

No. 86293-1

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SUPREME COURT OF THE STATE OF WASHINGTON

CEDAR RIVER WATER AND SEWER DISTRICT *and*
SOOS CREEK WATER AND SEWER DISTRICT,

Appellants/Cross-Respondents,

v.

KING COUNTY,

Respondent/Cross-Appellant, and

SNOHOMISH COUNTY, *et al.,*

Respondents.

**APPELLANTS' ANSWER TO *AMICUS CURIAE* BRIEF OF
WASHINGTON ASSOCIATION OF PROSECUTING
ATTORNEYS**

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ORIGINAL

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I. INTRODUCTION

The appellant sewer districts agree with much of what the Washington Association of Prosecuting Attorneys (“WAPA”) says in its *amicus* brief. Developers and permitting agencies should indeed be able to enter into agreements to provide for mitigation of adverse environmental impacts of large, complicated projects like Brightwater. Parties adversely affected by land use decisions should indeed assert any challenges to those decisions promptly, so that the projects in question are not unduly bogged down by legal delays.

The problem with WAPA’s argument, however, is that that is not what this case is about. The Settlement Agreement between King County and Snohomish County does not provide for mitigation of adverse environmental impacts of Brightwater. It provides for payments for long-planned community improvements having nothing to do with adverse impacts of Brightwater; the payments were made simply to buy off political opposition to the project. That is the central point of the districts’ claim regarding the \$70 million of so-called “community mitigation” payments.

It sheds no light on the issues involved in this appeal for WAPA to wax eloquent about why it is good public policy to allow a developer and a permitting agency to enter into an agreement to provide mitigation for

adverse impacts of a project. The districts agree with that policy. But the point of RCW 82.02.020, and of the *Nollan/Dolan* line of cases,¹ and of King County's own codified environmental mitigation policies (*see* KCC 28.86.140.B.EMP-1 *et seq.*),² is that the mitigation must be for *identified adverse impacts* of the project. Where, as the districts have shown in this case, the payments in question are not for mitigation of *identified adverse impacts*, they amount to exactly the kind of illegal exactions that are prohibited by RCW 82.02.020 and the *Nollan/Dolan* line of cases, and are in violation of King County's EMP-1.

Similarly, it sheds no light on the issues presented in this case for WAPA to argue about the need for finality of land use decisions. The pertinent issues here are whether King County's decision to use the restricted sewage fund to make the so-called "community mitigation" payments called for in the Settlement Agreement was a "land use decision," and whether the districts were adversely affected (giving them standing to sue) not by the counties' entering into that agreement in 2005 but rather by King County's subsequent use of the sewage fund to make the illegal payments called for under that agreement.

¹ *Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), *Dolan v. Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), and Washington cases applying the law established in *Nollan* and *Dolan*. *See* Dists. Opening Br. at 46-47.

² Copies of King County's environmental mitigation policies ("EMPs") are set forth at CP 1897 (included for the Court's convenience as Appendix A hereto).

The districts' claim did not have, nor could it have had, any delaying or other effect on completion of the Brightwater project. The Settlement Agreement between the two counties expressly provided that judicial invalidation of the "community mitigation" payments would not invalidate any permits for the project.³

WAPA's arguments are premised in large part on (i) its mischaracterization of the environmental mitigation policies ("EMPs") set forth in King County's Regional Wastewater Services Plan ("RWSP") as codified in the King County Code, (ii) its mischaracterization of the Settlement Agreement between the two counties, and (iii) its apparent misunderstanding of what the districts are claiming. We begin by addressing those mischaracterizations and misunderstandings, and then address the real issues presented by this appeal.⁴

II. ARGUMENT

A. WAPA Mischaracterizes the RWSP and the Nature of "Community Mitigation."

In an attempt to find some legal basis for the invented concept of

³ Settlement Agreement § 6.5 (CP 2369).

⁴ WAPA's *amicus* brief addresses only one of the six substantive claims involved in this appeal, namely, the districts' claim concerning the \$70 million of so-called "community mitigation" payments. WAPA's brief does not address the districts' claims concerning King County's use of sewage funds to pay for (i) building infrastructure for distribution and sale of reclaimed water, (ii) incentives to StockPot Soups to preserve jobs in the Puget Sound region, (iii) Culver Fund projects unrelated to sewage treatment or disposal, (iv) general government overhead expenses or (v) so-called "credit enhancement fees" for issuing LTGO bonds.

