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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

**CITY OF FEDERAL WAY,
a Washington municipal corporation,**

Petitioner/Respondent,

v.

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

Respondents/Appellants.

**BRIEF OF RESPONDENTS/APPELLANTS
TOWN & COUNTRY REAL ESTATE, LLC, ET AL.**

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I. INTRODUCTION

Town & Country Real Estate, LLC (“T&C”), applied to the City of Tacoma for preliminary plat approval of a 51-lot subdivision (also known as “the Scarsella plat”). At the request of the neighboring City of Federal Way, Tacoma imposed a mitigating condition under the State Environmental Policy Act (“SEPA”). That condition required T&C to enter into a voluntary agreement to pay Federal Way over a quarter of a million dollars to mitigate the purported traffic impacts of T&C’s proposed subdivision on two Federal Way street locations.

The first of these is an intersection (SW 336th Street / 21st Avenue SW) and the second a stretch of road (a segment of SW 336th / SW 340th Streets). During the evening peak hour, Town & Country’s proposed Scarsella plat will send no more than 27 new vehicle trips through the SW 336th/21st SW intersection, and no more than 32 trips through any stretch of the SW 336th/SW 340th street segment. Federal Way asserts that, as a SEPA mitigation measure, it may lawfully charge Town & Country \$250,123 to mitigate the impacts of these new trips – \$4,239 per vehicle trip. Yet neither Federal Way nor Tacoma has ever identified any direct adverse impact of Town & Country’s subdivision traffic on Federal Way’s streets that justifies this SEPA mitigation fee. According to the Federal Way traffic analysis, relied on by Tacoma in

imposing the mitigation condition, neither of those two locations will undergo any change in their traffic Level of Service (“LOS”) if the T&C subdivision is developed. Before and after development, the LOS at both locations will meet Federal Way’s standard of acceptability. Based on new traffic data that Federal Way introduced at the SEPA appeal hearing, Federal Way asserts that both locations will have a failing LOS after development of the T&C plat. But Federal Way’s new traffic data never identified the specific impacts of T&C’s subdivision, separate and apart from the generalized impacts of overall traffic growth in the city.

Federal Way and Tacoma warn that the heavens will fall if the Court upholds the Tacoma Hearing Examiner’s decision invalidating this SEPA mitigation fee. They assert that municipalities will be powerless to collect impact fees for street improvements from smaller developments. They predict that only the largest developments will be required to contribute, since only large developments would have the direct impacts needed to sustain a SEPA mitigation fee. The two cities claim that only in the rare case in which the traffic from a small development would be the “straw that breaks the camel’s back” could a jurisdiction collect fees from small projects. These dire predictions will not come to pass.

Since 1990, the Growth Management Act (GMA) has authorized cities like Tacoma and Federal Way to cooperate in the imposition and

collection of generalized traffic impact fees, pursuant to RCW 82.02.050 *et seq.* For over 20 years now, GMA cities and counties have routinely levied these impact fees. Had Federal Way and Tacoma adopted a coordinated GMA impact fee system, they would have had a legitimate means of obtaining a fair-share contribution from T&C toward Federal Way's future road projects. GMA impact fees are designed to mitigate the impacts caused by *all* projects. Those fees are predictable and must be equitably proportional. And they may be imposed without any showing of a direct impact, something that, by contrast, is required to impose a mitigation fee under RCW 82.02.020, and something that Federal Way failed to do here.

Instead of availing themselves of this GMA-authorized method for collecting a fair-share traffic impact fee, the cities attempted to exact an impact fee from T&C as SEPA mitigation. But in so doing, they failed to adhere to the explicit requirements for such mitigation under both RCW 82.02.020 and SEPA. Accordingly, this Court should reverse the judgment of the superior court and reinstate the hearing examiner's decision.

II. ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred in granting Federal Way's Land Use Petition and in entering the Conclusions of Law, Order and Judgment, dated May 18, 2009, in favor of Federal Way.

Issues Pertaining to Assignment of Error

1. RCW 82.02.020 authorizes a city to exact payment from a developer via a voluntary agreement to mitigate a specific identified impact, if the city demonstrates that the mitigation is reasonably necessary as a direct result of the proposed development. Does Tacoma's SEPA condition, requiring a developer to enter into a voluntary agreement with Federal Way to pay \$250,123 for traffic mitigation, violate RCW 82.02.020 because neither city proved there would be a specific adverse traffic impact directly resulting from the development?

(Assignment of Error 1)

2. The Scarsella subdivision will contribute one-half of one percent of total afternoon peak-hour trips at one Federal Way street location, and 1.2 percent of total afternoon peak-hour trips at the other. Does Tacoma's condition requiring a \$250,123 payment to Federal Way violate RCW 82.02.020 because neither city proved that the payment is reasonably necessary? (Assignment of Error 1)

3. Does Tacoma's condition requiring the developer to enter into a voluntary agreement to pay Federal Way \$250,123 for traffic mitigation violate RCW 82.02.020 because neither city proved that the payment is roughly proportional to the traffic impact of the Scarsella subdivision on the two Federal Way street locations? (Assignment of Error 1)

4. Under Washington law, the ultimate authority for imposing impact mitigation under RCW 82.02.020 is the State Environmental Policy Act (SEPA). Does Tacoma's condition requiring the developer to pay Federal Way \$250,123 for traffic mitigation violate SEPA because the cities failed to clearly identify any specific adverse impact of the Scarsella subdivision on the two Federal Way street locations? (Assignment of Error 1)

5. Does Tacoma's condition requiring the developer to pay Federal Way \$250,123 for traffic mitigation violate SEPA because the condition is not reasonable? (Assignment of Error 1)

III. COUNTERSTATEMENT OF THE CASE

A. T&C Applies to Tacoma for Preliminary Plat Approval of the 51-Lot Scarsella Subdivision.

There are few, if any, undisputed facts in this case, all of which are established in the administrative record compiled before the Tacoma

Hearing Examiner.¹ In December 2006 T&C (a company in which Frank and Emil Scarsella are officers and directors) applied to Tacoma for approval of a preliminary plat of its 9.23-acre property. The T&C property is located in northeast Tacoma and abuts the City of Federal Way.² T&C seeks to subdivide its property into 51 residential lots.³ But on a net basis, the Scarsella plat will add only 49 new homes to the T&C property, since two of the new houses will replace two existing residences that will be demolished.⁴ Along with the plat application, T&C's engineering consultants submitted the required environmental checklist for the Scarsella plat proposal under the State Environmental Policy Act (SEPA), RCW ch. 43.21C, noting that the development would generate 490 new daily vehicle trips.⁵

¹ The administrative record considered by the Tacoma Hearing Examiner was not included in the numbering of the Clerk's Papers but was instead filed under separate cover. T&C will cite to documents in the administrative record as "R __," followed by the handwritten page number in the lower right-hand corner of each page. T&C also includes a parenthetical identification of the hearing examiner's exhibit number of the document and its internal page number, if any. For pages in the record that are double-sided copies but have record numbers assigned only to the front page, T&C cites to "R __a" to refer to the numbered front side and "R __b" to refer to the unnumbered back side.

² R 575 (Ex. R18, stipulated Scarsella Application Timeline).

³ R 576-77 (Ex. R19, Tacoma Staff Report for Scarsella Plat at 1-2). The site plan of the subdivision is at R 592a and R 592b. A color aerial photograph showing the vicinity of the project, and identifying the undeveloped T&C site with a red "X," appears at R 323.

⁴ See R 340 (Ex. R2, e-mail dated 3/7/07 from Chris Larson, Tacoma Engineering Division, to Kurtis Kingsolver, 7:59 a.m.) and R 331-38 (Ex. R1, SEPA Environmental Checklist for Scarsella Preliminary Plat dated 12/18/06).

⁵ R 337b (Ex. R1, SEPA Environmental Checklist dated 12/18/06 at 12).

B. Tacoma's Initial SEPA Review of the Plat Identifies No Adverse Traffic Impacts.

In conformance with SEPA, Tacoma reviewed the Scarsella plat application and its related SEPA documentation to determine whether the proposal would generate any significant adverse environmental impacts.⁶ Tacoma's engineering and planning staff initially agreed that, with only 490 new daily trips, and only 49 total new p.m.-peak-hour trips, the traffic impact of the Scarsella subdivision would not be significant enough to require mitigation.⁷ No traffic study was therefore warranted.⁸ As of March 2007, Tacoma appeared to have concluded that no SEPA mitigation of traffic impacts in either Tacoma or Federal Way would – or should – be required for the Scarsella plat.

C. Federal Way Submits a Traffic Impact Analysis for the Scarsella Plat and Seeks Traffic Mitigation of \$266,344.

The neighboring City of Federal Way was not satisfied. Federal Way wanted a substantial contribution from T&C toward that city's planned street improvements, to mitigate the purported incremental traffic impacts of the Scarsella plat. Accordingly, in November 2007 Federal

⁶ See SEPA Rules, WAC 197-11-330 (threshold determination process), adopted by reference in Tacoma Municipal Code (TMC) § 13.12.004).

⁷ A p.m. peak-hour trip is one occurring during the hour of heaviest afternoon traffic, generally between 4:00 and 6:00 p.m., the evening rush hour.

⁸ R 339-40 (Ex. R2, e-mail chain dated 3/7/07 to and from Tacoma planning and engineering staff personnel).

Way submitted a Traffic Impact Analysis to Tacoma for the Scarsella plat.⁹ The Traffic Impact Analysis provided results from a run of Federal Way's EMME/2 computerized traffic model.¹⁰ Through its analysis, Federal Way sought T&C's contribution toward all public street improvement projects listed in the city's six-year Transportation Improvement Program ("TIP") that the Scarsella subdivision would affect by 10 or more new evening peak-hour trips.¹¹

Federal Way's traffic analysis concluded that 10 or more p.m.-peak-hour trips from the Scarsella plat would affect four planned Federal Way street improvement projects listed on the city's six-year TIP.¹² Applying Federal Way's own pro-rata formula for developer contributions toward such projects, the city asked Tacoma to impose a SEPA mitigation condition requiring T&C to pay Federal Way \$266,344

⁹ R 638-815 (Ex. R19.4, Federal Way Transportation Impact Analysis ["TIA"] re Scarsella Plat and cover letter from Federal Way dated 11/5/07). An identical but inferior copy of the TIA also appears in the record at R 341-520 (Ex. R-7).

¹⁰ The bulk of the traffic analysis consists of 245 EMME/2-model printouts in Appendix B – first, printouts of computer "background" (i.e., baseline) data projecting traffic levels of service at 113 Federal Way intersections in the then-future 2009 "horizon year" *without* the Scarsella plat, and second, printouts projecting levels of service at those same 113 intersections in the 2009 horizon year *with* development of the Scarsella plat, in order to identify any differences in traffic volumes resulting from the plat. R 688-811. The "horizon year" is the projected year of full buildout of a project. Testimony of Richard Perez, P.E., Federal Way City Engineer, Transcript of 7/11/08 Public Hearing before Hearing Examiner at 181. (Transcripts of the two days of hearings before the Tacoma Hearing Examiner are hereafter cited as "Tr.," followed by the date.)

