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STATE OF WASHINGTON
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No. 39407-3-II

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

CITY OF FEDERAL WAY, a Washington municipal corporation,

Petitioner/Respondent,

v.

TOWN & COUNTRY REAL ESTATE, LLC, a Washington limited liability company; FRANK A. SCARSELLA, taxpayer; EMIL P. SCARSELLA, taxpayer; and the CITY OF TACOMA, a Washington municipal corporation,

Respondents/Appellants.

# BRIEF OF ~~RESPONDENT~~ (Petitioner) CITY OF TACOMA

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## I. INTRODUCTION

The central issue in this case is whether, under RCW 82.02.020 and the State Environmental Policy Act ("SEPA"), RCW Chapter 43.21C, a local government may require a developer to contribute to the cost of planned transportation improvements to certain roadways when the developer's project adds traffic to those roadways and is a concurrent cause of the need for the improvements, but is not the sole triggering cause of that need – the "straw that broke the camel's back."

In 2006, Appellant Town & Country Real Estate, LLC ("T&C") applied to the City of Tacoma for approval of a preliminary plat (the "Scarsella plat") of property located in Tacoma. Federal Way prepared a site-specific analysis showing the traffic generated by the Scarsella plat and the distribution and assignment of that traffic on Federal Way's road network. It is undisputed that the Scarsella plat will generate hundreds of new vehicle trips and that most of these trips will travel north into Federal Way. It is also undisputed that this new traffic will use two roadways for which Federal Way had planned improvements because they were projected to fail as a result of new development. Based on Federal Way's traffic analysis, Tacoma staff imposed a SEPA condition requiring T&C to pay a fee to Federal Way to mitigate the proportional impacts of the traffic generated by its plat.

In 2008, T&C appealed the traffic mitigation condition to the Tacoma Hearing Examiner. After a two-day hearing, the Examiner issued a decision concluding that the City of Tacoma may not require T&C to contribute a pro rata share to the cost of the planned roadway improvements under RCW 82.02.020 and SEPA. The Examiner found that the Scarsella plat's traffic would contribute to a level of service ("LOS") failure on the roadways, but concluded that the traffic condition was unlawful because the plat was not the sole triggering cause of the LOS failures. Instead, the roadways were projected to fail as a result of the Scarsella plat's traffic combined with other traffic from new development. The Hearing Examiner's decision was based on the erroneous assumption that RCW 82.02.020 and SEPA prohibit local government from requiring a developer to contribute to transportation improvements unless the projected LOS failure that created the need for those improvements was triggered solely by the developer's project.

The Hearing Examiner's decision was appealed by Federal Way and reversed in Pierce County Superior Court, where Judge Thomas Felnagle entered an order rejecting the Examiner's erroneous interpretations of RCW 82.02.020 and SEPA. Judge Felnagle's order recognized that the need for transportation improvements may be created by the cumulative effect of individual developments like the Scarsella plat

and that developers may properly be required to contribute to the cost of such improvements if their projects contribute to a LOS failure. Judge Felnagle ruled that Tacoma is authorized to impose such a condition under SEPA and RCW 82.02.020 and rejected T&C's assertion that such fees may be collected only by adopting and implementing an impact fee ordinance under RCW 82.02.050 through .090.[1] Judge Felnagle also rejected T&C's theory that a developer may be required to contribute only if its project is "the straw that broke the camel's back."[2]

The City of Tacoma did not file a separate appeal of the Hearing Examiner's decision, but Tacoma is aligned with the City of Federal Way as a respondent in Federal Way's appeal. Tacoma's position is that SEPA authorizes and obligates Tacoma to mitigate the traffic impacts of the Scarsella plat on Federal Way's roads and that RCW 82.02.020 does not prohibit Tacoma from collecting a proportionate fee from T&C for that purpose. Like Federal Way, Tacoma believes that the Hearing Examiner's decision is not only unsupported by the law, but would also have disastrous consequences for local government efforts to plan and pay for

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[1] Tacoma has not elected to adopt a Growth Management Act impact fee ordinance under RCW 82.02.050 through 090. Testimony of Dana Brown, Tr. 7/11/08 at 288. Citations to "Tr." indicate transcripts of administrative hearings before the Tacoma Hearing Examiner held on July June 19, 2008, and July 11, 2008. *See* CP 74-277.

[2] In oral argument, counsel for T&C admitted that this theory was the "centerpiece" of his argument: "[U]nless you can show . . . that this is the straw that breaks the camel's back, there is not the showing of direct impact that is required." Verbatim Report of Proceedings ("RP"), 4/10/09, p. 37; *see also* RP, 4/8/09, p. 21.

growth-induced transportation impacts, as they are required to do under the Growth Management Act ("GMA") and SEPA.

For these reasons, Tacoma asks this Court to affirm Judge Felnagle's order, which granted Federal Way's appeal and reversed the Hearing Examiner's decision to strike the traffic mitigation condition.

## II. ASSIGNMENT OF ERROR

### A. Assignments of Error to Hearing Examiner's Decisions

The City of Tacoma assigns error to the following portions of the Hearing Examiner's decisions dated September 5, 2008 and October 26, 2008. *See* R 102-140[3] (September 5 decision); R 3-6 (October 26 decision)[4] (collectively the "Examiner's Decision").

1. The Hearing Examiner erred in concluding that the traffic mitigation condition violates RCW 82.02.020.

2. The Hearing Examiner erred in concluding that the traffic mitigation condition violates SEPA.

3. The Hearing Examiner erred in entering the following findings of fact:

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[3] Citations to pages of the administrative record before the Tacoma Hearing Examiner, which was not paginated as part of the Clerk's Papers, are to "R ___," followed by a parenthetical identifying the document. *See* Index to Clerk's Papers dated September 2, 2009, p. 2 (noting administrative record was "sent under separate cover").

[4] The Hearing Examiner's October 26 decision denied reconsideration of his September 5 decision to strike the traffic mitigation condition.

> Thus, the evidence establishes that the need for improvements planned for the 21st Avenue SW/336th Street intersection and the 336th Street/340th Street to 26th Place SW and Hoyt Road arterial corridor are not a direct result of the traffic expected to be contributed by Town & Country's proposed subdivision.

