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No. 39407-3-II

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

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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.

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*Petitioner*  
**REPLY BRIEF OF ~~RESPONDENT~~ CITY OF TACOMA**

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## I. INTRODUCTION

Appellant Town & Country Real Estate, LLC (“T&C”) urges this Court to hold that cities and counties may not fund planned transportation improvements by imposing monetary mitigation fees for traffic impacts under the State Environmental Policy Act (“SEPA”), and that local government may only mitigate traffic impacts through impact fee ordinances under the Growth Management Act (“GMA”). But the Legislature deliberately made GMA impact fees an optional, additional tool for local government to mitigate the impacts of growth, and the Washington Supreme Court has expressly approved the use of SEPA mitigation fees based on the number of new vehicle trips generated by new development.

To impose a traffic mitigation fee under SEPA, Tacoma must satisfy the SEPA requirement to identify an “impact” of the Scarsella plat that is both “adverse” and “specific.” Under RCW 82.02.020, Tacoma may then impose a mitigation fee only for those impacts that are “direct,” and must establish that the fee is “reasonably necessary as a direct result” of the Scarsella plat. All of these requirements were met. Tacoma identified the generation of 490 new daily vehicle trips as one direct, specific, adverse impact of the plat. In evaluating the significance of that impact, Tacoma determined that the trips generated by the Scarsella plat

were part of a major cumulative impact to two roadways within Federal Way's street system. Because the trips generated by the Scarsella plat will contribute to a decline in the Level of Service ("LOS") on those roadways to a level below Federal Way's adopted standard, the fee imposed by Tacoma was "reasonably necessary as a direct result" of the Scarsella plat.

T&C suggests that there is no "specific" or "adverse" impact under SEPA and no "direct" impact under RCW 82.02.020 unless the trips generated by the Scarsella plat, by themselves, cause a degradation in the LOS. This argument is not supported by the plain language of SEPA or RCW 82.02.020. The 490 new trips generated by the Scarsella plat are "specific," "adverse" impacts under SEPA, and are "direct" impacts under RCW 82.02.020, regardless of whether they independently cause a degradation in LOS. T&C's arguments regarding RCW 82.02.020 are based on a re-wording of the statute, which does not limit mitigation to large projects that by themselves "necessitate" (T&C's modifier) transportation improvements. Instead, once a direct impact is identified, RCW 82.02.020 allows the collection of payments that are "reasonably necessary as a direct result" of the plat.

This Court should affirm Judge Felnagle's determination that the mitigation fee complied with SEPA and was reasonably necessary as a direct result of the Scarsella plat.

## II. ARGUMENT

### A. Standard of Review

Contrary to T&C's argument, under the Land Use Petition Act ("LUPA"), this Court need not defer to the Tacoma Hearing Examiner's interpretations of RCW 82.02.020 and SEPA.<sup>1</sup> RCW 36.70C.130(1)(b) allows for "such deference as is due the construction of a law by a local jurisdiction with expertise." Numerous appellate decisions have held that deference is due when local governments interpret their own ordinances.<sup>2</sup> However, T&C cites no appellate authority holding that deference is due when local governments interpret state laws such as RCW 82.02.020 and SEPA.

The single case cited by T&C does not support its suggestion that this Court should defer to the Tacoma Hearing Examiner's interpretations of state law. Brief of Respondents/Appellants Town & Country Real Estate, LLC, et al. ("Brief of T&C") at 21, n. 58 (citing *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 225 P.3d 448 (2010) ("*Douglass*"). The court in *Douglass* merely restated the general proposition that RCW 36.70C.130(1) provides for deference under

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<sup>1</sup> Brief of Respondents/Appellants Town & Country Real Estate, LLC, et al. ("Brief of T&C") at 21, n. 58.

<sup>2</sup> *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 412, 120 P.3d 56 (2005); *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Associates*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004); *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wn. App. 461, 475, 24 P.3d 1079 (2001).

appropriate circumstances. *Douglass*, 154 Wn. App. at 415. The court did not actually defer to any of the Hearing Examiner’s interpretations of SEPA or other state law. *Id.*

Because no deference is due to the Tacoma Hearing Examiner’s interpretations of RCW 82.02.020 and SEPA, this Court’s review is de novo. *See Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006).

