

NO. 39407-3-II

IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

CITY OF FEDERAL WAY, a Washington municipal corporation,

Petitioner/Respondent,

vs.

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 CITY OF FEDERAL WAY

Bob C. Sterbank
WSBA No. 19514
Kenyon Disend, PLLC
11 Front Street South
Issaquah, WA98027-3820
(425) 392-7090
Attorneys for Respondent
City of Federal Way

Peter B. Beckwith
WSBA No. 34141
Assistant City Attorney
City of Federal Way
33325 8th Avenue South
Federal Way, WA 98003
(253) 835-7000
Attorneys for Respondent
City of Federal Way

ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	3
III.	COUNTER STATEMENT OF THE CASE.....	3
	A. Town & Country’s Project.....	3
	B. Federal Way Traffic Impact Analysis	6
	C. Town & Country SEPA Appeal.....	8
	D. Hearing Examiner Decision.....	11
IV.	ARGUMENT	19
	A. Standards of Review, Burden, and Deference	19
	1. Land Use Petition Act Legal Standards	19
	2. Burden of Proof and Deference.....	20
	B. The Hearing Examiner’s Decisions Were Properly Reversed, Because They Addressed the Wrong Legal Issues	23
	C. Tacoma’s MDNS Complied With SEPA.....	24
	1. Cumulative Impacts are Subject to Mitigation Under SEPA.....	26
	2. Federal Way Proved the Scarsella Plat Specific Impacts.....	30
	3. The Scarsella Plat Impacts are Legally Significant.....	32

4.	The MDNS Required Traffic Mitigation was Proportionate to the Scarsella Plat Impacts	35
5.	To the Extent Legally Necessary, Tacoma Identified the Specific, Adverse Environmental Impacts of the Scarsella Plat	37
6.	The Required Mitigation was Reasonable and Not Duplicative	38
D.	The MDNS Traffic Mitigation Condition Complied With RCW 82.02.020.....	40
1.	RCW 82.02.020 Allows a City to Require a Developer to Pay its Pro Rata Share of Traffic Mitigation Even if the City has Already Planned Improvements to Address Anticipated Level-of-Service Failures.....	41
2.	RCW 82.02.020 Does Not Limit Mitigation to Only the Project That is the “Straw that Breaks the Camel’s Back.”	44
V.	CONCLUSION.....	50

APPENDIX

Appendix A	Verbatim Transcript of Proceedings April 8, 2009, pp. 4, 21 - 25	A
Appendix B	Verbatim Transcript of Proceedings April 10, 2009, pp. 36 - 37	B
Appendix C	Verbatim Transcript of Proceedings April 10, 2009, pp. 58 - 66.....	C
Appendix D	Conclusions of Law, Order and Judgment Granting Land Use Petition filed May 18, 2009	D

TABLE OF AUTHORITIES

TABLE OF CASES

Alpine Lakes Protection Society v. Forest Practices Board, 135 Wn. App. 736, 144 P.3d 385 (Div. I 2006)29

Boehm v. City of Vancouver, 111 Wn. App. 711, 47 P.3d 137 (Div. II 2002).....28, 29

Castle Homes v. City of Brier, 76 Wn. App. 95, 882 P.2d 1172 (Div. I 1994) 25, 46-49

Citizens’ Alliance v. Sims, 145 Wn. App. 649, 187 P.3d 786 (Div. I 2008)43

Citizens to Preserve Pioneer Park LLC v. City of Mercer Island, 106 Wn. App. 461, 24 P.3d 1079 (2001).....22

Clallam County Citizens for Safe Drinking Water v. Port Angeles, 137 Wn. App. 214, 151 P.3d 1079 (Div. II 2007) 23

Cobb v. Snohomish County, 64 Wn. App. 451, 829 P.2d 169 (Div. I 1991) 24

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 821 P.2d 549 (1992).....31

Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994)..... 36

Griffin v. Dept. of Social and Health Services, 91 Wn.2d 616, 590 P.2d 816 (1979) 24

Habitat Watch v. Skagit County, 155 Wn.2d 397, 120 P.3d 56 (2005).....22

<i>Hayes v. Yount</i> , 87 Wn.2d 280, 552 P.2d 1038 (1976).....	27-29
<i>HJS Development, Inc. v. Pierce County</i> , 148 Wn.2d 451, 61 P.3d 1141 (2002)	20
<i>Humbert/Birch Creek Constr. v. Walla Walla County</i> , 145 Wn. App. 185, 185 P.3d 660 (Div. III 2008)	21
<i>Isla Verde International Holdings, Inc. v. City of Camas</i> , 146 Wn.2d 740, 752 (2002)	43
<i>Leschi Imp. Council v. Wash. State Highway Comm'n.</i> , 84 Wn.2d 271, 525 P.2d 774 (1974)	24
<i>Levine v. Jefferson County</i> , 116 Wn.2d 575, 807 P.2d 353 (1991).....	25
<i>Lingle v. Chevron U.S.A., Inc.</i> , 544 U.S. 528, 546, 125 S. Ct. 2074 (2005).....	36
<i>Mason v. King County</i> , 134 Wn. App. 806, 142 P.3d 637 (Div. I 2006)	20
<i>McClung v. City of Sumner</i> , 548 F.3d 1219, 1225-28 (9th Cir. 2008).....	36
<i>Miller v. Port Angeles</i> , 38 Wn. App. 904, 691 P.2d 229 (Div. II 1984); <i>rev. denied</i> , 103 Wn.2d 1024 (1985).....	42, 48
<i>Narrowsview Preservation Ass'n v. City of Tacoma</i> , 84 Wn.2d 416, 526 P.2d 897, 902 (1974).....	27
<i>Norway Hill Preservation and Protection Assoc v. King County</i> , 87 Wn.2d 267, 552 P.2d 674 (1976).....	27, 28
<i>Nollan v. California Coastal Commission</i> , 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987)	36

<i>Olympia v. Drebeck</i> , 156 Wn.2d 289, 126 P.3d 802 (2006).....	36
<i>Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Associates</i> , 151 Wn.2d 279, 87 P.3d 1176 (2004).....	22
<i>Quadrant Corp. v. State Growth Management Hearings Bd.</i> , 154 Wn.2d 224, 110 P.3d 1132 (2005).....	22
<i>Quality Rock Products, Inc. v. Thurston County</i> , 139 Wn. App. 125, 159 P.3d 1 (Div. II 2007), <i>rev. denied</i> 163 Wn.2d 1018 (2008).....	21, 22
<i>SEAPC v. Cammack Orchards II</i> , 49 Wn. App. 609, 744 P.2d 1101 (1987).....	28
<i>Skagit County v. Dept. of Ecology</i> , 93 Wn.2d 742, 613 P.2d 115 (1980).....	29
<i>Sparks v. Douglas County</i> , 127 Wn.2d 901, 904 P.2d 738 (1995).....	42
<i>Trimen v. King County</i> , 124 Wn.2d 261, 877 P.2d 187 (1994).....	18, 37, 41-43
<i>Tucker v. Columbia Gorge Commission</i> , 73 Wn. App. 74, 867 P.2d 686 (Div. II 1994).....	27, 28

STATUTES

Revised Code of Washington (“RCW”) 35.77.010	7, 44
RCW 36.70A.070(6).....	7, 49
RCW 36.70A.070(6)(b)	44
RCW 36.70C.....	19
RCW 36.70C.130	19

RCW 36.70C.130(1).....	19
RCW 36.70C.130(1)(b)	20, 22, 41
RCW 36.70C.130(1)(d)	20, 22-23
RCW 43.21C.....	1, 24
RCW 43.21C.060.....	37
RCW 82.02.020	24, 36, 40-42, 44-46, 49-50
RCW 82.02.060(b) and (c)	39
RCW 82.02.090	15, 36

REGULATIONS AND RULES

Washington Administrative Code (“WAC”) 197-11-060(4)(d)	45
WAC 197-11-300(2).....	25
WAC 197-11-310[MCS1][MCS2][MCS3].....	25
WAC 197-11-330.....	34
WAC 197-11-330(2)(c)	46
WAC 197-11-330(3)(c)	26, 28
WAC 197-11-330(3)(e)	26
WAC 197-11-335(3).....	5
WAC 197-11-350.....	25
WAC 197-11-360(1).....	38

WAC 197-11-660.....	36
WAC 197-11-660(1)(c)	37
WAC 197-11-660(1)(d)	36
WAC 197-11-794.....	33, 34, 45
WAC 197-11-794(2).....	33, 34
WAC 197-11-794(3).....	33
Tacoma Municipal Code (“TMC”) 13.12.004	25
TMC 13.12.340.....	25
TMC 13.12.350.....	25
TMC 13.12.510.....	5
TMC 13.12.680(1)(d).....	24
TMC 13.12.680(4)(e)(ii).....	25
TMC 13.12.680(4)(e)(iv).....	23

OTHER AUTHORITIES

Merriam Webster’s Online English Dictionary	46
Settle, <i>The Washington State Environmental Policy Act: A Legal and Policy Analysis</i>	46

I. INTRODUCTION

This case concerns the well-established legal principle, arising under the State Environmental Policy Act, RCW 43.21C (“SEPA”), that a City may require a developer to mitigate the off-site traffic impacts of its development by paying the pro-rata share of the cost of improvements necessary to mitigate those impacts.

The City of Tacoma correctly applied this SEPA mitigation principle below, and required developer Town & Country Real Estate (“Town & Country,” or “T&C”) to pay its pro-rata costs of street improvements in the City of Federal Way necessary to mitigate the off-site impacts of Town & Country’s proposed new “Scarsella” housing subdivision. (Although Town & Country’s proposed subdivision is located in northeast Tacoma, the evidence demonstrated that 76% of the Scarsella car trips would drive north through Federal Way, adversely affecting intersections and an arterial corridor there.) Town & Country appealed and, after an unsuccessful attack on the traffic engineering, succeeded in distracting Tacoma’s Hearing Examiner with novel but unsupported legal arguments. During briefing and argument on a LUPA appeal before well-respected Pierce County Superior Court Judge Thomas Felnagle, however, Town & Country was forced to acknowledge critical errors in the Hearing Examiner’s decision. After thorough consideration, Judge Felnagle issued a detailed and well-reasoned

written decision, concluding that the initial City of Tacoma SEPA mitigation decision should be reinstated, because it correctly keyed the extent of Town & Country's mitigation obligation to the exact same percentage of Scarsella Plat traffic trips that would travel through affected intersections.

In its appeal to this Court, Town & Country fashions a smoke screen, by suggesting that there are disputed issues of fact (when T&C never challenged any findings of fact) and resurrecting some of the very same arguments it conceded to Judge Felnagle below. At the end of the day, however, Town & Country is left with the argument that only a project that is the "straw that breaks the camel's back" by triggering a failure of transportation Level of Service ("LOS") standards may be assessed mitigation, even if traffic from many other new developments also contributes to the LOS failure. As Judge Felnagle observed, however, nothing in any published decision, SEPA, or RCW 82.02.020 compels such an absurd result; instead, applicable law supports a requirement for mitigation where, as here, the amount required directly corresponds to the percentage of T&C's Plat impacts.

Therefore, as discussed in more detail below, this Court should affirm Judge Felnagle's decision below, which affirmed Tacoma's SEPA mitigation condition requiring Town & Country to pay its pro rata share of the costs of projects necessary to mitigate Scarsella Plat traffic impacts.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Should this Court affirm the trial court's conclusion that Tacoma's SEPA Mitigated Determination of Nonsignificance ("MDNS") lawfully required a developer to pay its pro rata share to mitigate transportation level of service failures, where unchallenged findings of fact demonstrate that those failures will result from the cumulative impact of the developer's proposed subdivision combined with traffic impacts from other new development?

B. Should this Court affirm the trial court's ruling that the mitigation required by Tacoma's MDNS complied with other SEPA requirements, in that the mitigation was limited to the developer's pro rata share of the cost of the transportation projects needed to avoid a level of service failure, the mitigation was reasonable, and the mitigation was imposed to address impacts identified in the environmental documents?

C. Should this Court affirm the trial court's ruling that the MDNS mitigation complied with RCW 82.02.020, because the mitigation was imposed for direct impacts in the form of transportation level of service failures that the proposed subdivision would cause when combined with other cumulative traffic impacts?

D. Should this Court affirm the trial court's ruling that the mitigation complied with RCW 82.02.020 because the mitigation was limited to the developer's pro rata share of the costs of projects that were reasonably necessary to avoid a level of service failure?

III. COUNTER STATEMENT OF THE CASE

A. Town & Country's Project.

This case began on December 18, 2006, when Town & Country submitted its application and SEPA environmental checklist for the proposed "Scarsella" subdivision to the City of Tacoma ("Scarsella Plat"). The proposed plat consists of 9.23 acres proposed to be divided into 51

lots, and its eastern boundary directly abuts the City of Federal Way.¹ The environmental checklist acknowledges that the proposed subdivision will generate stormwater runoff, as well as 490 new vehicle trips per day. R 625b;² R 628b (Environmental Checklist at 6, 12). Tacoma staff did not themselves undertake to evaluate whether the Scarsella Plat would have any impacts in neighboring jurisdictions like Federal Way, but rather waited to receive comments.³

On March 2, 2007, after the application had been deemed complete, Tacoma circulated the application and environmental checklist

¹ R 573-74 (Tacoma maps of project location); R 576-77 (Tacoma Staff Report at page 1). Following the pattern established below, and by Appellant's Brief, citations to the record below are in the form of "R ___," followed by a parenthetical identifying the document title and page number within that document. These documents were assigned exhibit numbers by the Hearing Examiner, but because the record is individually and separately paginated (rather than being paginated as part of the Clerk's Papers), this brief cites directly to the page number in the record rather than an exhibit number or a Clerk's Paper designation.

² Some portions of the record are misnumbered, in that they are double-sided but have page numbers assigned only to the face page. For these portions of the record, this brief uses the citation format "R __a" to refer to the front, numbered side of the page, and "R __b" to refer to the back, unnumbered side of the same page.

³ In the first of its many misleading characterizations of the record, T&C suggests that this somehow indicates that Tacoma staff had determined that the project would have absolutely no traffic impacts whatsoever. T&C Brief at 5-6. As Tacoma staff testified, however, they lack sufficient staff to analyze a project's extra-territorial impacts on Tacoma's seven different neighboring cities and unincorporated county area. Instead, they simply wait to evaluate comments received. If the comments are based on accepted traffic engineering methodologies (which they considered Federal Way's to be), Tacoma incorporates those comments into Tacoma's eventual SEPA threshold determination. Tr. 7/11/08 at 281-82 (testimony of Tacoma engineer Dana Brown). Mr. Brown also testified that Tacoma would have required mitigation for projects in Tacoma, but the City had recently completed extensive improvements to Norpoint Drive and 49th Avenue, in the vicinity of the proposed plat, so no additional mitigation was required for the Scarsella Plat, but that if any level of service deficiencies had been identified in Tacoma, "[T]he developer would have been responsible to pay the entire bill for whatever improvement was necessary." Tr. 7/11/08 at 288.

to other public agencies and requested comments as called for by Tacoma's own code, TMC 13.12.510, as well as the Department of Ecology's SEPA Model Rules, especially WAC 197-11-335(3). R 611a-b (Notice of Application at 1-2). The City of Federal Way was one of the agencies to which Tacoma circulated the application and environmental checklist.