R 111 (Examiner's September 5 decision, Finding 16, p. 10).

> Federal Way, in its analysis of the traffic distribution of peak hour vehicle trips expected to be generated by Town & Country's proposed subdivision, did not develop information on the two TIPs for 2009 horizon year "without the project." Thus, Federal Way did not actually determine the specific impact of the proposed subdivision alone since it is "lumped" into all trips expected to be using the two street facilities at the 2009 horizon year.

R 112 (Examiner's September 5 decision, Finding 18, p. 11).

4. The Hearing Examiner erred in entering the following conclusions of law:

> As limited by RCW 82.02.020 and the authority provided under RCW 43.21C.060 and RCW 58.17.110, only mitigation that is intended to mitigate or cure specific identified adverse impacts or problems created by a proposed a development is authorized. Thus, it does not appear that there is a substantive difference between the authority granted by SEPA or the subdivision statute in regard to conditioning project actions.

R 122-23 (Examiner's September 5 decision, Conclusion 15, pp. 21-22).

> However, Federal Way has failed to establish that the required intersection and arterial corridor improvements, which it is seeking Town & Country's contribution in the amount of $250,123.00, are reasonably necessary to mitigate the direct impact of Town & Country's proposed 51-lot subdivision (*see* Castle Homes v. Brier at 107, citing

> Southwick v. City of Lacey at 895); or "to mitigate specific environmental impacts which are identified in environmental documents prepared under this chapter." RCW 43.21C.060. Both TIPs to which Federal Way is seeking contributions from Town & Country, have been planned for some time by Federal Way and well before Town & Country's subdivision was proposed. Further, Federal Way plans to proceed with the TIPs regardless of whether Town & Country proceeds with the development of its proposed subdivision since the identified intersection and arterial corridor are expected to achieve LOS F (failing LOS) by the 2009 horizon year.

R 123-24 (Examiner's September 5 decision, Conclusion 16, p. 22-23).

> Here, Federal Way calculated Town & Country's traffic mitigation fee by multiplying the entire estimated project cost for each TIP by a fraction whose denominator is the total number of trips predicted to use the identified intersection and arterial corridor, and whose numerator is the number of trips from Town & Country's proposed subdivision predicted to use the identified facilities. This methodology is inconsistent with the proportionality mandated by RCW 82.02.090, since it does not take into account the fact that these TIPs are required whether or not Town & Country's subdivision is developed, presumably due to the "sins of the past" as noted by the court in Castle Homes.

R 124 (Examiner's September 5 decision, Conclusion 17, p. 23).[5]

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[5] It is undisputed that the Examiner erred in concluding that the traffic mitigation condition violates RCW 82.02.090, which the parties agree is inapplicable in this case because the traffic mitigation condition was a SEPA condition, not a traffic impact fee levied under the GMA pursuant to RCW 82.02.050 through .090. *See* R 124 (Examiner's Decision, Conclusion 17, p. 23) ("This methodology is inconsistent with the proportionality mandated by RCW 82.02.090 . . .); R 74-5 (Federal Way's Motion for Reconsideration, pp. 7-8) ("[T]he decision's references to RCW 82.02.090's definition of 'proportionate share' are likewise inapt."); R 13 at n. 20 (Town & Country's Response to Motions for Reconsideration, p. 7) ("That statute [RCW 82.02.090] only applies to impact fees levied under the Growth Management Act (RCW 82.02.050 through .090) and therefore does not apply here.").

> Finally, Federal Way has not identified the specific impact to these street facilities resulting from Town & Country's proposed subdivision, as it has not done a "with the project" and "without the project" analysis. Moreover, the evidence establishes that the percentage of trips using the identified intersection and arterial corridor from Town & Country's plat is insignificant. *See* Finding of Fact 15.

R 125 (Examiner's September 5 decision, Conclusion 17, p. 24).

> Since the traffic mitigation condition set forth by Tacoma in its MDNS does not comport with the nexus requirements of RCW 82.02.020, 58.17.110, and 43.21C.060, and does not satisfy the rough proportionality requirements of RCW 82.02, it cannot be sustained and should be stricken.

R 125 (Examiner's September 5 decision, Conclusion 18, p. 24).

**B. Issues Pertaining to Assignment of Error**

1. Did the Hearing Examiner err in concluding that the traffic mitigation condition violates RCW 82.02.020 because Federal Way's methodology calculated T&C's share of the cost of planned traffic improvement projects (TIPs) on roadways that were projected to fail as a result of new growth such as the Scarsella plat? (Assignments of Error #1, 3, 4)

2. Did the Hearing Examiner err in concluding that the traffic mitigation condition violates RCW 82.02.020 based on Federal Way's alleged failure to conduct a "with the project" and "without the project" analysis? (Assignments of Error #1, 3, 4)

3. Did the Hearing Examiner err in concluding that the traffic mitigation condition violates RCW 82.02.020 because the Scarsella plat contributes 0.5% and 1.2% of total traffic to the two impacted roadways? (Assignments of Error #1, 3, 4)

4. Did the Hearing Examiner err in concluding that the traffic mitigation condition violates SEPA based on the Examiner's interpretation of the phrase "specific adverse environmental impacts" to mean roadway level of service failures that are triggered solely by the Scarsella plat? (Assignments of Error #2, 3, 4)

5. Did the Hearing Examiner err in concluding that the traffic mitigation condition violates SEPA because Federal Way evaluated the significance of the Scarsella plat's impacts in the context of cumulative impacts to the two impacted roadways? (Assignments of Error #2, 3, 4)

## III. STATEMENT OF THE CASE

Tacoma adopts the statement of the case set forth in the brief of Respondent City of Federal Way.

## IV. ARGUMENT

### A. Standard of Review

This is an appeal of Judge Felnagle's Conclusions of Law, Order and Judgment Granting Land Use Petition, which was issued pursuant to the Land Use Petition Act ("LUPA"), RCW Chapter 36.70C. CP 404-414

(the "Order"). As noted in this Court's Ruling Requiring Rebriefing dated February 24, 2010, however, the Court stands in the shoes of the superior court and applies the LUPA standards for relief directly to the Examiner's Decision. *HJS Development, Inc. v. Pierce County ex rel. Dept. of Planning and Land Services*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003). As such, this Court has ordered the parties to rebrief T&C's appeal of Judge Felnagle's decision, with Federal Way and Tacoma assigning error to the Hearing Examiner's Decision. This Court can affirm Judge Felnagle's Order reversing the Examiner's Decision if Federal Way and Tacoma establish one or more of the LUPA standards for relief.