¹¹ Testimony of Perez, Tr. 7/11/08 at 180.

¹² R 638 (Ex. R19.4, Federal Way's 11/5/07 cover letter to Jim Fisk, City of Tacoma, transmitting Federal Way TIA).

as a share of the city's total projected costs for the four planned street projects.¹³

D. Tacoma Issues Its SEPA MDNS Imposing the Traffic Mitigation Condition Requested by Federal Way.

Without performing any independent traffic analysis of its own on the Scarsella plat proposal, Tacoma acquiesced in Federal Way's traffic mitigation request, incorporating it as a condition of Tacoma's April 2008 SEPA decision for the Scarsella plat, a Mitigated Determination of Nonsignificance (MDNS).¹⁴

The MDNS expressly concluded that the Scarsella plat would have no significant adverse impact on Tacoma's own street system and required no payment of traffic mitigation fees to Tacoma.¹⁵ But as requested by Federal Way, the Tacoma MDNS required T&C either to construct all Federal Way TIP projects affected by 10 or more vehicle trips from the

¹³ Id. The request for \$266,344 was a reduction from the astonishing sum of \$439,282 that Federal Way had originally sought from T&C for traffic mitigation, in its original discussions with the developer earlier in 2008. Testimony of Perez, Tr. 7/11/08 at 178-80. See also R 521-22 (Ex. R9, cover letter dated 3/25/08 from Christopher Brown, P.E., to Hans Korve).

¹⁴ R 553-57 (Tacoma SEPA MDNS for Scarsella plat, dated 4/9/08). An MDNS is a determination that, with imposition of the mitigating measures specified therein, a development proposal will have no significant adverse effect on the environment. If either a straight DNS or an MDNS is issued under SEPA, no EIS is required. See SEPA Rules, WAC 197-11-330 through -350. The MDNS process is set forth in WAC 197-11-350.

¹⁵ R 555 (Tacoma MDNS for Scarsella plat at 4, Heading 21).

Scarsella plat, or “voluntarily” pay Federal Way the requested \$266,344 in traffic mitigation to mitigate purported direct traffic impacts.¹⁶

E. Federal Way’s Flawed Traffic Analysis and Mitigation Request.

Tacoma based its MDNS condition on the purported impacts of the Scarsella plat disclosed in Federal Way’s November 2007 Traffic Impact Analysis. But the traffic study does not support either city’s claim that Scarsella plat traffic will cause direct adverse impacts on the Federal Way street system. The traffic analysis suffers from a number of flaws:

- In order to calculate projected 2009 “background” evening peak-hour volumes, the Federal Way traffic analysis included a two-percent annual growth rate to the city’s latest available volumes. The study then added projected Scarsella plat trips on top of this adjusted volume to identify Scarsella plat impacts, without taking into account that the Scarsella plat traffic would be part of this two-percent annual growth.¹⁷
- In calculating both “background” volumes and “with-project” volumes, the traffic analysis assumed that all street improvement projects in Federal Way’s six-year Transportation Improvement Program would be constructed by 2009, even though the mitigation it was seeking from T&C was a contribution toward the cost of four of those same TIP projects.¹⁸
- The traffic analysis showed that, after development of the Scarsella subdivision, not a single one of the 113 studied Federal Way

¹⁶ R 556 (Tacoma MDNS for Scarsella plat, dated 4/9/08, at 5, Traffic Mitigation Measure).

¹⁷ R 648 (Ex. R19.4, Federal Way TIA at 4); R 671 (Ex. R19.4, Federal Way TIA at 26).

¹⁸ R 648 (Ex. R19.4, Federal Way TIA at 4); R 684 (Ex. R19.4, Federal Way TIA at 40).

intersections and street locations will suffer any degradation in its traffic Level of Service (“LOS”) from what 2009 “background” LOS conditions would be *without* the Scarsella plat.¹⁹

- Federal Way’s standard for a failing Level of Service is LOS F and is 1.0 or greater for a failing volume-to-capacity (“V/C”) ratio.²⁰ With or without the Scarsella plat, none of those 113 intersections will have a traffic Level of Service worse than LOS D or a V/C ratio greater than 0.98.²¹
- Both the Federal Way traffic analysis and Tacoma’s SEPA MDNS for the Scarsella plat conclude that with Federal Way’s programmed improvements, all intersections affected by 10 or more p.m.-peak-hour trips from the plat will meet Federal Way’s LOS standards. “[T]hus the transportation system provides adequate capacity concurrent with the development.”²²
- Of the 113 Federal Way intersections analyzed in the traffic analysis, only 15 show any change at all in their volume-to-capacity (V/C) ratios, from “2009 Background Conditions” to the “2009 With-Project Conditions.”²³

¹⁹ R 681-84 (Ex. R19.4, Federal Way TIA at 37-40, Table 3 – LOS Summary Worksheet). For each of the 113 intersections, Table 3 asks but one question. That question is, “LOS Standard Met?” The answer is “Y” [Yes] for all 113, for both background and with-project conditions. *Id.*

²⁰ R 646 (Ex. R19.4, Federal Way TIA at 2, Table 1, Level of Service Thresholds); testimony of Perez, Tr. 7/11/08 at 210, 277. The LOS is a letter grade measuring traffic flow at an intersection and ranges from a high of A (free-flowing traffic, no delays) to a low of F (substantial congestion and delays). The volume-to-capacity (V/C) ratio is a numerical expression of the capacity of a street or intersection to handle traffic. Any ratio greater than 1.0 indicates that the street or intersection is at full capacity and cannot accommodate any increased volume of traffic without congestion and is equivalent to a failing LOS F. R 646 (Ex. R19.4, Federal Way TIA at 2); testimony of Perez, Tr. 7/11/08 at 210, 219.

²¹ R 681-84 (Ex. R19.4, Federal Way TIA at 37-40, Table 3 – LOS Summary Worksheet).

²² R 685 (Ex. R19.4, Federal Way TIA at 41); R 556 (Tacoma MDNS for Scarsella plat, dated 4/9/08, at 5).

²³ R 681-84 (Ex. R19.4, Federal Way TIA at 37-40, Table 3 – LOS Summary Worksheet). The 15 intersections are Table 3 ID Nos. 1650, 1935, 3028, 3036, 3828, 4025, 4028, 4132, 4218, 4220, 4222, 4242, 4840, 5231, and 5240.

- Of the 15 intersections showing a V/C change, one shows a 0.01 V/C *decrease*, meaning a slight increase in the capacity of the intersection to accommodate traffic.²⁴
- Of the remaining 14 intersections, one shows a V/C increase of 0.02.²⁵ The other 13 all show a V/C increase of only 0.01, the smallest V/C increment measured in the traffic analysis. These are negligible impacts that will be virtually unnoticeable.²⁶

F. T&C Appeals the \$266,344 SEPA Condition to the Tacoma Hearing Examiner.

Because of the defects in Federal Way’s traffic analysis and mitigation request, T&C’s engineering consultants appealed the SEPA traffic mitigation condition to the Tacoma Hearing Examiner, on behalf of T&C.²⁷ The examiner consolidated T&C’s SEPA appeal with his consideration of the underlying preliminary plat application, taking testimony and evidence over two full days of hearings.²⁸ Various traffic engineering experts testified for T&C, Tacoma, and Federal Way throughout the hearing, disputing or defending the accuracy of the analysis in Federal Way’s November 2007 traffic study.

²⁴ R 682 (Ex. R19.4, Federal Way TIA at 38, Table 3 – LOS Summary Worksheet, Table 3 ID No. 3028).

²⁵ R 683 (Ex. R19.4, Federal Way TIA at 39, Table 3 – LOS Summary Worksheet, Table 3 ID No. 4242, 1st Way S/SW 340th St.).

²⁶ Testimony of Brown, Tr. 6/19/08 at 89-90, 140-45; Tr. 7/11/08 at 18, 135. See R 124-25 (Hearing Examiner’s Findings of Fact, Conclusions of Law, and Decisions re Scarsella plat dated 9/5/08, at 23-24, Conclusion of Law 17). The hearing examiner’s 9/5/08 decision is cited hereafter as “Examiner’s Decision.”

²⁷ R 559-61 (T&C’s SEPA Appeal dated 4/23/08).

²⁸ Hearing examiner’s statement, Tr. 6/19/08 at 5; R 103 (Examiner’s Decision at 2).

G. Federal Way Revises Its Mitigation Request to \$250,123 for Alleged Impacts to Two Street Locations.

In response to T&C's evidence, Federal Way introduced two new traffic exhibits on the afternoon of the second and last day of hearing, with information that had not been included in the city's earlier traffic analysis.²⁹ The two new exhibits presented Synchro computer-modeled data for the four Federal Way street locations where mitigation was sought.³⁰ The first (Exhibit R39) was four computer printouts showing existing traffic conditions at the four locations, and assuming completion of the City's programmed TIP projects, but without adding the Scarsella plat traffic.³¹ The second (Exhibit R40) was four printouts showing 2009 "horizon year" traffic at the same locations, now assuming *no* construction of the city's TIP projects, but here including the Scarsella plat traffic. Exhibit R40 showed that with the addition of Scarsella plat traffic, two of the four Federal Way street locations would have LOS F conditions.³²

Yet under closer scrutiny, Exhibit R40 actually failed to disclose any direct traffic impacts of the Scarsella plat. On cross-examination, Federal Way's City Engineer and traffic expert conceded that Exhibit R40

²⁹ Testimony of Perez, Tr. 7/11/08 at 221. The two new exhibits were Ex's R39 and R40, which appear in the record at R 947-50 and R 951-54 respectively.

³⁰ Testimony of Perez, Tr. 7/11/08 at 215, 221.

³¹ Id. at 218-20, 259-60.

³² Id. at 221, 261.

included Scarsella subdivision traffic only as part of annual overall traffic growth in the city. The discrete impact of the Scarsella subdivision traffic alone was not analyzed. Scarsella plat traffic was simply lumped in with the rest of the annual traffic growth.³³ To gauge the incremental impact of Scarsella plat traffic, the City would have had to analyze current traffic *without* Scarsella plat traffic, and also *without* assuming the city's TIP projects, and then in turn analyze horizon-year traffic *with* Scarsella plat traffic, again *without* assuming the TIP projects.³⁴ The city never presented such a before-and-after, apples-to-apples, comparison that would disclose the direct impacts of only Scarsella plat traffic, if the city failed to construct its TIP projects.