**B. Tacoma is Not Required to Adopt a GMA Impact Fee Ordinance as the Only Method to Mitigate Traffic Impacts.**

T&C asserts that the only way for Tacoma and Federal Way to obtain a “fair-share contribution” from developers for their impacts on Federal Way’s road system is for the cities to adopt and implement a “coordinated GMA impact fee system.”<sup>3</sup>

T&C cites no authority for its argument that GMA impact fee ordinances replaced SEPA as the only tool by which local government may mitigate traffic impacts, and nothing in RCW 82.02.050-.090 supports such an argument.<sup>4</sup> Indeed, the Legislature implicitly recognized that GMA impact fees did not replace SEPA mitigation when it adopted

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<sup>3</sup> Brief of T&C at 3.

<sup>4</sup> In providing this tool to local government, the Legislature used language that is permissive, not mandatory. *See, e.g.*, RCW 82.02.050(1)(b) (legislative intent to establish standards by which local government “may require, by ordinance, that new growth and development pay a proportionate share of the cost of new facilities needed to serve new growth and development”); RCW 82.02.050(2) (local governments “are authorized to impose impact fees on development activity”); RCW 82.02.050(4) (fees “may be collected and spent” only for certain types of public facilities). (Emphasis added.)

RCW 43.21C.065, which provides that “[a] person required to pay an impact fee for system improvements pursuant to RCW 82.02.050 through 82.02.090 shall not be required to pay a fee pursuant to RCW 43.21C.060 for those same system improvements.”

The Washington Supreme Court has also recognized that GMA impact fees are not a replacement for SEPA mitigation but an alternative tool for mitigating impacts. *See Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 232, 119 P.3d 325 (2005) (“SEPA allows local governments to condition development ‘to mitigate specific adverse environmental impacts’ that would result from the proposed development. RCW 43.21C.060 . . . An impact fee may also be imposed under RCW 82.02.050; however, a government may not charge for the same impact under both RCW 43.21C.060 and RCW 82.02.050.”); *City of Olympia v. Drebeck*, 156 Wn.2d 289, 301, 126 P.3d 802 (2006) (“GMA impact fees are likewise distinct from those exacted under the State Environmental Policy Act”).<sup>5</sup>

This Court should reject T&C’s attempt to limit local government to the optional tool of GMA impact fees when the Legislature and the courts have not made that tool exclusive.

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<sup>5</sup> While the facts of *Drebeck* did not involve a SEPA-based fee, the *Drebeck* court recognized SEPA-based fees in its description of how such fees differ from GMA impact fees. *Id.*

### **C. The Mitigation Fee Imposed by Tacoma Complies with SEPA.**

SEPA provides in relevant part that mitigation conditions like the traffic fee may be imposed “only to mitigate specific adverse environmental impacts.” RCW 43.21C.060. Thus, to satisfy SEPA requirements for the imposition of mitigation, Tacoma must (1) identify an impact (2) that is adverse and (3) specific to the project upon which mitigation is imposed.

T&C’s theory of this case presumes that there is no “adverse impact” under SEPA unless the new vehicle trips generated by the proposed project, by themselves, cause a degradation in LOS. T&C variously suggests that new vehicle trips generated by the Scarsella plat are not “impacts,” “adverse” impacts, or “specific” impacts under SEPA because Tacoma and Federal Way did not show that those trips, by themselves, degraded the LOS on the impacted roadways.<sup>6</sup> These arguments are contradicted by the SEPA Rules upon which T&C relies and by the record below, which support the common sense conclusion that

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<sup>6</sup> Brief of T&C at 28 (“While the cities are correct that Federal Way’s traffic analysis did calculate the number of trips that the Scarsella plat would contribute to the Federal Way street system, that calculation alone does not identify an ‘impact’ sufficient to support mitigation imposed under RCW 82.02.020.”); *id.* at 28 (“The trip number doesn’t disclose whether an impact will be *adverse*, since the effect of adding the new trips to the capacity of the intersection hasn’t yet been factored in yet.”) ; *id.* at 46-48 (“The cities thus never identified a specific adverse traffic impact of the Scarsella subdivision alone, as SEPA requires.”).

the new vehicle trips added to Federal Way's street system by the Scarsella plat represent a specific, adverse environmental impact.