“community mitigation,”⁵ WAPA begins its brief by stating that the RWSP “specifically requires King County to provide mitigation *to an impacted community* in an amount equal to at least 10% of the costs associated with the new facilities,” citing KCC 28.86.140.B.EMP-1 & 4 (WAPA Br. at 1-2, italics added), as if the mitigation were something to be handed over to the community to use for general community improvements.⁶ That is not what the RWSP says, either in EMP-1, EMP-4 or anywhere else. The mitigation must address adverse project impacts that are specifically identified in environmental documents; it is not for general improvements to the community, unrelated to specifically identified project impacts.

Nothing in King County’s environmental mitigation policies provides that mitigation is to be provided “to” an impacted community. The EMPs provide that *the new facility* is to be designed and constructed in such a way as to mitigate adverse impacts. EMP-1 provides that the mitigation measures shall “address the adverse environmental impacts *caused by the project,*” shall “address the environmental impacts *identified*

⁵ As the districts pointed out in their opening brief at 49-50, there is no such concept as “community mitigation” in Washington law.

⁶ WAPA states again at p. 17 of its brief that “In 1999, King County adopted a policy committing up to 10% of the cost of a new sewage treatment plant to *community mitigation* in the RWSP and King County code” (italics added). That is untrue. The RWSP and King County Code provide for mitigation of adverse environmental impacts, but not for *community mitigation*.

in the county's environmental documents," and shall "be reasonable in terms of cost and magnitude as measured against severity and duration of impact" (italics added).⁷ EMP-2 provides that the mitigation measures "shall be *incorporated into design plans and construction contracts* to ensure full compliance" (italics added). EMP-4 provides that "the county's goal will be to construct *regional wastewater facilities* that enhance the quality of life in the region and in the local community, and are not detrimental to the quality of life in their vicinity" (italics added). Thus, the kind of mitigation called for in the RWSP is the kind described in the Final EIS, and that King County was already designing into the project. The mitigation measures included \$52 million for elimination of odors (King County guaranteed "zero" odor emissions from the treatment plant) and \$88 million for mitigation of non-odor impacts, including reduced traffic to and from the site compared to pre-existing conditions, visual barriers and *onsite* habitat and wetland improvements, including a beautiful new 40-acre nature park on the site.⁸

At p. 16 of its brief, WAPA says "there was public notice of the proposed community mitigation through the SEPA process, . . ." That is

⁷ As the districts point out in their reply brief at 15, these three conditions essentially reiterate the "nexus" and "rough proportionality" requirements of *Nollan/Dolan*, RCW 82.02.020 and the Washington cases cited in the districts' opening brief at 46-47.

⁸ See CP 1038-39, 2241-42, 2536-69 (and table at 2543), 1110, 1028-29.

untrue. There was no mention of the proposed “community mitigation” in any draft, Final or Supplemental EIS for Brightwater, although the State Environmental Protection Act, RCW ch. 43.21C (“SEPA”), requires all project impacts and mitigation to be disclosed in the EIS.⁹ Since both counties formally agreed that the Final EIS and Supplemental EIS identified all significant adverse environmental impacts associated with Brightwater and were adequate for purposes of making any permitting decisions,¹⁰ the counties have in effect admitted that the so-called “community mitigation” payments were not mitigation measures to address *identified project impacts*. They were, instead, payments made to induce Snohomish County to drop its political opposition to Brightwater.

WAPA goes on to say that “Brightwater is a type of facility unwelcome in most any neighborhood, as it will generate odor, traffic and noise.” (WAPA Br. at 6). But that is contrary to the record in this case. King County guaranteed “zero” odor emissions from Brightwater, in contrast to the “nauseating” odors emitted by StockPot Soups, a previous occupant of the site. CP 480; CP 1018-21; CP 1035-36. It was undisputed

⁹ See, e.g., RCW 43.21C.060; WAC 197-11-660(b), WAC 197-11-400(2), WAC 197-11-430(2)(e), WAC 197-11-440(4), WAC 197-11-440(5)(c)(i), WAC 197-11-440(6)(a) and WAC 197-11-440(6)(c)(iii). In this respect, the districts again are in agreement with WAPA that “SEPA requires consideration of impacts to *all* aspects of the environment, including the built environment.” WAPA Br. at 10, italics in original.