Still, even these two flawed exhibits undermined Federal Way's prior claim of adverse Scarsella plat impacts on two of the four street locations that were the subject of the city's funding request from T&C. Exhibits R39 and R40 showed that these two locations – both of them intersections – would have an acceptable Level of Service not only under existing conditions, but also in the horizon year, after addition of generalized traffic growth, which included traffic from the T&C plat.³⁵

³³ Id. at 261-62; R 112 (Examiner's Decision at 11, Finding of Fact 17).

³⁴ R 112 (Examiner's Decision at 11, Finding of Fact 18).

³⁵ See Appendix B hereto, TIP Project Nos. 3028 and 4132. Appendix B is a chart summarizing traffic data from Federal Way's November 2007 traffic analysis and from

As a result, Federal Way made a modest adjustment to its mitigation demand, reducing it from \$266,344 to \$250,123, and abandoning any funding request from T&C for these two intersections.³⁶ Federal Way's final traffic mitigation demand was thus based on alleged direct adverse impacts of the Scarsella plat on the two remaining Federal Way locations, identified as TIP Project Nos. 4028 and 4220.³⁷

But just as with the two intersections that Federal Way dropped from its mitigation request, these two remaining locations will sustain no direct adverse traffic impact from the Scarsella subdivision:

- By Federal Way's own calculations, the Scarsella development will contribute a mere 27 new peak-hour trips to the intersection of TIP Project No. 4028 (a/k/a Map ID 11), out of a total horizon-year peak-hour volume of 4,945 vehicles at that intersection, i.e., a ratio of 0.00546 – or about one-half of one percent. Federal Way seeks \$67,420 from T&C as the latter's

Ex's. R39 and R40, with record citations to specific page locations in those two exhibits. The data in Federal Way's 2007 traffic analysis had disclosed a similar outcome for the same two intersections, i.e., that neither would experience a failing LOS F in either the "background" or the "with-project" condition.

³⁶ Testimony of Perez at 222; see R 936 (Ex. R35, Federal Way's Reduced Pro Rata Share Figures).

³⁷ R 936 (Federal Way's Reduced Pro-Rata Share Figures). The two remaining street locations for which mitigation was sought are *TIP Project No. 4028, a/k/a Map ID 11*, i.e., the intersection of 21st Avenue SW and SW 336th Street (a/k/a SW Campus Drive), and *TIP Project No. 4220, a/k/a Map ID 23*, i.e., SW 336th Way/SW 340th St., from 26th Place SW to Hoyt Road. See R 813-15 (Ex. R19.4, Federal Way TIA, Appendix C at 1- 3, Table entries for Map IDs 11 and 23). Both locations are already congested. Through its TIP, Federal Way has plans to spend more than \$27 million in improvements on the two locations. R 814-815 (Ex. R19.4, Federal Way TIA, Final TIP Data, Map ID Nos. 11 and 23).

pro-rata share of the total \$12.348 million cost of the Project No. 11 intersection improvement, also about 0.5 percent.³⁸

- Again by Federal Way's own calculations, the Scarsella subdivision will contribute only 27 to 32 new peak-hour trips to the stretch of road constituting TIP Project No. 4220 (a/k/a Map ID 23), out of total horizon-year peak-hour volumes of anywhere between 2,011 and 2,951 vehicle trips at various intersections on this street segment.³⁹ The increase attributable to Scarsella plat traffic averages about 1.2 percent. According to Federal Way, the pro-rata share of the total \$15.312 million cost of Project No. 23 attributable to the Scarsella plat is \$182,703, likewise about 1.2 percent.⁴⁰
- Richard Perez, Federal Way's City Engineer, testified that Federal Way's TIP projects, including the two street improvement projects for which contributions are sought here, are needed today, whether or not the Scarsella plat develops.⁴¹
- Mr. Perez further testified that Federal Way intends to go forward with constructing these two TIP street projects, whether or not T&C contributes to them as requested by Federal Way.⁴²

H. The Examiner Sustains T&C's SEPA Appeal and Invalidates the Traffic Mitigation Condition.

In September 2008, the hearing examiner issued a lengthy written decision upholding T&C's SEPA appeal of the MDNS traffic condition

³⁸ R 813 (Ex. R19.4, Federal Way TIA, Appendix C at 1, Table entry for Map ID 11). The total projected cost of Federal Way's Project No. 4028 (Map ID 11) is \$12.348 million. *Id.* See also Appendix B to this Brief.

³⁹ R 815 ("New Trips" column for each intersection of Map ID Project No. 23; and "Horizon with Project Volume" column for each such intersection).

⁴⁰ R 936 (Federal Way's Reduced Pro-Rata Share Figures). The projected \$15,312,000 cost of Project No. 4220 is shown at R 813 (Federal Way TIA, Appendix C at 1, Table entry for Map ID 23).

⁴¹ Testimony of Perez, Tr. 7/11/08 at 271; R 111 (Examiner's Decision at 10, Finding of Fact 16); R 123-24 (Examiner's Decision at 22-23, Conclusion of Law 16).

⁴² Testimony of Perez, Tr. 7/11/08 at 271-72, 274-75; R 111 (Examiner's Decision at 10, Finding of Fact 16).

and approving the Scarsella preliminary plat.⁴³ The examiner concluded that the traffic mitigation condition violated both RCW 82.02.020 and SEPA.⁴⁴ All parties sought reconsideration of various portions of the Examiner's Decision, with both Federal Way and Tacoma seeking to reinstate the \$250,123 traffic mitigation condition. In his Order on Reconsideration, the Examiner declined to change his ruling on the traffic condition.⁴⁵

I. Federal Way Appeals to Superior Court. The Court Reverses the Examiner and Reinstates the MDNS Mitigation Payment Condition.

Federal Way thereafter filed a Land Use Petition Act (LUPA) suit in Pierce County Superior Court seeking reversal of the Examiner's Decision on the traffic mitigation condition of the MDNS.⁴⁶ Tacoma was a nominal respondent but aligned itself in superior court with the petitioner Federal Way.⁴⁷ In its LUPA petition, Federal Way did not challenge the Examiner's Decision to approve the Scarsella preliminary plat but instead sought only to reinstate the SEPA MDNS measure

⁴³ R 102-40 (Examiner's Decision).

⁴⁴ See R 119-25 (Examiner's Decision at 18-24, Conclusions of Law 9-18).

⁴⁵ R 3-5 (Examiner's Order Granting in Part and Denying in Part Motions for Reconsideration, Amending Conclusions of Law, and Affirming Decisions dated 10/29/08, at 1-3).

⁴⁶ CP 3-66 (Federal Way's LUPA Petition). LUPA is codified as RCW ch. 36.70C.

⁴⁷ CP 278 (Brief of Respondent City of Tacoma at 3).

requiring T&C to pay over \$250,000 to Federal Way for traffic mitigation.⁴⁸

In April 2009, Judge Thomas J. Felnagle ruled in favor of Federal Way and reinstated the SEPA mitigation measure requiring T&C to pay Federal Way \$250,123 for traffic mitigation.⁴⁹ T&C appealed the superior court's judgment to this Court.⁵⁰ Although they are now denominated as respondents by order of the Court, T&C and the Scarsellas seek review and reversal of the superior court's decision, as set forth in T&C's Assignment of Error.⁵¹

IV. ARGUMENT

A. LUPA Review: Burden of Proof and Standards of Review.

1. The Appellate Court Stands in the Shoes of the Trial Court and Reviews the Administrative Record Directly.

This is a LUPA case reviewing the correctness of a land use decision. In a LUPA review on appeal, the Court stands in the shoes of the superior court and limits its review to the administrative record.⁵² The Court reviews that record directly, not the decision of the superior

⁴⁸ CP 18 (Federal Way's LUPA Petition at 16, Relief Requested).

⁴⁹ CP 404-14 (Conclusions of Law, Order and Judgment Granting Land Use Petition, filed May 18, 2009).

⁵⁰ CP 415-26 (Notice of Appeal to Court of Appeals, Division II, dated 6/16/09).

⁵¹ Ruling Requiring Rebriefing, *City of Federal Way v. Town & Country Real Estate, LLC, et al.*, No. 39407-3-II (Wash. Ct. App. Feb. 24, 2010).

⁵² *Abbey Road Group, LLC v. City of Bonney Lake*, 141 Wn. App. 184, 192, 167 P.3d 1213 (2007), *aff'd*, 167 Wn.2d 242, 8 P.3d 180 (2009).

court, and applies the LUPA standards for granting relief directly to the hearing examiner's decision.⁵³

2. *Federal Way Continues to Bear the Burden of Proving That the Hearing Examiner's Decision Was in Error.*

T&C prevailed before the Tacoma Hearing Examiner on its appeal of the SEPA traffic mitigation condition, and Federal Way as the aggrieved party then sought judicial review under LUPA. While the superior court below reversed the examiner and granted judgment to Federal Way, Judge Felnagle's decision does not shift the LUPA burden of proof. On appeal to this Court, the burden of establishing an error under one the grounds specified in LUPA remains with the petitioning party – Federal Way – even though the city prevailed on its LUPA claim in superior court.⁵⁴ Under LUPA's standards of review, which accord due deference to the hearing examiner's decision below, Federal Way cannot carry its burden.

⁵³ *HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning & Land Servs.*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2002).

⁵⁴ *Quality Rock Products, Inc. v. Thurston County*, 139 Wn. App. 125, 134, 159 P.3d 1 (2007), *review denied*, 163 Wn.2d 1018 (2008); *Ruling Requiring Rebriefing, City of Federal Way v. Town & Country Real Estate, LLC, et al.*, No. 39407-3-II (Wash. Ct. App. Feb. 24, 2010).

3. *The Applicable LUPA Standards of Review Defer to the Hearing Examiner's Decision.*

Federal Way must prove one of the six bases for relief set forth in LUPA, RCW 36.70C.130(1)(a) through (f).⁵⁵ Federal Way has sought relief under three of those grounds, subsections (b), (c), and (d) of the statute.⁵⁶

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

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

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

Each of these standards implicates a different standard of review, but each grants due deference to the hearing examiner's decision below.

Standard (b), asserting an erroneous legal interpretation, presents questions of law which the Court will review de novo, while according due deference to the hearing examiner's expertise, as required by LUPA.⁵⁷

In light of its independent de novo review of the law, the Court will

⁵⁵ *Abbey Road, supra*, 141 Wn. App. at 192.

⁵⁶ CP 14 (Federal Way's Land Use Petition for Review at 12, Section IV).