1. New Trips Generated by the Scarsella Plat are "Impacts."

T&C correctly notes that the SEPA Rules define "impacts" to mean "the effects or consequences of actions."<sup>7</sup> WAC 197-11-752. Because the "action" is the Scarsella plat, the "impact" includes the trips generated by the plat – the "effects or consequences" of plat approval.<sup>8</sup>

2. New Trips Generated by the Scarsella Plat are "Adverse Impacts."

The next inquiry is whether the trips admittedly generated by the Scarsella plat (the impacts) are "adverse" impacts. The term "adverse" is not defined in SEPA or the SEPA Rules. Webster's defines "adverse" as "detrimental" or "unfavorable."<sup>9</sup> The record, including the testimony at the hearing, demonstrated that vehicle trips added to roadways that will

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<sup>7</sup> *Id.* at 27-28, n. 86 (citing WAC 197-11-752).

<sup>8</sup> WAC 197-11-752 further provides that "[e]nvironmental impacts are effects upon the elements of the environment listed in WAC 197-11-444," which in turn lists the following as elements of the environment:

- (c) Transportation
  - (i) Transportation systems
  - (ii) Vehicular traffic
  - ...
  - (iv) Parking
  - (v) Movement/circulation of people or goods
  - (vi) Traffic hazards

WAC 197-11-444(2)(c). The SEPA Rules therefore define the Scarsella plat's "impact" as its effects on transportation systems, vehicular traffic, parking, circulation of people and goods, and traffic hazards.

<sup>9</sup> WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 31 (1993).

fail LOS standards without improvements are “detrimental” to those roadways.<sup>10</sup> In particular, the testimony of Federal Way’s traffic engineer, Richard Perez, described the harm caused by “death by a thousand cuts” if cities were unable to mitigate the traffic impacts of smaller projects.<sup>11</sup>

T&C admits that its project will add new vehicle trips to these roadways but portrays the new trips as “modest,” “minor,” or “scarcely detectable,” in an effort to equate its view of insignificance with its assertion that the trips are, therefore, not “impacts” or not “adverse impacts.”<sup>12</sup> However, T&C also concedes that “common sense dictates” that adding traffic without making any improvements “will eventually degrade the level of service.” *Id.* at 33.

Thus, both the record below and common sense confirm that the addition of new vehicle trips is an “adverse” impact under SEPA, regardless of how many trips are added.

### 3. New Trips Generated by the Scarsella Plat are “Specific” Impacts.

T&C repeatedly asserts, without explanation or citation, that the cities “never identified a specific adverse traffic impact.”<sup>13</sup> This assertion, like T&C’s arguments about whether the impacts are “adverse,” is based

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<sup>10</sup> See, e.g., Testimony of Perez, Tr. 7/11/08 at 274 (stating that “the project will impact these locations adversely”).

<sup>11</sup> Testimony of Perez, Tr. 7/11/08 at 257-58.

<sup>12</sup> Brief of T&C at 29, 31, 47.

<sup>13</sup> Brief of T&C at 46-48.

on the erroneous premise that only a LOS decline, triggered solely by the Scarsella plat, constitutes a “specific” impact. This is simply a different label for the same argument regarding “adverse” raised by T&C and addressed in Section II.C.2, *supra*.

The term “specific” means “characterized by precise formulation.”<sup>14</sup> The measurement of new trips generated by the Scarsella plat is “specific” because it is precise – it counts each new trip added to each roadway. The Supreme Court has recognized that the number of new peak hour trips generated by a project is a “specific” impact, and that local government may properly base a mitigation fee on that number. *See Tiffany Family Trust Corp.*, 155 Wn.2d at 232 (“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.”) (Emphasis added.)

Thus, it cannot be disputed that the new vehicle trips represent a “specific” adverse impact on Federal Way’s roadways.

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<sup>14</sup> *See* WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2187 (1993).

4. SEPA Allows Consideration of Cumulative Impacts, Including the Cumulative Effects of “Direct” and “Indirect” Impacts.

T&C asserts that “cumulative impacts” cannot be considered in determining whether mitigation is appropriate under RCW 82.02.020 because SEPA excludes “direct” impacts from “cumulative” impacts. This argument is contradicted by the plain language of the SEPA Rules, Washington case law, and regulations implementing the National Environmental Policy Act (“NEPA”), which Washington courts use to interpret SEPA.<sup>15</sup>

a. *Cumulative Impacts Include Both “Direct” and “Indirect” Impacts.*

T&C argues that “cumulative” impacts are not “direct” impacts because the SEPA Rules provide that “[i]mpacts may be (i) Direct; (ii) Indirect; or (iii) Cumulative,” and suggests that these three categories of impacts are mutually exclusive.<sup>16</sup> See WAC 197-11-792(2)(c).