On March 16, 2007, the City of Federal Way responded via letter from Director of Community Development Services Kathy McClung. R 614-15. Ms. McClung indicated that Federal Way was "concerned about adverse transportation impacts to existing and future City of Federal Way streets and intersections resulting from the proposal," and noted that a transportation impact analysis for the project had not been provided to Federal Way. *Id.* Therefore, Federal Way requested that "a traffic impact analysis be required to identify any appropriate mitigation to maintain the City's level of service standards so that [Growth Management Act-required] concurrency requirements do not preclude planned development in the City." *Id.*

In response to the City's letter, T&C's engineer, Hans Korve, contacted Federal Way's Traffic Engineer, Rick Perez, and inquired about what type of transportation impact analysis the City was requesting. Tr. 7/11/08 at 176: 15-20. Mr. Perez suggested a concurrency analysis

consistent with the way Federal Way then analyzed traffic impacts for development within its own borders. Mr. Korve agreed. *Id.*

B. Federal Way Traffic Impact Analysis.

On April 26, 2007, Mr. Korve submitted a concurrency application to the City of Federal Way. R 934-35. The application estimated that the Scarsella Plat would generate 51 new, p.m. peak hour vehicle trips. R 935. Federal Way then prepared a Transportation Impact Analysis, or “TIA.”⁴ The TIA was prepared in accordance with Federal Way’s standards applicable to such analyses, which Federal Way had adopted based on SEPA.⁵ As explained by Mr. Perez, in preparing a TIA, the City typically first examines existing conditions and quantifies how the roadway system is functioning in the area of the project.⁶ It then examines the “horizon year,” which is the year that a development is anticipated to be constructed. The TIA then forecasts what traffic conditions will be like at that time, calculates the amount of traffic being generated by the development, and adds those trips to the horizon year analysis to determine the project’s impact. If there are deficiencies in adopted transportation levels of service for the horizon year “with the project,” the TIA would identify the need for a mitigation, either by contribution of the

⁴ R 638-815 (November 5, 2007 letter from Ken Miller to Jim Fisk, and enclosed TIA).

⁵ R 641-44; Tr. 7/11/08 at 178: 3-5.

⁶ Tr. 7/11/08 at 183: 3-10

developer's pro-rata share mitigation towards an already-planned transportation improvement project⁷ or, if there was to be an impact not addressed by an anticipated construction project, the TIA would also determine the amount of mitigation above and beyond a pro-rata share contribution.⁸

Based on this analysis, the TIA concluded that the Scarsella Plat would generate 10 or more evening peak hour trips that would affect four intersections or corridors. R 638. Those four intersections were predicted to have failing levels of service by the year 2014, the end year for the City's proposed Transportation Improvement Plan ("TIP").⁹ The TIA concluded that the project's pro-rata share contribution to the cost of the four projects, planned in the City's TIP to address those LOS failures, equaled \$266,344.¹⁰

Federal Way shared this with the City of Tacoma, and requested

⁷ Mr. Perez and others at the hearing refer to planned street projects as "TIP" projects. The acronym refers to projects that are included on a city's 6-year Transportation Improvement Program ("TIP"), required to be adopted each year by RCW 35.77.010.

⁸ Tr. 7/11/08 at 183: 14-25 – 184: 1-4.

⁹ Tr. 7/11/08 at 181: 1-9.

¹⁰ R 638 (November 5, 2007 letter to Tacoma's Jim Fisk, enclosing TIA). T&C makes much of the fact that the TIA assumed that the TIP projects would be constructed and thus levels of service would not fail. Appellant's Brief at 9-10. As Rick Perez explained, though, the TIA did so because the City is required by the GMA to demonstrate "concurrency" by showing that transportation levels of service will not fall below adopted levels if new projects are planned to be in place "concurrent" with the new development. Tr. 7/11/08 at 209-210; RCW 36.70A.070(6)(b). Federal Way planned the TIP projects in the first place because modeling showed LOS failures by 2014. Tr. 7/11/08 at 221: 8-14; at 274. The TIA highlighted the Scarsella Plat impacts, by identifying which "already projected to fail" levels of service the Plat would exacerbate.

that Tacoma require SEPA mitigation in the form of a condition requiring Town & Country to pay the pro-rata share contribution of \$266,344 to the City of Federal Way. When Tacoma issued its SEPA threshold environmental determination, in the form of an MDNS, Tacoma included the requested condition.¹¹

C. Town & Country SEPA Appeal.

T&C filed an administrative appeal of Tacoma's SEPA MDNS. R 559-561 (SEPA Appeal). T&C's SEPA Appeal challenged the factual basis for the traffic mitigation condition.¹² In response, Federal Way reconsidered its mitigation request. Federal Way concluded that because the TIA guidelines called for the horizon year to be the estimated completion of the Scarsella Plat construction, and that year was 2009 (not 2014, the TIP's concluding year), two of the four intersections would – although perilously close - not have failing levels of service by that 2009 date.¹³ To its credit, Federal Way then removed amounts for projects related to those two intersections, which dropped the requested pro-rata share contribution to \$250,123. Tr. 7/11/08 at 181: 1-9.

¹¹ R 621 (SEPA MDNS at 5, Mitigation Measure No. 1).

¹² R 559-561 (alleging that Tacoma “did not give appropriate consideration” to T&C traffic engineer Chris Brown’s comments, that the TIA included several projects for which there was allegedly “no clear nexus” given their distance from the proposed Scarsella project site, and that the dollar amount of mitigation was unreasonable because it was allegedly higher on a per-unit basis than mitigation fees in other cities).

¹³ These were the projects that T&C’s appeal alleged had “no clear nexus.”

The \$250,123 total mitigation amount was for the two remaining projects: (1) the installation of left-turn lanes to the intersection of 21st Avenue SW and SW 336th Street (“21st/336th”); and (2) the widening to five lanes of the corridor extending west-east along SW 340th and SW 336th¹⁴ from Hoyt Road to 26th Place SW (“340th/336th”). For the 21st/336th intersection, the Scarsella Plat would contribute 27 new p.m. peak hour trips, out of a total of 4,945, which required a pro-rata contribution of \$67,420 towards a total cost of \$12,348,000. For the 340th/336th corridor, the Scarsella Plat would contribute 227 new trips along its various segments, out of a total of 20,032 trips, which required a pro-rata contribution of \$182,703 towards a total project cost of \$15,312,000. Thus, while the \$250,123 figure is not, by itself, insubstantial, it represents only a small fraction of the nearly \$28 million in total costs needed to mitigate the impacts of the Scarsella Plat and other new developments’ traffic. And, the \$250,123 figure is directly proportionate to Scarsella Plat’s percentage of the total number of trips anticipated to use the 21st/336th intersection and the 340th/336th corridor in the horizon year.

In its Pre-hearing Brief to the Examiner, Town & Country repeated

¹⁴ The locations of these projects are shown in purple highlighting on the map at R 307.

the factual arguments from its appeal.¹⁵ At the SEPA appeal hearing, however, gaping holes in those factual claims were quickly exposed. The factual and engineering bases for Federal Way's TIA were demonstrated to be fundamentally sound - the transportation modeling, trip generation and trip distribution were based on the well-accepted Puget Sound Regional Council model, used the standard method (Institute for Traffic Engineers Trip Generation Manual) for estimating the number of trips generated by each new house, and correlated well with census tract data and the PSRC regional employment forecast. T&C's "expert," Christopher Brown, had actually used the very same methodology in his work on other projects in Federal Way,¹⁶ and he admitted on cross-examination that his work on the Scarsella Plat and elsewhere was riddled with errors.¹⁷

Given the collapse of its case at the hearing, T&C's closing brief literally ran away from T&C's initial claims. T&C suddenly claimed that its case "[did] not stand or fall" on fact-finding (despite nearly two

¹⁵ See, e.g., R 224-26 (Town & Country's Pre-Hearing Brief) at 9; at 10 (fee of \$5,222 per lot "an exorbitant amount"); at 11 (attacking Federal Way's distribution of trips). T&C also challenged a Tacoma-recommended subdivision condition requiring Town & Country to pay a pro rata contribution for use of a Federal Way regional stormwater detention facility, to which runoff from the Scarsella Plat would drain. This condition required payment of approximately \$70,000 to Federal Way. The Examiner upheld this condition, and T&C has not challenged it either below or here.

¹⁶ R 880-85 (Brown TIA for Wynstone Plat); Tr. 7/11/08 at 82-84 (Brown cross-examination re same).

¹⁷ Tr. 7/11/08 at 66-76; at 85-88 (Brown cross-examination); R 897-909.

full days of engineering testimony), and mocked its own expert's testimony and that of other expert engineers, labeling it "sound and fury"¹⁸ on "arcane technical issues of transportation engineering." R 143 and R 157 (T&C Post-Hearing Brief at 3 and 17, respectively). T&C argued instead that the City had failed to establish that levels of service would be affected by the Scarsella Plat, because the City planned to build the TIP improvements with or without the Scarsella Plat. R 151-152 (T&C Post-Hearing Brief at 11-12). Town & Country also argued for the first time that the percentage of trips affecting the intersections – instead of the dollar amount – was itself too small to constitute an impact. R 146-47 (T&C Post-Hearing Brief at 6-7). Because post-hearing briefs were submitted simultaneously, neither Federal Way nor Tacoma received an opportunity to respond to Town & Country's new legal arguments.¹⁹

D. Hearing Examiner Decision.

On September 5, 2008, the Tacoma Hearing Examiner mailed his Findings of Fact, Conclusions of Law, and Decisions ("Decision"). The Decision rejected T&C's claims that the traffic engineering modeling used

¹⁸ The reference is a partial quotation from Shakespeare: "It [life] is a tale, told by an idiot, full of sound and fury, signifying nothing." Shakespeare, *Macbeth*, Act V, Scene 5.

¹⁹ Federal Way and Tacoma instead focused primarily on the factual engineering issues that had dominated the hearing *See, e.g.*, R 180-197 (Federal Way Post-Hearing Brief at 2-19) R 166-170 (Tacoma Post-Hearing Brief at 8-12); Tr. 7/11/08 at 293: 11-295: 20 (Hearing Examiner's outline of questions for counsel to address).

by Federal Way's TIA was unreasonable:

It has not been shown by appellant that the transportation model used by Federal Way . . . has not been developed in accordance with accepted transportation modeling practices or has been improperly utilized by Federal Way in its analysis of Town & Country's subdivision proposal. In fact, the weight of the evidence is to the contrary.

R 109 (Decision at 8, Finding 13) (emphases added).

The Hearing Examiner also found that Federal Way's methods for calculating the number of Scarsella Plat vehicle trips, and distributing those trips over the Federal Way street network to evaluate their impacts, were also "consistent with accepted transportation princip[les]." R 110 (Decision at 9, Finding of Fact 14). Based on that finding, the Hearing Examiner also agreed with Federal Way that 76% of the vehicle trips generated by the Scarsella Plat would travel north into Federal Way. *Id.* He further specifically found that the Federal Way TIA correctly calculated the traffic impacts to the two areas of concern: the 21st/336th intersection, and the 336th/340th arterial corridor. Concerning the 21st/336th intersection, the Examiner found:

Using accepted transportation methodologies, Federal Way calculated that Town & Country's proposed 51-lot subdivision would contribute 27 new PM peak hour trips to the 21st Avenue SW / SW 336th Street intersection at a horizon year of 2009, with expected volumes of 2,945 vehicle trips during the PM peak hour or stated another way, approximately one-half of one percent contribution to that intersection.

R 110 (Decision at 9, Finding 15). He made a similar finding concerning the arterial corridor:

In regard to the SW 336th Street / SW 340th Street . . . arterial corridor, Federal Way, again using accepted transportation methodology, calculated Town & Country's proposed subdivision would contribute 27 to 32 PM peak hour trips to this corridor. By 2009, the referred to corridor would be expected to experience traffic volumes during the PM peak ranging from 2,263 to 2,682 vehicle trips, which would result in an LOS F for that arterial corridor . . . The proposed vehicle trip contribution to the corridor in 2009 by Town & Country's proposed subdivision, would represent 1.2 percent of the vehicle trips using that corridor by 2009.

R 110-111 (Decision at 9-10, Finding 15).

Unfortunately, however, the Hearing Examiner swallowed whole T&C's novel new legal arguments, made for the first time during the simultaneous post-hearing briefing. The Decision noted that due to traffic from other new developments in addition to the Scarsella Plat, the level of service will fall to the designation "F"²⁰ both with and without the project. Because of that fact, and because Federal Way had anticipated this level of service failure by planning (as required by state law) for future improvements to address it, the Examiner somehow concluded that the need for improvements could not be the direct result of Scarsella Plat

²⁰ A level of service designation of F is referred to as "LOS F."

traffic.²¹ The Decision also concluded that the percentage of Scarsella Plat trips affecting the intersection are - somehow - *per se* insignificant. R 125 (Decision at 24, Conclusion 17). Based on these two fundamental legal errors, the Decision then concluded that the traffic mitigation required by the MDNS did not comply with RCW 82.02.020, and must be stricken. R 125 (Decision at 24, Conclusion of Law 18).

All parties sought reconsideration. R 68-90; R 47-67; R 42-46. Federal Way and Tacoma sought reconsideration of the traffic mitigation portion of the Decision, while T&C sought reconsideration of the Examiner's approval of the condition requiring T&C to pay its pro-rata share for use of Federal Way's regional stormwater detention facility. The Examiner amended a conclusion of law supporting his decision on the stormwater mitigation fee, but otherwise issued a one-line order affirming the initial Decision.²²

Federal Way timely filed a land use petition in Pierce County Superior Court seeking reversal of the Initial and Reconsideration Decisions. CP 3-66 (Land Use Petition). The parties thoroughly briefed the issue, with T&C again raising new issues that it had not pursued before

²¹ R 111 (Decision at 10, Finding of Fact 16); R 123-24 (Decision at 22-23, Conclusions of Law 16-17).

²² R 5 (Order Granting in Part and Denying in Part Motions for Reconsideration, Amending Conclusions of Law, and Affirming Decisions ("Reconsideration Decision" at 3).

the Examiner below. CP 354-363. Prior to oral argument, the parties appeared before the assigned judge, the Honorable Thomas Felnagle, who invited them to provide preliminary comments to help focus his consideration of the parties' briefs. RP 04/08/09 at 4. In response to a question from Judge Felnagle, T&C's counsel conceded that the Examiner had erred in concluding that the traffic mitigation was invalid simply because Federal Way had identified TIP projects to address an anticipated LOS failure:

THE COURT: Are you also adhering to the argument that, because they've anticipated failure, that they're no longer able to exact fees?

