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SUPREME COURT OF THE STATE OF WASHINGTON

WHATCOM COUNTY FIRE DISTRICT NO. 21,

Petitioner

v.

WHATCOM COUNTY, a municipal corporation;
BIRCH POINT VILLAGE, L.L.C., a Washington corporation;
SCHMIDT CONSTRUCTION, INC.,
A Washington corporation; and BRIGHT HAVEN
BUILDERS, LLC, a Washington corporation;
MAYFLOWER EQUITIES, INC.; LISA SCHENK
and MIKE SUMNER,

Respondents

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AMICUS BRIEF OF WASHINGTON STATE FIRE COMMISSIONERS
ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

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A. IDENTITY AND INTEREST OF AMICUS

The Washington Fire Commissioners Association “WFCA” is an association of fire protection districts authorized by RCW 52.12.031(4). WFCA’s interest in the subject matter is specified in part 1 of the Motion to file Amicus Brief in Support of Petition for Review filed concurrently with this Brief.

B. ISSUES PRESENTED FOR REVIEW

WFCA incorporates by reference the issues presented for review as set forth in the Petitioner’s Petition for Review.

C. STATEMENT OF THE CASE

WFCA incorporates by reference the statement of the case as set forth in the Petitioner’s Petition for Review.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The issues presented for review represent issues of substantial public importance that will have a wide-ranging impact on the provision of fire protection and emergency medical services in areas served by fire districts. RAP 13.4(b)(4). The Court of Appeals decision undermines the ability of fire districts to protect life, health and safety by granting counties a power not granted by the legislature, i.e. the power to establish fire protection service levels without consideration of the level of service

established by, or available from, the fire district. This usurpation of the authority and responsibility of fire districts by the Court of Appeals violates the central tenets of the Growth Management Act, violates chapter 43.21C RCW "SEPA" and creates an analytical model that will permit development in Washington State to proceed without adequate concurrent development of fire and life safety services.

1. The Court of Appeals decision violates the Growth Management Act.

The Court of Appeals decision undermines the central tenet of the Growth Management Act.

The legislature finds that uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and the wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state. It is in the public interest that citizens, communities, local governments, and the private sector cooperate and coordinate with one another in comprehensive land use planning. ... RCW 36.70A.010 (emphasis added).

The Court's decision establishes that a county has the unilateral authority to dictate a level of service in a fire protection district. Under the Court of Appeals analysis, this authority may be exercised without consideration of the fire district's legislatively established service level

determinations.¹ This ignores the legislative authority granted to fire districts to establish levels under chapter 52.33 RCW, which requires fire districts to establish response time based performance standards to meet and protect the public's "best interest." *Exhibit A*.

The Court's exclusion of any consideration of the fire district's planning or ability to serve encourages counties to proceed with unplanned and uncoordinated growth in direct violation of RCW 36.70A.010 and chapter 52.33 RCW. The Court's ruling that Whatcom County's concurrency regulation, WCC 20.80.212, did not permit a project by project review further undermines the GMA purpose, conflicts with the GMA planning goals² and excludes consideration of a fire district's adopted service levels.

¹ The Court of Appeals makes only a single reference to the Fire District's growth management resolutions and makes no reference to the significant evidence presented by the Fire District to the hearing examiner of its inability to provide service. *Whatcom County Fire District No. 21 v. Whatcom County*, 151 Wash. App. 601, 607, 215 P.3d 956, 958 (2009); *Petition for Review*, at 4-5.

² RCW 36.70A.020 sets forth the GMA's stated goals for concurrency and service levels as follows: ...

(1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner....

(12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

Under the Court of Appeals analysis, once a county establishes a service level in its comprehensive plan, no further planning, coordination or concurrency issues can be addressed regardless of the level of planning or ability to serve documented by the fire district. The Court of Appeals grant of this unprecedented authority to counties to dictate the level of service without any consideration of concurrency or local planning eviscerates any semblance of a commitment to coordinated and cooperative planning as mandated by GMA. The inconsistency of the Court of Appeals decision with the stated goals and purpose of the GMA is an issue of public importance that justifies additional review by the Supreme Court.

2. The Court of Appeals decision violates SEPA.

The Court of Appeals ruling creates a system that allows counties to completely ignore the service levels enacted by a fire district. This conflicts with the basic responsibilities of a county as a lead agency under SEPA. SEPA requires the preparation of an environmental checklist that specifically considers the impacts of project on fire protection.³

³ The Environmental Checklist, WAC 197-11-960, provides in Part 15. "Public services a. would the project result in an increased need for public services (for example: Fire protection, police protection, health care, schools, other)? If so, generally describe. b. Proposed measures to reduce or control direct impacts on public services, if any.

