

**BEFORE THE HEARING EXAMINER
OF THE CITY OF KENMORE**

In Re: An Appeal Of The Lakepointe
Commercial Site Development Permit
(B96cs005) And Master Plan
(A95PO105)

FINDINGS, CONCLUSIONS &
DECISION

By
Dan Olsen, Appellant

SUMMARY OF DECISION

The appeal is granted in part and denied in part.

BACKGROUND

History of Application & Appeal

Pioneer Towing Company (Applicant) filed an application with King County in 1995 for a master plan approval and a commercial site development permit for a project known as "Lakepointe." The Lakepointe proposal includes approximately 1,200 residential units (including apartments and condominiums), 630,000 square feet of various commercial uses (including retail, office, a hotel and a theatre), a marina with 52 boat slips and 4,464 parking places. King County approved the applications in August 1998. On August 27, 1998, Mr. Dan Olsen (Appellant) filed this appeal of the Commercial Site Development Permit. On August 31, 1998, the City of Kenmore (City) incorporated and the jurisdiction for processing land use appeals of permits issued by King County was transferred to the City by Interlocal Agreement. The City retained a Land Use Hearing Examiner and assigned jurisdiction to that Examiner to hear and decide this appeal.

Nature of Appeal

The Appellant presented two primary issues on appeal:

1. Did King County err in approving the Lakepointe project in violation of the County's Integrated Transportation Program?

2. Did King County err in approving the Lakepointe project in violation of SEPA for failure to adequately mitigate impacts?

The issues involving the Integrated Transportation Program focus on concurrency and intersection standard requirements. The issue involving SEPA focuses on whether there is a duty to mitigate identified impacts.

SUMMARY OF PROCEDURE

Hearing

On November 19, 1998, the Examiner conducted an open-record appeal hearing. The City, the Applicant and the Appellant were each represented by Legal Counsel.¹ Each party was given an opportunity to present exhibits and witnesses and to respond to the exhibits and witnesses presented by others, including the opportunity for cross-examination of witnesses. Several observers were present during the appeal hearing. A tape-recorded record was kept of all testimony presented and exhibits were marked and received.

Exhibits

The Hearing Examiner considered the following Exhibits submitted in advance of the open-record hearing as agreed to by the parties:

File Exhibits:

- File Exhibit 1: Lakepointe Mixed Use Development Commercial Site Development Permit (File No. B96CS005 (approval Aug. 13, 1998));
- File Exhibit 2: Notice of Appeal (Aug. 26, 1998) and Statement of Appeal (Sep. 3, 1998);
- File Exhibit 3: Pre-Hearing Order (Oct. 30, 1998);
- File Exhibit 4: Appellant's Statement of Issues and Preliminary Witness and Exhibit List (Oct. 20, 1998);
- File Exhibit 5: Pioneer Towing Co.'s Response to Appellant's Statement of Issues and Preliminary Witness and Exhibit List (Oct. 27, 1998);
- File Exhibit 6: Examiner's Ruling on Motion to Limit Appeal (Nov. 12, 1998);
- File Exhibit 7: Lakepointe Mixed Use Master Plan Supplemental Environmental Impact Statement (Jul. 1998).

¹ At the hearing, appellant Dan Olsen was represented by Bricklin & Gendler, LLP and Jennifer A. Dold; the Lakepointe development applicant, Pioneer Towing Co., was represented by Phillips, McCullough, Wilson, Hill & Fikso and John C. McCullough; and the City of Kenmore was represented by the Kenyon Law Firm and Michael R. Kenyon.

The Hearing Examiner also considered the following Exhibits admitted during the open-record hearing:

Open-Record Hearing Exhibits:

- Hearing Exhibit 1: Excerpts from Chapter of King County Comprehensive Plan;
- Hearing Exhibit 2: Photographs taken by Dan Olsen;
- Hearing Exhibit 3: Resume of Christopher Brown, P.E.;
- Hearing Exhibit 4: Transportation Service Areas Map from King County Comprehensive Plan (1997);
- Hearing Exhibit 5: Existing HOV System and Future Needs Map from King County Comprehensive Plan (1994);
- Hearing Exhibit 6: Resume of Jeff Ream.

Post Hearing Exhibits(not admitted):

Two exhibits were offered by the Appellant following the open-record hearing. These were:

Post-Hearing Exhibit 1:

July 7, 1998 letter from Sheri L. Baylin to Washington State Department of Transportation;

Post-Hearing Exhibit 2:

August 4, 1998 letter from Washington State Department of Transportation to Sheri L. Baylin.