MR. WILSON: No, Your Honor. Simply because they have done the planning they should have done with the capital improvement program, that's fine

RP 4/08/09 at 22: 10-15. T&C's counsel also conceded that the Examiner had erred in concluding that the required traffic mitigation violated RCW 82.02.090:

MR. WILSON: [T]he Examiner ruled that part of what Federal Way and Tacoma did violated section 090 of 82.02. That's the GMA impact [fees] section. That does not apply here. . . .

RP 4/08/09 at 23: 12-14 (emphasis added).

These concessions left T&C with but a single remaining argument: that Tacoma's required traffic mitigation was unlawful because only the

project that is the “straw that breaks the camel’s back,” and independently causes an LOS failure, can be required to pay mitigation.

THE COURT: Are you advancing still the idea raised apparently by the Hearing Examiner that it’s only the impact that tilts – I guess the straw that breaks the camel’s back sort of argument? Is that one that you are adhering to?

MR. WILSON: Yes, Your Honor, that if the addition of just this much traffic from this Scarsella plat would have caused that level of service to fail, then they could be tagged for this mitigation under SEPA.

RP 4/08/09 at 21: 14-22.

Even before it had concluded reviewing the parties’ briefs, however, the trial court recognized the illogic in T&C’s argument:

THE COURT: I’m sure you answered this in the brief, but what do you do if there is a hundred small impacts, none of which can be shown to be the decisive one? Is government then bound not to exact any impacts because no single impact is sufficient?

RP 4/08/09 at 25: 20-24.

When the parties returned two days later for oral argument, Judge Felnagle again honed in on the “extreme” nature of T&C’s argument that a city may require mitigation only for a project that is the “straw that breaks the camel’s back.” The trial court’s questions forced T&C’s counsel to concede that, in fact, there is no case supporting T&C’s argument:

THE COURT: The caselaw that carries that concept of direct result to the extreme you would carry it is found

where?

MR. WILSON: Well, the Court characterizes it as extreme, but I believe that it can be found in reading together SEPA and 82.02 . . . And I, therefore, contend that, no, we don't have a case directly on point with this, but unless 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.

RP 4/10/09 at 36: 23-25 – 37: 1-25 (emphasis added). Despite the lack of appellate precedent, T&C's counsel insisted that unless a project caused either a level of service failure or the volume-to-capacity ratio of an intersection or corridor to be exceeded, a city may not impose traffic mitigation under SEPA. *Id.* at 44: 1-9.

Following oral argument, Judge Felnagle issued a detailed oral ruling from the bench, in which he either applied or distinguished each of the cases cited by T&C as controlling. RP 4/10/09 at 58-66, esp. at 61-63. He also specifically addressed, and rejected, T&C's "straw that breaks the camel's back" argument (*Id.* at 64: 3-10), as well as other particular findings and conclusions of the Hearing Examiner. *Id.* at 64: 18-25; at 65: 1-25. Judge Felnagle then entered detailed Conclusions of Law memorializing his oral ruling. CP 404-415.

For example, with respect to T&C's "straw that breaks the camel's back" argument, Judge Felnagle concluded:

Town & Country's arguments notwithstanding, there is no case law holding that requiring mitigation for the extent of

a proposed development's contribution to cumulative, significant impacts violates either SEPA or RCW 82.02.020. The caselaw, including *Trimen*, indicate the contrary, because they hold that a development may be required to pay mitigation for the extent of its contribution to an existing level of service deficiency. The result of Town & Country's arguments would be a scenario in which no one project would independently cause a level of service failure, and therefore no mitigation at all could be required, and that is not the statutes' intent.

CP 410-11 (Concl. 9) (emphasis added).

Judge Felnagle also concluded that the Examiner's determination, that Tacoma and Federal Way had failed to document the specific number of increased vehicle trips coming from the Scarsella Plat, was not supported by substantial evidence:

Substantial evidence, in the form of exhibits and testimony admitted at the hearing before the Hearing Examiner, demonstrates that Federal Way did determine the specific impact of the proposed subdivision alone, and that impact would be 27 new PM peak hour trips contributed to the 21st / 336th intersection (out of a total of 4,945), and a total of 227 new PM peak hour trips contributed to the various segments of the 336th / 340th Street arterial corridor (out of a total of 20,032). For the same reasons, the sentence in Conclusion of Law No. 17, to the effect that "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," was also not supported by evidence that is substantial when viewed in light of the whole record before the court.

CP 406 (Concl. 3) (emphasis added).

Judge Felnagle also considered and expressly rejected the Hearing

Examiner's *sua sponte* conclusion that the Scarsella Plat impacts were somehow *per se* insignificant:

This conclusion was also an erroneous interpretation of the law and a clearly erroneous application of the law to the facts. Substantial evidence shows that the traffic impacts of the Scarsella Plat are quantifiable, concentrated, consistent and re-occurring, certain to result, and part of a major cumulative impact in the form of level of service failures at the 21st / 336th intersection and the 336th / 340th Street arterial corridor. Such a level of service failure is a significant impact for SEPA purposes, as was conceded by all parties here.

CP 410 (Concl. 8) (emphasis added).

Based on the foregoing, Judge Felnagle concluded that Federal Way had met its burden under RCW 36.70C.130(1) and was entitled to relief, in the form of an Order reversing the Decision and Reconsideration Decision, and affirming the City of Tacoma's MDNS. CP 411-412 (Concl. 12; Order at paras. 1-2).

T&C then filed its Notice of Appeal. CP 415.

IV. ARGUMENT

A. Standards of Review, Burden, and Deference.

1. Land Use Petition Act Legal Standards.

The Court reviews the Initial and Reconsideration Decisions pursuant to the Land Use Petition Act, RCW 36.70C ("LUPA"). LUPA's substantive legal standards are set forth in RCW 36.70C.130 and authorize

a court to grant relief “if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met.” The standards in RCW 36.70C.130(1)(b) and (d) are the most relevant here.

Under LUPA, this Court applies the statutory standards of review directly to the administrative record,²³ and questions of law are reviewed *de novo*.²⁴ This does not mean, as T&C suggests, that this Court must ignore the trial court decision; rather, it simply means that this Court applies the statutory standard of review to the administrative, fact-finding record, rather than the record of the superior court.²⁵ This Court should not ignore Judge Feltnagle’s decision any more than the Supreme Court should ignore a decision of the Court of Appeals, even though the Supreme Court would (in a typical case) apply the applicable standard of review directly to the record of the superior court rather than to the record of the Court of Appeals.

2. Burden of Proof and Deference.

Because T&C’s appeal has zero appellate precedent upon which to rely, T&C twists appellate decisions regarding the burden of proof and

²³ *Mason v. King County*, 134 Wn. App. 806, 809, 142 P.3d 637 (Div. I 2006).

²⁴ *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2002).

²⁵ *Compare HJS Devel.*, 148 Wn.2d at 468 (“appellate court reviews administrative decisions on the record of the administrative tribunal, not of the superior court”) with Appellant’s Brief at 21 (“Court reviews that record directly, not the decision of the superior court. . . .”) (emphases added).

deference in land use cases, to create the impression that barriers exist to affirming Judge Felnagle’s decision below. For example, T&C emphasizes that a petitioner in a LUPA case has the burden of proof on appeal, even if the petitioner prevailed in superior court. Appellant’s Brief at 21-22, esp. n. 66. T&C, however, glosses over the very authority upon which it relies – this Court’s decision in *Quality Rock Products v. Thurston County* – which holds that the burden of proof is not significant where, as here, the issues being reviewed are primarily legal (because review of legal issues is *de novo*).²⁶

T&C also argues that the LUPA standards of review “grant due deference to the Hearing Examiner’s decision below.” Appellant’s Brief at 23. Again, T&C overreaches in describing applicable precedent. For example, T&C argues this Court’s *de novo* review of legal conclusions means that this Court must “disregard the superior court’s conclusions of law” (Appellant’s Brief at 23, emphasis added), but the case upon which T&C cites held that in a LUPA case the Court of Appeals “will disregard the superior court’s findings . . .”²⁷ *Humbert*’s holding is perfectly

²⁶ *Quality Rock Products, Inc. v. Thurston County*, 139 Wn. App. 125, 134-35, 159 P.3d 1 (Div. II 2007), *rev. denied* 163 Wn.2d 1018 (2008).

²⁷ *Humbert/Birch Creek Constr. v. Walla Walla County*, 145 Wn. App. 185, 192 n.3, 185 P.3d 660 (Div. III 2008) (emphasis added).

logical, given that a trial court reviews the administrative record and has no authority to enter new findings of fact. As noted above, there is no reason for this Court to disregard Judge Felnagle's articulate, well-reasoned legal conclusions, even if not binding on this Court.

T&C then argues that the Hearing Examiner's legal conclusions are entitled to deference, again citing *Pinecrest*, *Quality Rock*, and *Habitat Watch v. Skagit County*. Appellant's Brief at 23, n.69. Those cases, however, merely paraphrase RCW 36.70C.130(1)(b), which provides that a reviewing court may reverse a land use decision that 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." Reviewing courts do not defer to erroneous interpretations of state law.²⁸ A reviewing court will defer to a city council's or hearing examiner's legal interpretation only when the jurisdiction has expertise in construing its own ordinances.²⁹

The one standard of review that T&C correctly describes is the "clearly erroneous" standard. RCW 36.70C.130(1)(d) (relief may be

²⁸ *Quadrant Corp. v. State Growth Management Hearings Bd.*, 154 Wn.2d 224, 238, 110 P.3d 1132 (2005).

²⁹ See, e.g., *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Associates*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004) (interpretation of zoning ordinance); *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 412, 120 P.3d 56 (2005) (interpretation of grading 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).

granted under LUPA when land use decision is a “clearly erroneous application of the law to the facts.”). T&C neglects to point out, however, that the decision that the Hearing Examiner reviewed – Tacoma’s SEPA Mitigated Determination of Nonsignificance – was itself entitled to substantial weight, and could not be reversed unless it was “clearly erroneous.”³⁰ Any deference accorded by the “clearly erroneous” standard to the Examiner’s Decision is counterbalanced by the deference owed (under common law and Tacoma’s own code) by the Examiner to Tacoma’s underlying SEPA decision.³¹

B. The Hearing Examiner’s Decisions Were Properly Reversed, Because They Addressed the Wrong Legal Issues.

The Hearing Examiner erred, first procedurally, because he addressed the wrong legal issues. T&C’s SEPA appeal challenged only the factual, engineering basis for the MDNS condition and its compliance with certain Tacoma Municipal Code provisions. R 559-561. T&C’s appeal did not challenge the statutory authority or jurisdiction of the City to issue an MDNS. Because the Examiner was required to afford the MDNS

³⁰ See, e.g., *Clallam County Citizens for Safe Drinking Water v. Port Angeles*, 137 Wn. App. 214, 225, 151 P.3d 1079 (Div. II 2007). This is the same standard set forth in TMC 13.12.680(4)(e)(iv), which authorizes the Examiner to reverse a decision “in regard to challenges to the appropriateness of the issuance of a DNS” only when the DNS is “clearly erroneous in view of the public policy of the Act.”

³¹ Although the Examiner did acknowledge the deference owed to Tacoma’s MDNS, he inexplicably attempted to apply instead the standard of review in TMC 13.12.680(4)(e)(ii), i.e., whether a decision is “outside the statutory authority or jurisdiction of the City.” R 120 (Decision at 19, Concl. 12).

“substantial weight,” and because he was considering the matter in his appellate capacity, the Hearing Examiner was not entitled to *sua sponte* raise and consider new legal issues not brought as part of Town & Country’s appeal. His jurisdiction was limited to the specific appeal issues contained in Town & Country’s SEPA appeal.³² The Decisions’ forays into RCW 82.02.020 and other matters should be reversed on this ground alone.

The Examiner’s Decisions were also substantively erroneous, as explained below.

C. Tacoma’s MDNS Complied With SEPA.

The source for Tacoma’s legal authority to require traffic mitigation is SEPA, RCW 43.21C. This is the case regardless of whether mitigation is also subject to the overarching legal requirement of RCW 82.02.020, because that statute does not provide independent authority for imposition of a mitigation fee.³³ Thus, SEPA provides the starting point

³² TMC 13.12.680(1)(d) (SEPA appeals must contain “a concise statement of the legal and factual reasons for the appeal,” along with “the grounds upon which the appellant relies”); *Griffin v. Dept. of Social and Health Services*, 91 Wn.2d 616, 631, 590 P.2d 816 (1979) (“Failure to raise issues during the course of an administrative hearing precludes the consideration of such issues on review”); *Leschi Imp. Council v. Wash. State Highway Comm’n.*, 84 Wn.2d 271, 273, 525 P.2d 774 (1974) (“The general rule is that objections or questions which have not been raised or urged in proceedings before the administrative agency or body will not be considered . . .”).

³³ See, e.g., *Castle Homes v. Brier*, 76 Wn. App. 95, 105, 882 P.2d 1172 (Div. I 1994) and *Cobb v. Snohomish County*, 64 Wn. App. 451, 462-63, 829 P.2d 169 (Div. I 1991). RCW 82.02.020 is “not an enabling statute” but rather a “taxing statute” that includes an exception to allow a local government to enter into an agreement to pay a fee “as an alternative to dedicating land or complying with a mitigation requirement which that government may impose as a result of authority granted by another statute.” which includes SEPA. *Cobb*, at 462-63 (Agid, J., concurring and dissenting) (emphasis added).

for examining Tacoma's condition requiring T&C to pay traffic mitigation fees.

SEPA requires that a "threshold determination" be made by the responsible official. TMC 13.12.004 (adopting WAC 197-11-310). This "threshold determination" decides whether a proposed project has a significant adverse environmental impact requiring an environmental impact statement ("EIS"). *Id.* (adopting WAC 197-11-300(2)). If an EIS is not required, the official may issue either a determination of nonsignificance ("DNS") or a Mitigated Determination of Nonsignificance ("MDNS"). TMC 13.12.340; TMC 13.12.350; WAC 197-11-350. The MDNS provides the mitigation measures the applicant must take to reduce the environmental impact of a proposed project. TMC 13.12.350. Ultimately, conditions in an MDNS may be imposed over an applicant's objection. *Levine v. Jefferson County*, 116 Wn.2d 575, 578, 807 P.2d 353 (1991).

Here, T&C complains that the MDNS requirement that T&C pay mitigation for the Scarsella Plat's traffic impacts is inconsistent with SEPA. T&C is wrong. As Judge Felnagle correctly concluded, the Examiner's determinations that Tacoma and Federal Way had failed to establish the Scarsella Plat's specific impacts, that those impacts were *per se* insignificant, and that the MDNS-required mitigation was not

proportional to the Scarsella Plat's impacts, were not supported by substantial evidence, were erroneous interpretations of the law, and were clearly erroneous applications of the law to the facts. CP 405-06 (Concl. 2-3); CP 408-11 (Concl. 6-10). This Court should affirm Tacoma's MDNS and Judge Felnagle's reversal of the Hearing Examiner.