Three LUPA standards are potentially at issue here:

> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
>
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
>
> (d) The land use decision is a clearly erroneous application of the law to the facts;

RCW 36.70C.130(1)(b)-(d).

Standard (b) addresses questions of law, which the court reviews de novo. *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006). This standard allows for "such deference as is

due the construction of a law by a local jurisdiction with expertise." RCW 36.70C.130(1)(b) (emphasis added); *see also Habitat Watch v. Skagit County*, 155 Wn.2d 397, 412, 120 P.3d 56 (2005) ("Local jurisdictions with expertise in land use decisions are afforded an appropriate level of deference in interpretations of law under LUPA") (emphasis added). Courts have found that deference to a local jurisdiction is due, for example, when a city council or Hearing Examiner interprets city ordinances. *See, e.g., Habitat Watch*, 155 Wn.2d at 412 (interpretation of grading ordinance); *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Associates*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004) (interpretation of zoning ordinance); *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wn. App. 461, 475, 24 P.3d 1079 (2001) (interpretation of ordinance permitting height variance for wireless facilities). However, no city ordinances are at issue in this appeal, and courts have not deferred to a local jurisdiction's interpretation of state law, such as the Hearing Examiner's interpretations of RCW 82.02.020 and SEPA. Moreover, reviewing courts do not defer to erroneous interpretations of law. *See, e.g., Quadrant Corp. v. State Growth Management Hearings Bd.*, 154 Wn.2d 224, 238, 110 P.3d 1132 (2005).

Standard (c) addresses questions of fact, which the court reviews for substantial evidence. *Cingular Wireless*, 131 Wn. App. at 768

("Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement asserted"). The key facts relevant to this appeal are not in dispute. The Scarsella plat will generate additional trips using Federal Way streets and intersections that are expected to fail LOS standards in the future with projected new development such as the Scarsella plat. Federal Way has planned transportation improvements to address this predicted LOS failure. The amount of the traffic mitigation fee charged to the Scarsella plat is proportionate to that plat's share of the total trips (existing plus new trips) projected to use the Federal Way roadways that are included within the planned transportation improvements. With two exceptions, as noted in Judge Felnagle's order, the Hearing Examiner's findings of fact were unchallenged and are therefore verities on appeal. *See* CP 402 (Order, p. 2) (findings unchallenged except for Findings of Fact 16 and 18). Tacoma believes that these findings are, in fact, legal conclusions that are properly addressed under LUPA standard (b). However, to the extent that these two findings can be characterized as including a factual component, they are mixed questions of fact and law and are properly addressed under LUPA standard (c).

Standard (d) addresses the application of law to the facts, which the court reviews under the clearly erroneous test. *Cingular Wireless*, 131

Wn. App. at 768 ("Under that test, we determine whether we are left with a definite and firm conviction that a mistake has been committed"). Courts defer to the factual component but not the legal component of such mixed questions of fact and law. *See id.* As noted above, legal interpretations are reviewed de novo.

Thus, while Federal Way bears the burden of proof in this appeal, its burden is not great: "the question of who has the burden of proof is not significant here because [the Court is] reviewing a legal decision." *Quality Rock Products, Inc. v. Thurston County*, 139 Wn. App. 125, 134, 159 P.3d 1 (2007).

**B. The Traffic Mitigation Condition Complies with RCW 82.02.020.**

1. Statutory Framework

RCW 82.02.020 provides in relevant part as follows:

> 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 . . . Any such voluntary agreement is subject to the following provisions:
>
> . . .
>
> 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.

RCW 82.02.020 (emphasis added). Thus, RCW 82.02.020 imposes two requirements on local governments seeking to require a developer to make such a payment. First, the local government must identify a direct impact of the proposed development or plat. Second, the local government must establish that the payment is "reasonably necessary as a direct result of the proposed development or plat."

Both of these requirements were met in this case. First, Federal Way identified the direct impact of the proposed Scarsella plat. Consistent with the developer's preliminary estimates that the plat will generate 490 new daily vehicle trips and between 49 and 51 new "p.m. peak hour" trips,[6] Federal Way determined that the plat would generate a total of 58 new p.m. peak hour trips.[7] Federal Way then used computer modeling to distribute and assign these p.m. peak hour trips to its roadway system based on its travel demand model, taking into account surrounding land uses and existing traffic patterns.[8] Federal Way's model predicted that 76 percent of the trips generated by the Scarsella plat would travel north into

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[6] R 337b (Ex. R-1); R 935 (Ex. R-34).

[7] R 659 (Ex. R-19.4, Federal Way Transportation Concurrency Analysis, p. 14).

[8] R 660 (Ex. R-19.4, Federal Way Transportation Concurrency Analysis, p. 15).

Federal Way.[9] The model also predicted that these trips would impact an intersection and an arterial corridor in Federal Way by contributing 27 new p.m. peak hour trips to the intersection and 227 new p.m. peak hour trips to various segments of the arterial corridor.[10] Federal Way excluded from consideration intersections and corridors that would be impacted by fewer than ten new p.m. peak hour trips generated by the Scarsella plat.[11] In this manner, Federal Way identified the direct impact of the Scarsella plat on its roadway system.

Second, Federal Way established that a payment was reasonably necessary as a direct result of the Scarsella plat and calculated the amount of payment that was reasonably necessary. Because Federal Way had already planned for TIPs at the impacted intersection and corridor in question (based on trips anticipated to be added by new development such as the Scarsella plat), it evaluated the need for payment and calculated the amount of payment in the context of these planned TIPs. Federal Way's analysis demonstrated that, while current conditions at the intersection and corridor are tolerable, both will reach a failing LOS with the addition of

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[9] Testimony of Perez, Tr. 7/11/08 at 208; R 109 (Examiner's Decision, Finding 14, p. 8).