These were not admitted by the Examiner. The exhibits were not presented during the open-record hearing. Thus, the other parties were not given an opportunity to review them and object to their admission².

Testimony

The following individuals presented testimony under oath at the open-record hearing:

- Dan Olsen, Appellant;
- Christopher Brown, P.E., Expert Witness for Appellant;
- Jeff Ream, Transportation Planner, Expert Witness for Applicant;
- Aileen McManus, County Staff;

² In a letter to the Examiner dated December 7th, the Applicant's Attorney filed an objection to the admission of these exhibits. As noted in the objection, the documents have been available since August and could have been offered during the hearing.

Richard Warren, County Staff,
Priscella Kaufman, County Staff.

Based on the Exhibits and Testimony submitted, the Hearing Examiner hereby enters the following Findings, Conclusions and Decision:

FINDINGS

Findings of General Applicability

1. Pioneer Towing Company (Applicant), owner of the Lakepointe site, filed an application in 1995 with King County for a master plan approval and a Commercial Site Development Permit. King County, through its Department of Development and Environmental Services, approved the Lakepointe development on August 13, 1998. *File Exhibit 7*. The Lakepointe development site is located at the north end of Lake Washington in the City of Kenmore. The proposed Lakepointe development is a phased project which will consist of 1,200 residential units; over 600,000 square feet of retail and commercial space; a marina with 52 boat stalls; 4,464 parking stalls; and the construction of a new road connecting SR 522/NE Bothell Way and 68th Avenue NE called Lakepointe Way NE. *File Exhibit 1*.
2. King County conducted environmental review of the proposal. The Final Supplemental Environmental Impact Statement ("FSEIS") for the Lakepointe development states that the increase in traffic due to the development is expected to be 12,700 new vehicle trips per day. *File Exhibit 7, page 3-48*. Following an analysis of the specific impacts of this increase in traffic due to the Lakepointe project, the FSEIS concludes, "the proposed action is likely to result in a significant adverse impact that cannot be mitigated." *File Exhibit 7, page 3-70.*³
3. On August 27, 1998, Mr. Dan Olsen (Appellant) filed this appeal of the Commercial Site Development Permit. On August 31, 1998, the City of Kenmore incorporated and the jurisdiction for processing land use appeals of permits issued by King County was transferred to the City by Interlocal Agreement. *File Exhibit 3*.
4. King County regulates the transportation impacts of development projects through its Integrated Transportation Program (ITP), codified at KCC Chapter 14.65 through 14.80. The ITP includes three components: transportation concurrency management (KCC Chapter 14.70), transportation impact fees (KCC Chapter 14.75), and the intersection standards (KCC Chapter 14.80). KCC Section 14.65.025 authorizes the County to adopt administrative rules to implement the ITP. The impact fee program was not identified by the Appellant as a topic on appeal and will not be further discussed. The transportation concurrency management

³ There was no challenge to the adequacy of the FSEIS. The statements therein are thus accepted as fact unless a party offers contradictory evidence within the scope of this appeal.

("Concurrency") program implements RCW 36.70A.070(6) and Policies T-301 through T-306 and T-401 through T-403 of the King County Comprehensive Plan (KCCP). It is designed to ensure that new development occurs in areas serviced by adequate transportation facilities and that the resulting roadway level of service standards established in the KCCP are not degraded by new development. *KCC 14.70.010*. The intersection standards are designed to ensure adequate levels of service at intersections serving and impacted by proposed new development. The standards are used to identify development conditions to assure intersection capacity, safety and operational efficiency. *KCC 14.80.010*.

5. King County has adopted Transportation Adequacy Measure Standards ("TAMS") as the County's LOS standards to help identify mitigation measures for proposed developments and to ensure compliance with concurrency requirements. *KCC 14.70.060 & .070*. In setting the TAMS, King County has adopted a conceptual approach that uses transit service, non-motorized travel and demand management actions to set a threshold; exempts facility sections with high occupancy vehicle links which are operating at acceptable levels of service (defined as LOS C by the Washington State Transportation Commission) from the volume/capacity ("v/c") evaluation; evaluates v/c by a weighted zone average; evaluates v/c links which exceed a critical v/c ratio; evaluates urban connectors in the Rural Area; and address impacts within other jurisdictions. *Hearing Exhibit 1*. King County has adopted the following TAMS for different "Transportation Service Areas" within the County:

Transportation Service Area 1 are those areas with adequate HOV and transit service where a new development may have a maximum average v/c zonal score above 1.0 and an average TAM standard of LOS F. In a Transportation Service 1 without adequate HOV and transit service, a new development must have a maximum average v/c zonal score of less than 0.99 and an average TAM standard of LOS E.

