, to require compliance with Section 40.350.030(B) of the Clark County Code, intended to "ensure adequate cross-circulation in a manner which allows subsequent developments to meet these standards, and to provide a mechanism for integrating various streets into an efficient and safe transportation network." CCC 40.350.030(B)(2)(a).

CP 112, 179, et seq. Mr. Kramer also moved to supplement the *administrative* record with materials listed on page 8 of *Appellant's Opening Brief*, including a memorandum dated January 6, 2005, from Kittelson & Associates, Inc., *CP 299-302; AR 8-11*, which addressed deletion of proposed Approval Condition A-6, *not cross-circulation. CP 115-16, 159-77.*

The Board accepted review based upon advice from the County Prosecuting Attorney, *CP 81-82*, affirmed the hearing examiner's decision and failed to rule on Mr. Kramer's motion to supplement, *CP 87-90*.

Superior Court. Mr. Kramer timely filed an appeal under the *Land Use Petition Act* (LUPA), Chapter 36.70C RCW, alleging several errors on the part of the hearing examiner and the Board of County Commissioners pertaining to: (i) failure to require mandatory cross-circulation as provided in CCC 40.350.030(B); (ii) approval of the proposed subdivision in violation of CCC 2.51.090(1) and CCC 40.510.030(D)(5)(d); (iii) deletion of proposed Approval Condition A-6; and (iv) failure to order supplementation of the administrative record. *CP 4-8*.

Commerce Park argued that Mr. Kramer lacked standing because he failed to submit evidence or testimony to the hearing examiner. *CP 273-74*. In reply, Mr. Kramer argued deprivation of procedural due process, explaining his failure to participate in the examiner hearing in reliance upon published notice which depicted cross-circulation in satisfaction of his rights under CCC 40.350.030(B). *CP 318-22*. This matter was hotly contested at oral argument, *RP 16-26*, *42-45*, *47-51*, *60-66*, where Mr. Kramer objected to a belated challenge to his standing as violating RCW 36.70C.080, *RP 18*.

ARGUMENT

The gravamen of the present appeal, and the issues most directly addressed by the respondents, is contained in Mr. Kramer's arguments: (i) that defective notice deprived him of due process, (ii) that the requirement of cross circulation is mandatory under the County Code, and (iii) that the potential for violation of Commerce Park's rights to compensation for dedication and construction of cross-circulation does not diminish Mr. Kramer's property rights protected by CCC 40.350.030. In order to avoid any possible confusion, the cross-circulation mentioned in item "ii" consists of an east west extension of a "proposed public street" through the proposed project to Mr. Kramer's property, as depicted north of proposed "Tract A" (aka "Lot 10"), and south of proposed "Lot 4" on *AR 290*, 294, 296 (which are turned 90 degrees counter-clockwise to fit on the page). Deleted Approval Condition A-6, on the other hand, pertains to frontage improvements and turn lanes on NE 88 Street, along the southern boundary of the proposed project (as depicted south of proposed "Tract A" and "Lot 9" on *AR 290*). Although much of the evidence gleaned from traffic studies submitted on behalf of Commerce Park supports both cross-circulation and Approval Condition A-6, these improvements constitute separate issues on of appeal.

Procedural Due Process

Both Clark County and Commerce Park argue that Mr. Kramer waived due process rights by failing to raise the issue at various forums below. Contrary to respondents' arguments, the Rules of Appellate Procedure allow parties to "raise the following claimed errors for the first time in the appellate court: . . . (3) manifest error affecting a constitutions right." RAP 2.5(a). This rule has been applied by the Washington Supreme Court, holding that "[i]t is consistent with RAP 2.5(a) for a party to raise the issue of denial of procedural due process in a civil case at the appellate level for the first time." *Conner v. Universal Utilities*, 105 Wash.2d 168, 171, 712 P.2d 849 (1986); citing *Esmieu v. Schrag,* 88 Wash.2d 490, 497, 563 P.2d 203 (1977). The Supreme Court has also ruled that "failure to raise constitutional notice issues until [a] reply brief does not bar this argument." *Levinson v. Washington Horse Racing Com'n*, 48 Wash.App. 822, 828, 740 P.2d 898 (1987); citing *Conner* and *State v. Kitchen*, 46 Wash.App. 232, 730 P.2d 103 (1986).

In the present case, due process was first raised in reply to Commerce Park's claim, below, that Mr. Kramer failed to submit evidence or testimony to the hearing examiner. *CP 318-22.* If the issue may be raised for the first time in the present brief, then clearly a LUPA reply satisfies RAP 2.5(a).

Protected Property Rights

Commerce Park argues, without citation to authority, that "Mr. Kramer has absolutely no 'protected property right' in this case for which he is entitled to compensation." *Commerce Park Brief* at 30. Reviewing courts disregard arguments which are unsupported by citation to authority.[2] *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3(a).

Mr. Kramer's right to procedural due process is protected by the fifth and fourteenth amendments to the U.S. Constitution. Federal law is ultimately controlling in the deprivation of federal rights. *Sintra v. City of Seattle*, 119 Wash.2d 1, 14, 829 P.2d 765 (1992). "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Washington Independent Telephone Ass'n v. Washington Utilities and Transp. Com'n*, 149 Wash.2d 17, 24-25, 65 P.3d 319 (2003); citing *Board of Regents v. Roth,* 408 U.S. 564, 569-70, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

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[2]Commerce Park's Brief is replete with arguments which are unsupported by reference to authority, too numerous to mention. The holding in *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 809, 828 P.2d 549 (1992), and RAP 10.3(a), applies with equal force to diregard each unsupported argument.

This Court has observed that property interests "stem from an independent source such as state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Buffelen Woodworking Co. v. Cook*, 28 Wash.App. 501, 625 P.2d 703, *review denied* 95 Wash.2d 1020 (1981); citing *Board of Regents*, 408 U.S. at 577, 92 S.Ct. at 2709. In 1998, the Washington Supreme Court analyzed protected property interests that inhere in statutory schemes which place "significant substantive restrictions" upon administrative land-use decisions:

> [P]rocedural rights respecting permit issuance create property rights when they impose significant substantive restrictions on decision making.

Mission Springs, Inc. v. City of Spokane, 134 Wash.2d 947, 962-63, 954 P.2d 250 (1998); citing *Bateson v. Geisse,* 857 F.2d 1300, 1304-05 (9th Cir.1988) ("a statutory scheme which placed 'significant substantive restrictions' on the decision to grant a permit or license would be sufficient to confer due process rights."); *Wedges/Ledges of California, Inc. v. City of Phoenix,* 24 F.3d 56, 62 (9th Cir.1994) (procedural permitting requirements may transform a unilateral expectation into a property interest "if the procedural requirements are intended to be a 'significant substantive restriction' on . . . decision making") (quoting *Goodisman v. Lytle,* 724 F.2d 818, 820 (9th Cir.1984)).

In *Lutheran Day Care*, the Washington Supreme Court abandoned any distinction between ministerial and discretionary permits:

> "Along with the vast majority of federal courts, we recognize that denial of a building permit, under certain circumstances, may give rise to a substantive due process claim." . . . We see no reason to treat denial of a conditional use permit any differently.

Lutheran Day Care, 119 Wash.2d 91, 124-25, 829 P.2d 746 (1992); citing *R/L Assocs., Inc. v. Seattle*, 113 Wash.2d 402, 412, 780 P.2d 838 (1989).

The Washington Supreme Court recently adopted the holding in *Harris v. County of Riverside*, 904 F.2d 497 (9th Cir.1990), as establishing "a two part test to determine if procedural due process rights applied: first, the decision must be the type of government action requiring due process; and second, the decision must deprive the party of a protected property interest." *Chevron U.S.A., Inc. v. Puget Sound Growth Management Hearings Bd.*, 156 Wash.2d 131, 137, 124 P.3d 640 (2005); citing *Harris*, 904 F.2d at 501. The Court harmonized *Harris* with this Court's holding in *Holbrook, Inc. v. Clark County,* 112 Wash.App. 354, 49 P.3d 142 (2002), under the following rule:

> [T]hese cases stand for the proposition that due process rights, including the right to individual notice, may be implicated when a property owner's land is uniquely targeted by the government and, as a result, the landowner's property rights are actually and significantly affected . . .