[10] R 814-15 (Ex. R-19.4, Federal Way Transportation Concurrency Analysis, Appendix C, Final Transportation Improvement Plan, "Map ID 11" and "Map ID 23").

[11] R 646 (Ex. R-19.4, Federal Way Transportation Concurrency Analysis, p. 2) ("The study focuses on evening peak hour traffic operations at all intersections monitored for transportation concurrency impacted by at least ten (10) new evening peak hour trip[s]").

projected growth including the Scarsella plat.[12] This analysis established that a payment is reasonably necessary as a direct result of the Scarsella plat because not only will the Scarsella plat add more than ten new p.m. peak hour trips to the intersection and corridor in question, these new trips will contribute to the failure of the intersection and corridor if the TIPs are not built.

Finally, Federal Way calculated the amount of payment that was reasonably necessary. It did so by multiplying the estimated project cost for each TIP by a fraction whose numerator is the number of trips from the Scarsella plat predicted to use the identified intersection and corridor and whose denominator is the total number of trips (both existing and new) predicted to use the intersection and corridor.[13] T&C's contribution to the cost of each TIP was therefore directly proportional to the trips from the Scarsella plat predicted to use the intersection and corridor.

In its appeal, T&C urges this Court to reinstate the Examiner's ruling that the traffic mitigation fee violates RCW 82.02.020. Like the Hearing Examiner, however, T&C misinterprets RCW 82.02.020 by confusing the statute's requirement that "any <u>payment</u> . . . [be] reasonably necessary as a <u>direct</u> result of the proposed development or plat" with a

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[12] R 947-954 (Exhibits R-39 and R-40); Testimony of Perez, Tr. 7/11/08 at 208-223.

[13] R 684 (Ex. R-19.4, Federal Way Transportation Concurrency Analysis, p. 40); R 111-12 (Examiner's Decision, Finding 17, pp. 10-11).

but-for requirement – that the need for a particular transportation improvement was triggered solely as a result of the proposal (because the proposal was the "straw that broke the camel's back"). *See* RCW 82.02.020 (emphasis added). This Court should affirm Judge Felnagle's reversal of the Hearing Examiner's misinterpretation of RCW 82.02.020.

2. The Hearing Examiner Erred in Concluding that the Traffic Mitigation Condition Violates RCW 82.02.020.

The Examiner concluded that the traffic mitigation condition violates RCW 82.02.020 for the following reasons: (a) Federal Way's methodology calculated the Applicant's share of the costs of TIPs that were anticipated to be constructed at intersections that were already projected to fail in 2009, "regardless of whether Town & Country proceeds with the development of its proposed subdivision"; (b) Federal Way "has not done a 'with the project' and 'without the project' analysis"; and (c) "the evidence establishes that the percentage of trips using the identified intersection and arterial corridor from Town & Country's plat, is insignificant."[14]

As discussed in the following sections, each of these reasons for the Examiner's conclusion regarding RCW 82.02.020 is erroneous.

[14] R 123-24 (Examiner's Decision, Conclusion 16, pp. 22-23; Conclusion 17, p. 24).

*a. The condition does not violate RCW 82.02.020 merely because Federal Way had already planned for the transportation impacts of projected development such as the Scarsella plat.*

The Examiner's Decision erroneously concluded that the traffic mitigation fee violates RCW 82.02.020 because Federal Way's methodology was based on TIPs planned at intersections that were already projected to fail by the 2009 horizon year.[15] This interpretation of the statute is contrary to the plain language of RCW 82.02.020, the record in this case, Washington case law, and the GMA's strong public policy in favor of transportation planning.

The plain language of RCW 82.02.020 supports the cities' interpretation. The Examiner's Decision implies that local government may never collect mitigation fees for TIPs that have been planned based on projected growth. In other words, if there are other reasons why the TIP is needed, government cannot collect a share from one portion of the projected growth. This interpretation erroneously reads into RCW 82.02.020 a limitation that mitigation may be imposed only if the project is the sole trigger for the need for the TIP. That is not what RCW 82.02.020 says. It requires mitigation payments to be "reasonably

[15] *See* R 110-111 (Examiner's Decision, Findings 15-16, pp. 9-10; Conclusions 16-17, pp. 22-23).

necessary as a direct result of the proposed development or plat." RCW 82.02.020 (emphasis added).

RCW 82.02.020 does not define the term "direct." Undefined terms are given their plain and ordinary meaning, which may be found in dictionary definitions. *Flanigan v. Department of Labor & Indus.*, 123 Wn.2d 418, 426, 869 P.2d 14 (1994). Webster's defines "direct" as "characterized by or giving evidence of a close esp. logical, causal, or consequential relationship."[16]

Here, the relationship between the mitigation payment and the Scarsella plat is "direct" because it is a close logical, causal, and consequential relationship. As discussed in detail below, the need for the two TIP improvements was caused by projected growth. The Scarsella plat is part of that projected growth. Thus, the mitigation fee is necessary as a direct result of the plat, even though the fee was not necessary as the exclusive result of the plat.

The record in this case supports Tacoma's imposition of the traffic mitigation condition. The evidence and testimony presented at hearing clearly demonstrate that it is new growth (including the Scarsella plat), not

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[16] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 640 (1993). This dictionary is used by the Washington Supreme Court to interpret undefined statutory terms. *See, .e.g., Quadrant Corp. v. State Growth Management Hearings Bd.*, 154 Wn.2d 224, 239, 110 P.3d 1132 (2005); *Dahl-Smyth, Inc. v. City of Walla Walla*, 148 Wn.2d 835, 843, 64 P.3d 15 (2003).

existing deficiencies, that results in LOS standard failures[17] and thereby creates the need for the TIPs:

- Federal Way's traffic engineer Rick Perez testified that one of the roadways identified for mitigation is currently failing – but just barely, with a LOS "D" and a Volume to Capacity ratio of 1.02. The other roadway currently has a passing LOS "D" and a Volume to Capacity ratio of 0.86.[18]

- With the addition of growth projected for the 2009 horizon year, including the Scarsella plat, these intersections will fail badly unless the TIPs are constructed. The first intersection will have a LOS "F" and a Volume to Capacity ratio of 1.25. The second intersection will have a LOS "F" and a Volume to Capacity ratio of 1.17.[19]

Thus, the record demonstrates that, while the Scarsella plat is not the only reason the TIPs are needed, it is part of the reason.