Transportation Service Area 2 are those areas where a new development must have a maximum average v/c zonal score of less than 0.99 and an average TAM standard of LOS E.

Transportation Service Area 3 are those areas where a new development must have a maximum average v/c zonal score of less than 0.89 and an average TAM standard of LOS D.

Transportation Service Area 4 are areas where a new development must have a maximum average zonal score of less than 0.79 and an average TAM standard of LOS C.

Transportation Service Area 5 are those areas where a new development must have less than a maximum average v/c zonal score of 0.69 and an average TAM standard of LOS B. *Hearing Exhibit 1; KCC 14.70.060.*

For purposes of applying these standards, “adequate HOV and transit service” means that those services planned for Transportation Service Area 1 are in operation. *KCC 14.70.060(A)*. The King County Comprehensive Plan explains that an average TAM standard LOS “F” shall only be allowed in a Transportation Service Area 1 if the area is served by arterial and freeway HOV lanes and all-day express bus service. *Hearing Exhibit 1*. The standard in each concurrency zone or part is required to be the same as for the Transportation Service Area in which the zone or part is located. *KCC 14.70.060.A*.

6. The Lakepointe development is located in Transportation Service Area 1 (TSA 1). The FSEIS states that: “The significance of this designation is that the [TAMS] for that service area will allow the average of intersections within the service area to be at LOS F with an average critical link zonal V/C ratio greater than 1.0 if adequate HOV and transit service is available, which is the case for this site . . . Therefore, the proposed action meets concurrency per Section 27 of King County Ordinance No. 11617.” *File Exhibit 7, page 3-32*. No amount of increase in roadway capacity will reduce delays out of LOS F conditions at several intersections impacted by the proposed project (including SR 522 and 68th Ave NE; 68th Avenue NE and Lakepointe Way NE; and SR 522 and SR 104). *File Exhibit 7, page 3-32*. The outside westbound lane of SR 522 is restricted to transit only and is not open to private high occupancy vehicles except for making right turns. The shoulder eastbound lane of SR 522 is available for transit only and is not open to private high occupancy vehicles except for making right turns. *Hearing Exhibit 2; Site View; Testimony of Dan Olsen*. The Appellant argues, in part, that adequate HOV and transit service is not available (since the HOV lanes are restricted to transit only) so that LOS F should not be permitted in TSA 1. *Testimony of Mr. Brown, P.E.* The King County Code does not define HOV lanes. Chapter 81.100 of the Revised Code of Washington, entitled “High Occupancy Vehicle Systems”, defines HOV lanes as “lanes reserved for public transportation vehicles only *or* public transportation vehicles and private vehicles...” (emphasis added). *RCW 81.100.020*
7. Approximately 82 percent of the 12,700 Lakepointe development traffic trips would approach and access the development from the west, east, and north directions would travel either on SR 522 or through intersections located on SR 522. *File Exhibit 7, FSEIS, Figure 35B*. The FSEIS states that 18 percent of the traffic trips would approach and access the development from the south along or through intersections on 68th Avenue

NE and that 35 percent of traffic trips would approach and access the development from the north along or through intersections on 68th Avenue NE. *File Exhibit 7, FSEIS, Figure 35B*. The FSEIS states that approximately 499 project traffic trips would travel through the intersection of SR 522 and 68th Avenue NE during the PM peak period. *File Exhibit 7, FSEIS, Figure 37A*.

8. The FSEIS studied 8 roadways that would be impacted by Lakepointe development traffic: SR 522 (Bothell Way); SR 104 (Ballinger Way); 61st Avenue NE; 68th Avenue NE (Juanita Drive); 73rd Avenue NE; 80th Avenue NE; NE 175th Street; and NE 170th Street (Simonds Road). *File Exhibit 7, page 3-32*. The FSEIS concluded that some intersections on these roadways would be impacted by the Lakepointe development traffic and would operate at Level of Service F. The FSEIS recognizes that some of these intersections are already operating at LOS F. Level of Service ("LOS") is a qualitative measure to describe operational traffic conditions on a road using a letter designation from A to F. LOS A represents the best operating conditions; LOS F represents the worst operating conditions. The intersections that are projected to operate at LOS F in 2005 during AM and PM peak hours with the Lakepointe development are located at SR 522 and SR 104 and SR 522 and 61st Avenue NE. The intersections that are projected to operate at LOS F in 2005 during PM peak hours with the Lakepointe development are located at SR 522 and 68th Avenue NE; SR 522 and 80th Avenue NE; 68th Avenue NE and NE 170th Street; and 68th Avenue NE and NE 175th Street. In addition, a new road being built for the development, Lakepointe Way NE, will operate from the time of construction at 68th Avenue NE at LOS F. *File Exhibit 7, pages 3-60 through 3-62*.