¹⁰ See Dists. Reply Br. at 13, n.34; CP 2375 (§1.3(a)(i)) and CP 2383 (§4.1(c)).

that Brightwater would generate *less* traffic than the previous occupants of the site. There is no evidence indicating that Brightwater would cause any more noise than the previous occupants of the site. Property appraisals of parcels in the community either made no mention of Brightwater or said the plant would have no adverse effect on the value of the properties being appraised.¹¹ And a public opinion survey done for King County showed that 54% of the persons polled were in favor of building Brightwater in their community, while only 29% opposed it. CP 2636. Even if, contrary to the evidence in the record in this case, there had been a negative “stigma” about having a sewage treatment plant in the community, the law does not recognize such “stigma” as an adverse project impact justifying denial of a permit or requiring mitigation. *See* Dists. Opening Br. at 49.

Furthermore, EMP-5 expressly provides that any mitigation funded through wastewater revenues must be consistent with King County Charter § 230.10.10 (sewage revenues “shall never be used for any purposes other than” *sewage* operating expenses, debt service, capital expenses and rate reductions), the sewage disposal contracts, and other applicable county ordinance and state law restrictions. Among those other state law restrictions are RCW 82.02.020 and the *Nollan/Dolan* line of cases prohibiting a permitting agency from imposing any mitigation

¹¹ *See* Dists. Reply Br. at 18, n.47.

requirements except as to specifically identified adverse project impacts.

B. WAPA Mischaracterizes the Settlement Agreement and the Development Agreement.

WAPA correctly states that the Settlement Agreement incorporated and was conditioned upon approval of the Development Agreement (which described the “binding site plan” process to be used in determining whether permits for the project would be granted). WAPA Br. at 3. However, WAPA goes off track in the next sentence by stating that “[t]he Development Agreement, in turn, was dependent upon the Settlement Agreement.” *Id.* Although the Settlement Agreement was conditioned upon execution of the Development Agreement, the reverse was not true. The Development Agreement stands on its own; although its proposed form was included as an exhibit to the Settlement Agreement, it was not conditioned upon the Settlement Agreement in any way. The Development Agreement and any permits issued for Brightwater continue in effect regardless of any future invalidation of the “community mitigation” payments under the Settlement Agreement. *See* Settlement Agreement § 6.5 (CP 2369).¹²

Nothing in the Development Agreement says it is dependent in any

¹² WAPA insinuates but never actually asserts that there would be any impact to permits issued for Brightwater as a result of this Court’s invalidation of the “community mitigation” payments. The counties structured the two agreements in such a way as to insure that that would not be the case.

way on the execution or validity of the Settlement Agreement. The two counties purposely chose to address the permitting process in one agreement (the Development Agreement) and the dropping of Snohomish County's opposition to Brightwater in exchange for King County's payment of \$70 million for "community mitigation" in a different agreement (the Settlement Agreement). Even if the two agreements should be construed together to ascertain the intent of the parties, that does not mean that the two agreements are merged or mutually dependent.¹³ Contrary to WAPA's legally unsupported assertion (WAPA Br. at 14), the two agreements are not "interdependent upon each other and inextricably intertwined, constituting a single contract."¹⁴

WAPA attempts to make much of the fact that the Legislature has authorized jurisdictions to enter into development agreements with developers under RCW ch. 36.70B. However, the Settlement Agreement does not meet the definition or requirements of such a development agreement. For instance, although the Development Agreement was recorded with the Auditor as required by RCW 36.70B.190, the Settlement

¹³ See 11 Richard A. Lord, *Williston on Contracts*, § 30:26 at 247 (4th ed. 1999) ("It is important to note that even though several instruments relating to the same subject and executed at the same time should be construed together in order to ascertain the intention of the parties, it does not necessarily follow that those instruments constitute one contract or that one contract was accordingly merged in or unified with another so that every provision in one becomes a part of every other").

¹⁴ Despite that assertion, WAPA refers consistently to the two "Agreements" rather than referring to them as a single Agreement. WAPA Br. at 3, 4, 7, 8, 9, 11, 14, 15.

Agreement was not recorded. In any event, “[n]othing in RCW 36.70B.170 through 36.70B.200 and section 501, chapter 347, Laws of 1995 is intended to authorize local governments to impose impact fees, inspection fees, or dedications or to require any other financial contributions or mitigation measures *except as expressly authorized by other applicable provisions of state law.*” RCW 36.70B.210, emphasis added. In other words, the statute does not authorize the payment of money as “community mitigation” having no nexus to identified adverse environmental impacts of the project in question.