As part of a threshold determination process a county must consider whether a proposal “conflict[s] with local, state, or federal laws or requirements for the protection of the environment...” WAC 197-11-330(d)(ii). Under WAC 197-11-060(4)(b), the county must consider impacts in affected jurisdictions. “In assessing the significance of an impact, a lead agency shall not limit its consideration of a proposal’s impacts only to those aspects within its jurisdiction...” *See also*, WAC 197-11-335, which encourages lead agencies to “consult with other agencies, requesting information on the proposal’s potential impacts which lie within the other agency’s jurisdiction or expertise.”

In contrast to these requirements, the Court of Appeals precedent allows a county to unilaterally avoid SEPA consideration of fire and EMS impacts at the time of project development, without considering the expertise of the affected fire district, simply by referencing a service level standard in its comprehensive plan. The Court’s refusal to allow a project by project concurrency analysis as part of the implementation of the service levels identified in a comprehensive plan also violates WAC 365-195-835(4) “Planning jurisdictions should consider integrating SEPA compliance on the project-specific level with the case-by-case process for concurrency management.”

The inconsistency of the Court of Appeals reasoning and opinion with the well established cooperative and coordinated approach to mitigating environmental impacts under SEPA is a significant statewide issue that justifies additional review by this Court under RAP 13.4(b)(4).

3. The Court of Appeals decision will permit development throughout the state to proceed without adequate concurrent development of fire and life safety services.

The Court of Appeals analysis of the facts in Whatcom County creates an analytical model that will allow development throughout the state to proceed without adequate consideration for adequate fire and life safety services. The Court of Appeals focuses on a single sentence from the Birch Bay Community Plan, “These costs will be born [sic] by taxes paid by the growing population” to conclude that Whatcom County “determined that the District can meet its service obligation at the gold standard....” *Whatcom County Fire District No. 21 v. Whatcom County*, 151 Wash. App. 601, 612, 215 P.3d 956, 961 (2009). The Court, without analysis, relies on a general statement of fact (fire districts are primarily financed by property taxes) to conclude that, regardless of the service level determinations of the District and regardless of any specific facts applicable to the development, the County had no further obligation, or authority, to review the impact of a specific project on the District’s ability to provide an adequate level of service. The Court of Appeals

analytical model establishes a rule that once a service level is included in a comprehensive plan, no further concurrency analysis is permitted.

The Court's analytical progression from a general comprehensive plan recognition that District taxpayers will be responsible for increasing service levels to the conclusion that there should be no project level review or consideration of concurrency will trigger a number of likely unintended consequences. These consequences will place entire communities at risk by allowing future development to proceed without consideration of the service levels adopted by the entity the experience, expertise and responsibility for providing and funding the service.

Two examples demonstrate the problems created by the Court of Appeals reasoning both in counties that establish detailed service levels in their comprehensive plans and in counties that essentially ignore fire protection and EMS.⁴ King County falls in the latter category as it has determined that the sole consideration of the County in relation to whether adequate fire protection and emergency medical services exist is whether

⁴ Amicus disagrees with Respondents suggestion that the Whatcom County ordinance is somehow "unique" or a "relic." *Answer to Petition For Review*, at 10-12. The discussion in this brief of Skagit and King Counties reflect only two examples. While counties vary in their approach to service levels and concurrency, concurrency language is common in comprehensive plans and development regulations throughout the state. The common thread of concurrency is also reflected by the DCTED concurrency regulations cited and discussed in the *Petition for Review*, at 12 -17.

adequate access roads and fire flow serve a project.⁵ King County's Comprehensive Plan does not contain any specific level of service, however, the County's development regulations narrowly defines adequate fire protection as follows:

KCC 21A.28.130 Adequate fire protection. All new development shall be served by adequate fire protection as set forth below:

A. The site of the development proposed is served by a water supply system that provides at least minimum fire flow and a road system or fire lane system that provides life safety/rescue access, and other fire protection requirements for buildings as required by K.C.C. Title 17, Fire Code and K.C.C. Title 16, Building and Construction Standards; ...