But the terms “direct” impacts and “cumulative” impacts under WAC 197-11-792(2)(c) are not mutually exclusive; rather, “cumulative

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<sup>15</sup> As noted in Tacoma’s opening brief, courts use NEPA regulations and case law to help interpret SEPA. See *Gebbers v. Okanogan County Public Utility Dist. No. 1*, 144 Wn. App. 371, 381, n.1, 183 P.3d 324 (2008) (citing *Kucera v. Dep’t of Transp.*, 140 Wn.2d 200, 224, 995 P.2d 63 (2000)). T&C argues that the NEPA definition of “cumulative impacts” should not control because “it conflicts with Washington’s body of SEPA law.” Brief of T&C at 42. However, as discussed in Section II.B.4.b, *infra*, the NEPA definition of “cumulative impacts” is entirely consistent with Washington case law and the SEPA Rules.

<sup>16</sup> *Id.*

impacts” is a broader category that includes the summation of “direct” impacts from various projects, “indirect” impacts from various projects, or both. NEPA regulations, Washington case law, and the SEPA Rules all confirm that “cumulative impacts” can include “direct impacts.”

NEPA regulations define “direct” and “indirect” effects or impacts as follows:

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous.

40 C.F.R. § 1508.8.<sup>17</sup>

As discussed in Tacoma’s opening brief, NEPA regulations define “cumulative impact” as the impact “which results from the incremental impact of the action when added to other past, present, and reasonably

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<sup>17</sup> Compare WAC 197-11-060(4)(d) (“A proposal’s effects include direct and indirect impacts caused by a proposal.”).

foreseeable future actions.”<sup>18</sup> Thus, when 40 C.F.R. § 1508.7 is read in conjunction with 40 C.F.R. § 1508.8, “cumulative impacts” can be understood to include both “direct” (present) impacts and “indirect” (reasonably foreseeable future) impacts.

These NEPA definitions are consistent with Washington case law, which recognizes that cumulative impacts analysis may include consideration of past, present, and future actions.<sup>19</sup> The NEPA definitions are also consistent with the SEPA Rules, which clearly distinguish “direct” impacts, such as the new trips directly generated by the Scarsella plat, from “indirect” impacts, such as the effects indirectly resulting from growth caused by the plat and from the precedential effect of approving the plat. WAC 197-11-060(4) (“A proposal’s effects include direct and indirect impacts caused by a proposal. Impacts include those effects resulting from growth caused by a proposal, as well as the likelihood that the present proposal will serve as a precedent for future actions.”).<sup>20</sup>

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<sup>18</sup> See *Gebbers v. Okanogan County Public Utility Dist. No. 1*, 144 Wn. App. 371, 381, 183 P.3d 324 (2008) (quoting 40 C.F.R. § 1508.7).

<sup>19</sup> See, e.g., *Narrowsview Preservation Ass'n v. City of Tacoma*, 84 Wn.2d 416, 423, 526 P.2d 897 (1974), 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); *Hayes v. Yount*, 87 Wn.2d 280, 287, 552 P.2d 1038 (1976).

<sup>20</sup> Contrary to T&C’s argument, both of the examples provided in the second sentence of WAC 197-11-060(4) are “indirect” impacts. See Brief of T&C at 41, n. 122. T&C’s contention that “effects resulting from growth caused by a proposal” are “direct” impacts is nonsensical. “Direct” impacts result from the proposal itself, and under the SEPA Rules, “indirect” impacts include impacts that result from growth caused by the proposal and its precedential effect. See WAC 197-11-060(4).

b. *Boehm and Gebbers Do Not Preclude Consideration of the Cumulative Impacts of New Development.*

T&C relies on two appellate decisions for its suggestion that cumulative impacts may not be considered unless “future projects . . . are dependent on a proposal action.” Brief of T&C at 41-42 (citing *Boehm v. City of Vancouver*, 111 Wn. App. 711, 720, 47 P.3d 137 (2002); *Gebbers v. Okanogan County Public Utility Dist. No. 1*, 144 Wn. App. 371, 386, 183 P.3d 324 (2008)).<sup>21</sup>

These cases suggest that when a SEPA determination is challenged by a third party, local government may only be compelled to consider cumulative impacts when the project sets a precedent for other actions, such as when future projects are dependent on the project.<sup>22</sup> However, the question of whether local government is required to conduct a cumulative impacts analysis is different than the question of whether government is authorized to consider cumulative impacts.