C. WAPA Apparently Misunderstands the Districts’ Claim.

WAPA devotes much of its *amicus* brief to discussing the good public policy reasons for allowing “tailored” development agreements and for achieving finality in land use decisions, and explaining the important role that SEPA plays in promoting thoughtful, well-considered project development decisions. WAPA seems to be under the impression that the districts sought to block or delay the Brightwater project, or challenged the issuance of permits for the project, or found fault with the SEPA review or EIS for the project, or object to King County’s environmental mitigation policies set forth in the RWSP. The districts made no such claims and are seeking no such relief. To the contrary:

- 1) The districts point to King County’s EMPs as support for their

claim. The EMPs require that any mitigation measures address *adverse project impacts identified in the EIS* (EMP-1), and that any mitigation measures funded through wastewater revenues be consistent with King County Charter § 230.10.10, the sewage disposal contracts, RCW 82.02.020 and the *Nollan/Dolan* line of cases (EMP-5). The public policy inherent in those provisions, requiring a nexus between the mitigation and identified adverse environmental impacts of the project, is to prevent the problem which this case highlights: arbitrary and capricious decisions which can result if a jurisdiction is allowed to demand monetary payment for something as nebulous as “community mitigation.”

2) Far from objecting to the Brightwater EIS, the districts agree with King County and Snohomish County that the Brightwater Final EIS and Supplemental EIS fully disclosed all adverse environmental impacts and mitigation measures and were adequate for making any permitting decisions. The districts point to the *absence* of any mention of the so-called “community mitigation” projects or payments in the EIS as support for their claim.

3) The districts have not challenged any aspect of the Development Agreement or any permits issued under that Agreement or otherwise; and

4) The districts have not sought to block or delay the Brightwater project in any way; the districts’ only objection is to King County’s use of

the restricted sewage fund to make payments to Snohomish County that are in violation of RCW 82.02.020 and the *Nollan/Dolan* line of cases and are in breach of the sewage disposal contracts.

D. The “Community Mitigation” Payments Did Not Address Adverse Impacts of Brightwater and Were Therefore Unlawful.

SEPA requires that any adverse environmental impacts, and any measures to mitigate such impacts, be identified in an Environmental Impact Statement. Both counties agreed that the Final EIS and Supplemental EIS identified all significant adverse environmental impacts of Brightwater and were adequate for purposes of making any permitting decisions,¹⁵ but neither county (nor WAPA) has cited any EIS provision describing any impacts caused by Brightwater which required mitigation in the form of cash payments to Snohomish County for the so-called “community mitigation” projects.

Snohomish County’s demand for King County to pay millions of dollars for purposes other than to mitigate *identified adverse environmental impacts* of the project was a demand for an illegal exaction in violation of RCW 82.02.020 and the *Nollan/Dolan* line of cases. As King County Executive Ron Sims accurately wrote to Snohomish County Executive Aaron Reardon in May 2005 (before, unfortunately, caving in to

¹⁵ See Development Agreement §§ 1.3(a)(i) and 4.1(c) (at CP 2375 and 2383).

Snohomish County's unlawful demands a few months later):

“King County has been ready, willing and able to mitigate Brightwater’s impacts. Unfortunately, Snohomish County has made it clear that King County must first commit to paying many additional millions for Snohomish County roadways and other capital projects unrelated to Brightwater’s actual impacts, as the price tag for Snohomish County approval of Brightwater. Use of King County funds for these extraneous purposes is not authorized by law and is not appropriate.”

CP 1149 (emphasis added).

Mr. Sims’ letter correctly stated that Snohomish County’s demand for payments for Snohomish County capital improvements “unrelated to Brightwater’s actual impacts” was “not authorized by law” and was “not appropriate.” The critical requirement for any mitigation condition is that it must address actual, identified impacts of the project in question. This point is illustrated by WAPA’s misleading reference to a regulation dealing with procedural criteria for the *siting* process for essential public facilities (“EPFs”).¹⁶ WAPA partially quotes WAC 365-196-550(6)(e) as providing that “Counties . . . may also consider provisions for amenities or incentives for neighborhoods in which facilities are sited.” WAPA Br. at 7 n.22. It is telling that WAPA omitted from the quote the very next sentence of that regulation: “Any conditions imposed must be necessary