Moreover, Washington case law supports the cities' interpretation of RCW 82.02.020. The case law recognizes that cities may charge developers for their contribution to a traffic problem even if the problem existed and was projected to get worse before the developer submitted its application. *See, e.g., Sparks v. Douglas County*, 127 Wn.2d 901, 904 P.2d 738 (1995); *Miller v. Port Angeles*, 38 Wn. App. 904, 691 P.2d 229 (1984), *rev. denied*, 103 Wn.2d 1024 (1985).

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[17] Federal Way's Level of Service (LOS) standard is violated when an intersection is determined to have a Volume to Capacity ratio of greater than 1.0 or a Level of Service of "F." Testimony of Perez, Tr. 7/11/08 at 210.

[18] R 947-950 (Exhibit R-39); Testimony of Perez, Tr. 7/11/08 at 208-220.

[19] R 951-954 (Exhibit R-40); Testimony of Perez, Tr. 7/11/08 at 220-223.

In *Sparks*, the Supreme Court held that a condition requiring dedication of rights of way for road improvements satisfied both RCW 82.02.020 and the "nexus" and "rough proportionality" tests, despite the fact that the dedications "were imposed, in part, to accommodate anticipated future improvement of the road," taking into account "future developments and their anticipated cumulative impacts." *Sparks*, 127 Wn.2d at 914. *Sparks* adopted the *Dolan* court's formulation of the "rough proportionality" test: "No 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." *Id.* at 912 (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 388-91, 114 S.Ct. 2309, 2319-20, 129 L. Ed. 2d 304 (1994)). This standard is a far cry from the but-for test applied by the Examiner, which would prohibit the collection of any mitigation fees to fund an improvement unless the need for that improvement was triggered solely by the proposed development or plat. Indeed, the standard applied by the Examiner is comparable to the "specific and uniquely attributable" test, which *Dolan* distinguished as more "exacting" than the "rough proportionality" test. *See Dolan*, 512 U.S. at 389-90, 114 S.Ct. at 2319.

Likewise, in *Miller*, the Court of Appeals upheld a traffic mitigation payment of nearly $65,000 that was based on the applicant's share of the total average daily trips after construction of the proposed development. *Miller*, 38 Wn. App. at 907, n.1. The payment was calculated "by dividing the 778 average trips (ADTs) generated by the

development of Uplands No. 4, as described in the EIS, by the total average daily trips (ADTs) after construction of Uplands No. 4 (4,378 ADTs), as described in the EIS, and multiplying that percentage (18%) by the total cost necessary to construct Golf Course Road." *Id.* The *Miller* court also concluded that "the applicants were not required to pay more than their share of the cost" because "[t]hey were required to improve only the side of Melody Lane that abutted their property. Their contributions to the Golf Course Road Arterial Improvement Fund amounted to only 18 percent of the projected total, the remainder to be supplied from the municipal street fund, an LID composed of other abutting owners, and matching federal funds." *Miller*, 38 Wn. App. at 910-11. Because the Examiner's Decision erroneously assumed that payments toward planned TIPs can never be required, it is contrary to the law as set forth in *Sparks* and *Miller*.

Furthermore, the Examiner's reliance on *Castle Homes v. City of Brier* for the conclusion that RCW 82.02.020 was violated is misplaced. R 123 (Examiner's Decision, Conclusion 16, p. 22) (citing *Castle Homes v. City of Brier*, 76 Wn. App. 95, 882 P.2d 1172 (1994)). *Castle Homes* held that Brier's traffic mitigation condition violated RCW 82.02.020 because the city's traffic analysis failed to evaluate the individual traffic generated and distributed by different subdivisions and because its per-lot fee calculation charged developers for existing trips. *Id.* at 108 ("The City is using a proportional share approach where it would charge the developers for the full amount of the cost, albeit proportionally by the

number of lots. This does not take into account the direct impact of each separate subdivision location and the differing street distribution impacts of each"). The Examiner appropriately recognized that "[t]he traffic analysis performed by Federal Way differs materially from those which the courts found lacking in *Cobb v. Snohomish County*, 64 Wn. App. 451, 829 P.2d 169 (1991) and in *Castle Homes v. Brier*, 76 Wn. App. 95, 882 P.2d 1172 (1994)."[20] The Examiner failed to recognize, however, that, as a result of a material difference between the fee calculation used in *Castle Homes* and the fee calculation applied here, *Castle Homes* is inapposite.

The material difference between the City of Brier's fee calculation in *Castle Homes* and Federal Way's calculation here is that Brier calculated its per-lot fee by dividing the improvement cost only among new development projects (a "proportionate share," or "the full cost of the identified street projects divided by the total number of lots in all the new subdivisions"), which effectively charged developers for existing trips, while Federal Way divided the improvement cost among all development (a "fair share" based on the number of trips added to each intersection divided by the total number of trips at that intersection, including existing trips). *See Castle Homes,* 76 Wn. App. at 98, n.2. Thus, unlike the City of Brier in *Castle Homes*, Federal Way is not charging developers "for the full amount of the cost, albeit proportionally by the number of lots." *See*

[20] R 123 (Examiner's Decision, Conclusion 16, p. 22) (emphasis added).

*id.* at 108. This key difference between Brier's and Federal Way's fee calculations distinguishes *Castle Homes* from the facts of this case.

The fee calculation used by Federal Way is comparable to the method upheld by the Supreme Court in *Trimen Development Co. v. King County*, 124 Wn.2d 261, 269, 877 P.2d 187 (1994). However, Federal Way's analysis is even more site-specific than King County's approach in *Trimen*. There, King County's assessment of park mitigation fees was deemed "specific to the site" because it was "calculated based on zoning, projected population, and the assessed value of the land that would have been dedicated or reserved." 124 Wn.2d at 275. However, "King County did not conduct a site-specific study." *Id.* at 274 (emphasis added).[21] Here, Federal Way did conduct a site-specific study of traffic impacts from the Scarsella plat, which formed the basis for the mitigation.[22] Under *Trimen*, this approach is more than sufficient to satisfy RCW 82.02.020.