While fire districts are directed to adopt response time service levels under chapter 52.33 RCW. King County, which is not responsible for fire protection, has decided that it will not consider response times as a component of adequacy of availability of services. Under the Court of Appeal's reasoning, which excludes consideration of a fire district's established service levels under chapter 52.33 RCW, King County's narrow approach would be sustainable even in a situation where a fire service provider did not exist, provided that adequate roads and fire flow were available. The Court of Appeals deference to a county's legislative enactments would potentially preclude fire districts in King County from

⁵ Snohomish County takes a similar approach. See Snohomish County Comprehensive Plan, Goal CF 11.

making any claim of lack of concurrency based on the adopted service level standards of the fire district.

Skagit County provides another example of the potential wide-ranging impacts of the Court of Appeals decision. The Skagit County Comprehensive Plan, unlike King County, contains a detailed statement of a level of service, *Exhibit B*. Under the Court of Appeals reasoning, the simple fact that the Plan establishes a level of service likely establishes a finding that fire districts in Skagit County have the capacity to meet that standard. Skagit County also has a concurrency standard that parallels the Comprehensive Plan service standard, *Exhibit C*. However, if the Court of Appeals reasoning is applied to the Skagit County code, it would render the code irrelevant as the Skagit County Comprehensive Plan would “establish the availability and adequacy of services” without any further concurrency review and regardless of a fire district’s documented inability to provide the level of service.

The Skagit County situation demonstrates the arbitrary results created by the Court’s decision. The intent of the Skagit County code provision would, prior to the Court of Appeals decision, appear to have been clear, developments must be able to demonstrate concurrency for each project as it is developed. Under the Court of Appeals reasoning,

however, the concurrency statute would be rendered meaningless since the Comprehensive Plan arguably determines that all fire protection districts can meet the level of service established under the comprehensive plan.

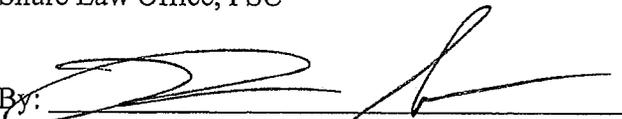
The Court of Appeals decision creates a statewide problem for fire districts as the Court of Appeals has transferred service level determinations to entities that have no responsibility for establishing services levels under chapter 52.33 RCW or for providing the service. Whether a county establishes a high level of service, such as Whatcom and Skagit Counties, or no level of service like King County, the impact of the Court of Appeals decision is to remove fire districts from any substantive role in determining the level of service they provide.

E. CONCLUSION

If the Court of Appeals decision remains as a precedent, counties will be able to rely on the decision to dispense with any concurrency planning involving fire protection services. This result will threaten the health, life and safety of citizens throughout the state. WFCA respectfully requests that the Court grant review of the Appeals Court decision and affirm the ruling of the Whatcom County Superior Court.

Dated: 12-3-2009

Respectfully Submitted:
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By: 

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**WFCA AMICUS BRIEF IN SUPPORT OF PETITION FOR REVIEW
EXHIBIT A**

Chapter 52.33 RCW

52.33.010. Intent

The legislature intends for fire protection districts and regional fire [protection] service authorities to set standards for addressing the reporting and accountability of substantially career fire departments, and to specify performance measures applicable to response time objectives for certain major services. The legislature acknowledges the efforts of the international city/county management association, the international association of fire chiefs, and the national fire protection association for the organization and deployment of resources for fire departments. The arrival of first responders with automatic external defibrillator capability before the onset of brain death, and the arrival of adequate fire suppression resources before flash-over is a critical event during the mitigation of an emergency, and is in the public's best interest. For these reasons, this chapter contains performance measures, comparable to that research, relating to the organization and deployment of fire suppression operations, emergency medical operations, and special operations by substantially career fire departments. This chapter does not, and is not intended to, in any way modify or limit the authority of fire protection districts and regional fire protection service authorities to set levels of service.

52.33.020. Definitions

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

- (1) "Advanced life support" means functional provision of advanced airway management, including intubation, advanced cardiac monitoring, manual defibrillation, establishment and maintenance of intravenous access, and drug therapy.
- (2) "Aircraft rescue and fire fighting" means the fire fighting actions taken to rescue persons and to control or extinguish fire involving or adjacent to aircraft on the ground.
- (3) "Brain death" as defined by the American heart association means the irreversible death of brain cells that begins four to six minutes after cardiac arrest.
- (4) "Fire department" means a fire protection district or a regional fire protection service authority responsible for fire fighting actions, emergency medical services, and other special operations in a specified geographic area. The department must be a substantially career fire department, and not a substantially volunteer fire department.
- (5) "Fire suppression" means the activities involved in controlling and extinguishing fires.
- (6) "First responder" means provision of initial assessment and basic first-aid intervention, including cardiac pulmonary resuscitation and automatic external defibrillator capability.