¹⁶ The siting decision for Brightwater had already been made long before the two counties entered into the Settlement Agreement at issue on this appeal.

to mitigate an identified impact of the essential public facility.”¹⁷

King County’s eventual willingness to pay the illegal exaction described in the King County Executive’s May 2005 letter, using the restricted sewage fund to do so, was as wrongful as Snohomish County’s demand for it.¹⁸ King County should be required to reimburse the sewage fund for those unlawful expenditures.¹⁹

E. The Districts Are Not Challenging Any Land Use Decision, Nor Did They Have Standing to Do So Under LUPA.

WAPA, like the two counties, completely ignores the fact that the districts lacked standing under the Land Use Petition Act, RCW ch. 36.70C (“LUPA”), to challenge any land use decision concerning Brightwater. The districts are located in south King County, far from the Brightwater site. For the reasons set forth in the districts’ opening brief at 42-44, the districts were not and could not have been “aggrieved or

¹⁷ See Dists. Reply Br. at 16-17 for additional reasons why that regulation does not support the concept of “community mitigation” advocated by WAPA or the two counties.

¹⁸ As an editorial columnist for the Seattle Times wrote, “Depending on which side of the table one is sitting on, it translates as either bribery or extortion. . . . Snohomish County whined and wheedled its way into \$70 million, . . . disbursed to keep the project on track. . . . the largesse covers parks, recreation, land costs, buffers, wetlands, stream restoration, art work and, well, tons of crap.” The columnist characterized such expenditures as “wretched excess.” CP 520-21.

¹⁹ King County, in turn, should be able to recover those amounts from Snohomish County. The Settlement Agreement expressly contemplated that a court might invalidate the “community mitigation” payments, and provided for the return of any unexpended funds in that event. Settlement Agreement § 6.5 (CP 2369). King County has asserted a crossclaim against Snohomish County seeking return of the money if the districts ultimately prevail on this claim, and Snohomish County is still holding the bulk of the funds pending the outcome of this litigation. See CP 68; CP 2120-21; CP 2623-26.

adversely affected” by any permitting or other land use decision concerning Brightwater, within the meaning of RCW 36.70C.060. Since they were not “aggrieved or adversely affected” by any such land use decision, the districts lacked standing to bring any petition under LUPA and could not be subject to LUPA’s 21-day time limit for such a petition.

As explained below, the Settlement Agreement clearly was not a “land use decision” within the meaning of LUPA. Even if it were, however, that would not give the districts standing to challenge its legality under LUPA. The districts were not “aggrieved or adversely affected” by the mere fact that King County and Snohomish County entered into that agreement. The districts were aggrieved by King County’s subsequent use of the restricted sewage fund to make the “community mitigation” payments. Those payments were made in November 2006, October 2007 and October 2008, long after the Settlement Agreement was signed in 2005. CP 2295-96. Nothing in the Settlement Agreement said that the payments would come from the restricted sewage fund. If King County had used some other source of funds to make those payments (for example, from the county’s general fund or from some state, federal or other grant that did not have to be repaid with sewer revenues), then the districts would not have been “aggrieved or adversely affected” at all and

would not have had any claim to assert.²⁰

Consider the following hypothetical. Suppose a bank holds funds in trust for some dedicated purpose. The bank wishes to open a new branch office somewhere and applies for a needed variance or other permit. The permitting agency (say, the city where the new branch is to be located) makes some unlawful demand as a condition for granting the permit, such as requiring the bank to pay for a new park on the other side of town, unrelated to any adverse environmental impact of the new bank branch. The bank decides to avoid litigation by caving in to that unlawful demand, and enters into an agreement to pay \$1 million to the city in exchange for the city's agreement to issue the permit. A year later, the bank takes \$1 million out of the trust fund to pay the city for the new park.

Under that hypothetical, persons aggrieved or adversely affected by the city's agreement to issue the permit would be subject to the 21-day time limit under LUPA. But the beneficiaries or grantors of the trust fund being held by the bank would have no reason to sue, and no standing to sue, until the money was withdrawn from the trust fund and was used to make the unlawful payment. The trust beneficiaries' or grantors' claim

²⁰ Although the districts were not "aggrieved or adversely affected" by any land use decision and therefore lacked standing to sue under LUPA, they clearly were aggrieved or adversely affected by King County's use of the restricted sewage fund to make illegal payments to Snohomish County, and thus they have standing to sue to require King County to reimburse the sewage fund for those illegal expenditures. *See* Dists. Opening Br. at 44 n.122; Dists. Reply Br. at 11-12.

could not be barred by the 21-day LUPA time limit, and they would be free to argue that the trust fund had wrongfully been used to make an illegal payment. Even if the dedicated purpose of the trust fund was to pay for new parks, the beneficiaries or grantors of the fund would be able to argue that that particular payment was unlawful. Surely no one could argue with a straight face that the trust beneficiaries' or grantors' claim against the bank for recovery of the \$1 million became barred by LUPA 21 days after the city agreed to issue the permit for the bank's new branch.