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<sup>21</sup> One commentator has argued that *Boehm* is simply “wrong.” See Keith H. Hirokawa, *The Prima Facie Burden and the Vanishing SEPA Threshold: Washington's Emerging Preference for Efficiency over Accuracy*, 37 Gonz. L. Rev. 403, 432-424 (2001/2002). Tacoma’s arguments presume that *Boehm* and *Gebbers* are not necessarily “wrong,” but have been misinterpreted by T&C. To the extent that *Boehm* and *Gebbers* are inconsistent with cases like *Narrowsview* and *Hayes* and the SEPA Rules, however, they are in conflict with controlling precedent.

<sup>22</sup> *Boehm*, 111 Wn. App. at 720 (“We agree with Fred Meyer and the City. The project's cumulative impacts are merely ‘speculative’ and therefore, need not be considered. The Boehms have not clearly identified evidence of a cumulative impact.”); *Gebbers*, 144 Wn. App. at 387 (“In sum, we reject Citizens' contention that necessary cumulative impacts were not analyzed and conclude that the FEIS satisfies the rule of reason”).

T&C cites no authority holding that local government may not consider cumulative impacts if the project does not set a precedent, and numerous cases have held that local government may.<sup>23</sup> The SEPA Rules also made it abundantly clear that cumulative impacts may be considered outside the context of projects that set a precedent.<sup>24</sup> Even a recent case cited in T&C's brief supports the notion that local governments may consider cumulative impacts in determining appropriate mitigation for traffic generated by new development. *See Douglass*, 154 Wn. App. at 423 (affirming Hearing Examiner's consideration of "additional traffic generated by the Ponderosa development and other projects that had been approved in the Ponderosa area" because "[s]uch additional trips are relevant in determining the cumulative impact").

In short, SEPA authorizes the consideration of both "direct" (present) impacts and "indirect" (reasonably foreseeable future) impacts, as well "cumulative" impacts, which includes both "direct" and "indirect" impacts. None of the cases cited by T&C preclude local government from considering this broad range of cumulative impacts under SEPA.

It is true that, under RCW 82.02.020, local government may not impose a mitigation fee for "indirect" impacts. However, nothing in

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<sup>23</sup> *See, e.g., Narrowsview*, 84 Wn.2d at 423; *Hayes*, 87 Wn.2d at 287.

<sup>24</sup> *See* WAC 197-11-060(4)(e); WAC 197-11-060 (5)(d)(2); WAC 197-11-228(1)(c); WAC 197-11-235(5)(b); WAC 197-11-238; WAC 197-11-792(2)(c)(iii).

SEPA or RCW 82.02.020 precludes local government from requiring mitigation of “direct” impacts that are part of a “cumulative impact.” And as discussed below, new vehicle trips generated by the Scarsella plat are such “direct” impacts.

**D. The Mitigation Fee Imposed by Tacoma Complies with RCW 82.02.020.**

RCW 82.02.020 imposes some limits on what SEPA mitigation can be imposed as a fee. The impacts mitigated by a fee must be “direct” impacts, and the imposition of and amount of the fee must be “reasonably necessary as a direct result of the plat.”

Tacoma’s mitigation fee complied with these limits.

1. New Vehicle Trips Are “Direct” Impacts under RCW 82.02.020.

The term “direct” is used to modify two different words in the relevant language of RCW 82.02.020. First, “direct” is used to modify “impact”:

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.

RCW 82.02.020 (emphasis added).

The parties agree that the term “direct” means “characterized by or giving evidence of a close esp. logical, causal, or consequential relationship.”<sup>25</sup> The relationship between the Scarsella plat and the new trips generated by the plat is “direct” because it is a close logical, causal, and consequential relationship.

T&C’s argument that the cities failed to identify a “direct impact” of the Scarsella plat relies on its assertion that a decline in LOS is required to impose mitigation. Brief of T&C at 26 (“Because none of the four [street locations] will have a failing LOS as a consequence of the Scarsella plat, there is no *direct impact*, within the meaning of RCW 82.02.020.”). But nothing in SEPA, RCW 82.02.020, or the definition of “direct” requires a change in LOS to show that an impact is “direct.”