Finally, public policy supports the cities' interpretation of RCW 82.02.020. The Examiner's Decision is contrary to the public policy favoring advance planning by local government for transportation improvements necessitated by growth, as required by the GMA. *See* RCW 36.70A.070(6). The GMA requires local government to plan for growth by adopting a transportation element that includes assumptions

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[21] *See also United Development Corp. v. City of Mill Creek*, 106 Wn. App. 681, 694, 26 P.3d 943 (2001) (stating that under *Trimen*, "the City is not required to conduct a site-specific analysis of direct impacts," and holding that "[t]he City is granted some discretion in developing its impact formulations under RCW 82.02.020").

[22] R 645-815 (Ex. R-19.4, Federal Way Transportation Concurrency Analysis).

about land use, traffic forecasts, estimated impacts to existing facilities, and adopted levels of service standards. *See id.* The Examiner's interpretation of RCW 82.02.020 would thwart the transportation planning scheme required by the GMA by punishing local government for fulfilling its transportation planning obligations under the GMA. This interpretation turns planning on its head and should be rejected.

In this case, Federal Way did exactly what the GMA requires. It evaluated the existing LOS of its transportation network, projected the growth and impacts expected to occur as a result of projects like the Scarsella plat, evaluated the LOS of its network with the addition of projected growth, and scheduled transportation improvements for failing intersections and road segments. Thus, projects like the Scarsella plat are built into the decision to schedule a TIP.

Under the Examiner's interpretation of RCW 82.02.020, almost any developer in a jurisdiction like Tacoma could use the same argument advanced by T&C in this case to avoid its mitigation obligations. Only developers that are unlucky enough to be the "straw that broke the camel's back" could be charged a mitigation fee. All other developers could argue they cannot be charged because the improvements were already programmed. That is not what the statute or the case law says.

*b. The condition does not violate RCW 82.02.020 based on Federal Way's alleged failure to include a "with the project" and "without the project" analysis.*

The Examiner erroneously found and concluded that the mitigation fee violated RCW 82.02.020 because Federal Way "did not develop information on the two TIPs for 2009 horizon year 'without the project."[23] The record contradicts this finding and the legal conclusions drawn from this finding are incorrect.

As a factual matter, it is clear from the record that Federal Way did develop such information. Federal Way's Transportation Concurrency Analysis ("TCA") plainly states that "[t]he analysis was conducted for 2009, the anticipated year of opening of the development proposal for conditions with and without the project."[24] Table 3 of the TCA ("LOS Summary Worksheet") summarizes the LOS analysis conducted by the City for the study intersections.[25] This summary includes an analysis of both "2009 Background Conditions" (i.e., "without the project") and "2009 With-Project Conditions") ("with the project").[26] As applied to the two intersections at issue, this analysis demonstrates that the City's LOS standard will be met in 2009, with or without the project, as long as the

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[23] R 112 (Examiner's Decision, Finding 18, p. 11; Conclusion 17, p. 24, ln. 1-3).

[24] R 646 (Ex. R-19.4, Federal Way Transportation Concurrency Analysis, p. 2) (emphasis added).

[25] R 681-685 (Ex. R-19.4, Federal Way Transportation Concurrency Analysis, pp. 37-40).

[26] R 681 (Ex. R-19.4, Federal Way Transportation Concurrency Analysis, p. 37).

TIPs are constructed.[27] By contrast, as discussed above, Exhibit R-40 shows that both of these intersections will fail in 2009 with the addition of projected growth (including the Scarsella project) if the City does not construct the TIPs.[28]

Moreover, as discussed above, the fact that an intersection is predicted to fail as a result of projected growth does not preclude local government from collecting fees to mitigate impacts caused by projects that are part of that projected growth. The Examiner's statements about the need for analysis "with" and "without" the project, which were based on the presumption that mitigation may be required only if the project is the sole triggering cause of the need for a transportation improvements, find no support in the law. As discussed above, RCW 82.02.020 requires Federal Way to identify a "direct impact" of the Scarsella plat and to establish that "any payment . . . is reasonably necessary as a direct result" of the Scarsella plat. This is not the same as a requirement that the proposed development or plat must, by itself, "necessitate" a particular transportation improvement by being the "straw that broke the camel's back" – the last project in the door that causes a LOS failure. The

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[27] R 683, "Project ID" number 4028 (Ex. R-19.4, Federal Way Transportation Concurrency Analysis, p.39) (LOS met at intersection of 21st Av SW and SW 336th St. / SW Campus Dr.); *compare id.*, "Project ID" numbers 4025, 4124, 4218, 4220, 4222, and 4223 (LOS met at all intersections in corridor widening project at SW 336th Way / SW 340th St: 26th Pl SW – Hoyt Rd.).

[28] *See* R 952, 954 (Exhibit R-40, pp. 2, 4)

Examiner erred by applying a "but-for" test that fails to recognize the possibility of multiple concurrent causes.[29]

*c. The condition does not violate RCW 82.02.020 merely because the Scarsella plat contributes 0.5% and 1.2% of trips to the two impacted roadways.*

The Examiner erroneously concluded that the traffic mitigation condition violated RCW 82.02.020 because, according to the Examiner, "the percentage of trips using the identified intersection and arterial corridor from Town & Country's plat, is insignificant."[30] The Examiner made this statement in the context of his discussion of the "rough proportionality" test, which the Examiner equated to the requirement in RCW 82.02.020 that any mitigation payment must be "reasonably necessary as a direct result of the proposed development or plat."[31] The Examiner's reasoning suggests that a traffic mitigation payment is never "reasonably necessary as a direct result of the proposed development or plat" unless the trips generated by the proposal constitute a "significant"

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[29] *Compare* WPI 15.04, Comment, "Multiple proximate causes" ("There may be more than one proximate cause for the same injury. The acts of different persons, though otherwise independent, may concur in producing the same injury").

[30] R 125 (Examiner's Decision, Conclusion 17, p. 24) (citing Finding of Fact 15, which indicates that the Scarsella plat is projected to contribute 0.5% to total volume at the 321st Avenue SW/SW 336th Street intersection and 1.2% to total volume at the SW 336th Street/SW 340th Street to 26th Place SW and Hoyt Road arterial corridor).