1. Cumulative Impacts are Subject to Mitigation Under SEPA.

T&C's primary SEPA argument is that the Scarsella Plat's impacts may not be considered, and it cannot be required to pay its fair share of those impacts, because the impacts are not the "straw that broke the camel's back," but rather part of the cumulative impacts of other new development and growth in background traffic. Appellant's Brief at 35-36. Adopting a crabbed reading of SEPA, T&C argues that cumulative impacts are only those impacts that serve as a precedent for other development. T&C misreads SEPA.

As the SEPA Rules makes clear, SEPA allows for consideration of two different types of cumulative impacts: (1) the accumulation of incremental impacts; and (2) where one development serves as a precedent for additional development.³⁴ Because SEPA's consideration of

³⁴ Compare WAC 197-11-330(3)(c) (Responsible official shall take into account that "Several marginal impacts when considered together may result in a significant adverse impact" (emphasis added)) with -330(3)(e) (proposal may "establish a precedent for future actions with significant effects . . .").

cumulative impacts encompasses both types, appellate precedent also addresses both types of cumulative impacts. For example, long-established precedent, cited in Judge Felnagle's decision,³⁵ holds that SEPA provides the basis for requiring mitigation or even project denial if the project will have cumulative impacts, in the form of an accumulation of several, smaller impacts. *Hayes v. Yount*, 87 Wn.2d 280, 287-88, 552 P.2d 1038 (1976).³⁶ Where the overall, cumulative impact is significant, it is immaterial that a project's individual impact may be insignificant:

In addition, the finding of insignificant environmental effect and the Board's conclusion are in no way inconsistent. Logic and common sense suggest that numerous projects, each having no significant effect individually, may well have very significant effects when taken together.

Hayes v. Yount, 87 Wn.2d at 287-88 (emphasis added). In *Hayes*, the Supreme Court upheld a denial of a shoreline substantial development permit for a permit that authorized filling of wetlands in the Snohomish River estuary. The Shorelines Hearings Board had concluded that the ecological impact of the proposed fill would be "insignificant," but that

³⁵ CP 410 (Conclusions of Law, Order and Judgment at Concl. 9).

³⁶ See also *Tucker v. Columbia Gorge Commission*, 73 Wn. App. 74, 867 P.2d 686 (Div. II 1994); *Norway Hill Preservation and Protection Assoc v. King County*, 87 Wn.2d 267, 277, 552 P.2d 674 (1976) (consideration of significant impacts must include "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"); *Narrowview Preservation Ass'n v. Tacoma*, 84 Wn.2d 416, 423, 526 P.2d 897 (1974) (same).

“the cumulative effect of other such developments would cause irreversible damage to the ecosystem of the estuary at some unknown and unpredictable stage of development.” The Board therefore denied the permit. After a trial court reversal, the Supreme Court upheld the Board’s decision, noting that both SEPA and the Shoreline Management Act required consideration of cumulative impacts, and that “[t]his concept of cumulative environmental harm has received legislative and judicial recognition.” *Id.* at 288 (emphasis added).

Here, T&C does not even bother to cite, let alone distinguish, *Hayes* or *Tucker*. T&C relies primarily instead on *Boehm v. City of Vancouver*, 111 Wn. App. 711, 47 P.3d 137 (Div. II 2002). Appellant’s Brief at 35, n.109. *Boehm*’s holding cited by T&C, however, merely states the limits on when an agency can be required to perform a cumulative impacts analysis, based on whether a project has been properly “phased.”³⁷ *Boehm* does not hold that cumulative impacts do not also include the aggregation of several, smaller impacts; indeed, *Boehm* itself cites *Norway Hill* and quotes WAC 197-11-330(3)(c) to the effect that “several marginal impacts when considered together may result in a significant adverse impact.” *Boehm*, 111 Wn. App. at 717, n.1. And, in

³⁷ *Boehm*, 111 Wn. App. at 720-21 (discussing phasing and *SEAPC v. Cammack Orchards II*, 49 Wn. App. 609, 614-15, 744 P.2d 1101 (1987)).

Boehm, this Court expressly approved of Vancouver’s requirement of mitigation for exactly the type of cumulative impacts at issue here: the City required mitigation (all-way stop controls) after evidence showed that “due to pre-existing deficiencies” an intersection near the project would have a failing level of service after construction of the gas station. *Id.* at 721 (emphasis added). *Boehm* does not support T&C, nor do the other cases T&C cites.³⁸

Here, like *Hayes*, the “cumulative impacts” at issue result from the aggregation of impacts from several different new development proposals, including Scarsella as well as other projects in the “pipeline.” Unlike *Hayes*, the cumulative impact of the failure of Federal Way intersection levels of service will not occur at some “unknown and unpredictable stage of development,” but rather in the horizon year of 2009, unless the TIP projects are built. This is a significant, cumulative impact for which Tacoma’s MDNS rightly required mitigation, as Judge Felnagle correctly ruled. The MDNS (and Judge Felnagle) should be affirmed.

³⁸ See Appellant’s Brief at 35, n.110, citing *Skagit County v. Dept. of Ecology*, 93 Wn.2d 742, 749-50, 613 P.2d 115 (1980). This case, however, quotes approvingly from *Hayes*, without limiting its holding to “precedential” impacts as T&C claims. T&C also cites *Alpine Lakes Protection Society v. Forest Practices Board*, 135 Wn. App. 736, 388, 144 P.3d 385 (Div. I 2006). Appellant’s Brief at 35, n. 110. In *Alpine Lakes*, the Court considered whether DNR was required by SEPA to adopt a rule that would eliminate a statutory categorical exemption for certain types of forest practices that were exempt from environmental review but that, taken together, had cumulative impacts. While the Court held DNR was not required to adopt such a rule, its analysis indicates that “cumulative impacts” include the accumulated impact from multiple proposals like the Scarsella Plat.

2. Federal Way Proved the Scarsella Plat Specific Impacts.

T&C's next argument is that Federal Way failed to prove the specific Scarsella Plat impacts, because Federal Way failed to provide a "with project, without TIP" and "without project, without TIP" comparison. Appellant's Brief at 43 ("cities never identified a specific impact of the Scarsella Plat alone"). This argument mirrors the Examiner's Finding 18. R 112 (Finding 18). At its core, this argument is simply a repetition of T&C's position that it may not be required to mitigate the Scarsella Plat cumulative impacts. And, in any event, T&C admitted below that the City had proven the Plat's specific impacts, and the Examiner's Finding 18 simply lacks the requisite substantial evidence to support it.

As the Examiner found in detail elsewhere in the Decision, Federal Way's Traffic Impact Analysis ("TIA") set forth with precise detail the Scarsella Plat impacts, consistent with what the Examiner labeled "accepted transportation principals" [sic]. R 110 (Decision at Finding 14). The Decision determined the Scarsella Plat p.m. peak hour trip generation (58 trips), and the percentage that would travel into Federal Way (76%). R 109-110 (Decision at Findings 13 and 14). Federal Way also distributed those trips, and identified an intersection and arterial corridor that would

receive more than 10 p.m. peak hour new trips, the number of new trips each would receive (27, and 27-32, respectively), and the percentage of total estimated horizon year trips (.5 percent and 1.2 percent, respectively). R 110 (Decision at Finding 15).³⁹ As T&C was forced to admit below, Federal Way “did analyze the trip assignment of the Scarsella Plat traffic, thus attempting to identify the direct impacts of the T&C plat.” CP 368 (T&C Response Brief at 23).⁴⁰

Further, Finding 18’s contention that Federal Way “did not develop information for the two TIPs for [the] 2009 horizon year ‘without the project,’” is simply not supported by substantial evidence. The TIA expressly provides that “the analysis was conducted for 2009, the anticipated year of opening of the development proposal for conditions with and without the project.” R 646 (TIA at 2) (emphasis added). The TIA assumed construction of the TIPs, so one of its analyses was “with TIPs, without the project.” Further, at the hearing, the City provided an

³⁹ T&C did not cross-appeal these findings, which are verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 821 P.2d 549 (1992).

⁴⁰ T&C’s hint of a “potential double count” of Scarsella Plat traffic, because Federal Way’s modeling took into account a 2% annual growth in background traffic (Appellant’s Brief at 8-9), is off base. Accounting for “background” traffic growth is standard engineering practice and required by Federal Way’s TIA guidelines. R 346a at III.B (“Annual Growth Rate”). This is to account for annual increases in miles driven (R 941-44; Tr. 7/11/08 at 199), and to address the effect of very small developments with fewer than 10 p.m. peak hour trips. Even if T&C was correct and Federal Way had double-counted Scarsella Plat traffic, such a “mistake” would have redounded to T&C’s benefit, because it resulted in larger ratios and a smaller per-trip mitigation cost. Subtracting T&C trips from the “denominator” of the pro rata share calculation would only increase T&C’s mitigation obligation.

additional exhibit, R-40, that analyzed traffic without assuming construction of the TIPS, but “with the project.” It was precisely this analysis – to which T&C neither objected⁴¹ nor responded - that demonstrated that background traffic plus traffic from new developments (including Scarsella) would cause LOS failures. It was also this analysis that prompted Judge Felnagle to wryly observe:

I still wonder what it is that the City could have shown or that Mr. Perez could have shown through his analysis that would have made it more clear what the effect was with or without the project.

RP 4/10/09 at 24: 21-23. Judge Felnagle was correct: Federal Way adequately established the Scarsella Plat impacts for SEPA purposes⁴², and this decision should be affirmed.

3. The Scarsella Plat Impacts are Legally Significant.

The Hearing Examiner concluded (and T&C argues here), that the Scarsella Plat impacts are, *per se*, insignificant. The Examiner’s decision was an erroneous interpretation of the law and a clearly erroneous interpretation of the law to the facts. The un rebutted evidence is that the Scarsella Plat impacts, along with traffic from other new development, will cause LOS failures. And even T&C concedes that LOS failures are “significant” under SEPA. As Mr. Perez testified, it does not matter

⁴¹ Tr. 7/11/08 at 223: 4.

⁴² CP 418 (Conclusions of Law, Order and Judgment at Concl. 3).

whether the Scarsella Plat alone will cause the level of service to fail; instead, the important consideration is “that it fails, and that the [Scarsella] project will impact these locations adversely.” Tr. 7/11/08 at 273: 1-2. The Examiner’s Decision (and T&C’s argument) is again, a simple refusal to accept that “cumulative impacts” may be significant, and pro rata mitigation for them required. Judge Felnagle’s decision to reverse the Examiner on this point⁴³ was correct, and should be affirmed.

The Hearing Examiner’s Decision cites no legal authority for its conclusion that the Scarsella Plat impacts are “insignificant.” R 125 (Decision at Concl. 17). The SEPA Rules, however, prescribe a definition and process for determining “significance.” Under WAC 197-11-794, “‘Significant’ as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental quality.” As the Rule continues:

Significance involves context and intensity (WAC 197-11-330) and does not lend itself to a formula or quantifiable test. The context may vary with the physical setting. Intensity depends on the magnitude and duration of an impact.

WAC 197-11-794(2). Further, pursuant to WAC 197-11-794(3), “WAC 197-11-330 specifies a process, including criteria and procedures, for determining whether a proposal is likely to have a significant adverse

⁴³ CP 422 (Conclusions of Law, Order and Judgment at Concl. 8).

environmental impact.” Here, that process culminated in Tacoma’s MDNS condition requiring T&C to pay traffic mitigation.

The Hearing Examiner did not even attempt to apply these legal standards for measuring “significance” to the record. Instead, despite the command of WAC 197-11-794(2), the Examiner attempted to utilize but a single quantifiable measure – the ratio of Scarsella Plat trips to total trips using the intersection and corridor. By contrast, Judge Felnagle applied the applicable legal standard to the record. As his decision explains in Conclusion 8:

Substantial evidence shows that the traffic impacts of the Scarsella Plat are quantifiable, concentrated, consistent and re-occurring, certain to result, and part of a major cumulative impact in the form of level of service failures at the 21st / 336th intersection and the 336th / 340th Street arterial corridor. Such a level of service failure is a significant impact for SEPA purposes, as was conceded by all parties here.

CP 422 (Conclusions of Law, Order and Judgment at Concl. 8) (emphasis added).

Other evidence supports Judge Felnagle’s decision. Although T&C argues (and the Examiner concluded) that the percentage of Scarsella Plat trips was simply too small (R 125; Decision at Concl. 17), T&C’s own expert prepared a traffic analysis on a different project (Wynstone), and concluded that percentages comparable to the Scarsella Plat’s justified

a traffic mitigation requirement.⁴⁴ Further, T&C's argument is simply illogical, as Judge Felnagle noted:

And, to a certain degree, Town & Country, I believe, was hoisted on its own petard when they talk about the proportion being too small. It is small in relation to the whole project or the whole total impact and the need to mitigate the whole thing. It is, however, a significant amount of money to them. So, how can they suggest that the end result is not one of significance when the share they are asked to contribute has been shown to be proportionate? In other words, if a proportionate amount of money is significant, why isn't their proportionate impact, which is a component of that calculation, also significant?

RP 4/10/09 at 65-66 (emphasis added). T&C has no answer to this question. Judge Felnagle was right, and this Court should affirm.

4. The MDNS Required Traffic Mitigation was Proportionate to the Scarsella Plat Impacts.

The traffic mitigation required by Tacoma's MDNS was also calibrated to be proportionate to the Scarsella Plat impacts. "Proportionality," in the SEPA context, is required under WAC 197-11-660(1)(d), which provides that "mitigation measures may be imposed upon an applicant only to the extent attributable to the identified adverse

⁴⁴ See, e.g., Tr. 7/11/08 at 82-84 (C. Brown testimony); at 278 (Perez testimony); see also R 881-884 (C. Brown Wynstone TIA).

impacts of its proposal.”⁴⁵ This requirement is clearly met here where, as discussed above, it is undisputed that the MDNS required T&C to pay the same ratio of the costs of projects needed to avoid LOS failures equal to the ratio of the Scarsella Plat trips to the total number of trips expected to use the affected intersection and arterial corridor. R 109-110 (Decision at Finding 17); CP 421 (Felnagle, J. Conclusions of Law, Order and Judgment at Concl. 7).