The position of the districts here is roughly analogous to that of the trust beneficiaries or grantors in the hypothetical. While obviously this is not a perfect analogy, it does illustrate the point that the districts are challenging an improper use of the restricted sewage fund; they are not challenging a land use decision. It also illustrates why this situation is different from the one in *James v. Kitsap Cnty.*, 154 Wn.2d 574, 115 P.3d 286 (2005), cited in WAPA's brief (at 15-16) in support of the proposition that, where a permitting agency imposes an impact fee as part of a land use decision, a developer's challenge to the impact fee is subject to LUPA, including the 21-day time limit. The distinction is that in *James* the developer was aggrieved by Kitsap County's imposition of the fee as part of the land use decision; but in our hypothetical the grantors or beneficiaries of the trust fund are not aggrieved at all unless and until the

bank uses the trust fund to make the payment that was wrongfully demanded by the city. Similarly here, the districts were not aggrieved by Snohomish County's wrongful demand for \$70 million, nor by King County's agreement in 2005 to make those payments; the districts were aggrieved by King County's use of the restricted sewage fund to make the unlawful payments in 2006, 2007 and 2008.

Indeed, the districts' position here is stronger than that of the trust beneficiaries or grantors in the hypothetical. The city's agreement to issue the permit in the hypothetical was a land use decision subject to LUPA; but the Settlement Agreement between King County and Snohomish County was not a "land use decision" under LUPA, because it was not a "final determination by a local jurisdiction" on either: (a) an application for a project permit; (b) an interpretive or declaratory decision regarding zoning or other land use ordinances or rules to a specific property; or (c) enforcement of ordinances regulating improvement or use of real property. RCW 36.70C.020(2). The Settlement Agreement meets none of those criteria. No permit was either approved or denied by the Settlement Agreement; Snohomish County did not issue an interpretive or declaratory decision in the Settlement Agreement regarding application of land development rules to the Brightwater property; and the Settlement Agreement was not an enforcement decision by Snohomish County under

its land use ordinances.

Because the districts are not challenging any “land use decision” within the meaning of LUPA, and because they would have lacked standing to do so even if they had wanted to, the trial court erred by holding that the districts’ claim was subject to LUPA or was barred in any respect by LUPA’s 21-day time limit.

III. CONCLUSION

Washington land use law provides a comprehensive scheme balancing competing interests concerning the siting of essential public facilities and the regulation of other significant land development projects, as well as protection of the environment. An essential part of that comprehensive scheme is RCW 82.02.020 and the *Nollan/Dolan* line of cases, placing limits on the power of local governments to require developers to pay for public improvements.

The applicable legislation, the courts and common sense all converge in arriving at essentially the same place in describing those limits: a local government, as permitting agency, can require the developer to mitigate the adverse environmental impacts of a project, including requiring the developer to pay “impact fees,” so long as the fees are limited to mitigation of *actual, direct impacts* of the project that are *identified* in the appropriate environmental documents (EIS).

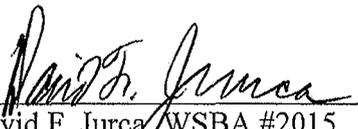
Important governmental decisions, especially about a large, controversial project like Brightwater, should be based on thoughtful consideration of its pros and cons, including consideration of the adverse impacts and mitigation measures identified in an EIS. Those decisions should not be based on how much money a permitting agency can manage to wring out of a developer in order to keep the project on track, or in order to buy off political opposition to the project.

The districts were not aggrieved or adversely affected when King County entered into the Settlement Agreement in 2005. They were aggrieved many months later, in 2006, 2007, and 2008, when King County used the restricted sewage fund to make the payments in question. The trial court erred in ruling that the districts' claim was barred by LUPA 21 days after the Settlement Agreement was signed.

The trial court ruling dismissing the districts' claim should be reversed.