⁵⁷ *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004); *Quality Rock, supra*, 139 Wn. App. at 133. See *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 412, 120 P.3d 397 (2005) ("Local jurisdictions with expertise in land use decisions are afforded an appropriate level of deference in interpretations of law under LUPA.")

disregard the superior court's conclusions of law, which were superfluous and need not have been entered.⁵⁸

Standard (c) concerns factual determinations that the Court reviews for substantial evidence.⁵⁹ Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement asserted.⁶⁰ This is a deferential review, requiring the Court to consider all the evidence and reasonable inferences in the light most favorable to T&C, the party that prevailed in the highest forum exercising fact-finding authority, i.e., the Tacoma Hearing Examiner.⁶¹

Finally, standard (d) requires the Court to apply the law to the facts, employing the *clearly erroneous* test.⁶² Under that test, the Court determines whether it is left with the definite and firm conviction that a mistake has been committed.⁶³ Again, the Court will defer to factual

⁵⁸ *Humbert v. Walla Walla County*, 145 Wn. App. 185, 192 n.3, 185 P.3d 660 (2008). It is instead the Tacoma Hearing Examiner's findings and conclusions that the Court will review here. Federal Way wrongly asserts that the examiner's legal conclusions are entitled to deference only if they involve construction of Tacoma's own ordinances. Opening Brief of Federal Way at 26-27. On the contrary, the Court will give substantial deference to all factual and legal determinations by a hearing examiner, including an examiner's application of SEPA law. See *Lanzce C. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 225 P.3d 448 (2010).

⁵⁹ *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 250, 8 P.3d 180 (2009).

⁶⁰ *Id.*

⁶¹ *Id.*; *Cingular Wireless, L.L.C. v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006).

⁶² *Id.*; *Quality Rock, supra*, 139 Wn. App. at 133.

⁶³ *Cingular Wireless*, 131 Wn. App. at 768.

determinations made by the Tacoma Hearing Examiner, the highest fact-finding authority.⁶⁴

B. The Hearing Examiner Had Jurisdiction to Consider Whether the Mitigation Fee Violates RCW 82.02.020.

Federal Way argues that the Tacoma Hearing Examiner erred in even considering whether the traffic mitigation fee imposed by Tacoma for the benefit of Federal Way violated RCW 82.02.020. Federal Way asserts that because Town & Country did not list this issue in its appeal statement filed with the examiner, the examiner could not consider it.⁶⁵ The city is in error.

Contrary to Federal Way's assertion, the examiner did not raise this issue *sua sponte*.⁶⁶ T&C raised the issue in its prehearing brief.⁶⁷ Federal Way never objected to the examiner's consideration of the issue, either at the appeal hearing or in the city's motion for reconsideration.⁶⁸

In any case, the Tacoma Municipal Code confers ample authority on the examiner to consider the issue. The code provides that the examiner may reverse a SEPA decision (including, as here, a condition imposed in a SEPA Mitigated Determination of Nonsignificance) if the

⁶⁴ *Id.*

⁶⁵ Opening Brief of Federal Way at 27-28.

⁶⁶ *Id.* at 27.

⁶⁷ See R 226-27 (Appellant's Prehearing Brief to Hearing Examiner at 11-12).

⁶⁸ See R 68-91 (City of Federal Way's Motion for Reconsideration).

decision “is outside the statutory authority or jurisdiction of the City” or if the SEPA “responsible official has engaged in unlawful procedure or decision-making process.”⁶⁹ These standards confer explicit authority on the examiner to review compliance with the requirements of RCW 82.02.020 regardless of whether the issue was set forth in T&C’s SEPA appeal statement.⁷⁰

C. Tacoma’s SEPA Condition Requiring Payment to Federal Way Violates RCW 82.02.020.

RCW 82.02.020 broadly prohibits any tax, fee, or charge, either direct or indirect, on the development or subdivision of land. But the statute does explicitly authorize voluntary agreements with developers under certain circumstances, as an exception to this general prohibition:

This section does not prohibit voluntary agreements with counties, cities, towns, or other municipal corporations that allow a payment in lieu of a dedication of land or to mitigate a direct impact that has been identified as a consequence of a proposed development, subdivision, or plat.⁷¹

⁶⁹ Tacoma Municipal Code (TMC) § 13.12.680(4)(e)(ii), (iii), *available at*: <http://cms.cityoftacoma.org/cityclerk/Files/MunicipalCode/Title13-LandUseRegulatoryCode.PDF>. A copy of TMC § 13.12.680 is attached hereto as Appendix A.

⁷⁰ Unless a transportation impact fee is imposed pursuant to provisions of the Growth Management Act (GMA), the ultimate underlying statutory authority for mitigating traffic impacts via a fee payment under RCW 82.02.020 is SEPA. *Castle Homes & Dev., Inc. v. City of Brier*, 76 Wn. App. 95, 105-06, 882 P.2d 1172 (1994). The examiner therefore had jurisdiction to consider this SEPA issue in a SEPA appeal.

⁷¹ RCW 82.02.020.

When a developer's monetary obligation to mitigate an environmental impact is imposed via a voluntary agreement with a municipality, the requirements of RCW 82.02.020 must be met, as well as those of SEPA.⁷² And RCW 82.02.020 requires strict compliance with its terms.⁷³

The Court should be mindful of the distinction between generalized transportation impact fees levied under the Growth Management Act ("GMA") and those exacted as SEPA mitigation under RCW 82.02.020.⁷⁴ GMA impact fees are not intended to compensate local governments for the direct impacts of development on specific streets or intersections. Rather, they raise revenue for "system improvements reasonably related to the new development."⁷⁵ They are involuntary fees that resemble taxes.⁷⁶ And those system improvements need only "reasonably benefit the new development."⁷⁷

⁷² *Citizens' Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 657, 187 P.3d 786 (2008), *review denied*, 165 Wn.2d 1020 (2009) (citing *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 755-56, 49 P.3d 867 (2002)).

⁷³ *Id.*, 145 Wn. App. at 657.

⁷⁴ GMA impact fees are authorized in RCW 82.02.050 through .090 to finance a portion of the cost of "system improvements," including transportation system improvements.

⁷⁵ RCW 82.02.050(3)(b).

⁷⁶ *Isla Verde*, 146 Wn.2d at 753; *New Castle Invs. v. City of LaCenter*, 98 Wn. App. 224, 235, 989 P.2d 569 (1999), *review denied*, 140 Wn.2d 1019 (2000).

⁷⁷ RCW 82.02.050(3)(c). See *City of Olympia v. Drebeck*, 156 Wn.2d 289, 300-08, 126 P.3d 802 (2006).

By contrast, mitigation fees payable under a voluntary agreement may be levied only to mitigate a specific, direct impact that has been identified as a consequence of a proposed development.⁷⁸ Our courts have reformulated this statutory limitation into a test of whether a governmental exaction is *reasonably necessary* as a *direct result* of a development.⁷⁹ As with the burden of proof under LUPA in this case, the burden of proving these essential elements under RCW 82.02.020 was and is on Tacoma, the governmental entity imposing the requirement.⁸⁰

But neither Tacoma nor Federal Way (as the intended beneficiary of Tacoma's mitigation fee) can carry that burden. The Federal Way mitigation fee is fatally flawed because the alleged traffic impact is neither a *direct result* of the Scarsella plat nor *reasonably necessary*. Further, a mitigation fee must be *roughly proportional* to the impact of the proposed development. The Federal Way fee is not.

1. The Cities Did Not Prove That the Scarsella Plat Will Have a Direct Adverse Impact on Federal Way Streets.

By the express wording of RCW 82.02.020, a voluntary agreement to mitigate development impacts of a proposed development is limited to

⁷⁸ RCW 82.02.020; *Drebick*, 156 Wn.2d at 308 (citing *New Castle Invs.*, 98 Wn. App. at 235-36).

⁷⁹ *Citizens' Alliance*, 145 Wn. App. at 657 (citing *Isla Verde*, *supra* n.72, 146 Wn.2d at 755-56; and *Trimen Dev. Co. v. King County*, 124 Wn.2d 261, 270-71, 877 P.2d 187 (1994)).

⁸⁰ *Citizens' Alliance*, 145 Wn. App. at 657; *Isla Verde*, 146 Wn.2d at 755-56.

the mitigation of *direct impacts* identified as a consequence of the proposed development. Tacoma and Federal Way identified no such direct impact here, either in Federal Way's traffic analysis, in its new exhibits introduced at the public hearing, or in any other document considered by the Examiner.

a. *A Direct Impact Means an Adverse Impact Directly Caused by a Development.*

The Federal Way traffic analysis shows that all four street locations for which the city originally sought mitigation will have an acceptable V/C ratio and will be at LOS C or D, both before and after the Scarsella plat development.⁸¹ Because none of the four will have a failing LOS as a consequence of the Scarsella plat, there is no *direct impact*, within the meaning of RCW 82.02.020.

As used in RCW 82.02.020, *direct impact* means an *adverse impact caused directly* by the Scarsella plat because that is what *direct impact* means under SEPA. In determining a statute's meaning, the Court may examine closely-related statutes, since statutes related to the same subject matter should be read in *pari materia*, as together constituting one

⁸¹ See R 638 (Ex. R19.4, Federal Way 11/7/07 cover letter summarizing mitigation request for four locations); see Appendix B hereto, summarizing V/C and LOS results in the November 2007 TIA.

law.⁸² The exception in RCW 82.02.020 allowing the exaction of development fees to mitigate direct impacts must be read in pari materia with SEPA, RCW ch. 43.21C. The subject matter of both laws is the identification and mitigation of environmental impacts. Indeed, as already noted, the underlying authority for imposing mitigation fees under RCW 82.02.020 is SEPA itself.⁸³

The Court must therefore look to the Department of Ecology's long-standing administrative construction of *environmental impacts* and related SEPA terms.⁸⁴ Indeed, Tacoma has expressly adopted Ecology's SEPA definitions as part of that city's Environmental Code.⁸⁵ The SEPA Rules define *impacts* as the *effects or consequences* of actions.⁸⁶

⁸² *Premera v. Kreidler*, 133 Wn. App. 23, 36, 131 P.3d 930 (2006); *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007(2009): "The 'plain meaning' of a statutory provision is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole."

⁸³ *Castle Homes*, *supra* n.70, 76 Wn. App. at 105-06.

⁸⁴ Ecology is the agency specifically charged by the legislature with adopting rules of interpretation regarding SEPA and defining terms relevant to its implementation. RCW 43.21C.110(1)(a), (f). Further, the legislature has decreed that Ecology's SEPA Rules be accorded substantial deference in the interpretation of SEPA. RCW 43.21C.095. The SEPA Rules are codified as WAC ch. 197-11.

⁸⁵ TMC § 13.12.004. Tacoma's Environmental Code governs "compliance by all City departments/divisions, commissions, boards, committees, and City Council with the procedural requirements of [SEPA]." TMC § 13.12.020(3).

⁸⁶ SEPA Rules, WAC 197-11-752.