Chevron, 156 Wash.2d at 138. The Ninth Circuit, in *Harris*, determined that even legislative rezones may be subject to procedural due process constraints where they have an "exceptional effect on . . . a specific, identifiable individual," and applied the second prong of the test as follows:

> We must also determine whether the County's decision deprived Harris of a protected property interest prior to applying procedural due process. We find that it did. "The right of [an owner] to devote [his] land to any legitimate use is properly within the protection of the Constitution."

Harris, 904 F.2d at 503; citing *Washington ex rel. Seattle Title Trust Co. v. Roberge,* 278 U.S. 116, 121, 49 S.Ct. 50, 51, 73 L.Ed. 210 (1928).

As an adjacent property owner, Mr. Kramer has a protected property interest and/or legitimate claim of entitlement, under the ordinance, to the provision of cross-circulation for future development of his property:

> The circulation plan *shall* demonstrate feasibility with development of adjacent properties, or may revise the off-site portion of prior approved plans. . . .
>
> (1) Cross Circulation. Cross-circulation *shall* be provided in a manner, where possible, that will allow subsequent developments to meet these standards. . . .
>
> (2) Access Street System. The access street system *shall*:
>
> (a) Provide convenient parcel access to and from adjacent arterials and/or collectors; . . .

CCC 40.350.030(B), emphasis added; *CP 337.*

Commerce Park's application for subdivision approval was subject to quasi-judicial review, requiring notice, comment and public hearing. Chapter 58.17 RCW; Chapter 40.350 CCC. The respondents argue that, having received notice of the *application*, Mr. Kramer is held to some version of constructive notice as to revisions which subsequent inquiry might reveal. However, this argument overlooks the fact that Commerce Park revised its application, and Clark County revised its conditions of approval, *after* publishing notice of proposed improvements which would have satisfied Mr. Kramer's justified expectations and property rights under the foregoing ordinance. The present case is similar in relevant particulars to *Harris*, where the Court held that individualized notice was required by revisions which resulted in "[l]oss of use and enjoyment" of the affected property:

> Individual notice is required here because the County specifically changed the zoning of Harris' land, upon receiving a request to make the change at least in part to restrict its use, after the County had published notice of a proposed General Plan Amendment which did not include this change.

Harris, 904 F.2d at 505. If individualized notice is required of restrictive changes to a legislative enactment, then such notice is also required of quasi-judicial exemptions from mandatory Code provisions, which result in restrictions upon the use of neighboring property.

Contrary to respondents' arguments, the individualized notice to which Mr. Kramer is entitled concerns *not* merely the application for neighboring subdivision, but the deprivation of protected property rights to cross-circulation under CCC 40.350.030(B), which were violated by a project revision that contradicted published notice. Even if general notice of a subdivision application were construed to entail constructive notice of all matters contained in the administrative file; nonetheless, the deprivation of Mr. Kramer's property right would mandate individualized notice under the authorities cited above.

Of course, procedural due process requires notice which is reasonably calculated, under the circumstances, to apprise affected parties of the pending action and to afford them the opportunity to present their objections. *Pease Hill Community Group v. County of Spokane*, 62 Wash.App. 800, 806, 816 P.2d 37 (1991). Hence, public participation requires some level of specificity as to the elements of notice. As discussed in *Appellant's Opening Brief*, the term "preliminary plat" is defined to include the "layout of streets," RCW 58.17.020(4). Even neighbors without protected property rights should be entitled to notice of street alignments, and the County should have published revised notice when street alignments were revised.

Standing

Although couched in terms of "failure to raise issues before the examiner," respondents' arguments, and the Superior Court's decision, regarding Mr. Kramer's failure to note the cross-circulation issue on the "Parties of Record Register" is actually a standing challenge. The Clark County Code clearly limits appellate standing to "parties of record." CCC40.510.030(H)(1). This term is defined, in the case of subdivision approvals, to include persons "signing the sign-in sheet noting the person's name, address and the subject matter in which they are interested." CCC 40.100.070. If Mr. Kramer had failed to qualify as a "party of record" under the foregoing provisions, he would have lacked standing to appeal. Under LUPA, defenses based upon lack of standing are waived unless raised at the initial hearing:

> (2) The parties *shall note* all motions on jurisdictional and procedural issues *for resolution at the initial hearing*, . . .
>
> (3) The defenses of *lack of standing*, untimely filing or service of the petition, and failure to join persons needed for just adjudication are waived if not raised by timely motion noted to be heard at the initial hearing, unless the court allows discovery on such issues.

RCW 36.70C.080, emphasis added.

In the present case, neither respondent noted a motion on jurisdictional issues for resolution at the initial hearing. *RP 18.* The record is entirely devoid of procedural motions except for Mr. Kramer's motion to supplement. *CP 329.* Having failed to raise the issue of Mr. Kramer's standing by motion at the initial hearing, the respondents waived that issue, and the Superior Court erred in affirming the examiner based upon lack of standing. RCW 36.70C.080.

Public Purpose

The respondents rely upon the fact that circulation across the Kramer property will be provided by an existing industrial/commercial driveway[3] in order to conclude that road extension will serve an allegedly private purpose. *County Brief* at 13, 15, *Commerce Park Brief* at 24, 26. This argument fails to acknowledge contrary provisions in the County Code, as follows:

> (1) Approval Criteria -- General. Private roads are not allowed in either the urban or rural area: . . .
>
> (c) When they connect two (2) public roads (*except for commercial or industrial uses in urban areas*); or . . .

CCC 40.350.030(B)(10)(b)(1)(c), emphasis added.

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[3]Although originally zoned industrial, Mr. Kramer's property has been approved for redesignation as "Highway Commercial."

The parenthetical exception clearly recognizes the function served by commercial and industrial driveways providing cross-circulation in urban areas. Indeed, severe traffic conflicts which would result if patrons could not use common driveways to navigate amongst neighboring commercial and industrial destinations. The cul-de-sac proposed by Commerce Park is *private*, which would refute the argument that cross-circulation cannot be provided by Mr. Kramer's existing driveway.[4] See Conditions A-4, A-7, A-9:

> A-9 Prior to the Final Site Plan approval driveway approaches along the proposed private cul-de-sac road shall be full movement accesses, and shall be constructed in accordance with the Standard Details Manual, Drawing F17.

CP 39; *AR 36*. The public function of commercial and industrial driveways is emphasized in the examiner's findings that turnaround requirements are satisfied by driveways on each industrial lot:

> The proposed private road is proposed as an over-length cul-de-sac. However, in industrial/commercial subdivisions, turnaround opportunities are provided within each individual development site.

CP 33; *AR 30*.

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[4]We object to Clark County's suggestion that Mr. Kramer has admitted to termination of cross-circulation at his western boundary. *County Brief* at 13. The same sentence cited by the County avers that the Kramer parcel "is already developed for commercial use." *CR 104*. Hence, the Kramer parcel already provides circulation over a commercial/industrial driveway connecting to NE 88th Street.

Unlimited* and *Burton

The respondents attempt to harmonize the present case with this Court's opinion in *Unlimited v. Kitsap County*, 50 Wash.App. 723, 750 P.2d 651 (1988); however, they fail to recognize key factual distinctions. As noted by this Court in *Burton v. Clark County*, the holding in *Unlimited* was based upon a lack of foreseeable connection:

> We assume that the government may sometimes rely on the future as well as the present when attempting to establish these relationships. At a minimum, however, it may not rely on the future unless the record furnishes a basis for inferring what the foreseeable future holds. Thus, in *Unlimited v. Kitsap County*, where the county wanted to exact an easement in favor of a parcel known as the Berg/Carslon property, we rejected the exaction because the county "intends to hold the exacted property until some undefined future time when Randall Way can be extended to connect with other, as yet unbuilt, roads," and because "[t]here is no expectation that the Berg/Carlson property is to be developed at the same time as Unlimited's development, or, for that matter, any time soon."