2. The Traffic Mitigation Fee Was “Reasonably Necessary as a Direct Result” of the Scarsella Plat.

The second term modified by “direct” in RCW 82.02.020 is the word “result”:

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.

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<sup>25</sup> See Brief of T&C at 39 (quoting definition for “direct” in WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 640 (1993)); Brief of Respondent City of Tacoma at 18 (same).

RCW 82.02.020 (emphasis added).

Based on this language, T&C argues that the Scarsella plat must “necessitate” the two improvements being funded by the challenged mitigation payment.<sup>26</sup> However, the word “necessitate” does not appear anywhere in the statute.

When paraphrased correctly, the actual language of the statute provides that “any payment” must be “reasonably necessary as a direct result of the proposed development or plat.” *See* RCW 82.02.020. T&C’s interpretation would modify this language to state that any improvement must be reasonably necessary as the exclusive result of the proposed development or plat. That is not what the statute says. This Court should reject T&C’s invitation to add words to RCW 82.02.020 or to substitute words that do not appear in the statute.<sup>27</sup>

To determine whether the imposition and amount of payment required by Tacoma was “reasonably necessary as a direct result” of the Scarsella plat, this Court must examine the relationship between the payment and the “direct result” of the Scarsella plat – the trips that will be added directly to Federal Way’s street system. In other words, does the

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<sup>26</sup> Brief of T&C at 30 (“Federal Way thus never demonstrated that any direct traffic impact of the Scarsella plat will necessitate the two TIP project improvements.”) (Emphasis added.)

<sup>27</sup> *See Vita Food Products, Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978) (courts do not construe an unambiguous statute and do not add words to a statute).

addition of new trips directly create a reasonable need for a contribution to the cost of road improvements; or, conversely, is the payment of a small percentage of the cost of the planned transportation improvements as mitigation “reasonably necessary” as a direct result of the Scarsella plat’s addition of that same percentage of new traffic that impacts those roadways? The need for the two Federal Way improvements was caused by projected growth. The Scarsella plat is part of that projected growth. SEPA authorizes the imposition of mitigation for adverse impacts (i.e., new traffic) to those impacted roadways. Thus, the mitigation fee is reasonably necessary as a direct result of the plat, even though the improvements were not necessary as the exclusive result of (or “necessitated by”) the plat.

In answering the question of what is “reasonably necessary,” the Court must also ask what would happen if no fee were required of smaller projects like the Scarsella plat. The record below establishes that the result would be “death by a thousand cuts.”<sup>28</sup> Thus, the traffic mitigation fee is “reasonably necessary” so that Tacoma and Federal Way may avoid this result. In fact, if this Court were to adopt T&C’s assertion that Tacoma cannot impose mitigation under SEPA and RCW 82.02.020 unless the small project itself causes the LOS failure, arguably the result

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<sup>28</sup> Testimony of Perez, Tr. 7/11/08 at 257-58.

would be to impose a burden on one small plat that is beyond what is reasonably necessary as a direct result of the traffic generated by the plat.

**E. T&C's Position Would Require this Court to Overturn Supreme Court Precedent Based on a Misreading of Court of Appeals Precedent.**

T&C relies heavily on a single decision by Division I of the Court of Appeals and fails to address the Supreme Court decisions cited in Tacoma's and Federal Way's briefs, which establish that the traffic condition was appropriate and lawful.

1. T&C Disregards *Sparks* and *Trimen*.

In particular, T&C completely disregards the cities' discussions regarding the *Sparks* and *Trimen* cases. *See Sparks v. Douglas County*, 127 Wn.2d 901, 904 P.2d 738 (1995) (finding compliance with RCW 82.02.020 and "nexus" and "rough proportionality" tests where right-of-way dedications took into account "future developments and their anticipated cumulative impacts"); *Trimen Development Co. v. King County*, 124 Wn.2d 261, 269-274, 877 P.2d 187 (1994) (finding compliance with RCW 82.02.020 where park mitigation fee was calculated "based on zoning, projected population, and the assessed value of the land that would have been dedicated or reserved," even though the County "did not conduct a site-specific study").

T&C continues to assert that transportation improvements must be “necessitated” by the Scarsella plat alone in order to meet the “rough proportionality” test, even though *Sparks* adopted the *Dolan* court’s less stringent 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.” *Sparks*, 127 Wn.2d 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) (emphasis added)). What T&C is really advocating is the more exacting “specific and uniquely attributable” test, which the *Dolan* court declined to adopt in favor of the “rough proportionality” test. *See Dolan*, 512 U.S. at 389-90, 114 S. Ct. at 2319.