[31] *See* R 124 (Examiner's Decision, Conclusion 17, p. 23) ("RCW 82.02.020, in addition to requiring a nexus between the mitigation sought and direct impacts caused by the development also requires a showing of rough proportionality.").

percentage of the trips on a particular roadway (and, as discussed above, the trips trigger the need for a roadway improvement).

However, there is nothing in the plain language of RCW 82.02.020 that limits collection of mitigation payments to "direct impacts" that make a "significant" contribution to an identified problem. As discussed in Section IV.C below, the significance of an environmental impact is relevant under SEPA, especially for determining whether an environmental impact statement must be prepared. However, RCW 82.02.020 itself does not require an assessment of the significance of a "direct impact," as long as the payments are "reasonably necessary as a direct result of the proposed development or plat." Moreover, to the extent that the "rough proportionality" test can be applied under RCW 82.02.020, that test does not limit mitigation to projects whose impacts constitute a "significant" portion of a problem. *See Sparks*, 127 Wn.2d at 914 (describing "rough proportionality" test as "determining whether a reasonable relationship also exists between the dedications and the impact created by the developments").

In addition, as the Examiner correctly noted, Federal Way built into its analysis a threshold of ten new p.m. peak hour trips.[32] This threshold already ensures that Federal Way's requested mitigation does not address impacts that are insignificant. Federal Way's traffic engineer

[32] *See* R 110 (Examiner's Decision, Finding 15, p. 9); R 646 (Ex. R-19.4, Federal Way Transportation Concurrency Analysis, p. 2) ("The study focuses on evening peak hour traffic operations at all intersections monitored for transportation concurrency impacted by at least ten (10) new evening peak hour trip[s]").

testified that, if Federal Way chose to depart from a 10-trip threshold and instead adopt a 100-trip or 500-trip threshold, the result would be "death by a thousand cuts," or a "situation where very few developments would ever even do an impact analysis and not mitigate impacts, and then we would quickly be unable to sustain any kind of attempt to manage congestion."[33]

Furthermore, the percentage of total trips added by a single development project is a poor measure of significance because it disregards the potential cumulative effect of trips added by many projects. As discussed below, such cumulative effect must be considered under SEPA.

### C. The Traffic Mitigation Condition Complies with SEPA.

#### 1. Statutory Framework

In reviewing the Scarsella plat, Tacoma was obligated to mitigate all of the environmental impacts of the proposed development, including traffic impacts that will occur in Federal Way. The Washington Supreme Court has interpreted SEPA's policy to mean that "[w]here the potential exists that a zoning action will cause a serious environmental effect outside jurisdictional borders, the zoning body must serve the welfare of the entire affected community. If it does not do so it acts in an arbitrary and capricious manner." *Save a Valuable Environment (SAVE) v. City of*

[33] Testimony of Perez, Tr. 7/11/08 at 257-58.

*Bothell*, 89 Wn.2d 862, 868-72, 576 P.2d 401 (1987) (finding that "the City has a duty to serve the welfare of the entire affected community").[34]

SEPA provides in relevant part as follows:

> Any governmental action may be conditioned or denied pursuant to this chapter: PROVIDED, That . . . [s]uch action may be conditioned only to mitigate specific adverse environmental impacts which are identified in the environmental documents prepared under this chapter.

RCW 43.21C.060 (emphasis added).

SEPA's implementing regulations (the "SEPA Rules") provide in relevant part as follows:

> (1) Any governmental action on public or private proposals that are not exempt may be conditioned or denied under SEPA to mitigate the environmental impact subject to the following limitations:
>
> . . .
>
> (b) Mitigation measures shall be related to specific, adverse environmental impacts clearly identified in an environmental document on the proposal and shall be stated in writing by the decision maker . . .

WAC 197-11-660 (emphasis added).

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[34] Similarly, the SEPA rules provide that "[i]n assessing the significance of an impact, a lead agency shall not limit its consideration of a proposal's impacts only to those aspects within its jurisdiction, including local or state boundaries." WAC 197-11-060(4)(b). *See also* WAC 197-11-330(3) ("In determining an impact's significance . . . the responsible official shall take into account the following, that: (a) The same proposal may have a significant adverse impact in one location but not in another location").

The central SEPA requirement at issue in this appeal is that mitigation measures must be "related to specific, adverse environmental impacts." *Id.* The Hearing Examiner's erroneous conclusion that the traffic mitigation condition failed to meet this requirement was based on his misinterpretation of the term "specific" and his failure to recognize that cumulative impacts must be considered under SEPA.

2. The Hearing Examiner Erred in Concluding that the Traffic Mitigation Condition Violates SEPA.

*a. The Examiner misconstrued the term "specific."*

The Hearing Examiner erred by interpreting the phrase "specific adverse environmental impacts" in SEPA to mean impacts that are the sole trigger for the need for improvements.[35] The Examiner's interpretation of SEPA, like his interpretation of RCW 82.02.020, erroneously reads into the statute a test of exclusivity that is not found in the statute and is contradicted by case law.

The term "specific" is not defined in SEPA itself or in the SEPA Rules.[36] Webster's defines "specific" as "characterized by precise

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[35] *See* R 112 (Examiner's Decision, Finding 18, p. 11, ln. 11-14) ("Federal Way did not actually determine the specific impact of the proposed subdivision alone"); R 123 (Examiner's Decision., Conclusion 16, p. 22, ln.14-22) ("Federal Way has failed to establish that the required intersection and arterial corridor improvements . . . are reasonably necessary . . . "to mitigate specific environmental impacts which are identified in environmental documents prepared under this chapter"); R 125 (Examiner's Decision, Conclusion 17, p. 24, ln 1-6) ("Federal Way has not identified the specific impact to these street facilities resulting from Town & Country's proposed subdivision").