Burton v. Clark County, 91 Wash.App. 505, 524-25, 958 P.2d 343 (1998); citing *Unlimited*, 50 Wash.App. at 727-28. As argued at each level of appeal, and as depicted in aerial photographs submitted with Commerce Park's application, the Kramer property is *already* developed and provides circulation to NE 88th Street. *CR 206* (Commerce Park is outlined, and existing development of the Kramer property is visible immediately east).

Moreover, there was *no* ordinance in *Unlimited* that created a protected property right in neighboring landowners; rather:

> Kitsap County [had] adopted a comprehensive land use plan that called ultimately for the extension of Randall Way. To implement the plan, the County in early 1985 condemned a strip of property for the extension along Unlimited's southern (Randall Way) boundary. At the same time, the County decided to curve Randall Way to the south rather than extending it straight as called for by the comprehensive plan, so the condemned strip ran only from the intersection to the curve.

Unlimited, 50 Wash.App. at 724-25. Apparently, Kitsap County subsequently revised its intention and, at hearing, "[t]he County's desire to obtain more of Unlimited's property for the western extension of Randall Way was . . . made known to the hearing examiner." *Unlimited*, 50 Wash.App. at 726. Hence, code authority for the *Unlimited* exaction was even weaker than *Burton*, where the ordinance at least codified Clark County's desire for road extension as follows:

> Where a public or private road has been constructed or created in such a manner as to be able to be extended or widened in accordance with adopted road plans or this chapter, then: . . . (2) Right-of-way or private easements necessary to such extension or widening and falling within parcels being developed, shall be granted or created as a condition of development approval.

Burton, 91 Wash.App. 509, fn. 1 citing former CCC 12.05.370.

The remainder of Footnote 1, in *Burton*, concludes that "Clark County Code 12.05.370 is subject to, and thus has no impact on, the constitutional analysis that follows." *Id.* We have argued that this conclusion is inconsistent with federal and state takings law, and with the doctrine of unconstitutional conditions, because no constitutional violation occurs unless and until Commerce Park is deprived of compensation for the exaction, an issue which is premature because neither the examiner nor Superior Court sitting in LUPA capacity has authority to hear claims for compensation. *Appellant's Opening Brief* at 41-45.

Moreover, a rule that encourages counties to extort exactions, safe in the knowledge that they can avoid liability under an exaggerated interpretation of the doctrine of "unconstitutional conditions," would violate the talisman of takings jurisprudence, prohibiting "government action which forces some private persons alone to shoulder affirmative public burdens, 'which, in all fairness and justice, should be borne by the public as a whole.'" *Mission Springs*, 134 Wash.2d at 964; citing *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960); and *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835, n. 4, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).

As noted above, the present case differs from both *Unlimited* and *Burton* because the governing ordinance creates an enforceable property right to expect the provision of "cross-circulation . . . in a manner . . . that will allow subsequent developments to meet these standards . . . [including] convenient parcel access to and from adjacent arterials and/or collectors; . . ." CCC 40.350.030(B); *CP 337*.[5] Hence, it matters little that requiring the improvement may result in the filing of compensation claims by the applicant, for surely the County's failure to enforce the ordinance will result in similar claims on the part of the injured neighbor.[6] Moreover, the illegal action of approving a subdivision in violation of a mandatory ordinance raises the specter of substantive due process under the 14th Amendment because "agency action that is in violation of a statute is, by definition, arbitrary and capricious, or contrary to law." *Skamania County v. Columbia River Gorge Com'n*, 144 Wash.2d 30, 57, 26 P.3d 241 (2001).

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[5]Commerce Park, apparently advocating a process of "land use through the looking glass," urges that the ordinance is satisfied by the mere *submittal* of drawings depicting required improvements, without any expectation that the improvements will actually be constructed. *Commerce Park Brief* at 20. We submit that the only reason for requiring improvements is that proposed plans, once approved, will govern construction.

[6]Like the applicant, Mr. Kramer's right to takings compensation does not ripen until he is *denied compensation*. Claims alleging deprivation of substantive due process, on the other hand, ripen immediately upon final decision affirming the approval of the Commerce Park application without provision for required cross-circulation.

Contribution to a Public Problem

Commerce Park offers the disingenuous argument that its proposal sends no trips to the east because, without cross-circulation, they have no place to go in that direction. *Commerce Park Brief* at 27. We submit that this Court may follow its own knowledge that drivers will take the course of least interference and would, if available, circulate across the Kramer property to and from NE 88th Street. However, Commerce Park's argument is flawed for a more fundamental reason under the analysis in *Burton*:

> The county identifies three problems that it claims Burton's project will exacerbate. It emphasizes traffic circulation, for it wants to minimize "pocket neighborhoods" that lack access to adjoining neighborhoods. It also identifies, as related problems, traffic congestion and emergency vehicle access. The last, emergency vehicle access, has various facets, including (a) whether police and fire personnel can quickly reach the homes Burton intends to build, and (b) whether fire trucks responding to one of the homes can quickly turn around if called to another emergency elsewhere.
>
> Each identified problem is public, as opposed to private. Moreover, each will be exacerbated by Burton's project to at least a slight degree. Burton's project will bring more residents to the neighborhood and generate about 30 vehicle trips per day on neighborhood roads. This means an increase in the need for adequate traffic circulation in and out of the neighborhood; in the congestion on neighborhood roads (with or without better circulation); and in the likelihood that police and fire units will be called to and from the neighborhood in emergency situations. The record shows a reasonable relationship between project and problem.

Burton, 91 Wash.App. at 526. Based upon the foregoing analysis, *all* proposed development impacts the public problem of cross circulation. Considering only easterly traffic, Commerce Park projects 170 inbound trips during the AM Peak Hour, and 188 outbound trips during the PM Peak Hour. *AR 754*. We can hardly imagine a contingency in which at least some of these trips do not use the access to NE 88th Street provided by existing development of the Kramer parcel. Even if we could, the employment of possible world semantics does not rule out the need for emergency vehicle access to and from Commerce Park's proposed "over-length cul-de-sac." *CP 33*; *AR 30*. Clearly, the Commerce Park proposal will contribute to the existing public problem of cross-circulation under the holding in *Burton*.[7]

Solution of Public Problems

Both respondents argue that the circulation *to* the Kramer parcel would do nothing to solve public problems of traffic circulation. *County Brief* at 15-16; *Commerce Park Brief* at 27, 30. That this is merely a matter of description is evident in their respective failures to acknowledge circulation *through* the Kramer parcel to NE 88th Street. Both respondents observe that the Kramer parcel borders on State Road I-205 to the east and northeast and,

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[7]We note that County counsel, who participated in *Burton*, does not contest this element.

apparently, assume that there is no need for circulation except to locations east of I-205. The record, and logic, are devoid of any support for respondents' position. Anyone who has navigated amongst industrial and commercial uses can attest to the value of a traffic grid with multiple routes.

However, the foregoing argument is used by the respondents to raise the specter of RCW 82.02.020, which permits exactions that are reasonably necessary as a direct result of proposed development. We submit that the requirements of this statute are coextensive with the nexus requirements under *Burton*, and are satisfied by the showing, above, that Commerce Park will contribute to the public problem of cross-circulation, and that circulation through the Kramer parcel will help to alleviate the impacts.