(7) "Flash-over" as defined by national institute of standards and technology means when all combustibles in a room burst into flame and the fire spreads rapidly.

(8) "Marine rescue and fire fighting" means the fire fighting actions taken to prevent, control, or extinguish fire involved in or adjacent to a marine vessel and the rescue actions for occupants using normal and emergency routes for egress.

(9) "Response time" means the time immediately following the turnout time that begins when units are en route to the emergency incident and ends when units arrive at the scene.

(10) "Special operations" means those emergency incidents to which the fire department responds that require specific and advanced training and specialized tools and equipment.

(11) "Turnout time" means the time beginning when units receive notification of the emergency to the beginning point of response time.

52.33.030. Policy statement--Service delivery objectives

(1) Every fire protection district and regional fire protection service authority shall maintain a written statement or policy that establishes the following:

- (a) The existence of a fire department;
- (b) Services that the fire department is required to provide;
- (c) The basic organizational structure of the fire department;
- (d) The expected number of fire department employees; and
- (e) Functions that fire department employees are expected to perform.

(2) Every fire protection district and regional fire protection service authority shall include service delivery objectives in the written statement or policy required under subsection (1) of this section. These objectives shall include specific response time objectives for the following major service components, if appropriate:

- (a) Fire suppression;
- (b) Emergency medical services;
- (c) Special operations;
- (d) Aircraft rescue and fire fighting;
- (e) Marine rescue and fire fighting; and
- (f) Wild land fire fighting.

(3) Every fire protection district and regional fire protection service authority, in order to measure the ability to arrive and begin mitigation operations before the critical events of brain death or flash-over, shall establish time objectives for the following measurements:

- (a) Turnout time;

(b) Response time for the arrival of the first arriving engine company at a fire suppression incident and response time for the deployment of a full first alarm assignment at a fire suppression incident;

(c) Response time for the arrival of a unit with first responder or higher level capability at an emergency medical incident; and

(d) Response time for the arrival of an advanced life support unit at an emergency medical incident, where this service is provided by the fire department.

(4) Every fire protection district and regional fire protection service authority shall also establish a performance objective of not less than ninety percent for the achievement of each response time objective established under subsection (3) of this section.

52.33.040. Annual evaluations--Annual report

(1) Every fire protection district and regional fire protection service authority shall evaluate its level of service and deployment delivery and response time objectives on an annual basis. The evaluations shall be based on data relating to level of service, deployment, and the achievement of each response time objective in each geographic area within the jurisdiction of the fire protection district and regional fire protection service authority.

(2) Beginning in 2007, every fire protection district and regional fire protection service authority shall issue an annual written report which shall be based on the annual evaluations required by subsection (1) of this section.

(a) The annual report shall define the geographic areas and circumstances in which the requirements of this standard are not being met.

(b) The annual report shall explain the predictable consequences of any deficiencies and address the steps that are necessary to achieve compliance.

WFCA AMICUS BRIEF IN SUPPORT OF PETITION FOR REVIEW

EXHIBIT B

Skagit County Comprehensive Plan – December 2008

10A1.7 Fire Service Standards – The county shall ensure that adequate fire and emergency medical service facilities are located or planned to accommodate current and future population. Standards for urban levels of fire service shall be consistent with Countywide Planning Policy 1.7. Non- urban fire level of service shall be as follows:

- A. Fire facilities shall maintain a Washington Survey and Rating Bureau (WSRB), public protection classification No. 8 or better, and fire flow in accordance with the Coordinated Water System Plan (Section 4 – Minimum Design Standards)....

Skagit County County Wide Planning Policy 1.7 – October 2007

1.7 Development within established urban growth boundaries shall, as a minimum, conform to those urban development standards in effect within the respective municipality as of April, 1, 1999. Bayview Ridge UGA urban standards for roads, sewer, and stormwater shall meet or exceed those in effect in the City of Burlington on April 1, 1999. UGAs with populations of over 1500 or a Commercial/Industrial land allocation (new) over 100 acres shall have, as a minimum, the following levels of urban law enforcement and fire service levels:

...