[36] *See* RCW Chapter 43.21C; WAC Chapter 197-11.

formulation or accurate restriction . . . free from ambiguity as results from careless lack of precision or from omission or pertinent matter."[37] Here, the record shows that the mitigation fee is required to mitigate "specific" impacts – impacts that are measured precisely. In fact, Federal Way could not have been more specific in measuring the impacts of the Scarsella plat because it counted each trip that would be added to each roadway segment, as recognized by the Examiner's statement that "Federal Way's model is currently used to predict traffic distribution and trip assignments to specific intersections within Federal Way."[38]

Case law confirms that SEPA allows collection of mitigation fees to pay for a portion of planned improvements based on the number of peak hour trips added to a roadway. In *Tiffany Family Trust Corp. v. City of Kent*, the Supreme Court interpreted RCW 43.21C.060 to authorize the imposition of such fees:

> SEPA allows local governments to condition development "to mitigate specific adverse environmental impacts" that would result from the proposed development. RCW 43.21C.060. Thus, in exchange for the adverse impacts that the proposed development is anticipated to have on the surrounding area, the developer agrees to either act in some manner or pay for a portion of nearby improvements intended to address those impacts.
>
> . . .

[37] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2187 (1993).

[38] R 109 (Examiner's Decision, Finding 13, p. 8) (emphasis added).

> Mitigation conditions must be reasonable and capable of mitigating "specific environmental impacts." RCW 43.21C.060. One accepted formula for determining the amount of a mitigation fee is based on the increased peak hour trips a given development will generate in the relevant area.

*Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 232, 119 P.3d 325 (2005) (emphasis added). Thus, the Supreme Court has expressly approved the formula used by Federal Way in this case. This Court should therefore reject the Examiner's misinterpretation of the term "specific," which was one basis for his erroneous conclusion that the traffic mitigation condition violated SEPA.

*b. The Examiner failed to recognize that cumulative impacts must be considered in assessing the significance of a direct impact under SEPA.*

Another key flaw in the Examiner's reasoning is that, in evaluating the significance of the Scarsella plat's impacts, he failed to consider the cumulative harm that results from the Scarsella plat's contribution to adverse conditions.

Numerous cases have held that cumulative impacts must be considered in assessing the significance of an impact. For example, in *Narrowsview Preservation Ass'n v. City of Tacoma*, the Supreme Court explained that the SEPA term "significantly" requires examination of at least two relevant factors:

> (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.

*Narrowsview Preservation Ass'n v. City of Tacoma*, 84 Wn.2d 416, 423, 526 P.2d 897 (1974) (emphasis added), disapproved of on other grounds by *Norway Hill Preservation and Protection Ass'n v. King County Council*, 87 Wn.2d 267, 552 P.2d 674 (1976). As Professor Settle has stated:

> In *Narrowsview Preservation Association v. City of Tacoma* . . . the Washington Supreme Court . . . recognized that impacts might be "significant" on either a relative or an absolute basis. Relatively, action might "significantly" affect the environment because it will produce adverse environmental impacts not produced by existing activities in the area. Absolutely, action might "significantly" affect the environment because of the quantitative extent of its impacts, including the cumulative effects of the action taken together with existing activities . . . [E]ven action which qualitatively conforms to existing uses and impacts may be environmentally "significant" because its impacts, alone or in combination with those of similar actions, might be the "straw that broke the camel's back."[39]

*See also Hayes v. Yount*, 87 Wn.2d 280, 287, 552 P.2d 1038 (1976) ("Logic and common sense suggest that numerous projects, each having

[39] R. Settle, The Washington State Environmental Policy Act: A Legal and Policy Analysis § 13.01[1] (4th ed.1993), at 13-5 - 13-6 (emphasis added).

no significant effect individually, may well have very significant effects when taken together.").

SEPA does not define the term "cumulative impacts." *Gebbers v. Okanogan County Public Utility Dist. No. 1*, 144 Wn. App. 371, 380, 183 P.3d 324 (2008). Regulations implementing the National Environmental Policy Act ("NEPA") define "cumulative impact" as the impact on the environment "which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions."[40] *Gebbers*, 144 Wn. App. at 381 (quoting 40 C.F.R. § 1508.7) (emphasis added). This definition is consistent with cases such as *Narrowsview* and *Hayes*, in which the courts recognized that cumulative impacts analysis can include consideration of past and present actions whose impacts may combine with the impacts of the action under consideration to create significant impacts, in addition to consideration of reasonably foreseeable future actions.

In short, nothing in SEPA or RCW 82.02.020 precludes Federal Way from considering cumulative impacts to its roadways in determining the significance of the Scarsella plat's increased peak hour trips under SEPA or in determining what is "reasonably necessary as a direct result"

[40] Courts use NEPA regulations and caselaw to help interpret SEPA. *See Gebbers*, 144 Wn. App. at 381, n. 1 (citing *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 224, 995 P.2d 63 (2000)).

of the Scarsella plat under RCW 82.02.020. Federal Way's and Tacoma's actions were appropriate and permissible under state law.

## V. CONCLUSION

As part of its review of the Scarsella plat, the City of Tacoma determined that the proposed development would add traffic to streets within the City of Federal Way that were expected to reach failing LOS standards due to traffic from new development like the Scarsella plat. Based on these uncontested facts, the City imposed a traffic mitigation condition on the Scarsella plat requiring a payment that was proportionate to the plat's share of the total trips impacting Federal Way streets that were projected to fail. The City Hearing Examiner incorrectly concluded that the City did not have the authority to impose this condition. On appeal, the Superior Court recognized the Hearing Examiner's errors and reversed the Examiner's Decision.

Neither RCW 82.02.020 nor SEPA impose a but-for test or a "straw that broke the camel's back" requirement for traffic mitigation conditions. The Examiner's reasoning would prohibit local governments from imposing monetary traffic conditions under SEPA except in those rare cases where the proposed development happens to trigger a LOS failure. This extreme result is unsupported by the relevant statutes, is

contradicted by the case law, and is contrary to this state's strong policy in favor of transportation planning.

For the reasons stated herein, the City of Tacoma respectfully requests that this Court affirm the Superior Court's Order reversing the Examiner's Decision and upholding the traffic mitigation condition.

RESPECTFULLY SUBMITTED this 26th day of March, 2010.

GORDONDERR LLP

By _____

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## CERTIFICATE OF SERVICE

I certify that on March 26, 2010, I caused a true and correct copy of BRIEF OF RESPONDENT CITY OF TACOMA to be served on the following in the matter indicated below:

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

Lynne M. Overlie