The Hearing Examiner’s conclusion that proportionality was lacking was an erroneous interpretation of the law, and a clearly erroneous interpretation of the law to the facts. First, the Examiner concluded that Tacoma was required to comply with the definition of “proportionality” set forth in RCW 82.02.090. R 124 (Decision at Concl. 17). As even T&C admitted below, this was error, because that statute applies only to GMA impacts fees, not to SEPA. *See, e.g.*, RP 4/08/09 at 23: 12-15. It

⁴⁵ This is the only source of the “proportionality” requirement. RCW 82.02.020 does not itself contain a proportionality requirement. Cases T&C cites to the contrary are *dicta*, and are themselves incorrectly importing the “nexus/rough proportionality” standard from federal constitutional takings jurisprudence, which applies only to a required dedication of land. *See, e.g., Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 546, 125 S. Ct. 2074 (2005) (*Nollan/Dolan* framework applies to adjudicative land-use exactions where the “government demands that a landowner dedicate an easement . . .”); *McClung v. City of Sumner*, 548 F.3d 1219, 1225-28 (9th Cir. 2008); *Olympia v. Drebeck*, 156 Wn.2d 289, 302, 126 P.3d 802 (2006) (“[N]either the United States Supreme Court nor this court has determined that the tests applied in *Nollan* and *Dolan* to evaluate land exactions must be extended to the consideration of fees imposed to mitigate the direct impacts of a new development . . .”). This Court should decline T&C’s invitation to error and limit its consideration of “proportionality” to that required by SEPA and WAC 197-11-660.

was also error because the Examiner's Conclusion 17 was based on the notion that proportionality was lacking due to Federal Way's previously-planned TIP projects. As explained in more detail, *infra*, T&C also conceded this was error. Judge Felnagle so concluded as well, because the Supreme Court held in *Trimen v. King County*, 124 Wn.2d 261, 877 P.2d 187 (1994), that a jurisdiction's use of planning to identify existing and anticipated level of service deficiencies supported rather than barred required mitigation.

5. To the Extent Legally Necessary, Tacoma Identified the Specific, Adverse Environmental Impacts of the Scarsella Plat.

T&C argues that Tacoma's environmental documents failed to clearly identify the specific, adverse environmental impacts of the Scarsella Plat.⁴⁶ T&C confuses "identify" with "prove."⁴⁷ All that RCW 43.21C.060 requires is that environmental documents "identify" the impact to be mitigated, and Tacoma's MDNS clearly complied.

For example, Tacoma's MDNS clearly identified the specific adverse environmental impacts to Federal Way's street system at page 4, under the heading "Transportation":

⁴⁶ Appellant's Brief at 41, *citing* RCW 43.21C.060 and WAC 197-11-660(1)(c).

⁴⁷ Appellant's Brief at 42 ("Since neither Federal Way nor Tacoma proved that traffic specifically from the Scarsella Plat would cause any adverse impact . . . Tacoma's MDNS must be invalidated.") (emphasis added).

[T]he City of Federal Way has provided comment that indicates an adverse impact to the City of Federal Way's transportation network. Review by the Public Works Engineering Division has determined that the analysis provided by the City of Federal Way, see Exhibit "C" is appropriate and will adequately mitigate any potential significant adverse impacts associated with the development.

R 555 (emphasis added). The MDNS goes on to conclude that "additional mitigating measures" are necessary to address those impacts; specifically, that T&C either construct the needed TIP projects, or pay its pro-rata share of traffic mitigation to Federal Way. R555-56. This clearly - and sufficiently for SEPA purposes - identified the environmental impact.⁴⁸ T&C's complaint is that the environmental documents did not contain a full analysis proving that the impacts would occur, but T&C had an opportunity to appeal, and that proof T&C is demanding was provided at the hearing.

6. The Required Mitigation was Reasonable and Not Duplicative.

T&C also argues that the mitigation was unreasonable. Appellant's Brief at 44-45. This argument merely repeats T&C's argument that the Scarsella Plat impacts are "insignificant," an argument rebutted above. Further, to the extent that T&C is simply challenging the

⁴⁸ After all, if a SEPA Responsible Official determines that a proposal "may" have "probable significant, adverse environmental impacts," preparation of a full Environmental Impact Statement is required. WAC 197-11-360(1).

dollar amount of the mitigation, that amount is a percentage of the TIP projects' total cost, and that percentage is exactly the same as the percentage of the Scarsella Plat trips utilizing the intersection and arterial corridor in question. Further, in a different project, T&C's own expert recommended payment of "fair share" mitigation based on percentages virtually identical to those T&C claims are unreasonable here.⁴⁹ The only difference is that the TIP projects now cost more – but that does not make the mitigation "unreasonable."

Last, T&C claims that mitigation is a duplicative "double dip," because Federal Way might receive State and/or federal grant money for part of the TIP projects. Appellant's Brief at 46. Again, there is absolutely no basis for T&C's claim. First, while RCW 82.02.060(b) and (c) require that a GMA impact fee ordinance must provide an adjustment for grant funds, T&C has already acknowledged that the GMA impact fee statute does not apply here, and there is no parallel SEPA requirement. Second, Rick Perez testified that although Federal Way had successfully obtained grant funds in the past, grant money is no longer available unless a project is located on a state route – and the intersection and arterial corridor here are not. Tr. 7/11/08 at 277: 21-24. Even if grants were

⁴⁹ Tr. 7/11/08 at 82-84 (C. Brown testimony); at 278 (Perez testimony); *see also* R 881-884 (C. Brown Wynstone TIA).

available, SEPA mitigation is typically used to meet the grant “match” requirement, and Federal Way would be responsible for paying for the portion of the TIP project to be used by existing trips. There simply is no evidence in the record that the Scarsella Plat mitigation fee would duplicate any grant money Federal Way might receive.

D. The MDNS Traffic Mitigation Condition Complied With RCW 82.02.020.

T&C also argues that the MDNS condition requiring payment of traffic mitigation violated RCW 82.02.020. The “centerpiece” of T&C’s argument is the claim that RCW 82.02.020 mandates that only a project that is the sole cause of a level of service failure may be required to pay mitigation. Appellant’s Brief at 29-30; *see also* RP 4/08/09 at 25-26. T&C also implies that because Federal Way had already anticipated level-of-service failures and identified TIP projects needed to remedy those failures, requiring T&C to pay its pro-rata share would violate RCW 82.02.020. T&C has already admitted below that this second argument is wrong, and that its first argument lacks any case law whatsoever to support it. This Court should reject T&C’s claims, and affirm Judge Felnagle and Tacoma’s MDNS.

1. RCW 82.02.020 Allows a City to Require a Developer to Pay its Pro Rata Share of Traffic Mitigation Even if the City has Already Planned Improvements to Address Anticipated Level-of-Service Failures.

The Examiner's Decisions concluded that T&C could not be required to mitigate its traffic impacts, because those impacts will occur at an intersection (21st Ave. SW/SW 336th Street) and along an arterial corridor (SW 336th/SW 340th) that Federal Way had already predicted would have failing levels of service in 2009 and, accordingly, had planned two Transportation Improvement Program (TIP) projects.⁵⁰ According to the Examiner, this meant that Tacoma and Federal Way could not establish that the traffic mitigation fee was "to mitigate a direct impact that has been identified as a consequence" of the Scarsella Plat, or "reasonably necessary as a direct result" of the Scarsella Plat, as RCW 82.02.020 required. These conclusions were erroneous interpretations of the law and correctly reversed under RCW 36.70C.130(1)(b). As Judge Felnagle explained:

Appellate decisions, including *Trimen v. King County*, hold that neither an existing level of service deficiency, nor a local jurisdiction's plans to correct it, prevent a local jurisdiction from requiring mitigation from a developer whose project contributes additional impacts to deficiency.

⁵⁰ CP 31 (Decision at 10, Finding 16) and CP 43-44 (Decision at 22-24, Conclusions 16 and 17).

CP 419 (J. Felnagle Concl. 4) (emphasis added).⁵¹

Although T&C now suggests otherwise,⁵² T&C's counsel admitted to Judge Felnagle that the Examiner erred in concluding that Federal Way's TIP planning proved a violation of RCW 82.02.020. RP 4/08/09 at 22: 10-15. Indeed, Judge Felnagle's Conclusions expressly noted T&C's concession:

Respondent Town & Country conceded that the fact that a local jurisdiction engages in planning for projects to address existing deficiencies does not in and of itself bar a local jurisdiction from requiring mitigation from new development to fund those projects.

CP 419 (J. Felnagle Concl. 4) (emphases added).

The reason T&C conceded this point below is that *Trimen v. King County*, 124 Wn.2d 261, 877 P.2d 187 (1994), establishes not only that prior planning does not invalidate later mitigation fees, prior planning is required in order to justify such fees. In *Trimen*, the Supreme Court considered a developer's challenge to a \$52,000 parks mitigation fee. The developer argued, *inter alia*, that the fee was not "reasonably necessary as a direct result of the development." *Id.* at 273-276. The Court rejected

⁵¹ Additional appellate decisions with similar holdings include *Sparks v. Douglas County*, 127 Wn.2d 901, 904 P.2d 738 (1995); and *Miller v. Port Angeles*, 38 Wn. App. 904, 691 P.2d 229 (Div. II 1984); *rev. denied*, 103 Wn.2d 1024 (1985). A full explication of these decisions is contained in Federal Way's briefs below. CP 327-330 (Opening Brief); 383-84 (Reply Brief).

⁵² Appellant's Brief at 18, 31-32, 37 (*citing* Perez testimony that TIP projects are needed whether or not Scarsella Plat is developed).

this argument, noting that the County's parks mitigation fee was justified by a parks needs study, prepared nearly a decade prior to the development, that "indicated that there was a deficit of approximately 107 park acres . . ." *Id.* at 274. In rejecting Trimén's argument that the fee was invalid because the developer had not agreed to the particular capital improvements upon which the fee would be spent, the Court noted that the County was required by its own code to spend the money in the same parks plan subarea that the development was located and, in this case, had allocated the money towards new tennis courts identified in the County's plan. *Id.* at 273. This critical component of the Court's holding in *Trimén* remains the law.⁵³

Given these precedents, it is clear (as T&C conceded) that a city's responsible planning for improvements to address the needs from new development is simply not a legal bar to imposition of traffic mitigation on new residential plats. Were it otherwise, local jurisdictions would be unable to meet GMA requirements that they plan for and finance

⁵³ *Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 760, 49 P.3d 867 (2002) (distinguishing case before it from *Trimén* because "[I]n *Trimén*, the county conducted a comprehensive assessment of park needs in a report predating the developer's applications for subdivision approval," and "[t]hat report showed a deficit of park acres in the area of the proposed developments, and projected a greater deficit as population expanded."). The continued vitality of this aspect of *Trimén*, was also noted by Division I of this Court in *Citizens' Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 666, 187 P.3d 786 (Div. I 2008) (emphasis added).

transportation infrastructure improvements necessary to serve new growth and development,⁵⁴ because the very act of planning would undercut their ability to collect mitigation fees to help finance those improvements. There is simply no legal support for such a result. Judge Felnagle correctly held that the Hearing Examiner's determination (in Finding 16 and Concl. 16) was an erroneous interpretation of the law and a clearly erroneous application of the law to the facts. This Court should affirm.

2. RCW 82.02.020 Does Not Limit Mitigation to Only the Project That is the "Straw that Breaks the Camel's Back."

Despite T&C's lengthy protestations otherwise, nothing in RCW 82.02.020 restricts mitigation to only those projects that are the sole cause of a level of service failure, and - as T&C admitted - no case holds otherwise.⁵⁵ Thus, when T&C argues that "in the absence of any unacceptable LOS shift attributable to the proposal, there is no direct adverse impact," it points to no authority other than itself. Appellant's Brief at 30, n. 93, citing to Appellant's Brief, Section V.B.1.c.

⁵⁴ Under RCW 36.70A.070(6), cities are required to adopt a transportation element in their comprehensive plans. The transportation element must include "facilities and service needs," including an "[i]dentification of state and local system needs to meet current and future demands," and a "multi-year finance plan" coordinated with the six-year plan (*i.e.*, the TIP) required under RCW 35.77.010. Cities' finance plans typically rely at least in part on SEPA mitigation and/or traffic impact fees to finance a portion of needed improvements; mitigation fees are a critical source of "matching" funds required to obtain state and federal grants. Tr. 7/11/08 274: 20-25; 278: 14-16.

⁵⁵ RP 4/10/09 at 37 ("[N]o, we don't have a case directly on point with this . . .").

T&C then argues that cumulative impacts cannot, as a matter of law, constitute a “direct” impact for purposes of RCW 82.02.020, because the Department of Ecology’s SEPA Rules define SEPA “impacts” as “direct, indirect and cumulative.” Therefore, T&C implies, “direct impacts” as used in RCW 82.02.020 cannot include “cumulative impacts.” Appellant’s Brief at 34-35. This argument misreads both the SEPA Rule and RCW 82.02.020. First, RCW 82.02.020’s requirement that mitigation be “reasonably necessary as a direct result” of a proposed development was adopted in 1982 - before the 1984 adoption of WAC 197-11-794’s definition of “impact.” *Compare* Washington Laws 1982 1st ex.s. c 49 § 5; *with* WSR 84-05-020 (Order DE 83-39). T&C can hardly contend that in using the term “direct impacts” in 1982, the Legislature somehow anticipated and incorporated the meaning of an administrative agency’s rule adopted two years later in a different (SEPA) statutory context.

Second, WAC 197-11-794 does not prescribe that “direct” and “indirect” have independent meanings from “cumulative.”⁵⁶ Instead, both “direct” and “indirect” are types of immediate impacts, as well as types of

⁵⁶ *See, e.g.*, WAC 197-11-060(4)(d) (“A proposal’s effects include direct and indirect impacts caused by a proposal,” while also noting that “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.”(Emphasis added.)

“cumulative” impacts. “Direct” refers to whether the impact flows “directly” (rather than indirectly) from the project to the affected location. “Cumulative” means “made up of accumulated parts,” or “increasing by successive addition.” Merriam Webster’s Online English Dictionary. “Cumulative” is thus a quantitative term, referring not to direction, but rather to the incremental accumulation of smaller impacts.⁵⁷ In this case, the Scarsella Plat impacts are “direct,” within the meaning of RCW 82.02.020, because the unchallenged findings below demonstrate that they flow directly to the intersection and arterial corridor in question. That they are also “cumulative” because, taken together with the impacts of other development, they will cause a level-of-service failure, does not make them any less “direct,” nor does it mean that the MDNS mitigation condition violated RCW 82.02.020.

Castle Homes v. Brier, 76 Wn. App. 95, 882 P.2d 1172 (Div. I 1994), does not help T&C. In *Castle Homes*, Division I of this Court invalidated mitigation imposed for the Castle Crest II subdivision, because the City in that case had apportioned 100% of the costs of new traffic

⁵⁷ See, e.g., WAC 197-11-330(2)(c) (“[S]everal marginal impacts when considered together may result in a significant adverse impact.”); see also Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis*, at 13-5 – 13-6 (“[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 other similar actions, might be the “straw that breaks the camel’s back.””) (emphasis add).

improvements upon new development in the area, including Castle Crest II, even though “most of the traffic from Castle Crest II will enter Mountlake Terrace directly, or within a short distance.” *Id.* at 107.⁵⁸ By contrast here, 76% of the Scarsella Plat traffic will enter Federal Way and help cause LOS failures at a particular intersection and arterial corridor.

The other reason *Castle Homes* is inapplicable is that Brier’s analysis did not analyze the particular trip contribution of the Castle Crest II subdivision, but rather simply apportioned the entire cost of new improvements upon the new development, then divided it by the number of new lots:

Here the City did not acknowledge that it should pay for any of the off-site improvements in its street system. In arguing about the factual basis for the amount charged, the City specifically said it had completed the study of Donald Carr, P.E., its traffic expert, which had concluded there would be substantial impacts on a cumulative basis. 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. As such the decision cannot stand.