And *environmental impacts* are effects on the specified elements of the environment.⁸⁷

While the cities are correct that Federal Way’s traffic analysis did calculate the number of trips that the Scarsella plat would contribute to the Federal Way street system, that calculation alone does not identify an “impact” sufficient to support mitigation imposed under RCW 82.02.020.⁸⁸ Calculating the number of trips that a plat will add to an intersection reveals only whether there will be any traffic impact at all. But without more, it is just a number. The trip number doesn’t disclose whether an impact will be *adverse*, since the effect of adding the new trips to the capacity of the intersection hasn’t yet been factored in. As borne out by the definition of *impacts* in the SEPA Rules, it is the *consequence* of adding those new trips – what happens to the functioning of the intersection when the trips are added – that identifies whether there will be any *adverse impact*, and indeed, SEPA mitigation is imposed in order to mitigate *adverse impacts*.⁸⁹

⁸⁷ *Id.*

⁸⁸ See Opening Brief of Federal Way at 22, 36; Brief of Tacoma at 13; CP 406 (Superior Court’s Conclusions of Law, Order and Judgment Granting Land Use Petition at 3, Conclusion 3).

⁸⁹ Proposals “may be conditioned only to mitigate specific adverse environmental impacts which are identified in the environmental documents prepared under this chapter.” SEPA, RCW 43.21C.060.

b. The Federal Way Traffic Analysis Did Not Identify Any Direct Adverse Impact.

Federal Way's November 2007 traffic analysis failed to demonstrate that the Scarsella plat would have any discernible direct adverse impact on the city's street system. The traffic analysis simply disclosed that the Scarsella plat would add a modest number of additional peak-hour trips to various Federal Way streets and intersections.⁹⁰ The analysis did not reveal any adverse consequence of those trips.

In fact, the traffic analysis showed that the result of adding the new Scarsella plat trips would be *no change* in the level of service of any of the 113 intersections and road segments studied, from their 2009 "background" levels of service. Every one of those 113 met the city's LOS standard under "background" conditions (without Scarsella plat traffic), and every one of those 113 would still meet the standard when Scarsella plat traffic is added.⁹¹ The city thus tells only part of the story when it asserts that its traffic analysis set forth the specific traffic impacts of the Scarsella plat with "precise detail."⁹² The actual, direct adverse impact of the plat, as disclosed in the traffic analysis, was no adverse

⁹⁰ R 638-815 (Ex. R19.4, Federal Way TIA. Appendix B to this Brief summarizes the relevant traffic impacts in the record.

⁹¹ R 681-84 (Ex. R19.4, Federal Way TIA, at 37-40, Table 3 – LOS Summary Worksheet).

⁹² Opening Brief of Federal Way at 36.

impact at all – no change in the level of service at any of the 113 locations studied in the Federal Way traffic analysis.

Federal Way nevertheless asserts that its traffic study does show a direct impact of Scarsella plat traffic – an estimated 0.5 percent horizon-year increase in peak-hour traffic volumes (i.e., 27 new trips) at TIP Project 4028 (a/k/a Map ID No. 11), and about a 1.2 percent horizon-year increase (ranging between 27 and 32 new trips) along the stretch of road constituting TIP Project 4220 (a/k/a Map ID No. 23).⁹³ These traffic volume increases do not amount to a specific adverse impact.

Both Table 3 and Appendix C of the Federal Way traffic analysis compare existing traffic conditions to projected future conditions after development of the Scarsella plat, and assume implementation of all of Federal Way's TIP capital street projects.⁹⁴ But those TIP projects are the very mitigation Federal Way seeks to implement through this SEPA condition, by obtaining T&C's monetary contribution toward the cost of the TIPs. Federal Way thus never demonstrated that any direct traffic impact of the Scarsella plat will necessitate the two TIP project improvements for which the city seeks T&C's contribution. Only an

⁹³ See nn.38-40 and accompanying text *supra*.

⁹⁴ R 681-84 (Ex. R19.4, Federal Way TIA at 37-40, Table 3); R 813-15 (Federal Way TIA, Appendix C).

analysis that did *not* include the City's TIP projects could reveal if that were the case.

Even if Federal Way had properly analyzed the additional Scarsella plat vehicle trips projected for the two locations in question (i.e., TIP Projects 4220 and 4028), a modest increase in trips does not equate to a *specific adverse impact*. The location of TIP Project 4220 is a street segment (SW 336th Way, becoming SW 340th Street, between 26th Place SW and Hoyt Road) that in the horizon year carries total peak-hour trips averaging around 2,500 trips. Its two major intersections will both function at a very acceptable LOS C both without and with the Scarsella plat traffic.⁹⁵

The intersection constituting TIP Project No. 4028 (21st Avenue SW and SW Campus Drive) will function at LOS D both before and after addition of the Scarsella plat traffic, also acceptable under Federal Way's adopted LOS standards. An increase in traffic of 0.5 percent does not amount to a direct adverse impact if the municipality cannot point to an unacceptable decline in its adopted street service

⁹⁵ R 815 (Ex. R19.4, Federal Way TIA, Appendix C, horizon volumes for segments of Map ID No. 23); R 683 (Federal Way TIA at 39): TIP Project ID No. 4220, 35th Ave. SW/SW 340th St. = "background" and "with project" LOS C; TIP Project ID No. 4218, Hoyt Rd. SW/SW 340th St. = "background" and "with project" LOS C. See Appendix B to this Brief.

standards.⁹⁶ The Hearing Examiner concurred, labeling the percentage of Scarsella plat trips that will use these two Federal Way street locations “insignificant.”⁹⁷

c. Federal Way’s Hearing Exhibits Did Not Identify Any Direct Adverse Impact.

In light of its 2007 traffic analysis, showing an acceptable LOS at each of the 113 Federal Way locations after addition of Scarsella plat traffic, the City apparently recognized that it had failed to identify any direct adverse traffic impact of T&C’s plat. The city therefore introduced two new computer-modeled traffic exhibits on the last day of the SEPA appeal hearing – eight months after preparation of its traffic analysis. But those exhibits, R39 and R40, likewise failed to disclose any direct impact of Scarsella plat traffic.⁹⁸ Exhibit R39 assumed construction of Federal Way’s scheduled TIP projects and showed levels of service on its street network under the existing traffic load, without adding any Scarsella plat traffic.⁹⁹ The import of this exhibit was unsurprising – construction of substantial street improvements over several years, assuming current traffic volumes, would result in acceptable levels of service.

⁹⁶ See *Castle Homes & Dev., Inc. v. City of Brier*, 76 Wn. App. 95, 106-07, 882 P.2d 1172 (1994).

⁹⁷ R 125 (Examiner’s Decision at 24, Conclusion of Law 17; see R 110-11 (*id.* at 9-10, Finding of Fact 15)).

⁹⁸ Exhibit R39 (R 947-50); Exhibit R40 (R 951-54).

⁹⁹ Testimony of Richard Perez, P.E., Tr. 7/11/08, at 215, 259-60.

Exhibit R40 showed data on existing Federal Way traffic plus the addition of traffic attributable to annual growth in the city – presumably including Scarsella plat traffic, though its traffic was never specifically called out – while assuming *no* construction of the city’s scheduled TIP projects.¹⁰⁰ The upshot of this exhibit– that without improvements and with additional growth, two city street locations would eventually operate at Level of Service F – was again unsurprising. Common sense dictates that adding traffic from all projected annualized growth to an existing street network, without making any improvements to the network, will eventually degrade levels of service.

But the exhibit failed to show that traffic specifically from the Scarsella plat alone – and differentiated from the effects of generalized traffic growth – would result in a direct adverse impact to Federal Way’s street network.¹⁰¹ The city thus failed to demonstrate a *direct impact* of Scarsella plat traffic, the prerequisite for imposing a SEPA mitigation fee under RCW 82.02.020. The hearing examiner recognized this failure, and that is why he struck down the traffic mitigation fee.¹⁰²

¹⁰⁰ Id. at 221-22.

¹⁰¹ Id. at 262; R 112 (Examiner’s Decision at 11, Finding of Fact 18). See Testimony of Perez, Tr. 7/11/08, at 261-62.

¹⁰² Federal Way’s reliance on a showing of generalized traffic impacts of projected growth throughout the area, and the improvements that would be needed to serve that growth, would be an appropriate basis for imposing a GMA traffic impact fee under RCW 82.02.050. But evidence of the impacts of projected (and unidentified) annual

Federal Way's two last-minute exhibits also failed to provide a genuine before-and-after comparison of traffic conditions that could properly have identified a direct adverse impact of the Scarsella plat traffic. To do that, Exhibit R39 should have shown existing traffic conditions *without* the city's TIP Projects (rather than with them), and *with* traffic growth from other projects but *without* Scarsella plat traffic. Such an analysis would then have meshed with the comparison shown on Exhibit R40. The only difference between the two would have been the net addition of Scarsella plat traffic in Exhibit R40. But Federal Way's exhibits didn't do that. Instead, the first exhibit assumed construction of the City's TIP projects, while the second did not, thus completely changing the assumed capacities of the various intersections.¹⁰³

The lack of any direct adverse traffic impact attributable to the Scarsella plat is underscored by the testimony of Federal Way's own

growth is insufficient to satisfy the more stringent requirements for imposing a SEPA impact mitigation fee under RCW 82.02.020. *See City of Olympia v. Drebeck*, 156 Wn.2d 289, 301, 126 P.3d 802 (2006): "GMA impact fees are likewise distinct from those exacted under the State Environmental Policy Act (SEPA), chapter 43.21C RCW, which authorizes local jurisdictions to impose conditions on a proposed development 'to mitigate *specific* adverse environmental impacts.' . . . Notably, in the GMA impact fee statutes, the legislature did *not* require that the funded facilities be *directly* or *specifically* related and beneficial to the development seeking approval. Whereas the starting point in the calculation of SEPA . . . fees is the individual development and its direct impact, the local government's calculation of a proposed development's GMA impact fee begins, in contrast, with the anticipation of the area-wide improvements needed to serve new growth and development in the aggregate." (emphasis in original)

¹⁰³ Compare Exhibit R39 (R 947-50) ("Existing w/programmed projects," upper left-hand corner of each page) *with* Exhibit R40 (R 951-54) ("Horizon without TIP," upper right-hand corner of each page).

traffic expert and the evidence in its own Traffic Impact Analysis. As the Examiner noted in his decision, Federal Way's city engineer testified that TIP Project Nos. 4028 and 4220 (a/k/a Map ID Nos. 11 and 23) will be required even *without* development of the Scarsella plat.¹⁰⁴ The traffic concerns raised by Federal Way are simply not attributable to new traffic specifically from the Scarsella plat. They are concerns caused by *existing* traffic volumes, plus projected traffic resulting from growth in general.¹⁰⁵ Where, then, is the individualized identification of a specific, direct adverse impact of Scarsella plat traffic that is required in order to mitigate impacts pursuant to a voluntary agreement under RCW 82.02.020?¹⁰⁶

In addition, Federal Way's engineer also testified that as funds become available, Federal Way will construct both TIP Project Nos. 4028 and 4220, whether or not the Scarsella plat develops.¹⁰⁷ Again, it is plain that existing high traffic volumes, coupled with increased volume from already-approved "pipeline" projects, are the actual cause of the traffic

¹⁰⁴ R 111 (Examiner's Decision at 10, Finding of Fact 16); R 123-24 (Examiner's Decision at 22-23, Conclusions of Law 16 and 17); Testimony of Perez, Tr. 7/11/08 at 271.