This Court should reject T&C’s effort to graft the “specific and uniquely attributable” test onto RCW 82.02.020, which only requires that fees be “reasonably necessary.”

## 2. T&C Misapplies *Castle Homes*.

Based on dicta in a Division I case, *Castle Homes v. City of Brier*, 76 Wn. App. 95, 882 P.2d 1172 (1994), T&C is essentially asking this Court to overturn, or at least to disregard, the Supreme Court’s holdings in *Sparks* and *Trimen*.

The central problem in *Castle Homes*, which formed the basis for the court's holding, was that the City of Brier's fee calculation charged developers for existing trips by dividing the total improvement cost only among new development projects (a "proportional share"). *Castle Homes*, 76 Wn. App. at 98, n.2 (distinguishing "proportional share" from "fair share"). Thus, new development in the *Castle Homes* case was paying for 100% of the cost of an improvement that served both new trips and existing trips. *Id.* This is what the court found objectionable.

Here, because Federal Way divided the improvement cost among all development (a "fair share") rather than just new development, Federal Way effectively excluded existing trips from the cost charged to developers. Thus, *Castle Homes* is inapposite.

It is true that the *Castle Homes* court also noted that the traffic generated by the development in question "would not significantly impact the levels of service of the streets," that "the need for safety improvements" would remain without or without new development, and that the fees at issue were "based on a cumulative impact of all the new subdivisions." *Id.* at 106-107. However, because these statements were

not necessary for the court's holding, they are dicta and need not be followed.<sup>29</sup>

Significantly, the *Castle Homes* court did not did not invalidate the traffic mitigation fee altogether. Instead, it remanded for a recalculation of the fee based on a "fair share" approach. *Id.* at 110 ("The decision is reversed and remanded for a determination of the 'fair share' amount of the impact fees based on the correct number of lots."). If the *Castle Homes* court had intended its statements about the significance of impacts, the need for improvements with and without the development, and cumulative impacts to mean that no fee was permissible under RCW 82.02.020 (as T&C argues), the court would have invalidated the fee altogether rather than remanding for recalculation.

Thus, the statements in *Castle Homes* quoted by T&C are dicta and may be disregarded. And to the extent that they conflict with *Sparks* and *Trimen*, they are incorrect and in conflict with controlling precedent.

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<sup>29</sup> *DCR, Inc. v. Pierce County*, 92 Wn. App. 660, 964 P.2d 380 (1998) (a court's statements are dicta if they "do not relate to an issue before the court and are unnecessary to decide the case"); *State v. Potter*, 68 Wn. App. 134, 150, n. 7, 842 P.2d 481 (1992) ("Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute orbiter dictum, and need not be followed.").

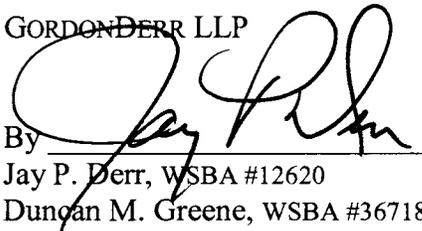
### III. CONCLUSION

Nothing in RCW 82.02.020 or SEPA require Tacoma to adopt an impact fee ordinance as the only method to collect a share of traffic mitigation on the Scarsella plat. Even without an impact fee ordinance, SEPA provides Tacoma with ample authority to require developers to pay a fair share of the cost of planned improvements based on the number of trips generated by each development. New trips generated by the Scarsella plat are direct, adverse impacts, and they are part of the cumulative impact to Federal Way's streets that create the overall need for road improvements. The mitigation fee for a pro-rate share of the cost of those improvements was therefore lawful under RCW 82.02.020 and SEPA.

For the reasons stated herein, the City of Tacoma respectfully asks this Court to affirm Judge Felnagle's Order reversing the Examiner's Decision and upholding the traffic mitigation condition.

RESPECTFULLY SUBMITTED this 11th day of May, 2010.

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**CERTIFICATE OF SERVICE**

I certify that on the 11<sup>th</sup> day of May, 2010, I caused a ~~true and correct~~ copy of REPLY BRIEF OF RESPONDENT CITY OF TACOMA to be served

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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