⁵⁸ Castle Homes’ expert testified that “at most, 25 percent of the traffic would enter the City’s street system, with only 8 percent staying in the City [of Brier] for more than two blocks.” *Id.* at 101.

Id. at 108 (underscore added; italics in original).⁵⁹

As Judge Felnagle concluded, Tacoma and Federal Way's approach here was exactly what *Castle Homes* suggested should be done.⁶⁰ As the unchallenged Findings 15 and 17 acknowledge (R 124-125), Federal Way used a state-of-the-art transportation model, and followed the directions of the ITE Trip Generation Manual to calculate the Scarsella Plat precise trip generation and precise distribution of those trips along the street network within the City of Federal Way. After identifying the intersection and arterial corridor affected with projected failures of levels of service, Federal Way created a ratio of the Scarsella Plat trips to the total trips projected to use the intersection (including existing trips plus other new trips from other new developments). Federal Way then multiplied this ratio by the improvement's total cost, so that T&C was asked to pay only that portion of the necessary improvements that

⁵⁹ The Court's comment on the failure to take into account the differing impacts of separate subdivisions was a reference to its observation earlier in the decision that, when compared with the other new developments in the City, the amount of Castle Crest II traffic staying within Brier amounted to a lesser amount than the other developments, at least one of which was closer to the "heart" of Brier and paid no impact fees whatsoever even though it was projected to increase traffic by 100%. *Castle Homes*, 76 Wn. App. at 101, n.8. While the *Castle Homes* decision does mention that whether new development occurs or whether there is no development at all, the need for safety improvements on the City's streets would remain, the Court did not hold that this fact precluded the City of Brier from charging any traffic mitigation at all; rather, this reference followed the Court's comment concerning the lack of specific analysis of the Castle Crest II traffic impacts, upon which it then elaborated during the course of discussing *Miller*. *Id.* at 107.

⁶⁰ CP 407-08 (Conclusions of Law, Order and Judgment at Concl. 5).

Scarsella Plat trips would use. *Id.* As Mr. Perez testified, T&C was not charged for “sins of neglect,”⁶¹ or for existing trips; existing trips were included in the denominator, and therefore netted out of the amount calculated to be the Scarsella Plat pro rata share. Tr. 7/11/08 at 265-68.

Castle Homes simply does not stand for the proposition that cumulative impacts may not also be “direct impacts” that are identified as a consequence of a plat such that mitigation may be imposed consistent with RCW 82.02.020. The problem with T&C’s argument is that it requires the Court to insert the word “solely” into RCW 82.02.020, so that it would allow a fee only “to mitigate a direct impact that has been identified solely as a consequence of a proposed development, subdivision, or plat.” That is simply not the law, and if T&C were correct, it would be the rare case, if ever, upon which mitigation could be lawfully imposed. As Judge Felnagle ruled:

The result of Town & Country’s arguments would be a scenario in which no one project would independently cause a level of service failure, and therefore no mitigation at all could be required, and that is not the statutes’ intent.

⁶¹ This is the phrase actually used by the Court in *Castle Homes*, not the “sins of the past” indicated in the Decision at 23, line 24. *Castle Homes*, 76 Wn. App. at 98, n. 2. It presumably refers to deferred maintenance. Federal Way’s street system, however, is well-maintained; it simply does not have sufficient capacity to provide for new trips from the Scarsella Plat and other anticipated new development for which the City is required by the GMA to plan. See RCW 36.70A.070(6). “Sins of neglect,” therefore, were thus correctly omitted from Federal Way’s calculations.

CP 410-11 (Conclusions of Law, Order and Judgment at Concl. 9); *see also* RP 4/10/09 at 64: 6-10. This Court should reject T&C's novel interpretation of RCW 82.02.020, and affirm the trial court.

V. CONCLUSION

The Hearing Examiner's Decisions below are fundamentally flawed. They assert that the only project that may be required to mitigate its impacts is one that is the sole triggering cause of failing levels of service. This notion is not only unsupported by any precedent or the text of RCW 82.02.020, it is contradicted by decades-old decisions holding that the fact that a new project will add traffic to already-deficient streets or parks does not excuse the developer from mitigating its cumulative impacts. If allowed to stand, the Decisions will result in "death by a thousand cuts;"⁶² most development will be excused from mitigating its impacts, and cities "would quickly be unable to sustain any kind of attempt to manage congestion." Tr. 7/11/08 at 257: 23-24; at 258: 7-11.

For all of the foregoing reasons, this Court should affirm the reversal of the Hearing Examiner's Decisions, and affirm the MDNS traffic mitigation fee condition.

⁶² Tr. 7/11/08 at 257: 23-24.

RESPECTFULLY SUBMITTED this 19th day of January, 2010.

KENYON DISEND, PLLC

CITY OF FEDERAL WAY

By 
Bob C. Sterbank
WSBA No. 19514
Attorneys for Respondent
City of Federal Way

By 
Peter B. Beckwith
Assistant City Attorney
WSBA No. 34141
Attorneys for Respondent
City of Federal Way

NO. 39407-3-II

IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

CITY OF FEDERAL WAY, a Washington municipal corporation,

Petitioner/Respondent,

vs.

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.

APPENDIX TO BRIEF OF RESPONDENT CITY OF FEDERAL WAY

Bob C. Sterbank
WSBA No. 19514
Kenyon Disend, PLLC
11 Front Street South
Issaquah, WA 98027-3820
(425) 392-7090
Attorneys for Respondent
City of Federal Way

Peter B. Beckwith
WSBA No. 34141
Assistant City Attorney
City of Federal Way
33325 8th Avenue South
Federal Way, WA 98003
(253) 835-7000
Attorneys for Respondent
City of Federal Way

Appendix A	Verbatim Transcript of Proceedings April 8, 2009, pp. 4, 21 - 25	A
Appendix B	Verbatim Transcript of Proceedings April 10, 2009, pp. 36 - 37	B
Appendix C	Verbatim Transcript of Proceedings April 10, 2009, pp. 58 - 66.....	C
Appendix D	Conclusions of Law, Order and Judgment Granting Land Use Petition filed May 18, 2009	D

APPENDIX A

1 Federal Way. I think what we contemplated is that we
2 would both provide argument, although I think Mr. Greene
3 has indicated that his argument would be relatively brief
4 and that the Court would hear, for the most part, from
5 Federal Way.

6 THE COURT: Okay, because we have to pretty
7 much stick to the timelines I have outlined. If you go
8 three half hours, we are going to be pushing up against
9 the time we've got allotted. So, with the idea that it
10 will be two one-half hours and then whatever Mr. Greene
11 wants to add, we can probably get it done.

12 Now, I did also invite you to make any
13 preliminary comments this morning to kind of help focus
14 the direction of this. I have started reading the
15 briefings, and I haven't even finished that yet, so with
16 that in mind, I will let the petitioners say anything they
17 want as far as kind of getting us started.

18 MR. STERBANK: Thank you, Your Honor. Again,
19 for the record, Bob Sterbank for the petitioner, Federal
20 Way.

21 Since the Court has begun reading the briefs,
22 you know this case involves review of a hearing examiner
23 decision concerning mitigation for a proposed plat, the
24 Scarsella plat, a 51-lot subdivision in Northeast Tacoma.
25 There are some maps in the record that our brief should

1 to demonstrate that there was this direct impact as a
2 consequence of development. And of course, they are the
3 appellant here, so they are the ones, under LUPA, as well,
4 they are the ones that have to demonstrate that.

5 If the Examiner thinks it's a close question,
6 then I think the -- I'm sorry -- the Court must affirm the
7 Examiner if it believes the Examiner's decision was pretty
8 close to right or it might be right, but it might not,
9 that would be insufficient. The Court needs to be
10 convinced that a mistake was made, and that's the definite
11 and firm conviction, so we are distinguishing cumulative
12 impact analysis from what's required to show that direct
13 impact analysis, and that was not in the record.

14 THE COURT: Are you advancing still the idea
15 raised apparently by the Hearing Examiner that it's only
16 the impact that tilts -- I guess the straw that breaks the
17 camel's back sort of argument? Is that one that you are
18 adhering to?

19 MR. WILSON: Yes, Your Honor, that if the
20 addition of just this much traffic from this Scarsella
21 plat would have caused that level of service to fail, then
22 they could be tagged for this mitigation under SEPA.

23 Now, again, this does not leave Federal Way
24 without a remedy. There is a way to exact private
25 contributions, and that's through GMA impact fees. That's

1 why the Legislature has adopted this entirely alternate
2 form of raising money. Tacoma and Federal Way could enter
3 into an interlocal agreement whereby Tacoma could levy
4 Federal Way's GMA impact fees, and that wasn't done in
5 this case. Instead, they chose to use the blunt
6 instrument of SEPA to get that mitigation, but they don't
7 pass the test of SEPA, which does require that higher
8 standard of a specific adverse identified impact, as does
9 020. So, there's a way, but that wasn't followed here.

10 THE COURT: Are you also adhering to the
11 argument that, because they've anticipated failure, that
12 they're no longer able to exact fees?

13 MR. WILSON: No, Your Honor. Simply because
14 they have done the planning they should have done with the
15 capital improvement program, that's fine, but if they want
16 to use SEPA, they have to disregard that mitigation and
17 show that this plat will cause that adverse impact. If
18 it's going to happen anyway, then that is not an impact of
19 this plat. They can get there another way under impact
20 fees.

21 I do want to note that Federal Way asserts
22 that Town & Country 's arguments of SEPA violations were
23 not raised below and were not the basis of the Examiner's
24 decision, and since we didn't cross-appeal, the Court
25 can't consider them. I believe that is erroneous. We did

1 raise -- argue the SEPA grounds to the Examiner, and the
2 Examiner did rule that Tacoma's SEPA condition violated
3 SEPA in his Conclusions of Law.

4 But, even if we hadn't raised those issues
5 below, the Court is sitting in an appellate capacity in
6 land use cases. Federal Way, itself, recognizes, since
7 you are reviewing the record below, you can affirm on any
8 ground adequate to sustain it, so the arguments that we
9 advance here -- whether or not the Examiner ruled
10 correctly in all instances should not bar the Court from
11 affirming.

12 For example, the Examiner ruled that part of
13 what Federal Way and Tacoma did violated section 090 of
14 82.02. That's the GMA impact section. That does not
15 apply here, but that is, again, harmless error, because
16 the Court can affirm on any ground.

17 I think Mr. Sterbank has identified most of
18 the authority the Court needs to focus on. The Castle
19 Homes case. He did not mention the Isla Verde case, which
20 is a crucial case there, because that establishes, again,
21 that if there's an impact fee under Section 020, that it
22 needs to be a specific identified impact of development.

23 The Sparks vs. Douglas County, and the recent
24 Sims case on the King County areas ordinance are all
25 important cases. The Sims case does recognize that a

1 determination of rough proportionality is part of the
2 analysis under 82.02.020.

3 Mr. Sterbank and I have a disagreement as to
4 whether or not the nexus/rough proportionality analysis
5 factors in to fee cases as well as dedication of land
6 cases.

7 THE COURT: Are there any cases that suggest
8 it does factor in to fee cases?

9 MR. WILSON: Yes, Your Honor. The Sims case,
10 in particular, goes to that rough proportionality
11 analysis. The Sims case, Isla Verde case recognized that
12 -- either way, fees or dedications, fees in lieu of, it's
13 all part of the same thing. It's an exaction, and if it's
14 under 020, you can't levy that tax fee or charge unless it
15 falls into one of those statutory exceptions, and
16 therefore, we believe that is an appropriate analysis.

17 The Sims case, of course, petition for review
18 was filed with Supreme Court. Review was denied. Supreme
19 Court had an opportunity to visit that argument if they
20 wanted to and did not.

21 So, we believe that there is authority out
22 there. Proper reading of the case is that rough
23 proportionality is an issue here, and I think that's
24 important for the Court whether it's characterized as
25 rough proportionality or SEPA's requirement that

1 mitigation be reasonable. It goes to the same thing.

2 Is \$250,000 an appropriate mitigation for a
3 plat that will contribute one half of 1 percent to one
4 Federal Way intersection at the peak hour and 1.2 percent
5 to the other intersection, an intersection that will carry
6 thousands and thousands of vehicles? Should it be tagged
7 for a quarter of a million dollars? Mr. Sterbank says,
8 well, that's simply the way the chips fall. It's a large
9 number, and so the Scarsella proportion of that is
10 inherently large. That is what reasonable goes to. That
11 is what rough proportionality goes to.

12 There is an equitable element. Is it fair
13 given the impact in the case? That's what the Court needs
14 to look at. Given this impact, this cumulative impact
15 where levels of service will not be affected by this plat
16 one way or the other, is it fair to tag this plat for that
17 share when Federal Way does have another avenue of GMA
18 impact fees available to it, to obtain private dollars for
19 contributions toward its future programs.

20 THE COURT: I'm sure you answered this in the
21 brief, but what do you do if there is a hundred small
22 impacts, none of which can be shown to be the decisive
23 one? Is government then bound not to exact any impacts
24 because no single impact is sufficient?

25 MR. WILSON: Your Honor, that's precisely why

APPENDIX B

1 preliminary matter, the Court should give little weight to
2 Tacoma's arguments in this matter. Tacoma is respondent
3 here. It had the right to appeal its own examiner's
4 decision as an appellant in LUPA. It did not. It is only
5 Federal Way that did, and it is, therefore, I think,
6 inappropriate for Tacoma to attempt to circumvent the
7 21-day Statute of Limitations in LUPA by now tailgating on
8 Federal Way. That is somewhat a sideshow issue, but I
9 note for the record that I think it's Federal Way's
10 arguments that should be properly entertained by the
11 Court.

12 The essential facts, I believe, highlight the
13 unfairness, the unreasonableness of what Federal Way and
14 Tacoma have attempted to do here. Under Federal Way's own
15 traffic analysis, we have a 51-lot subdivision. Two of
16 the houses in it will remain, so we've got 49 new homes,
17 and based on the peak-hour trips from those 49 homes, we
18 will have one half of one percent affecting one of the two
19 intersections that Federal Way wants mitigation for, and
20 1.2 percent of the other. That's 27 out of 4,945 trips
21 for the first one -- almost 5,000 -- and 27 out of 2,263
22 trips for the other. A very, very small percentage.

23 It is our contention that the City failed to
24 make the individualized determination that it was required
25 to make under SEPA and under 82.02 showing that it is this

1 impact of this plat that has the direct result of causing
2 a level of service failure that would justify that kind of
3 mitigation.

4 THE COURT: Now, where do you find the
5 authority for the idea that they have to show that it's
6 this project that would cause this failure?

7 MR. WILSON: It would be the language of
8 "direct result" in 82.02 that it must --

9 THE COURT: The caselaw that carries that
10 concept of direct result to the extreme you would carry it
11 is found where?