¹⁰⁵ See R 952 (Ex. R40, TIP Project No. 4028: LOS F for horizon year with Scarsella project included as part of annualized growth.

¹⁰⁶ See *Isla Verde supra* n.72, 146 Wn.2d at 755, 761; see also *Miller v. City of Port Angeles*, 38 Wn. App. 904, 910, 691 P.2d 229 (1984), *review denied*, 103 Wn.2d 1025 (1985) ("The need for the [road] improvements arose directly from the development.").

¹⁰⁷ R 111 (Examiner's Decision at 10, Finding of Fact 16); testimony of Perez, Tr. 7/11/08 at 271-72, 274-75.

impacts that Federal Way wishes to alleviate via its TIP projects, not traffic from the Scarsella plat.

The facts before the Court are strikingly similar to those in the *Castle Homes* case.¹⁰⁸ There, a developer proposed a plat in the City of Brier, at a time of city concern about traffic impacts from a number of new subdivisions. Brier's traffic study concluded that there would be a substantial increase in traffic resulting from all the proposed new developments. After negotiations between Castle Homes and Brier, the parties entered into an agreement whereby Castle Homes would pay traffic mitigation fees to Brier, and Brier would approve the Castle Homes plat. At the time of final plat approval, the developer sought to amend the agreement with Brier, to reduce its mitigation fees to what Castle Homes asserted was its proper "fair share." Brier ultimately refused to do so, and the developer appealed to court.

Division One held that Brier had not shown its traffic impact mitigation fee to be reasonably necessary to mitigate any direct traffic impact of the proposed subdivision. The pertinent facts recited by the court are equally true in T&C's case:

The traffic studies produced by both the City and Castle Homes reveal that the traffic entering the City's street

¹⁰⁸ *Castle Homes & Dev., Inc. v. City of Brier*, 76 Wn. App. 95, 882 P.2d 1172 (1994).

system from Castle Crest II would not significantly impact the levels of service of the streets, especially when compared with other developments. There was testimony by both experts 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.¹⁰⁹

Just as the court invalidated the traffic mitigation fee in *Castle Homes*, this Court should likewise overturn the \$250,123 fee demanded by Federal Way because “the fees being charged to mitigate traffic woes were being based on a cumulative impact of all the new subdivisions, not the specific impact of the [T&C] development.”¹¹⁰

d. Traffic from the Scarsella Plat Will Not Create Any Cumulative Impact. In Any Case, Cumulative Impacts Are Not Direct Impacts and Cannot Be Mitigated Under a Voluntary Agreement.

Federal Way argues that even the modest increases in traffic volumes at its two TIP project locations resulting from the Scarsella plat do amount to a specific adverse environmental impact – a *cumulative* impact that may properly be mitigated via the massive payment sought by the city.¹¹¹ But the Scarsella plat traffic will not create any cumulative adverse impact, as that term is used in the administration of SEPA and other Washington environmental statutes. And even if the new trips from the Scarsella plat are deemed to be part of a *cumulative impact*, that effect

¹⁰⁹ *Id.* at 107.

¹¹⁰ *Id.* at 106.

¹¹¹ Opening Brief of Federal Way at 44.

is not a *direct impact*. It therefore cannot be mitigated via a voluntary agreement under RCW 82.02.020.

Federal Way and Tacoma both assert that the mere showing of the general adverse impact of all annual traffic growth is the equivalent of demonstrating a direct impact as required by RCW 82.02.020.¹¹²

They argue that a cumulative impact is a direct impact simply because the Scarsella plat traffic will flow directly to the intersection and arterial corridor in question.¹¹³ The cities' interpretation is contrary to the plain language of RCW 82.02.020, as well as the long-standing administrative construction of what is meant under SEPA by *direct impacts* and *cumulative impacts*.

As noted, RCW 82.02.020 requires strict compliance with its terms. A fee imposed on development is invalid unless it falls within one of the exceptions specified in the statute.¹¹⁴ A court is required to assume that the legislature meant exactly what it said and thus apply a statute as

¹¹² See Opening Brief of Federal Way at 40-42; Brief of Tacoma at 33-36. Federal Way goes so far as to assert that the individual impact of the Scarsella plat is irrelevant: "Where the overall, cumulative impact is significant, *it is immaterial that a project's individual impact may be insignificant.*" Opening Brief of Federal Way at 44 (emphasis supplied). Federal Way thus ignores the requirement of a *direct impact*.

¹¹³ Opening Brief of Federal Way at 41; Brief of Tacoma at 36.

¹¹⁴ *Citizens' Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 657, 187 P.3d 786 (2008), *review denied*, 165 Wn.2d 1020 (2009).

written.¹¹⁵ And if a statute's meaning is plain on its face, the Court must give effect to that meaning.¹¹⁶ Our courts have held that the language of this portion of RCW 82.02.020, regulating the exaction of impact mitigation fees, is indeed plain and unambiguous.¹¹⁷

The plain language of RCW 82.02.020 permits imposition of an impact fee only to mitigate a *direct impact* of a subdivision, not just *any* impact. The legislature is presumed not to have used any superfluous words, and the word *direct* must be given meaning.¹¹⁸ Since *direct* is not defined in the statute but has a well-accepted ordinary meaning, the Court will look to the definition of the word in a standard dictionary.¹¹⁹

Direct means

stemming immediately from a source . . . clear-cut and distinctive: having no compromising or impairing element . . . characterized by or giving evidence of a close esp. logical, causal, or consequential relationship . . . inevitable, unequivocal . . . marked by absence of an intervening agency, instrumentality, or influence: immediate: made, carried on, or effected without any intruding factor or intervening step . . . unhampered by divergent, intervening, or separative forces . . .¹²⁰

¹¹⁵ *Homestreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009).

¹¹⁶ *Premera v. Kreidler*, *supra* n.82, 133 Wn. App. at 36.

¹¹⁷ *Castle Homes*, *supra* n.70, 76 Wn. App. at 106.

¹¹⁸ *E.g., State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005).

¹¹⁹ *Whidbey Gen'l Hosp. v. State*, 143 Wn. App. 620, 628, 180 P.3d 796 (2008).

¹²⁰ *Webster's Third New International Dictionary of the English Language Unabridged* 640 (1993).

A direct impact is therefore one that is unequivocal, marked by the absence of any intervening instrumentality or influence, effected without any intruding factor, and unhampered by any intervening force. By definition, then, a direct impact cannot be a combined impact, attributable in part to other intervening causes in the form of traffic from other developments. A level of service failure of a Federal Way intersection therefore cannot be a direct impact of the Scarsella plat if that failure is attributable to the impact of the Scarsella plat in combination with existing traffic and projected traffic from future growth. The plain language of the statute compels that conclusion.

Even if the Court goes beyond the unambiguous wording of the statute, the same conclusion follows. The SEPA Rules explicitly define and distinguish three different types of impacts. “Impacts may be: (i) Direct; (ii) Indirect; *or* (iii) Cumulative.”¹²¹ The most that can be said of the impacts of the Scarsella plat on the two Federal Way street locations for which mitigation is sought is that they are *cumulative* impacts, impacts caused in combination with hundreds, even thousands, of trips arising

¹²¹ WAC 197-11-792(2)(c) (emphasis supplied). *See also* WAC 197-11-060(4)(e) (impacts to be analyzed in an EIS are direct, indirect, and cumulative impacts).

from other traffic growth in the city. But that is not a *direct* impact under SEPA.¹²²

In the parlance of SEPA, a *cumulative impact* is the impact of a proposal in combination with the impacts of other actual or potential proposals.¹²³ Thus, a cumulative impact cannot be a direct impact, not only because the SEPA Rules clearly distinguish between the two, but also because any impact created in concert with those of other pending or future proposals conflicts with the foregoing definition of *direct*, which excludes intruding or intervening causes.

Cumulative impacts properly include only the effects of pending and future proposals, not the impacts of an applicant's proposal coupled with those of any past actions. Otherwise, a developer is being asked to mitigate in part for *existing conditions*, caused by the past actions of others.¹²⁴ Tacoma cites Division Three's recent *Gebbers* decision for the

¹²² See WAC 197-11-060(4)(d): "A proposal's effects include direct and indirect impacts caused by a proposal. Impacts include those effects resulting from growth caused by a proposal, as well as the likelihood that the present proposal will serve as a precedent for future actions." In the preceding sentence, "effects resulting from growth caused by a proposal" are direct impacts, while the precedential nature of a proposal is an indirect impact. Note that the direct impact example is limited to the effects resulting from *growth caused by the proposal*, not the effects of that growth *plus* the growth of *other* proposals.

¹²³ Richard L. Settle, *The Washington State Environmental Policy Act* § 14.01[1][c][iii] (rev. 2009).

¹²⁴ "[A]s a general proposition, the nature of cumulative impacts is prospective and not retrospective." *Boehm v. City of Vancouver*, 111 Wn. App. 711, 720, 47 P.3d 137 (2002). Past actions or projects are instead included as part of the "existing environment," i.e., the baseline against which the impacts of a proposal are measured. See SEPA Rules, WAC 197-11-440(6)(a); (c)(1).

proposition that cumulative impacts embrace past, present, and reasonably foreseeable future actions.¹²⁵ *Gebbers* relied on the federal Council on Environmental Quality’s regulatory definition of *cumulative impacts* under the National Environmental Policy Act (“NEPA”), as well as NEPA federal case law, citing no SEPA definition or case. Insofar as that NEPA definition incorporates past actions as part of a cumulative impacts analysis, it conflicts with Washington’s body of SEPA law and should not control here.¹²⁶ In any case, the actual holding of *Gebbers* undercuts Tacoma’s position, since the court held that only *future* projects that are dependent on a proposed action require an analysis of cumulative impacts.¹²⁷

But parsing the precise meaning of *cumulative impacts* is ultimately a sideshow. No matter what *cumulative impacts* is defined to

¹²⁵ Brief of Tacoma at 35, citing *Gebbers v. Okanogan County P.U.D. No. 1*, 144 Wn. App. 371, 183 P.3d 324, review denied, 165 Wn.2d 1004 (2008).

¹²⁶ Our supreme court first endorsed the use of NEPA case law to inform the meaning of SEPA in one of the earliest SEPA cases, *Eastlake Community Council v. Roanoke Associates*, 82 Wn.2d 475, 488 n.5, 513 P.2d 36 (1973), stating, “We look *when necessary* to the federal cases construing and applying provisions of NEPA for guidance.” *Id.* (emphasis supplied). Three decades ago there was virtually no judicial gloss on SEPA and no implementing SEPA Rules. But since *Eastlake*, our courts have developed a coherent body of Washington SEPA case law, and we now have the SEPA Rules. In light of consistent Washington SEPA case law construing the term prospectively, there is no need for Washington’s courts to look to the divergent federal definition of *cumulative impacts* used for NEPA.