Respectfully submitted this 5th day of September, 2012.

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APPENDIX A

(King County Environmental Mitigation Policies)

WASTEWATER TREATMENT

28.86.130 - 28.86.140

WWPP-4: Facility sizing shall take into account the need to accommodate build-out population.

WWPP-5: RWSP review processes. King County shall monitor the implementation of the RWSP and conduct reviews of the RWSP as outlined in K.C.C. 28.86.165. (Ord. 15384 § 3, 2006; Ord. 13680 § 13, 1999).

28.86.140 Environmental mitigation policies (EMP).

A. Explanatory material. The environmental mitigation policies are intended to guide King County in working with communities to develop mitigation measures for environmental impacts from the construction and operation of wastewater facilities. These policies also ensure that the siting and mitigation processes for wastewater facilities are consistent with the Growth Management Act and the state Environmental Policy Act.

B. Policies.

EMP-1: King County shall work with affected communities to develop mitigation measures for environmental impacts created by the construction, operation, maintenance, expansion or replacement of regional wastewater facilities. These mitigation measures shall:

1. Address the adverse environmental impacts caused by the project;
2. Address the adverse environmental impacts identified in the county's environmental documents;

and

3. Be reasonable in terms of cost and magnitude as measured against severity and duration of impact.

EMP-2: Mitigation measures identified through the state Environmental Policy Act process shall be incorporated into design plans and construction contracts to ensure full compliance.

EMP-3: The siting process and mitigation for new facilities shall be consistent with the Growth Management Act and the state Environmental Policy Act, as well as the lawful requirements and conditions established by the jurisdictions governing the permitting process.

EMP-4: King County shall mitigate the long-term and short-term impacts for wastewater facilities in the communities in which they are located. The county's goal will be to construct regional wastewater facilities that enhance the quality of life in the region and in the local community, and are not detrimental to the quality of life in their vicinity.

EMP-5: King County shall enter into a negotiated mitigation agreement with any community that is adversely impacted by the expansion or addition of major regional wastewater conveyance and treatment facilities. Such agreements shall be executed in conjunction with the project permit review. Mitigation shall be designed and implemented in coordination with the local community, and shall be at least ten percent of the costs associated with the new facilities. For the south treatment plant and for the new north treatment plant, a target for mitigation shall be at least ten percent of individual project costs, or a cumulative total of ten million dollars for each plant, whichever is greater, provided that mitigation funded through wastewater revenues is consistent with: chapter 35.58 RCW; Section 230.10.10 of the King County Charter; agreements for sewage disposal entered into between King County and component agencies; and other applicable county ordinance and state law restrictions. (Ord. 13680 § 14, 1999).

(King County 9-2006)

No. 86293-1

RECEIVED BY E-MAIL

SUPREME COURT OF THE STATE OF WASHINGTON

CEDAR RIVER WATER AND SEWER DISTRICT *and*
SOOS CREEK WATER AND SEWER DISTRICT,

Appellants/Cross-Respondents

v.

KING COUNTY,

Respondent/Cross-Appellant, and

SNOHOMISH COUNTY, *et al.*,

Respondents.

DECLARATION OF SERVICE

Katherine M. Stewart hereby declares as follows, under penalty of perjury under the laws of the State of Washington:

1. I am over 18 years of age, am a resident of King County, Washington, and am not a party to the above-entitled action.

2. On September 5, 2012, I personally caused true and correct copies of the foregoing document, "APPELLANTS' ANSWER TO *AMICUS CURIAE* BRIEF OF WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS" and this "DECLARATION OF SERVICE" to be sent by first-class mail and by email to the following counsel of record:

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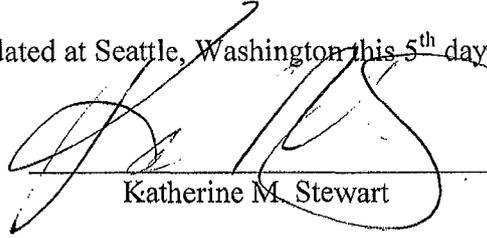
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Signed and dated at Seattle, Washington this 5th day of
September, 2012.



A handwritten signature in black ink, appearing to read 'Katherine M. Stewart', is written over a horizontal line. The signature is stylized and cursive.

Katherine M. Stewart

Case No.: 86293-1

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Please do not hesitate to contact me should you have any questions or concerns. Thank you.

Katherine M. Stewart

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