12 MR. WILSON: Well, the Court characterizes it
13 as extreme, but I believe that it can be found in reading
14 together SEPA and 82.02. We do know from the caselaw that
15 the real authority for imposing litigation under 82.02.020
16 is SEPA. The SEPA rules note, under the definition of
17 "significant," that impacts are direct, indirect, or
18 cumulative. 82.02 uses the word "direct." It does not
19 say an indirect or cumulative impact. It must be a direct
20 impact.

21 And I, therefore, contend that, no, we don't
22 have a case directly on point with this, but unless you
23 can show, as the Court asked on Wednesday, that this is
24 the straw that breaks the camel's back, there is not the
25 showing of that direct impact that is required.

APPENDIX C

1 197-11-060 -- which does not apply just to EISes, but to
2 all environmental analysis -- in section 060 sub (4) (d),
3 it's noted that impacts include those effects resulting
4 from growth caused by a proposal, which would be the trips
5 from the Scarsella plat, as well as the likelihood that
6 the present proposal will serve as a precedent for future
7 actions.

8 That's the kind of cumulative impact that's
9 truly at issue, so I don't think the Court should be
10 misled into assuming that cumulative impacts is Scarsella,
11 as a result, tagging onto everything that's gone before.
12 It has to be prospective in nature.

13 THE COURT: Thank you. This is always
14 challenging for me for a couple of reasons. One, it's
15 very intense and in an area that I don't particularly
16 specialize in, so I thank you for your excellent briefing
17 and your arguments.

18 I am going to rule right now, and I want to
19 say a couple of things about that. Don't assume, because
20 of that, that I am giving this short shrift or I just am
21 doing this off the seat of my pants. My staff will tell
22 you I have been locked away for the last couple of days
23 doing nothing but this. It may not show in my analysis,
24 but nonetheless, I have given it considerable attention.

25 I am going to be on recess for a week, so I

1 don't function well when I let things sit, so that's why I
2 will rule now, even though it may not be as organized as I
3 would like it to be, or as coherent or articulate as I'd
4 like it to be, but you will at least get the bottom line,
5 if nothing else.

6 The first thing I wanted to address was the
7 argument that Town & Country makes that the SEPA
8 requirements weren't met, that there wasn't shown a
9 specific adverse impact identified in an environmental
10 document. The City responds that SEPA was not even
11 addressed by the Hearing Examiner so there's no basis to
12 appeal that, but even if you do consider the requirements
13 of SEPA, I do find that they were met.

14 It's clearly an issue covered by SEPA. I
15 don't think anyone suggests that transportation and
16 traffic impacts are not a SEPA issue, and there is
17 adequate impact identified in the documents to get you by
18 the SEPA requirements, so this shouldn't be stricken
19 outright because SEPA wasn't appropriately raised.

20 The next thing I want to address is this
21 question of nexus and proportionality from City of Olympia
22 vs. Drebeck. You know, there's a question of whether
23 nexus and rough proportionality apply or don't apply.
24 Clearly, it's not been applied yet. The City emphasizes
25 the fact, well, it's not been applied and, therefore, it's

1 not going to be applied and you need to consider that it's
2 not a requirement.

3 Mr. Wilson points out that what they are
4 saying is it hasn't really been addressed yet and,
5 therefore, it's an open question.

6 I do find instructive a couple of things out
7 of the City of Olympia vs. Drebeck, not the least of which
8 is their finding that SEPA has differing requirements to
9 it and that it requires mitigation of specific adverse
10 environmental impacts. So, to me, some degree of nexus
11 and proportionality is going to be required. I reject the
12 idea that the City raises that, once you've found the
13 appropriate impact, the proportionate amount is not really
14 at issue.

15 There's going to be some requirement, and I
16 don't pretend to know where to draw the line exactly, nor
17 do I think the cases require one to draw the line exactly,
18 but the real question here is, has there been a showing of
19 a relationship and proportionality to the degree that the
20 cases seem to suggest is required.

21 For that, we have to turn to what the Hearing
22 Examiner determined, and the Hearing Examiner started with
23 the idea that the calculations of trip distributions were
24 appropriate. He found, I believe, that the trips
25 appropriately projected to specific sites. So, the key

1 becomes his Finding of Fact 18, which reads, "Federal Way,
2 in its analysis of the traffic distribution of peak-hour
3 vehicle trips expected to be generated by Town & Country's
4 proposed subdivision, did not develop information on the
5 two TIPS for 2009 horizon year 'without the project.'
6 Thus, Federal Way did not actually determine the specific
7 impact of the proposed subdivision alone since it is
8 'lumped' into all trips expected to be using the two
9 street facilities at the 2009 horizon year." And he cites
10 to the Perez testimony on cross-examination. That's one
11 of the critical things that needs to be examined in some
12 detail.

13 The requirements, then, are somewhat in doubt,
14 and I think you have to look to the caselaw to determine
15 what is required to show this specific impact. And Town &
16 Country suggests in their brief that the controlling
17 caselaw authority should be principally Isla Verde, Sims,
18 and Castle Homes, so I think we need to look at those
19 three cases a little more closely to see if the Hearing
20 Examiner was right as to his concerns about the defects in
21 the showing.

22 And I look first at Sims, and in the Sims
23 case, there was a set-aside of land, which, of course, is
24 different than our case. And Sims indicates that there
25 needs to be an individualized determination of the impact.

1 But, the distinction between our case and Sims is that,
2 unlike the ordinance in Sims, the City in our case did
3 show both an impact and a calculated proportion of the
4 impact to the total need to mitigate.

5 So, there was, in our case, the specifics that
6 Sims lacked, so I don't think Sims answers the question in
7 the way that Town & Country would like it answered.

8 When you look at Isla Verde, it also required
9 a set-aside of open space, and it particularly cited to
10 Trimen as a case that was distinguished from Isla Verde.
11 And they said that, in Trimen, there was the appropriate
12 showing. They said what was appropriately shown in Trimen
13 was, one, that they had projected population from the
14 subdivision, and it seemed to me that, in our case, we had
15 a showing of projected traffic trips, which was, in my
16 opinion, the equivalent or near equivalent of the
17 projected populations that would come from the
18 subdivisions.

19 And then, second, Trimen indicated that there
20 was a showing of fees based on value of the land needed to
21 be set aside, and our case has a showing of the cost of
22 traffic mitigation, which to me, again, is the equivalent
23 or at least rough equivalent of the value of the land
24 needed to be set aside.

25 So, it looks to me like our case lines up more

1 with Trimen, which was actually set up in Isla Verde as an
2 example of how to do it right, as opposed to the defects
3 in the Isla Verde case, itself. So, the bottom line is
4 that, under Isla Verde, the City's case would have failed
5 had they not shown the specific impacts by way of the
6 number of trips.

7 And in like fashion, Castle Verde (sic), which
8 is, in my opinion, the closest case factually to ours, the
9 mitigation of the traffic impact was computed on a fair
10 share basis, meaning that each lot was assessed a dollar
11 amount due to the cumulative effects of all of the
12 development. And the key there was that the court said
13 that the defect was the failure to utilize traffic
14 distribution analysis, which we have in our case.

15 So, again, while Castle Verde didn't find in
16 favor of the governmental entity's position, it did give
17 us a roadmap for what needs to be shown, and it appears it
18 was shown in this particular case.

19 MR. WILSON: Excuse me, Your Honor. Sorry to
20 interrupt. Are you talking about the Castle Homes case?

21 THE COURT: Castle Homes. I'm saying Castle
22 Verde. Yes, Castle Homes, I'm sorry.

23 Now, the two specific points in addition
24 raised by the Hearing Examiner were that his concern was
25 the level of service was going to reach failure with or

1 without the development, it wasn't shown that the project
2 caused the failure, and this is what Mr. Wilson has been
3 arguing today. But, as the City has pointed out, there's
4 really no caselaw that suggests this cumulative effects
5 analysis, which the City is advancing, is not appropriate.

6 And the end result, as we've talked about on a
7 number of occasions, if you follow Town & Country's line
8 of argument, is that no one project may cause the failure,
9 and thus, no mitigation could be recovered at all, and
10 that can't be the intent of the statutory scheme.

11 The next thing that the Hearing Examiner talks
12 about is that there was no showing of the impact without
13 the project, and again, Mr. Wilson has argued this, and
14 thus, no showing of any direct impact by the project.

15 The defect the Hearing Examiner found was that
16 all the projects were lumped together to produce an
17 ultimate impact, but again, I don't see that as being the
18 case, because by showing the specific number of increased
19 vehicle trips, you know what the effect of both with or
20 without the project is. I still wonder what it is that
21 the City could have shown or that Mr. Perez could have
22 shown through his analysis that would have made more clear
23 what the effect was with or without the project. So, I
24 don't find that either of those two premises by the
25 Hearing Examiner are appropriate.

1 The last one is probably the most troublesome,
2 and that is the Hearing Examiner's indication that the
3 impact is not shown to be significant. And we have thrown
4 around here what needs to be shown for significance and
5 what doesn't need to be shown for significance. And
6 rather than try and articulate a test, I will tell you
7 what I think was shown which convinces me that the impact
8 was significant and that the Hearing Examiner is wrong.

9 The impact has been shown to be quantifiable,
10 concentrated, consistent, and reoccurring, almost certain,
11 if not certain, to result in part of a major cumulative
12 effect. I think all of those things, taken together, are
13 considerations in determining significance or
14 non-significance, and they all lean towards significance.

15 And to a certain degree, Town & Country, I
16 believe, was hoisted on their own petard when they talk
17 about the proportion being so small. It is small in
18 relation to the whole project or the whole total impact
19 and the need to mitigate the whole thing. It is, however,
20 a significant amount of money to them. So, how can they
21 suggest that the end result is not one of significance
22 when the share that they are asked to contribute has been
23 shown to be proportionate? In other words, if their
24 proportionate amount of money is significant, why isn't
25 their proportionate impact, which is a component of that

1 calculation, also significant?

2 Taking all these things together, I find that
3 the Hearing Examiner was mistaken in those three areas
4 that I have indicated. I am prepared to reverse the
5 Hearing Examiner and affirm the mitigated determination of
6 non-significance.

7 MR. STERBANK: Thank you, Your Honor. Given
8 the timing of your imminent recess, what would the Court
9 like in the way of presentation of the order?

10 THE COURT: I am gone for a week, so you can
11 note it at your convenience for whenever --

12 MR. STERBANK: When you have returned?

13 THE COURT: Yes. And I don't know that
14 there's going to be a need for a great deal of argument,
15 so I would say just note it on the motion docket for a
16 Friday morning.

17 MR. STERBANK: Okay. We, of course, will do
18 our best to avoid the need for argument, if that can be
19 accomplished.

20 THE COURT: Okay. Anything more we need to
21 address this afternoon?

22 MR. STERBANK: Not from the City of Federal
23 Way.

24 THE COURT: Okay. If not, and nothing from
25 Town & Country, we are adjourned.

APPENDIX D



08-2-14874-8 32087127 JD 05-19-09

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Honorable Thomas F. DeMagle
DEPT. 15
IN OPEN COURT
MAY 18 2009
Pierce County Clerk
By *[Signature]*
Deputy

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

CITY OF FEDERAL WAY, a Washington
municipal corporation,

Petitioner,

vs.

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

Respondents.

NO. 08-2-14874-8

CONCLUSIONS OF LAW,
ORDER AND JUDGMENT
GRANTING LAND USE
PETITION

[PROPOSED]

I. JUDGMENT SUMMARY

- | | |
|-------------------------------------|--|
| 1. Judgment Creditor: | City of Federal Way |
| 2. Judgment Debtor: | Town & Country Real Estate, LLC;
Frank A. Scarsella; and Emil P.
Scarsella |
| 3. Total Judgment: | \$3,801.95 |
| 4. Judgment Interest Rate: | 12 percent per annum |
| 5. Attorneys for Judgment Creditor: | Bob Sterbank and Kenyon Disend,
PLLC |
| 6. Attorneys for Judgment Debtor: | Richard R. Wilson and Hillis Clark
Martin & Peterson PS |

This matter came before the Court on Federal Way's Land Use Petition pursuant to Chapter 36.70C RCW. The Land Use Petition challenged the Tacoma Hearing

CONCLUSIONS OF LAW, ORDER AND JUDGMENT
GRANTING LAND USE PETITION - 1
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Judgment and Order - Revised Final.doc\SAL\05/14/09

ORIGINAL

KENYON DISEND, PLLC
The Municipal Law Firm
11 FRONT STREET SOUTH
ISSAQUAH, WASHINGTON 98027-3820
(425) 392-7090 FAX (425) 392-7071

1 Examiner's Findings of Fact, Conclusions of Law and Decision dated September 5, 2008
 2 ("Initial Decision"), and the Order Granting in Part and Denying in Part Motions for
 3 Reconsideration, Amending Conclusions of Law and Decisions, dated October 29, 2008
 4 ("Reconsideration Decision"). The Court reviewed the pleadings and court files in this
 5 matter, reviewed the record certified by the City of Tacoma and the transcript prepared
 6 by the City of Federal Way, heard oral argument of the parties on April 8 and April 10,
 7 2009 and, being fully advised in the premises, does hereby enter the following:

8 II. CONCLUSIONS OF LAW

9 1. The Hearing Examiner's Findings of Fact were unchallenged and are accepted
 10 as verities on appeal to this Court, except for Findings of Fact 16 and 18 as discussed
 11 further below.

12 2. The City of Tacoma's Mitigated Determination of Nonsignificance (MDNS)
 13 issued for the Scarsella Plat complied with all requirements of the State Environmental
 14 Policy Act, RCW 43.21C (SEPA), and the Department of Ecology Model Rules
 15 implementing SEPA and codified at WAC Chapter 197-11. The MDNS required
 16 mitigation for specific, adverse traffic impacts that the Scarsella Plat would impose on the
 17 intersection of 21st Avenue SW and SW 336th Street, and along the arterial street corridor
 18 of SW 336th / SW 340th Streets between Hoyt Road and 26th Place SW within the City of
 19 Federal Way, and those adverse traffic impacts were identified in environmental
 20 documents, including the MDNS itself, as well as the Traffic Impact Analysis the City of
 21 Federal Way submitted to the City of Tacoma. The mitigation required in the MDNS
 22 was based on valid City of Tacoma SEPA policies identified in the MDNS and adopted
 23 by the City of Tacoma, and was therefore consistent with RCW 43.21C.060 and WAC
 24
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197-11-660.