¹²⁷ “When, like here, any future project is not dependent on the proposed action, no cumulative impacts analysis is required.” *Gebbers*, 144 Wn. App. at 331, citing *Boehm, supra*, 111 Wn. App. at 720.

include, Tacoma could not lawfully impose a SEPA traffic mitigation fee on T&C under RCW 82.02.020. Only a *direct impact* may be addressed by such mitigation fees, and no such direct impact was proved.

2. *The Cities Did Not Prove That the Traffic Mitigation Fee Is Reasonably Necessary.*

RCW 82.02.020 requires a city to show that a SEPA mitigation fee is *reasonably necessary* to mitigate a direct impact of the development.¹²⁸ Federal Way and Tacoma have failed to make that showing.

The impact of Scarsella plat traffic on the two Federal Way street locations in question will be a negligible 0.5 percent and 1.2 percent of their respective total horizon-year peak-hour traffic volumes.¹²⁹ Since there has been no showing that the Scarsella plat traffic will cause any level of service failure at these two locations, the mitigation fee sought by Federal Way cannot be reasonably necessary. In addition, the fee is not reasonably necessary because Federal Way intends to go forward with its TIP street improvement projects regardless of whether Town & Country pays the mitigation fee sought here.¹³⁰

¹²⁸ *Citizens' Alliance*, *supra* n.72, 145 Wn. App. at 656-57, *citing* RCW 82.02.020 and *Isla Verde*, *supra* n.72, 146 Wn.2d at 754. *See also* *Castle Homes*, *supra* n.70, 76 Wn. App. at 107.

¹²⁹ See nn.38-40 and accompanying text *supra*.

¹³⁰ Testimony of Perez, Tr. 7/11/08 at 264-65, 274-75; R 111 (Examiner's Decision at 10, Finding of Fact 16).

3. ***The Traffic Mitigation Fee Is Not Roughly Proportional to the So-Called Impact Being Mitigated.***

When exacted under the voluntary agreement exception of RCW 82.02.020, an impact mitigation fee, as well as a dedication of land, must be *roughly proportional* to the impact being mitigated.¹³¹ Given the negligible additional traffic the Scarsella subdivision will contribute to the two affected street locations, Federal Way's requested fee of \$250,123 is far in excess of what would be roughly proportional – that is, if Federal Way had ever demonstrated an actual, direct adverse traffic impact of the plat on the city's streets. The Hearing Examiner concluded that the requested fee lacked the requisite rough proportionality, and this Court should affirm that conclusion.¹³²

The *rough proportionality* test has its roots in the takings analysis adopted by the U.S. Supreme Court in the *Nollan* and *Dolan* cases.¹³³ The Washington Supreme Court explicitly applied the test to impact mitigation fees in *Trimen Development Co. v. King County*.¹³⁴ There, the supreme court upheld park impact fees imposed by King County under

¹³¹ *Benchmark Land Co. v. City of Battle Ground*, 103 Wn. App. 721, 727, 14 P.3d 172 (2000), *aff'd on other grounds*, 146 Wn.2d 685, 49 P.3d 860 (2002).

¹³² See R 124-25 (Examiner's Decision at 23-24, Conclusions of Law 17-18).

¹³³ *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

¹³⁴ *Trimen*, 124 Wn.2d 261, 877 P.2d 187 (1994).

RCW 82.02.020 in lieu of parkland dedication, holding that the fees were reasonably necessary as a direct result of Trimen's proposed development. In so holding, the court cited *Dolan's* rough proportionality requirement.¹³⁵ This Court should similarly undertake a *rough proportionality* inquiry in this case and invalidate the outsized traffic mitigation fee because it is out of all proportion to the insignificant effect that the Scarsella plat traffic will have on Federal Way's streets.¹³⁶

The recent *Citizens' Alliance* case is also on point.¹³⁷ There, Division One struck down King County's critical area clearing limits ordinance as an invalid "tax, fee, or charge" under RCW 82.02.020 because, inter alia, the ordinance lacked rough proportionality.¹³⁸ Since the court held a land set aside to be the in-kind equivalent of a "tax, fee, or charge" which must meet the rough proportionality test, it must

¹³⁵ *Id.*, 124 Wn.2d at 274.

¹³⁶ In dicta, a majority of our supreme court observed in a 2006 Growth Management Act impact fee case that neither the U. S. Supreme Court nor the Washington Supreme court has determined whether the *Nollan/Dolan* tests for evaluating land exactions also apply to fees imposed to mitigate direct impacts under RCW 82.02.020. *City of Olympia v. Drebeck*, 156 Wn.2d 289, 302, 126 P.3d 802 (2006). But as the dissenting opinion in that case noted, Division Two has already squarely held that the *Dolan* proportionality test applies to impact fee cases under RCW 82.02.020.¹³⁶ The dissent argued that the great weight of judicial and scholarly authority strongly favors applying the *Nollan/Dolan* tests to impact fee exactions, as well as to land exactions. *Id.*

¹³⁷ *Citizens' Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 665-70, 187 P.3d 786 (2008), *review denied*, 165 Wn.2d 1020 (2009).

¹³⁸ *Id.*, 145 Wn. App. at 667-69. "*Trimen* recognizes that proportionality is a necessary part of the analysis [under RCW 82.02.020]." *Id.* at 667.

follow that an *actual* fee or charge, such as Tacoma’s traffic mitigation fee for Federal Way, is subject to the same test. And under that test, the \$250,123 mitigation condition cannot stand because neither city proved that the fee was roughly proportional to the insignificant “impact” sought to be mitigated.

D. Tacoma’s Condition Requiring Payment to Federal Way Also Violates SEPA.

Separate and apart from its violation of RCW 82.02.020, the MDNS condition imposed by Tacoma also violates SEPA’s requirements for mitigation, as the Examiner correctly ruled.¹³⁹

1. *The Cities Failed to Show Any Specific Adverse Impact of the Scarsella Subdivision on the Two Federal Way Street Locations.*

Like RCW 82.02.020, SEPA similarly requires that a mitigation measure be related to “specific adverse environmental impacts clearly identified in an environmental document on the proposal.”¹⁴⁰ The Federal Way mitigation condition fails to satisfy this crucial SEPA requirement.

The only support for the requested traffic mitigation that appears in any “environmental document” reviewed by Tacoma for its SEPA MDNS

¹³⁹ R 123 (Examiner’s Decision at 22, Conclusion of Law 16); RCW 43.21C.060; SEPA Rules, WAC 197-11-660(1)(b) .

¹⁴⁰ SEPA Rules, WAC 197-11-660(1)(b); *see* RCW 43.21C.060. An *environmental document* is broadly defined to mean any written public document prepared under SEPA, including environmental analyses, studies, reports, and assessments. SEPA Rules, WAC 197-11-744.

is Federal Way's November 2007 traffic analysis.¹⁴¹ Unsurprisingly, the traffic analysis is the only document cited in the MDNS as justification for the requested mitigation.¹⁴² But as argued above, that Federal Way analysis does not "clearly identify" any *specific adverse environmental impact* of Scarsella plat traffic on either of the two street segments for which Federal Way ultimately sought its traffic mitigation fee.¹⁴³ On the contrary, Federal Way's traffic analysis and the testimony of its own witnesses support T&C's contention that at most, the Scarsella plat will have only a minor effect, scarcely detectable, on these two street segments.

Tacoma and Federal Way may not rely on the latter's Exhibits R39 and R40, introduced toward the end of the public hearing, to satisfy SEPA's impact disclosure requirement.¹⁴⁴ A specific adverse impact must be both (1) clearly identified in an environmental document on the proposal and (2) stated in writing by the decision maker.¹⁴⁵ Tacoma, as the MDNS decision maker, never identified in writing any specific

¹⁴¹ R 638-815 (Ex. R19.4, Federal Way TIA).

¹⁴² R 555 (Tacoma MDNS for Scarsella plat, dated 4/9/08, at 4, Finding of Fact 21): "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."

¹⁴³ See Section IV.C.1 *supra*.

¹⁴⁴ R 947-50 (Ex. R39); R 951-54 (Ex. R40).

¹⁴⁵ SEPA Rules, WAC 197-11-660(1)(a).

adverse impact based on the last-minute data in Exhibits R39 and R40 that would justify imposing the Federal Way traffic mitigation fee.

Even had Tacoma done so, the mitigation fee would still violate SEPA. The Court will recall that the data in Exhibit R 40 simply reflect the generalized impacts of annual traffic growth, with Scarsella plat traffic included only as part of overall traffic growth from new developments.¹⁴⁶ The cities thus never identified a specific adverse traffic impact of the Scarsella subdivision alone, as SEPA requires.

2. *The Federal Way Mitigation Fee Is Not Reasonable. Any Impact of Added Traffic from the Scarsella Subdivision Will Be Insignificant.*

A fundamental requirement for mitigation imposed under SEPA is that it be *reasonable*.¹⁴⁷ The Federal Way traffic mitigation condition is manifestly unreasonable and therefore cannot be sustained.

The term *reasonable* is not defined in either the SEPA statute or the administrative SEPA Rules. The Court must therefore look to the ordinary meaning of the word. *Reasonable* means:

being in agreement with right thinking or right judgment:
not conflicting with reason: not absurd . . . being or
remaining within the bounds of reason: not extreme: not
excessive . . . moderate.¹⁴⁸

¹⁴⁶ See Section III.G *supra*.

¹⁴⁷ SEPA, RCW 43.21C.060; SEPA Rules, WAC 197-11-660(1)(c).

¹⁴⁸ *Webster's Third New International Dictionary of the English Language Unabridged* 1892 (1993).

Applying that definition, Tacoma's MDNS condition requiring a \$250,123 mitigation payment to Federal Way fails the *reasonable* test.

The Examiner correctly concluded that the traffic impacts of the Scarsella plat would be "insignificant."¹⁴⁹ Given those trifling traffic impacts, the required fee is indeed excessive, immoderate, absurd, and extreme.

V. CONCLUSION

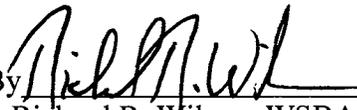
The Court should hold that Tacoma's SEPA traffic mitigation condition violates both RCW 82.02.020 and SEPA. The Court should accordingly reverse the judgment of the superior court below and reinstate the decision of the Tacoma Hearing Examiner.

¹⁴⁹ R 124 (Examiner's Decision at 23, Conclusion of Law 17). The definition of *significant* in the SEPA Rules underscores the correctness of the Examiner's conclusion. Those rules explicitly state that *significance* involves both *context* and *intensity*. SEPA Rules, WAC 197-11-794(2). While *context* varies with the physical setting, *intensity* depends on the magnitude and duration of an impact. *Id.* And in the particular context of large volumes of existing Federal Way background traffic and existing degraded levels of service, the degree of intensity — i.e., the magnitude of T&C's alleged traffic impact (0.5 percent and 1.2 percent at most) is properly characterized as insignificant.