Rough Proportionality

The final test in determining the existence of a compensable taking, is the presence or absence of "rough proportionality" between the impact and the exaction. The degree of specificity required for cross-circulation is clear under the holding in *Burton*:

> When and if the exacted road connects with Northeast 20th Avenue, it will tend to alleviate the identified public problems. Traffic will be able to circulate to the east as well as to the west; not all traffic will have to use the roads to the west; police and fire vehicles will be able to enter the neighborhood from either direction; and fire trucks will be able to exit the

> neighborhood without needing to turn around. Moreover, the exacted road will tend to alleviate the identified public problems in a way that is "roughly proportional" to the project's effect on those problems. Even though Burton's project will exacerbate the identified problems to only a small degree, the exacted road is only a small part of the solution to those problems, which is the creation of an overall street grid as the area changes from rural to urban.

Burton, 91 Wash.App. at 527. The foregoing analysis applies the U.S. Supreme Court holding in *Dolan*, that "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan v. City of Tigard*, 512 U.S. 374, 391, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). According to this Court's holding in *Burton*, proportionality is satisfied anytime that cross circulation will contribute to "the creation of an overall street grid as the area changes from rural to urban." *Burton*, 91 Wash.App. at 527.

Effect of Analysis

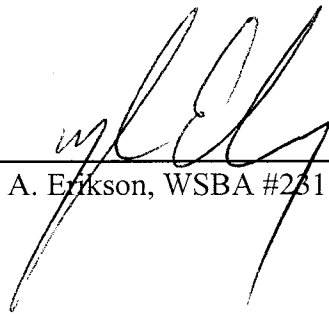
Where the *Burton* criteria are satisfied, dedications for cross-circulation are non-compensable under state and federal constitutions; but where the criteria remain unsatisfied, the exactions are compensable. However, application of the *Burton* criteria must not deprive neighboring landowners of protected property rights conferred under mandatory cross-

circulation ordinances. We submit that compensation for such rights, illegally deprived, may be as difficult to quantify as proportionality of the street-grid which they are intended to facilitate, but compensation is mandated no less.

Moreover, the mandate of County legislation must not be compromised by the "wait and see" approach inherent in respondents' position. Mr. Kramer relied upon mandatory provision of cross-circulation to serve his parcel. Dilution of the mandate will leave the Code awash with doubt; for who can speculate as to provisions that can withstand such an exaggerated notion of unconstitutional conditions as would nullify any mandate to avoid government liability. Of course, affirming Mr. Kramer's rights under the mandate may encourage local legislators to consider more carefully the ramifications of their enactments.

RESPECTFULLY SUBMITTED this 19th day of May, 2006.

ERIKSON & HIROKAWA, PLLC
Attorneys for the appellant



By: _____
Mark A. Erikson, WSBA #23106

2.51.090 Powers.

(1) Except as provided for in subsection (2) of this section, the examiner shall receive and examine available information, conduct public hearings and prepare a record thereof, and enter final decisions, subject to application, notice, public hearing and appeal procedures of 40.510, on the following matters:
- (a) Rezone applications and revisions or rescissions of agreements concomitant to rezones;
- (b) Preliminary plat applications and short plat appeals;
- (c) All other applications for permits or approvals, including appeals, under Title 40 of this code which call for an appeal of a Type I or Type II decision or a hearing on a Type III decision;
- (d) Administrative determinations and penalty appeals under the Commute Trip Reduction Ordinance (Ordinance 1993-01-21, codified as Chapter 5.50 of this code);
- (e) Development agreements authorized by RCW 36.70B.170.

(2) Notwithstanding the provisions of subsection (1) of this section, the following matters shall be heard by the planning commission:
- (a) Rezone applications initiated by the county to implement a newly adopted or amended comprehensive land use plan;
- (b) Any application otherwise delegated to the examiner under the provisions of subsection (1)(a) or (1)(c) of this section, which the planning director determines should be heard by the planning commission due to the substantial and unresolved land use policy issues presented by such application. The intent of this subsection is to divert to the planning commission only those extraordinary land use proposals which would result in major land use commitments for which neither the comprehensive land use plan, zoning ordinance, nor prior zoning actions provide clear policy guidance, direction or precedent;
- (c) Any application otherwise delegated to the examiner under the provisions of subsection (1) of this section, where due to disqualification, incapacity or other reason, no examiner is available to timely hear such matter. (Sec. 9 of Res. 1979-04-56; amended by Sec. 2 of Ord. 1981-01-06; amended by Sec. 1 of Ord. 1983-05-43: amended by Sec. 1 of Ord. 1984-10-81; amended by Sec. 1 of Ord. 1991-06-03; amended by Sec. 3 of Ord. 1993-01-21; amended by Sec. 4 of Ord. 1995-08-23; amended by Sec. 1 of Ord. 1996-02-21; amended by Sec. 4 of Ord. 1999-02-21)

Compile chapter

Party of record	"Party of record" means all persons, agencies or organizations who have submitted written comments in response to a notice of application, made oral comments in a formal public hearing conducted on the application, or requested in writing to be a "party of record." In the case of Type I decisions, the party of record shall include the applicant and any person who files a written request prior to the issuance of the decision. In the case of Type II decisions, the party of record shall include the applicant, and any person submitting to the responsible official written testimony, or a written request to be a "party of record," that is specific to a particular application prior to the issuance of the decision. In the case of Type III decisions, the party of record shall include the applicant and persons submitting written testimony before, during, or prior to the close of a public hearing; providing oral testimony at a public hearing; signing the sign-in sheet noting the person's name, address and the subject matter in which they are interested; or by submitting a written request to the responsible official to be a "party of record," that is specific to a particular application prior to the close of the subject public hearing. Notwithstanding any of the foregoing, no person shall be a party of record who has not furnished an accurate post office mailing address.

all public roads, and all nonresidential private roads, shall be paved and constructed with detached sidewalks.

Table 40.350.030-1. Rural/Urban Classification Conversion		
Rural Classification	Converts to	Urban Classification
Rural Major Collector (R-2)	♦ ∅	Urban Minor Arterial: two lanes, center turn lane and bike lanes (M-2cb)
Rural Minor Collector (RM-2)	♦ ∅	Urban Collector Arterial: two lanes (C-2)
Rural Local Access	♦ ∅	Urban Neighborhood Circulator
Rural Loop	♦ ∅	Urban Local Residential Access
Rural Cul-de-Sac[1]	♦ ∅	Urban Cul-de-Sac

[1] *No maximum length*

B. Standards for Development Review.
   1. Transportation Impact Study. The requirements for a transportation impact study are stated in Section 40.350.020(D).
   2. Circulation Plan.
      a. Purpose and Applicability. The purpose of this section is to ensure adequate cross-circulation in a manner which allows subsequent developments to meet these standards, and to provide a mechanism for integrating various streets into an efficient and safe transportation network.

      Developments that are required to conduct a transportation impact study or construct frontage improvements shall meet the requirements of this section.

      b. Information Requirements for a Circulation Plan. Applicants shall submit a circulation plan which includes the subject site and all adjacent parcels. Proposed streets must be shown to the point of connection with the existing street system within six hundred (600) feet. The circulation plan shall demonstrate feasibility with development of adjacent properties, or may revise the off-site portion of prior approved plans. Circulation plans shall also be consistent with the Arterial Atlas, as amended. A circulation plan shall be submitted at application. Draft circulation plans may be submitted at pre-application.
         (1) Information Requirements for Developments in Urban Area. Urban circulation plans shall be schematic in nature and to an engineering scale (e.g., 1″ = 100′, 1″ = 200′, 1″ = 400′). The plan should include sufficient off-site and on-site conditions to evaluate it against the review criteria. It shall include:
            (a) Proposed project boundary;
            (b) Existing and proposed streets, transit routes and facilities, and other pedestrian/bicycle destinations within six hundred (600) feet of the project boundary;
            (c) Site access points for vehicles, pedestrians, bicycles, and transit; and
            (d) Sensitive lands (wetlands, shoreline, geologic hazard, floodplain, etc.), if they are contained in the county's information package.