1
2 3. Finding of Fact No. 18 of the Initial Decision is not supported by evidence that
3 is substantial when viewed in light of the whole record before the court. Finding No. 18
4 states that Federal Way “did not develop information on the two TIPs [Transportation
5 Improvement Program (TIP) projects] for 2009 horizon year “without the project” and,
6 therefore, “did not actually determine the specific impact of the proposed subdivision
7 alone since it is ‘lumped’ into all trips expected to be using the two street facilities at the
8 2009 horizon year.” Substantial evidence, in the form of exhibits and testimony admitted
9 at the hearing before the Hearing Examiner, demonstrates that Federal Way did
10 determine the specific impact of the proposed subdivision alone, and that impact would
11 be 27 new PM peak hour trips contributed to the 21st / 336th intersection (out of a total of
12 4,945), and a total of 227 new PM peak hour trips contributed to the various segments of
13 the 336th / 340th Street arterial corridor (out of a total of 20,032). For the same reasons,
14 the sentence in Conclusion of Law No. 17, to the effect that “Federal Way has not
15 identified the specific impact to these street facilities resulting from Town & Country’s
16 proposed subdivision, as it has not done a ‘with the project’ and ‘without the project’
17 analysis,” was also not supported by evidence that is substantial when viewed in light of
18 the whole record before the court.
19

20 4. The Initial Decision’s Conclusion of Law No. 16 is an erroneous interpretation
21 of the law, and/or a clearly erroneous application of the law to the facts. Conclusion of
22 Law No. 16 states that the MDNS’ traffic mitigation requirement is contrary to RCW
23 82.02.020, because “Federal Way failed to establish that the required intersection and
24 arterial corridor improvements . . . are reasonably necessary to mitigate the direct impact
25

1 of Town & Country's proposed 51-lot subdivision . . . or to mitigate specific
 2 environmental impacts which are identified in environmental documents" As
 3 support, Conclusion No. 16 states that "both TIPs to which Federal Way is seeking
 4 contributions from Town & County, have been planned for some time by Federal Way
 5 and well before Town & Country's subdivision was proposed," because "Federal Way
 6 intends to proceed with the TIPs regardless of whether Town & Country proceeds with
 7 the development of its proposed subdivision since the identified intersection and arterial
 8 corridor are expected to achieve LOS F (failing LOS) by the 2009 horizon year."
 9 Appellate decisions, including *Trimen v. King County*, hold that neither an existing level
 10 of service deficiency, nor a local jurisdiction's plans to correct it, prevent a local
 11 jurisdiction from requiring mitigation from a developer whose project contributes
 12 additional impacts to deficiency. Respondent Town & Country conceded that the fact
 13 that a local jurisdiction engages in planning for projects to address existing deficiencies
 14 does not in and of itself bar a local jurisdiction from requiring mitigation from new
 15 development to fund those projects. The rationale stated in the Initial Decision's
 16 Conclusion No. 16 was an erroneous interpretation to the law and/or a clearly erroneous
 17 application of the law to the facts. For these same reasons, the last sentence of Finding of
 18 Fact No. 16 was an erroneous interpretation to the law and/or a clearly erroneous
 19 application of the law to the facts.
 20

21 5. The MDNS' mitigation requirement complies with RCW 82.02.020's
 22 requirement that mitigation be reasonably necessary to mitigate the direct impact of a
 23 proposed development. According to the cases cited by respondent Town & Country,
 24 (*Citizens' Alliance v. Sims, Isla Verde*, and *Castle Homes v. Brier*), and the *Trimen* case
 25

1 discussed by *Isla Verde* and *Sims*, RCW 82.02.020 requires a local jurisdiction to produce
 2 a study or analysis linking the proposed development to the identified impacts and the
 3 site where they will occur. In particular, the *Castle Homes* decision indicates that with
 4 respect to traffic impacts, a failure to provide a trip distribution analysis demonstrating
 5 the routes of a new development's vehicle trips can result in invalidation of required
 6 mitigation. In this case, however, as the Hearing Examiner found, Federal Way did
 7 provide a trip distribution analysis, and did document that new trips from the proposed
 8 Scarsella Plat would contribute to and/or exacerbate a transportation level of service
 9 failure at the identified intersection and arterial corridor. Federal Way's analysis was
 10 distinguishable from the absence of analysis in *Castle Homes*, was equivalent to the
 11 analysis the Supreme Court upheld in *Trimen*, and therefore complied with RCW
 12 82.02.020. Statements to the contrary in Finding of Fact No. 16 and Conclusion of Law
 13 No. 16 were not supported by substantial evidence when the record taken as a whole is
 14 considered, were erroneous interpretations of the law and a clearly erroneous application
 15 of the law to the facts.
 16

17 6. The Initial Decision, Conclusion of Law No. 17, states that RCW
 18 82.02.020 also requires a showing of "rough proportionality, based on RCW 82.02.090
 19 and *Sims*. This was an erroneous interpretation of the law, because it mistakenly
 20 identifies the source of the proportionality requirement. As Town & Country conceded,
 21 RCW 82.02.090 applies only to GMA impact fees, and not to SEPA mitigation even if
 22 imposed via a voluntary agreement subject to RCW 82.02.020. Nevertheless, because
 23 SEPA (specifically WAC 197-11-660(1)(c) and (d)) requires that mitigation must be
 24 reasonable and may be imposed "only to the extent attributable to the identified adverse
 25

1 impacts” of the proposal, the mitigation required by the MDNS must be proportionally
 2 related to the extent of the identified traffic impacts attributable to the proposed Scarsella
 3 Plat.

4 7. Conclusion of Law No. 17 also states that Federal Way failed to make the
 5 required showing of proportionality. This conclusion was an erroneous application of the
 6 law to the facts. Findings of Fact Nos. 15 and 17, which were unchallenged on appeal,
 7 show that the required mitigation of \$250,123 was proportionally related to the extent of
 8 the identified traffic impacts, because the Scarsella Plat would contribute 1.2% and .5%
 9 respectively of the total trips using the 21st / 336th intersection and the 336th / 340th Street
 10 corridor, and that the \$250,123 in mitigation is 1.2% and .5% of the total estimated costs
 11 of the TIP projects identified as being necessary to correct the anticipated level of service
 12 failures. This proportional relationship between the amount of the required mitigation
 13 and the number of new trips generated by the Scarsella Plat that would use the
 14 intersection and arterial corridor in question was reasonable, and did not exceed the
 15 extent of traffic impacts attributable to the Scarsella Plat. The Hearing Examiner’s
 16 conclusion that proportionality was lacking, because “TIPs are required whether or not
 17 Town & Country’s subdivision is developed,” was an erroneous application of the law to
 18 the facts. The foregoing statement failed to recognize that individual developments such
 19 as the Scarsella Plat have impacts that, considered as part of the cumulative impacts of
 20 new development, create the need for transportation improvements. Likewise, the
 21 Examiner’s conclusion in Conclusion No. 17 that the TIPs are “presumably” required as a
 22 result of the “sins of neglect” (or the “sins of the past”) was also an erroneous application
 23 of the law to the facts. The record demonstrated that it is new growth (including the
 24
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1 Scarsella Plat), not existing deficiencies, that will cause level of service failures and
 2 thereby require construction of the TIP projects. Federal Way's analysis demonstrated
 3 that, while current conditions at the two intersections are currently tolerable, both
 4 intersections will reach a LOS "F" with the addition of projected growth including the
 5 Scarsella Plat.

6 8. The Initial Decision's Conclusion of Law No. 17 also stated that "the
 7 percentage of trips using the identified intersection and arterial corridor from Town &
 8 Country's plat is insignificant." This conclusion was also an erroneous interpretation of
 9 the law and a clearly erroneous application of the law to the facts. Substantial evidence
 10 shows that the traffic impacts of the Scarsella Plat are quantifiable, concentrated,
 11 consistent and re-occurring, certain to result, and part of a major cumulative impact in the
 12 form of level of service failures at the 21st / 336th intersection and the 336th / 340th Street
 13 arterial corridor. Such a level of service failure is a significant impact for SEPA
 14 purposes, as was conceded by all parties here.

15 9. Appellate decisions, including the *Hayes v. Yount* and *Tucker v. Columbia*
 16 *Gorge Commission*, establish that cumulative impacts may be considered and mitigation
 17 for them required. Town & Country's arguments notwithstanding, there is no case law
 18 holding that requiring mitigation for the extent of a proposed development's contribution
 19 to cumulative, significant impacts violates either SEPA or RCW 82.02.020. The
 20 caselaw, including *Trimen*, indicate the contrary, because they hold that a development
 21 may be required to pay mitigation for the extent of its contribution to an existing level of
 22 service deficiency. The result of Town & Country's arguments would be a scenario in
 23 which no one project would independently cause a level of service failure, and therefore
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1 no mitigation at all could be required, and that is not the statutes' intent.

2 10. Conclusion of Law No. 18 is an erroneous interpretation of the law, and a
3 clearly erroneous application of the law to the facts, for the reasons discussed above.

4 11. Because the Reconsideration Decision did not correct the errors identified
5 above, it was an erroneous interpretation of the law, and a clearly erroneous application
6 of the law to the facts.

7 12. Because it has established that the Initial Decision and Reconsideration
8 Decision were not supported by substantial evidence, were an erroneous interpretation of
9 the law, and a clearly erroneous application of the law to the facts, Federal Way has met
10 its burden under RCW 36.70C.130(1) and is therefore entitled to relief.

11 13. RCW 36.70C.110(4) provides that the costs of preparation of the record
12 necessary for review of a land use petition shall be equitably assessed among the parties
13 taking into account, *inter alia*, the extent to which each party prevailed. Federal Way
14 fully prevailed on its land use petition, and is therefore entitled to be reimbursed for all of
15 the costs it incurred in obtaining the record and preparing the transcript of the
16 proceedings below, totaling \$3,206.95 (\$2,238.10 transcript preparation plus \$968.85
17 record preparation and copying).

18 14. RCW 4.84.030 provides that a prevailing party in any action in superior
19 court shall be entitled to an award of costs, which include a statutory attorney's fee, the
20 filing fee, and service of process fees. The case of *Brown v. Seattle* holds that an award
21 of such costs is appropriate in a Land Use Petition Act case, in addition to the record
22 preparation costs allowable under RCW 36.70C.110(4). Federal Way is therefore entitled
23 to an award of its costs in the amount of \$595.00 (\$200 statutory attorney's fee, \$200
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1 filing fee, and \$195 service of process fee).

2 Based on the foregoing Conclusions of Law, it is hereby ORDERED as follows:

3 III. ORDER

4 1. The City of Federal Way's Land Use Petition is granted, and the Tacoma
5 Hearing Examiner's Findings of Fact, Conclusions of Law and Decision dated September
6 5, 2008, and the Order Granting in Part and Denying in Part Motions for Reconsideration,
7 Amending Conclusions of Law and Decisions, dated October 29, 2008, shall be and
8 hereby are REVERSED;

9 2. The Mitigated Determination of Nonsignificance's requirement that Town
10 & Country pay traffic mitigation to the City of Federal Way in the amount of \$250,123 is
11 hereby affirmed;

12 3. This matter is remanded to the Tacoma Hearing Examiner pursuant to
13 RCW 36.70C.140 for modification consistent with this Judgment and Order;

14 4. The City of Federal Way is hereby awarded its record preparation and
15 statutory costs in the amount of \$3,801.95; and

16 5. Judgment shall be entered in favor of the City of Federal Way and against
17 Town & Country Real Estate, LLC and Frank A. and Emil P. Scarsella consistent with
18 the foregoing Conclusions of Law and this Order.
19

20 IV. JUDGMENT

21 Based on the foregoing Conclusions of Law and Order, it is hereby ADJUDGED
22 AND DECREED as follows:

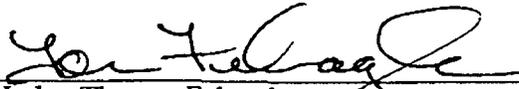
23 1. Judgment is hereby entered in favor of the City of Federal Way and
24 against Town & Country Real Estate, LLC and Frank A. and Emil P. Scarsella,
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REVERSING the Tacoma Hearing Examiner's Findings of Fact, Conclusions of Law and Decision dated September 5, 2008, and the Order Granting in Part and Denying in Part Motions for Reconsideration, Amending Conclusions of Law and Decisions, dated October 29, 2008; and AFFIRMING the Mitigated Determination of Nonsignificance's requirement that Town & Country pay traffic mitigation to the City of Federal Way in the amount of \$250,123; and

2. Respondents Town & Country Real Estate, LLC and Frank A. and Emil P. Scarsella shall pay to the City of Federal Way the amount of \$3,801.95 within thirty days of the date of this Judgment.

DONE IN OPEN COURT this 18th day of May, 2009.



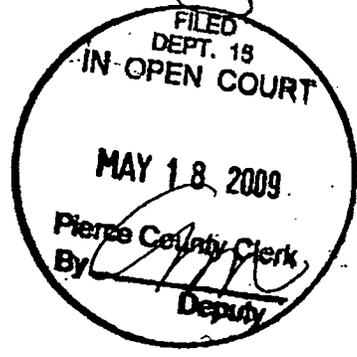
Judge Thomas Felnagle

Presented by:

KENYON DISEND, PLLC

By 

Bob C. Sterbank
WSBA No. 19514
Attorneys for Petitioner City of
Federal Way



Copy Received; Approved for Entry;
And Notice of Presentation Waived:

HILLIS CLARK MARTIN &
PETERSON PS

By *Bob C. Stibank per email authorization for:*
Richard R. Wilson
WSBA No. 6952
Attorneys for Respondents Town &
Country Real Estate and Scarsella

GORDON DERR LLP

By *Bob C. Stibank per email authorization for:*
Duncan M. Greene
WSBA No. 36718
Jay Derr
WSBA No. 12620
Attorneys for Respondent City of
Tacoma

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NO. 39407-3-II

IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

CITY OF FEDERAL WAY, a Washington municipal corporation,

Petitioner/Respondent,

vs.

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.

10/20/19 PM 4:15
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY: [Signature]

DECLARATION OF SERVICE

Bob C. Sterbank
WSBA No. 19514
Kenyon Disend, PLLC
11 Front Street South
Issaquah, Washington 98027-3820
(425) 392-7090
Attorneys for Respondent
City of Federal Way

Peter B. Beckwith
WSBA No. 34141
Assistant City Attorney
City of Federal Way
33325 8th Avenue South
Federal Way, WA 98003
(253) 835-7000
Attorneys for Respondent
City of Federal Way

ORIGINAL

I, Sheryl Loewen, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 19th day of January, 2010, I served a true copy of the *Brief of Respondent City of Federal Way*, as well as a true copy of the *Appendix to Brief of Respondent City of Federal Way*, also filed herewith, on the following counsel of record using the method of service indicated below:

Richard R. Wilson
HCMP Law Offices
500 Galland Building
1221 Second Avenue
Seattle, WA 98101-2925

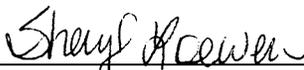
- First Class, U.S. Mail, Postage Prepaid
- Legal Messenger
- Overnight Delivery
- Facsimile
- E-Mail

Duncan M. Greene
Jay Derr
Gordon Derr LLP
2025 First Ave., Suite 500
Seattle, WA 98121-3140

- First Class, U.S. Mail, Postage Prepaid
- Legal Messenger
- Overnight Delivery
- Facsimile
- E-Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 19th day of January, 2010, at Issaquah, Washington.



Sheryl Loewen