DATE: April 26, 2010.

Respectfully submitted,

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By  _____

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Tacoma Municipal Code

adverse environmental impacts of the project action under RCW 43.21C.240, the responsible official shall not impose additional mitigation under this chapter.

(2) The decision maker should judge whether possible mitigation measures are likely to protect or enhance environmental quality. EIS should briefly indicate the intended environmental benefits of mitigation measures for significant impacts (WAC 197-11-440(6)). EIS are not required to analyze in detail the environmental impacts of mitigation measures, unless the mitigation measures:

(a) Represent substantial changes in the proposal so that the proposal is likely to have significant adverse environmental impacts, or involve significant new information indicating, or on, a proposal's probable significant adverse environmental impacts; and

(b) Will not be analyzed in a subsequent environmental document prior to their implementation. (Ord. 27296 § 39; passed Nov. 16, 2004; Ord. 25856 § 8; passed Jan. 27, 1996; Ord. 23262 § 8; passed Sept. 25, 1984)

13.12.680 Appeals of SEPA threshold determination and adequacy of final environmental impact statement.

(1) Appeal to the Hearing Examiner.

(a) Threshold determination or adequacy of a final environmental impact statement for a proposed land use action shall be appealable to the Hearing Examiner. All other appeals under this chapter shall be made to Superior Court.

(b) Appeal Procedure/Fee. A notice of appeal, together with a filing fee as set forth in Section 2.09.500 of the Tacoma Municipal Code, shall be filed with the Public Works Department. The Public Works Department shall process the appeal in accordance with Chapter 13.05 of this title.

(c) Time Requirement. An appeal shall be filed within 14 calendar days after issuance of the determination by the responsible official. If the last day for filing an appeal falls on a weekend day or holiday, the last day for filing shall be the next working day.

(d) Content of the Appeal. Appeals shall contain:

(i) The name and mailing address of the appellant and the name and address of his/her representative, if any;

(ii) The appellant's legal residence or principal place of business;

(iii) A copy of the decision which is appealed;

(iv) The grounds upon which the appellant relies;

(v) A concise statement of the factual and legal reasons for the appeal;

(vi) The specific nature and intent of the relief sought;

(vii) A statement that the appellant has read the appeal and believes the contents to be true, followed by his/her signature and the signature of his/her representative, if any. If the appealing party is unavailable to sign the appeal, it may be signed by his/her representative.

(e) Dismissal of Appeal. The Hearing Examiner may summarily dismiss an appeal without hearing when such appeal is determined by the Examiner to be without merit on its face, frivolous, or brought merely to secure a delay, or that the appellant lacks legal standing to appeal.

(f) Effect of Appeal. The filing of an appeal of a threshold determination or adequacy of a final environmental impact statement (FEIS) shall stay the effect of such determination or adequacy of the FEIS and no major action in regard to a proposal may be taken during the pendency of an appeal and until the appeal is finally disposed of by the Hearing Examiner. A decision to reverse the determination of the responsible official and uphold the appeal shall further stay any decision, proceedings, or actions in regard to the proposal.

(2) Withdrawal of Appeal. An appeal may be withdrawn, only by the appellant, by written request filed with the Public Works Department. The Public Works Department shall inform the Hearing Examiner and responsible official of the withdrawal request. If the withdrawal is requested before the response of the responsible official, or before serving notice of the appeal, such request shall be permitted and the appeal shall be dismissed without prejudice by the Hearing Examiner, and the filing fee shall be refunded.

(3) Response of Responsible Official. The responsible official shall respond in writing to the appellant's objections. Such response shall be transmitted to the Public Works Department. The Public Works Department shall forward all pertinent information to the Hearing Examiner, appellant, and responsible official no later than seven days prior to hearing. The official's response shall contain, when applicable, a description of the property and the nature of the proposed action. Response shall be made to each specific and explicit objection set forth in the appeal, but no response need be made to vague or ambiguous allegations. The response shall be limited to facts available when the threshold determination was made. In the case of a response to an appeal of the adequacy of a final environmental impact statement, the response shall be limited to

facts available when the final environmental impact statement is issued. No additional environmental studies or other information shall be allowed.

(4) Public Hearing.

(a) The hearing of an appeal of a determination of nonsignificance or adequacy of an environmental impact statement on a proposed land use action which requires a hearing shall be held concurrently with the hearing on the application request.

(b) The hearing of an appeal of a determination of nonsignificance or adequacy of the final environmental impact statement for a proposal which requires an administrative land use decision shall be expeditiously scheduled upon receipt of a valid appeal. If the SEPA determination and land use decision are appealed, the SEPA appeal and the land use hearing shall be held concurrently.

(c) The hearing of an appeal by a project sponsor of a determination of significance issued by the responsible official shall be expeditiously scheduled upon receipt of a valid appeal.

(d) The public hearing shall be conducted in accordance with the provisions of Chapter 1.23 of the Tacoma Municipal Code.

(e) Standards of Review. The Hearing Examiner may affirm the decision of the responsible official or the adequacy of the environmental impact statement, or remand the case for further information; or the Examiner may reverse the decision if the administrative findings, inferences, conclusions, or decisions are:

(i) In violation of constitutional provisions as applied; or

(ii) The decision is outside the statutory authority or jurisdiction of the City; or

(iii) The responsible official has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure; or

(iv) In regard to challenges to the appropriateness of the issuance of a DNS clearly erroneous in view of the public policy of the Act (SEPA); or

(v) In regard to challenges to the adequacy of an EIS shown to be inadequate employing the "rule of reason."

(f) Evidence – Burden of Proof. In each particular proceeding, the appellant shall have the burden of proof, and the determination of the responsible official shall be presumed prima facie correct and shall be afforded substantial weight. Appeals shall be limited to the records of the responsible official.

(g) Continuation of Hearing.

(i) Cause. A hearing may be continued by the Hearing Examiner with the concurrence of the applicant for the purpose of obtaining specific pertinent information relating to the project which was unavailable at the time of the original hearing.

(ii) Notification. The Hearing Examiner shall announce the time and place of a continued hearing at the time of the initial hearing or by written notice to all parties of record.

(5) The Examiner's decision for an appeal shall be made in accordance with Chapter 1.23 of the Tacoma Municipal Code.

(6) Pursuant to RCW 43.21C.080, notice of any action taken by a governmental agency may be publicized by the applicant for, or proponent of, such action in the form as provided by the Public Works Department and WAC 197-11-990.

The publication establishes a time period wherein any action to set aside, enjoin, review, or otherwise challenge any such governmental action on grounds of noncompliance with the provisions of SEPA must be commenced, or be barred. Any subsequent action of the City for which the regulations of the City permit use of the same detailed statement to be utilized and as long as there is not substantial change in the project between the time of the action and any such subsequent action, shall not be set aside, enjoined, reviewed, or thereafter challenged on grounds of noncompliance with RCW 43.21C.030(2)(c). (Ord. 25856 § 9; passed Jan. 27, 1996; Ord. 25738 § 10; passed Jul. 18, 1995; Ord. 23262 § 8; passed Sept. 25, 1984)

13.12.685 Appeal from denial or conditioning of an administrative permit.

Repealed by Ord. 25856

(Ord. 25856 § 10; passed Jan. 27, 1996; Ord. 23262 § 8; passed Sept. 25, 1984.)

13.12.801 Flexible thresholds for categorical exemptions.

The City of Tacoma establishes the following exempt levels for minor new construction as allowed under WAC 197-11-800(1)(c), except when undertaken wholly or partly on lands covered by water or in critical areas defined in Chapters 13.09 and 13.11 of this title.

(1) The construction or location of any residential structure of four or less dwelling units;

(2) The construction of a barn, loafing shed, farm equipment storage building, produce storage or

APPENDIX B

CHART SUMMARIZING FEDERAL WAY TRAFFIC DATA IN ADMINISTRATIVE RECORD

TIP Project #	Ex. R19.4 TIA (11/07) (Background) Horizon Year With TIPs Without Scarsella Plat			Ex. R19.4 TIA (11/07) Horizon Year With TIPs With Scarsella Plat			Ex. R39 (7/08): Existing Conditions With TIPs, Without Scarsella Plat		Ex. R40 (7/08): Horizon Year Without TIPs, With Annual Growth Including Scarsella Plat	
	V/C	LOS	Traffic Volume (Apdx. C)	V/C	LOS	Traffic Volume (Apdx. C)	V/C	LOS	V/C	LOS
3028 Map ID No. 18 (SW 320th/21st SW)	0.87 (R698)	D (R698)	4,121 (R815)	0.86 (R758b)	D (R758b)	4,134 (+13 trips) (R815)	0.90 (R947)	D (R947)	0.97 (R951)	D (R951)
4028 Map ID No. 11 (SW 336th/21st SW)	0.79 (R706)	D (R706)	4,918 (R814)	0.80 (R766b)	D (R766b)	4,945 (+27 trips) (+0.5%) (R814)	0.86 (R948)	D (R948)	1.17 (R952)	F (R952)
4132 Map ID No. 8 (SW Campus Dr./12th SW)	0.93 (R709)	D (R709)	28 to 3,829 (R814)	0.94 (R769b)	D (R769b)	31 to 3,841 (+3 to +12 trips) (R814)	0.78 (R949)	C (R949)	0.99 (R953)	D (R953)
4220 Map ID No. 23 (SW 336th & 340th, from 26th Pl. to Hoyt Rd.)	0.77 (R710)	C (R710)	2,011 to 2,951 (R815)	0.78 (R770b)	C (R770b)	2,040 to 2,983 (+27 to +32 trips) (+1.2%) (R815)	1.02 (R950)	D (R950)	1.25 (R954)	F (R954)

FILED
COURT OF APPEALS
EMERY 3-15

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CERTIFICATE OF SERVICE

I certify that on the 26th day of April, 2010, I caused a true and
correct copy of this BRIEF OF RESPONDENTS/APPELLANTS
TOWN & COUNTRY REAL ESTATE, LLC, ET AL., to be served on the
following in the manner indicated below:

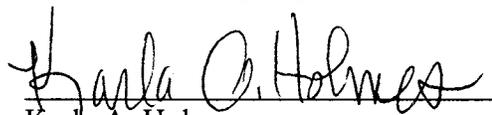
STATE OF WASHINGTON
BY  _____
DEPUTY

Bob C. Sterbank
Kenyon Disend, PLLC
11 Front Street South
Issaquah, WA 98027-3820
(X) Via U.S. Mail

Duncan M. Greene
Gordon Derr
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Peter Beckwith
Assistant City Attorney
City of Federal Way
P.O. Box 9718
Federal Way, WA 98063
(X) Via U.S. Mail

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



Karla A. Holmes