            The circulation plan should be prepared on eight and one-half (8 1/2) inch by eleven (11) inch (8 1/2″ x 11″) or eleven (11) inch by seventeen (17) inch (11″ x 17″) or twenty-four (24) inch by thirty-six (36) inch (24″ x 36″) format, and can be superimposed on the "arterials, C-Tran routes, parks and trails" and "elevation contours" page provided with the developer's GIS packet. Additional explanation or an additional legend may be required to adequately show proposed on-site facilities.
         (2) Information Requirements for Developments in Rural Area. Rural circulation

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plans shall be schematic in nature and based on the appropriate quarter-section map. The plan should include sufficient on-site and off-site conditions to evaluate it against the review criteria. Rural circulation plans shall include:

(a) Proposed project boundary;
(b) How the project site connects to the existing street system;
(c) Any arterials identified in the arterials atlas, as amended, within eight hundred (800) feet of the site.

c. Review Criteria for an Urban Circulation Plan.

(1) Cross-Circulation. Cross-circulation shall be provided in a manner, where possible, that will allow subsequent developments to meet these standards.

(a) Block Length. Block lengths shall be between one hundred (100) to eight hundred (800) feet; provided, that where a block is partially defined by an arterial or industrial road the block lengths along the arterial shall be no less than the minimum full access intersection spacing specified in Table 40.350.030-2 through Table 40.350.030-6.

(b) Block Perimeter. The block perimeter shall not exceed three thousand two hundred (3,200) feet unless accessway(s) for pedestrian or bicycle circulation are provided or where topographic or other physical constraints preclude achieving this standard.

(2) Access Street System. The access street system shall:

(a) Provide convenient parcel access to and from adjacent arterials and/or collectors;
(b) Be designed to discourage external traffic from short-cutting;
(c) Be designed to discourage vehicular speeds in excess of legal speed limits;
(d) Be designed for convenient circulation of internal traffic without reliance on the arterial systems;
(e) Support direct travel by pedestrians, bicyclists, and transit users; and
(f) Discourage unnecessary streets and hard surfaces.

d. Review Criteria for Rural Circulation Plan. Rural circulation plan shall show how the development connects to arterials, within eight hundred (800) feet of the site, that are defined in the Arterial Atlas.

3. Transportation Design Criteria. The design criteria set out in Table 40.350.030-2 through 40.350.030-6 are adopted as a portion of the Clark County standard specifications. Such criteria are applicable to roads located within and adjacent to a development. These criteria are intended for normal conditions. The responsible official may require higher standards for unusual site conditions.

Table 40.350.030-2. Design Criteria For Urban Arterials and Urban Collectors

	Arterials			Collector
Design Criteria	**Parkway Arterial Dwgs 1 – 1a**	**Principal Arterial Dwgs 2 – 5a**	**Minor Arterial Dwgs 6 – 10**	**Urban Collector Dwgs 11 – 12**
Maximum Spacing		2 – 5 miles	< 2 miles	< 2 miles
Minimum R/W (ft.) 2 lane	N/A	N/A	N/A	60
3 lanes w/bike	N/A	80	80	70
4 lane	N/A	N/A	80	N/A
4 lane w/CLT	90	90	90	N/A
4 lane w/bike	N/A	N/A	90	N/A
4 lane w/CLT and bike	100	100	100	N/A
6 lane w/CLT	110	110	N/A	N/A
6 lane w/CLT and bike	120	120	N/A	N/A
Lane Width (ft.) 2 lane	N/A	N/A	N/A	11
3 lanes w/bike	N/A	12	12	12
4 lane	N/A	N/A	12 – 13	N/A

or stubbed in such a manner as to be able to be extended or widened in accordance with adopted road plans, prior approved development or this section, including but not limited to maximum length requirements for cul-de-sacs as established in Table 40.350.030-4, design criteria for urban access roads, then:

(1) Connection With Adjacent Areas. All residences, buildings or structures shall be constructed in such a position on the property that they will not interfere with the extension or widening of the roadway to adjacent areas and shall be so situated that such extension will make orderly and planned development for additional road installations to meet the reasonable minimum requirements of good and safe traffic circulation, consistent with applicable zoning setbacks.

(2) Right-of-Way for Street Extensions. Right-of-way or private easements necessary to such extension or widening and falling within parcels being developed shall be granted or created as a condition of development approval.

b. Urban Developments.

(1) Provisions for Future Extensions. Any street within the urban area for which an extension in the future is planned shall be extended to the edge of the property being developed through the plat, short plat or site plan approval process, unless otherwise approved by the review authority. The street stub shall be a full street section, including sidewalks.

(2) Use of Temporary Turnaround. If a road serving more than eighteen (18) dwelling units or more than one hundred fifty (150) feet in length temporarily terminates at a property boundary, a temporary turnaround cul-de-sac bulb consistent with this standard shall be constructed near the plat boundary. The bulb shall be paved and shall be ninety (90) feet in diameter, which may include the width of the roadway with sidewalks, where required, terminating at the point where the bulb radius begins. Removal of the temporary turnaround and extension of the sidewalk shall be the responsibility of the developer who extends the road (see the Standard Details Manual). The easement for a temporary turnaround may be extinguished without county approval after the temporary turnaround is determined to be no longer necessary by the county.

(3) Barricades. A barricade shall be placed at the end of all stub streets, whether or not a temporary turnaround is constructed. For placement of temporary and permanent barricades, see Section 40.350.030(C)(4)(f).

c. Rural Developments. For any road in the rural area for which an extension is planned, the right-of-way falling within parcels being developed shall be dedicated where the existing platting pattern, the development under review and the potential for development of adjacent lots demonstrates a need for the dedication.

10. Private Roads.

a. Purpose. The purpose of private road standards is to provide an option to retain rural character, reduce costs to serve large rural lots, and allow more control, security, and sense of identity when public roads are not needed for public circulation.

For private road maintenance agreement, private road inspection, and developer maintenance obligation for private roads, see Section 40.350.030(C)(4)(g).

b. Approval Criteria and Requirements.

(1) Approval Criteria – General. Private roads are not allowed in either the urban or rural area:

(a) When they conflict with the Arterial Atlas, as amended; or

(b) When they are needed for public circulation; or

(c) When they connect two (2) public roads (except for commercial or industrial uses in urban areas); or

(d) When they are to serve more than fifty (50) potential residential lots in rural areas or one hundred (100) lots in urban areas, created after April 12, 1994, except within a planned unit development; provided, that where expansion of a public road is not presently feasible, the limitations of this subsection shall not apply if the affected internal and frontage roads are improved to public

standards (if otherwise required) and dedicated to the county, with the acceptance of such dedication(s) being deferred until extension of a public road allows connection.

(2) Additional Requirements for Urban Private Roads. Private roads within developments may be allowed, provided they meet the following additional criteria:

(a) Structural sections shall be the same as for public roads of equivalent classification;

(b) A pedestrian access plan shall be approved;

(c) Internal traffic calming measures or devices such as speed humps or traffic circles may be required; and

(d) Minimum curb to curb width shall be twenty (20) feet with parallel parking prohibited on streets that are less than twenty-four (24) feet wide; provided, in nonresidential areas, the minimum curb to curb width shall be twenty (20) feet with parallel parking prohibited on streets that are less than twenty-eight (28) feet wide.

c. Notice. The following statement is required on the face of any site plan, or binding site plan or within the Developer Covenants to Clark County for any subdivision or short plat containing a private road: "Clark County has no responsibility to improve or maintain the private roads contained within or private roads providing access to the property described in this development. Any private access street shall remain a private street unless it is upgraded to public street standards at the expense of the developer or abutting lot owners to include hard surface paving and is accepted by the county for public ownership and maintenance."

11. Joint Driveways. A maximum of three (3) legal lots may use a joint driveway to access a public or private road.

12. Cul-de-Sacs and Turnarounds.

a. Cul-de-Sacs.