Fire:

Urban fire level of service standard for Urban Growth Areas are as follows:

1. For Cities and their adjacent Urban Growth Areas, an ISO grading of 5 or better shall be maintained; otherwise
2. Within 5 minutes of being dispatched, the Fire Department shall arrive and be able to deliver up to 200 gallons per minute fire flow in an offensive (interior) attack, with a minimum of 4 firefighters, for responses to: structural fires, vehicle fires, other outside fires, motor vehicle accidents, activated fire alarm systems, or other hazardous conditions. The Fire Department shall also be capable of delivering a minimum of Basic Life Support including defibrillation, with a minimum of one First Responder or Emergency Medical Technician, for medical responses.

Within 10 minutes of being dispatched, the Fire Department shall be able to support the interior structural fire attack with teams which may include: a ventilation team, a search & rescue team, a team for a backup line, and standby firefighters, totaling between 8 and 12 firefighters on-scene. The Fire Department shall also be capable of providing Heavy Rescue capability, including heavy hydraulics, at Motor Vehicle Accidents.

Within 20 minutes of being dispatched, the Fire Department shall be capable of delivering 1500 gallons per minute fire flow in a sustained defensive attack mode for structural fire responses. For buildings larger than 10,000 square feet, the Fire Department shall be capable of delivering 2000 Gallons per Minute, and shall have an elevated master stream capability.

These requirements shall be met for 90% of all incidents.

Mutual aid requested under the Mutual Aid Contract may be used to provide relief to the initial operating crews, but shall not be used to provide initial attack capability, support functions, or sustained attack capability. This does not preclude automatic aid agreements under separate contract which does provide these capabilities or functions from other agencies.

Times are considered to be "Response Time," which shall be measured by the sum of turnout time (the time from dispatch until the first arriving unit is enroute to the incident), plus travel time. Dispatch time shall be allocated a maximum of 1 additional minute which is measured from the time the 9-1-1 call is received until the fire department is dispatched.

All operations shall be conducted in compliance with state and federal regulations, including training requirements for firefighters, and maintenance requirements for equipment and apparatus.

All commercial and industrial facilities shall be inspected for compliance with the Uniform Fire Code at least annually. Water systems shall be installed in accordance with the Skagit County Coordinated Water System Supply Plan, with a fire flow meeting the requirements of the Uniform Fire Code.

**WFCA AMICUS BRIEF IN SUPPORT OF PETITION FOR REVIEW
EXHIBIT C**

Skagit County Code, Chapter 14.28 Concurrency.

14.28.070 Non-transportation concurrency.

(1) Development projects required to obtain a concurrency determination for non-transportation facilities and services shall demonstrate that there is concurrency with each non-transportation facilities and services as follows:

...

(d) For Fire.

(i) In Urban Growth Areas. The project provides fire flow in accordance with the CWSP (Section 4, Minimum Design Standards) and International Fire Code; the provider has the capability for annual inspections of all commercial and industrial facilities and has an ISO grading of 5 or better, or has the ability to comply with the following 90% of the time:

(A) Within 5 minutes response time, delivering up to 200 gallons per minute (gpm) fire flow in an offensive (interior) attack, with a minimum of 4 firefighters for responses to structural fires, vehicle fires, other outside fires, motor vehicle accidents, activated fire alarm systems or other hazardous conditions; capable of delivering a minimum of basic life support including defibrillation with a minimum of 1 first responder or emergency medical technician for medical responses.

(B) Within 10 minutes response time, supporting the interior structural fire attack with teams which may include a ventilation team, a search and rescue team, a team for a backup line and standby firefighters totaling between 8 and 12 firefighters on-scene; providing heavy rescue capability, including heavy hydraulics, at motor vehicle accidents.

(C) Within 20 minutes response time, delivering 1,500 gpm fire flows in a sustained defensive attack mode for structural fire responses. For buildings larger than 10,000 square feet, delivering 2,000 gpm and have an elevated master stream capability.

(ii) In Non-Urban Growth Areas. The project provides fire flow in accordance with the CWSP (Section 4, Minimum Design Standards) and International Fire Code; and the provider has a Washington Surveying and Rating Bureau (WSRB) public protection classification No. 8 or better. The one exception to the requirements for fire flow and the WSRB classification of No. 8 or better is residential subdivision and construction of single-family dwellings on certain saltwater islands, as further described in SCC 14.16.850(6)(b)(iv). Within an IF-NRL designation, the project must also be within 5 road miles from a recognized Community A fire station, or within 10 road miles to a recognized Community A fire station and within 5 road miles of a fire station having an initial attack fire apparatus.

...