(1) Whenever a residential urban cul-de-sac street is more than one hundred fifty (150) feet long, a bulb or hammerhead shall be constructed as follows:

(a) Minimum right-of-way diameter across bulb section: one hundred (100) feet in a permanent cul-de-sac; ninety (90) feet in a temporary cul-de-sac, with any bulb area lying outside straight-street right-of-way provided as temporary easement pending forward extension of the street. Right-of-way may be reduced to eighty (80) feet provided utilities and necessary drainage are accommodated on permanent easements within the development and a thicker abutting sidewalk section is utilized (see the Standard Details Manual).

(b) Urban Cul-de-Sac or Eyebrow Island. Optional feature for any cul-de-sac when the bulb's paved diameter is ninety (90) feet or less; mandatory when the bulb's paved diameter exceeds ninety (90) feet. If provided, islands shall have full-depth vertical curbs. Minimum island diameter shall be twenty (20) feet and there shall be at least twenty-two (22) feet of paved traveled way in a shoulder type section; thirty (30) feet of paved traveled way in a curb type section around the circumference. Islands shall be grassed or landscaped. Islands shall be maintained by the adjoining lot owners. Islands are required on eyebrows with a radius greater than thirty (30) feet. The minimum island diameter shall be ten (10) feet.

(2) In the urban and urban holding areas of the county, a permanent cul-de-sac shall not be longer than six hundred (600) feet measured from curb line of intersecting street to the center of the bulb section. Proposed modifications to this rule will be considered by the review authority based on pertinent traffic planning factors such as topography, sensitive areas and existing development.

(3) In the rural area of the county, there is no limitation to the length of a dead-end road, loop road, or cul-de-sac; provided, however, that approved turnarounds on

roads greater than one-half mile long are provided every one thousand three hundred twenty (1,320) feet or as close to that distance as practical considering topography, natural features and existing manmade structures. Approved turnarounds may include cul-de-sacs, which may include the width of the roadway, intersecting public or private roads, hammerheads, or driveways meeting the dimensional requirements of a hammerhead. Within the wildland urban interface/intermix, approved turnarounds shall be provided every one thousand (1,000) feet. Dimensional requirements for all transportation related features in this subsection are as drawn in the Standard Details Manual.

Notwithstanding the foregoing, the development approval authority may restrict the length of a dead-end road or cul-de-sac where it is clearly shown that either:

(a) There is a practical alternative design that results in significantly superior actual or potential road connectivity or emergency services accessibility; or

(b) The presence of unstable slopes, flood risk, or other road blockage hazard presents a significant potential for isolating a substantial area from emergency services.

(4) The review authority may require an off-street accessway or an emergency vehicle access to connect a cul-de-sac at its terminus with other streets, parks, schools, bus stops, or other pedestrian traffic generators, if the need exists for pedestrian and bike circulation.

b. Turnarounds.

(1) When four (4) or more lots are served on a private road greater than one hundred fifty (150) feet in length, an approved turnaround shall be provided at the end of the private road. Easements may be required to be expanded to accommodate turnaround requirements.

(2) Approved turnarounds may include cul-de-sacs with an approved diameter in accordance with the Standard Details Manual (which may include the width of the roadway), or hammerheads, intersecting public or private roads or any alternative design approved through the road modification process. Dimensional requirements for all transportation related features in this subsection are as drawn in the Standard Details Manual.

(3) For those areas identified as wildland urban interface/intermix, refer to Chapter 15.13 as amended.

13. Urban Neighborhood Traffic Management.

a. Purposes. Urban neighborhood traffic management is intended to manage traffic speeds within residential neighborhoods and to discourage external traffic cutting through residential neighborhoods.

b. Applicability. The provisions of this section shall apply only to access roads within a development in the R1-5, R1-6, R1-7.5, R1-10, R1-20, R-12, R-18, R-22, R-30, R-43, OR-15, OR-18, OR-22, OR-30, OR-43, CR-1, CR-2, or MX zoning districts which meet one (1) of the following conditions:

(1) Projected average daily trip of greater than six hundred (600) and less than two thousand (2,000) motor vehicles and a sight distance in excess of six hundred (600) feet; or

(2) Determined by the County Engineer, not his or her designee, that traffic calming measures and/or traffic calming devices are warranted.

The review authority may waive the requirements of this section for Type I and Type II applications where the conditions listed above will not occur.

c. Standards and Requirements. If the condition in Section 40.350.030(B)(13)(b) occurs, traffic calming measures and/or traffic calming devices shall be required:

(1) Traffic Calming Measures. Traffic calming measures, such as "T" intersection, street trees, curvilinear streets, or entry treatments, shall be incorporated into the overall development design to manage traffic speeds.

(2) Traffic Calming Devices. Traffic calming devices, such as speed bump/hump and the devices shown in the Standard Details Manual or as approved by the

provided in Section 40.510.030(C)(2), the responsible official shall send the applicant a written statement indicating that the application is incomplete based on a lack of information and listing what is required to make the application fully complete.

a. The statement shall specify a date by which the required missing information must be provided to restart the fully complete review process pursuant to Section 40.510.030 (C)(2)(b). The statement shall state that an applicant can apply to extend the deadline for filing the required information, and explain how to do so.

b. The statement also may include recommendations for additional information that, although not necessary to make the application fully complete, is recommended to address other issues that are or may be relevant to the review.

6. If the required information is not submitted by the date specified and the responsible official has not extended that date, within seven (7) calendar days after that date the responsible official shall take the action in Section 40.510.030(C)(6)(a) or (C)(6)(b). If the required information is submitted by the date specified, then within fourteen (14) calendar days the responsible official shall decide whether the application is fully complete and, if not, the responsible official shall:

   a. Reject and return the application and scheduled fees and mail to the applicant a written statement which lists the remaining additional information needed to make the application fully complete; or

   b. Issue a decision denying the application, based on a lack of information; provided, the responsible official may allow the applicant to restart the fully complete review process a second time by providing the required missing information by a date specified by the responsible official, in which case the responsible official shall retain the application and fee pending expiration of that date or a fully complete review of the application as amended by that date.

7. If the responsible official decides an application is fully complete, then the responsible official shall, within fourteen (14) calendar days of making this determination:

   a. Forward the application to the county staff responsible for processing it, and schedule public hearing;

   b. Send a written notice of receipt of a complete application to the applicant acknowledging acceptance, listing the name and telephone number of a contact person at the review authority, and describing the expected review schedule, including the date of a hearing for a Type III process;

   c. Prepare a public notice in accordance with Section 40.510.030(E).

8. An application shall be determined fully complete if a written determination has not been mailed to the applicant within twenty-eight (28) calendar days of the date the application is submitted. An application shall be determined fully complete if a written determination has not been mailed to the applicant within fourteen (14) calendar days of the date that the necessary additional information is submitted.

9. A fully complete determination shall not preclude the county from requesting additional information, studies or changes to submitted information or plans if new information is required or substantial changes to the proposed action occur.

D. Procedure.

1. At least one (1) public hearing before the hearing examiner is required. The public hearing should be held within seventy-eight (78) calendar days after the date the responsible official issues the determination that the application is fully complete.

2. At least fifteen (15) calendar days before the date of a hearing, the responsible official shall issue a public notice of the hearing consistent with the requirements in Section 40.510.030(E).

3. At least fifteen (15) calendar days before the date of the hearing for an application(s), the responsible official shall issue a written staff report and recommendation regarding the application(s), shall make available to the public a copy of the staff report for review and inspection, and shall mail a copy of the staff report and recommendation without charge to the hearing examiner and to the applicant and applicant's representative. The responsible

official shall mail or provide a copy of the staff report at reasonable charge to other parties who request it.

4. Public hearings shall be conducted in accordance with the rules of procedure adopted by the hearing examiner, except to the extent waived by the hearing examiner. A public hearing shall be recorded electronically.
   a. At the beginning of a hearing or agenda of hearings, the hearing examiner shall:
      (1) State that testimony will be received only if it is relevant to the applicable approval criteria and development standards and is not unduly repetitious;
      (2) Identify the applicable approval criteria and development standards;
      (3) State that the hearing examiner will consider any party's request that the hearing be continued or that the record be kept open for a period of time and may grant or deny that request;
      (4) State that the hearing examiner must be impartial and whether the hearing examiner has had any ex parte contact or has any personal or business interest in the application. The hearing examiner shall afford parties an opportunity to challenge the impartiality of the authority;
      (5) State whether the hearing examiner has visited the site;
      (6) State that persons who want to receive notice of the decision may sign a list for that purpose at the hearing and where that list is kept; and
      (7) Summarize the conduct of the hearing.
   b. At the conclusion of the hearing on each application, the hearing examiner shall announce one (1) of the following actions:
      (1) That the hearing is continued. If the hearing is continued to a place, date and time certain, then additional notice of the continued hearing is not required to be mailed, published or posted. If the hearing is not continued to a place, date and time certain, then notice of the continued hearing shall be given as though it was the initial hearing. The hearing examiner shall adopt guidelines for reviewing requests for continuances;
      (2) That the public record is held open to a date and time certain. The hearing examiner shall state where additional written evidence and testimony can be sent, and shall announce any limits on the nature of the evidence that will be received after the hearing. The hearing examiner may adopt guidelines for reviewing requests to hold open the record;
      (3) That the application(s) is/are taken under advisement, and a final order will be issued as provided in Section 40.510.030(D)(6); or
      (4) That the application(s) is/are denied, approved or approved with conditions, together with a brief summary of the basis for the decision, and that a final order will be issued as provided in Section 40.510.030(D)(5).
5. Unless the applicant agrees to allow more time, within fourteen (14) calendar days after the date the record closes, the hearing examiner shall issue a written decision regarding the application(s); provided, the hearing examiner shall not issue a written decision regarding the application(s) until at least fifteen (15) calendar days after the threshold determination under Chapter 40.570 is made. The decision shall include:
   a. A statement of the applicable criteria and standards in this code and other applicable law;
   b. A statement of the facts that the hearing examiner found showed the application does or does not comply with each applicable approval criterion and standards;
   c. The reasons for a conclusion to approve or deny; and
   d. The decision to deny or approve the application and, if approved, any conditions of approval necessary to ensure the proposed development will comply with applicable criteria and standards.
6. Within seven (7) calendar days from the date of the decision, the responsible official shall mail the notice of decision to the applicant and applicant's representative, the neighborhood association in whose area the property in question is situated, and all parties of record. The mailing shall include a notice which includes the following

information:

a. A statement that the decision and SEPA determination, if applicable, are final, but may be appealed as provided in Section 40.510.030(H) to the board within fourteen (14) calendar days after the date the notice is mailed. The appeal closing date shall be listed in boldface type. The statement shall describe how a party may appeal the decision or SEPA determination, or both, including applicable fees and the elements of a petition for review;

b. A statement that the complete case file is available for review. The statement shall list the place, days and times where the case file is available and the name and telephone number of the county representative to contact for information about the case.

7. Notice of Agricultural, Forest or Mineral Resource Activities.

a. All plats, building permits or development approvals under this title issued for residential development activities on, or within a radius of five hundred (500) feet for lands zoned agriculture-wildlife (AG-WL), agriculture (AG-20), forest (FR-40, FR-80), or surface mining (S), or in current use pursuant to Chapter 84.34 RCW, shall contain or be accompanied by a notice provided by the responsible official. Such notice shall include the following disclosure:

The subject property is within or near designated agricultural land, forest land or mineral resource land (as applicable) on which a variety of commercial activities may occur that are not compatible with residential development for certain periods of limited duration. Potential discomforts or inconveniences may include, but are not limited to: noise, odors, fumes, dust, smoke, insects, operation of machinery (including aircraft) during any twenty-four (24) hour period, storage and disposal of manure, and the application by spraying or otherwise of chemical fertilizers, soil amendments, herbicides and pesticides.

b. In the case of subdivisions or short plats, such notice shall be provided in the Developer Covenants to Clark County; in the case of recorded binding site plans, such notice shall be recorded separately with the County Auditor.

(Amended: Ord. 2005-04-12)

E. Public Notice.

1. The notice of the application shall include the following information, to the extent known.

a. The project name, the case file number(s), date of application, the date of the application was determined fully complete, and the date of the notice of fully complete application;

b. A description of the proposed project and a list of project permits included with the application;

c. A description of the site, including current zoning and nearest road intersections, reasonably sufficient to inform the reader of its location and zoning;

d. A map showing the subject property in relation to other properties or a reduced copy of the site plan;

e. The name of the applicant or applicant's representative and the name, address and telephone number of a contact person for the applicant, if any;

f. A list of applicable development regulations;

g. A statement of the public comment period, that the public has the right to comment on the application, receive notice of and participate in any hearings, request a copy of the decision once made, and any appeal rights. A statement shall indicate that written comments received by the county within fifteen (15) calendar days from the date of the notice will be considered by staff in their recommendations;

h. The date, time, place and type of hearing;

i. A statement of the preliminary SEPA determination, if one has been made;

j. A statement that a consolidated staff report and SEPA review will be available for inspection at least fifteen (15) calendar days before the public hearing, and the deadline for submitting written comments;

C
WEST'S REVISED CODE OF WASHINGTON ANNOTATED
TITLE 36. COUNTIES
CHAPTER 36.70C. JUDICIAL REVIEW OF LAND USE DECISIONS
→**36.70C.080.** Initial hearing

(1) Within seven days after the petition is served on the parties identified in RCW 36.70C.040(2), the petitioner shall note, according to the local rules of superior court, an initial hearing on jurisdictional and preliminary matters. This initial hearing shall be set no sooner than thirty-five days and no later than fifty days after the petition is served on the parties identified in RCW 36.70C.040(2).

(2) The parties shall note all motions on jurisdictional and procedural issues for resolution at the initial hearing, except that a motion to allow discovery may be brought sooner. Where confirmation of motions is required, each party shall be responsible for confirming its own motions.

(3) The defenses of lack of standing, untimely filing or service of the petition, and failure to join persons needed for just adjudication are waived if not raised by timely motion noted to be heard at the initial hearing, unless the court allows discovery on such issues.

(4) The petitioner shall move the court for an order at the initial hearing that sets the date on which the record must be submitted, sets a briefing schedule, sets a discovery schedule if discovery is to be allowed, and sets a date for the hearing or trial on the merits.

(5) The parties may waive the initial hearing by scheduling with the court a date for the hearing or trial on the merits and filing a stipulated order that resolves the jurisdictional and procedural issues raised by the petition, including the issues identified in subsections (3) and (4) of this section.

(6) A party need not file an answer to the petition.

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C
WEST'S REVISED CODE OF WASHINGTON ANNOTATED
TITLE 58. BOUNDARIES AND PLATS
CHAPTER 58.17. PLATS--SUBDIVISIONS--DEDICATIONS
→**58.17.020.** Definitions

As used in this chapter, unless the context or subject matter clearly requires otherwise, the words or phrases defined in this section shall have the indicated meanings.

(1) "Subdivision" is the division or redivision of land into five or more lots, tracts, parcels, sites, or divisions for the purpose of sale, lease, or transfer of ownership, except as provided in subsection (6) of this section.

(2) "Plat" is a map or representation of a subdivision, showing thereon the division of a tract or parcel of land into lots, blocks, streets and alleys, or other divisions and dedications.

(3) "Dedication" is the deliberate appropriation of land by an owner for any general and public uses, reserving to himself or herself no other rights than such as are compatible with the full exercise and enjoyment of the public uses to which the property has been devoted. The intention to dedicate shall be evidenced by the owner by the presentment for filing of a final plat or short plat showing the dedication thereon; and, the acceptance by the public shall be evidenced by the approval of such plat for filing by the appropriate governmental unit.

A dedication of an area of less than two acres for use as a public park may include a designation of a name for the park, in honor of a deceased individual of good character.

(4) "Preliminary plat" is a neat and approximate drawing of a proposed subdivision showing the general layout of streets and alleys, lots, blocks, and other elements of a subdivision consistent with the requirements of this chapter. The preliminary plat shall be the basis for the approval or disapproval of the general layout of a subdivision.

(5) "Final plat" is the final drawing of the subdivision and dedication prepared for filing for record with the county auditor and containing all elements and requirements set forth in this chapter and in local regulations adopted under this chapter.

(6) "Short subdivision" is the division or redivision of land into four or fewer lots, tracts, parcels, sites, or divisions for the purpose of sale, lease, or transfer of ownership. However, the legislative authority of any city or town may by local ordinance increase the number of lots, tracts, or parcels to be regulated as short subdivisions to a maximum of nine. The legislative authority of any county planning under RCW 36.70A.040 that has adopted a comprehensive plan and development regulations in compliance with chapter 36.70A RCW may by ordinance increase the number of lots, tracts, or parcels to be regulated as short subdivisions to a maximum of nine in any urban growth area.

(7) "Binding site plan" means a drawing to a scale specified by local ordinance which: (a) Identifies and shows the areas and locations of all streets, roads, improvements, utilities, open spaces, and any other matters specified by local regulations; (b) contains inscriptions or attachments setting forth such appropriate limitations and conditions for the use of the land as are established by the local government body having authority to approve the site plan; and (c) contains provisions making any development be in conformity with the site plan.

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West's RCWA **58.17.020**

(8) "Short plat" is the map or representation of a short subdivision.

(9) "Lot" is a fractional part of divided lands having fixed boundaries, being of sufficient area and dimension to meet minimum zoning requirements for width and area. The term shall include tracts or parcels.

(10) "Block" is a group of lots, tracts, or parcels within well defined and fixed boundaries.

(11) "County treasurer" shall be as defined in chapter 36.29 RCW or the office or person assigned such duties under a county charter.

(12) "County auditor" shall be as defined in chapter 36.22 RCW or the office or person assigned such duties under a county charter.

(13) "County road engineer" shall be as defined in chapter 36.40 RCW or the office or person assigned such duties under a county charter.

(14) "Planning commission" means that body as defined in chapter 36.70, 35.63, or 35A.63 RCW as designated by the legislative body to perform a planning function or that body assigned such duties and responsibilities under a city or county charter.

(15) "County commissioner" shall be as defined in chapter 36.32 RCW or the body assigned such duties under a county charter.

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West's RCWA **82.02.020**

This document has been updated. Use KEYCITE.

WEST'S REVISED CODE OF WASHINGTON ANNOTATED
TITLE 82. EXCISE TAXES
CHAPTER 82.02. **GENERAL PROVISIONS**

→82.02.020. State preempts certain tax fields--Fees prohibited for the development of land or buildings--Voluntary payments by developers authorized-- Limitations--Exceptions

Except only as expressly provided in chapters 67.28 and 82.14 RCW, the state preempts the field of imposing taxes upon retail sales of tangible personal property, the use of tangible personal property, parimutuel wagering authorized pursuant to RCW 67.16.060, conveyances, and cigarettes, and no county, town, or other municipal subdivision shall have the right to impose taxes of that nature. Except as provided in RCW 82.02.050 through 82.02.090, no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space or appurtenance thereto, or on the development, subdivision, classification, or reclassification of land. However, this section does not preclude dedications of land or easements within the proposed development or plat which the county, city, town, or other municipal corporation can demonstrate are reasonably necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply.

This section does not prohibit voluntary agreements with counties, cities, towns, or other municipal corporations that allow a payment in lieu of a dedication of land or to mitigate a direct impact that has been identified as a consequence of a proposed development, subdivision, or plat. A local government shall not use such voluntary agreements for local off-site transportation improvements within the geographic boundaries of the area or areas covered by an adopted transportation program authorized by chapter 39.92 RCW. Any such voluntary agreement is subject to the following provisions:

(1) The payment shall be held in a reserve account and may only be expended to fund a capital improvement agreed upon by the parties to mitigate the identified, direct impact;

(2) The payment shall be expended in all cases within five years of collection; and

(3) Any payment not so expended shall be refunded with interest to be calculated from the original date the deposit was received by the county and at the same rate applied to tax refunds pursuant to RCW 84.69.100; however, if the payment is not expended within five years due to delay attributable to the developer, the payment shall be refunded without interest.

No county, city, town, or other municipal corporation shall require any payment as part of such a voluntary agreement which the county, city, town, or other municipal corporation cannot establish is reasonably necessary as a direct result of the proposed development or plat.

Nothing in this section prohibits cities, towns, counties, or other municipal corporations from collecting reasonable fees from an applicant for a permit or other governmental approval to cover the cost to the city, town, county, or other municipal corporation of processing applications, inspecting and reviewing plans, or preparing detailed statements required by chapter 43.21C RCW.

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West's RCWA **82.02.020**

This section does not limit the existing authority of any county, city, town, or other municipal corporation to impose special assessments on property specifically benefitted thereby in the manner prescribed by law.

Nothing in this section prohibits counties, cities, or towns from imposing or permits counties, cities, or towns to impose water, sewer, natural gas, drainage utility, and drainage system charges: PROVIDED, That no such charge shall exceed the proportionate share of such utility or system's capital costs which the county, city, or town can demonstrate are attributable to the property being charged: PROVIDED FURTHER, That these provisions shall not be interpreted to expand or contract any existing authority of counties, cities, or towns to impose such charges.

Nothing in this section prohibits a transportation benefit district from imposing fees or charges authorized in RCW 36.73.120 nor prohibits the legislative authority of a county, city, or town from approving the imposition of such fees within a transportation benefit district.

Nothing in this section prohibits counties, cities, or towns from imposing transportation impact fees authorized pursuant to chapter 39.92 RCW.

Nothing in this section prohibits counties, cities, or towns from requiring property owners to provide relocation assistance to tenants under RCW 59.18.440 and 59.18.450.

This section does not apply to special purpose districts formed and acting pursuant to Titles 54, 57, or 87 RCW, nor is the authority conferred by these titles affected.

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STATE OF WASHINGTON
BY

COURT OF APPEALS

OF THE STATE OF WASHINGTON, DIVISION II

RICHARD KRAMER, petitioner, v. CLARK COUNTY, a political subdivision of the State of Washington; MILDREN DESIGN GROUP, P.C., an Oregon Corporation; and I-205 COMMERCE PARK, L.L.C., an Oregon limited liability company; Respondents.	**Court of Appeals No. 34058-5-II** **Clark County No. 05-2-00681-5** **AFFIDAVIT OF SERVICE**

STATE OF WASHINGTON)
) ss
County of Clark)

I, Laura L. Longee, being first duly sworn upon oath, depose and say:

I am a citizen of the United States of America, over the age of 18 years, and competent to be a witness herein.

On the 22nd day of May, 2006, I served true and complete copies, of the following

ERIKSON & HIROKAWA, PLLC
ATTORNEYS AT LAW
Fourth Floor, Main Place
1111 Main Street, Suite 402
Vancouver, WA 98660-2958
(360) 696-1012

documents :

(i) *Appellants' Reply Brief*, and

(ii) *Affidavit of Service*

on the following by **Express Mail, postage pre-paid to:**

David Ponzoha
Court of Appeals, Division II
805 Broadway, Suite 300
Tacoma, WA 98402-4454

a true / correct copy to counsel by **Hand Delivery** on the following:

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Vancouver, WA 98666

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Vancouver, WA 98666

By: Laura L. Longee
Laura L. Longee

SUBSCRIBED AND SWORN to before me this 22nd day of May, 2006.

By: Hisako Kristina Eklove
Hisako Kristina Eklove
NOTARY PUBLIC in and for the State of Washington, residing in Washougal.
My commission expires July 15, 2009.

HISAKO KRISTINA EKLOVE
COMMISSION EXPIRES
NOTARY
PUBLIC
JULY 15, 2009
STATE OF WASHINGTON

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