9. The County evaluated each intersection identified in the FSEIS against the Intersection Standards found in Chapter 14.80 of the King County Code. The purpose of this analysis is to determine how the proposed project might impact each intersection. The County determined that:

For SR 522/68th Avenue NE: With Lakepointe traffic in place, this intersection function improves from LOS F to LOS E in the AM peak hour, and remains at LOS F (with no increase in delay) in the PM peak hour. *File Exhibit 7, Tables 31A, 32A*.

For SR 522/Lakepointe Way NE: With Lakepointe traffic in place, this intersection function will be at LOS E or better in both peak hours. *File Exhibit 7, Tables 31A, 32A*.

For SR 522/61st Avenue NE: With Lakepointe traffic in place, this intersection function will remain at LOS F in both the AM and PM peak hour. While some increase in delay at the intersection was projected,

Lakepointe has been conditioned to provide mitigation at this intersection in the form of a new southbound-to-eastbound left-turn lane on the north leg of the intersection, and a southbound-to-westbound right-turn phase overlap in signal operation. Implementation of this mitigation is not reflected in the FSEIS results on Tables 31A, 32A, and is projected to reduce delay at the intersection to pre-project levels. *File Exhibit 7, Tables 31A, 32A, J. Ream testimony.*

For SR 522/SR 104: This intersection is located in the City of Lake Forest Park. With Lakepointe traffic in place, this intersection function will remain at LOS F in both the AM and PM peak hours, with some increase in delay projected. Pursuant to KCC Section 14.80.010 and .050, Intersection Standards only apply to the King County road system, unless an Interlocal agreement is in place to provide for mitigation. King County has no Interlocal agreement with the City of Lake Forest Park. *File Exhibit 7, Tables 31A, 32A, J. Ream testimony; A. McManus testimony.*

For SR 522/73rd Avenue NE: With Lakepointe traffic in place, this intersection will operate at LOS C or better in both peak hours. *File Exhibit 7, Tables 31a, 32a.*

SR 522/80th Avenue NE: With Lakepointe traffic in place, this intersection will remain at LOS D in the AM peak hour and at LOS F in the PM peak hour (with some increase in projected delay). The FSEIS modeling for this intersection, however, assumed only one lane southbound on the north leg of the intersection, when in fact there is an unstriped right-turn lane at this location. Accounting for this lane, intersection operation improves to LOS D in the PM peak hour. *File Exhibit 7 at 3-62, Tables 31A, 32A; J. Ream testimony; A. McManus testimony.*

Review 68th Avenue NE/NE 170th Street (Simonds Road): Review of this intersection in the FSEIS indicates that it serves less than 20% of Lakepointe project traffic. Therefore, Intersection Standards do not apply. *File Exhibit 7, Tables 31A, 32A, J. Ream testimony; A. McManus testimony; TMA.*

10. In determining the TAM score for the proposed project area, the County excluded any intersection with SR 522 because SR 522 is considered by the County to be a “high occupancy vehicle facility” that is exempt from that calculation pursuant to county ordinances. The County also focused on levels of service on roadway segments, not at intersections. Thus, the average V/C score for the proposal as calculated by the County is 0.67. This TAM score complies with concurrency requirements in all TSAs. *Testimony of Richard Warren, King County Transportation Planner.*

11. King County has adopted public rules to establish standard procedures for the determination of concurrency and intersection improvements required of proposed developments. These are known as the “ITP Rules” (ITP). ITP 6.1.4.2 identifies specific unfunded critical links that “will be monitored and used in the level of service analysis of the Transportation Adequacy Measure for testing concurrency”. An “unfunded critical link” is defined as being important for countywide mobility, having a high level of traffic congestion and unfunded improvements under the County’s current Transportation Improvement Program. *ITP 6.1.4.2. 68th Avenue NE from NE 155 Street to SR 522 is identified as an unfunded critical link in the ITP Rules. ITP 6.1.4.2 (22).* There is no HOV facility on 68th Avenue NE. The County did not consider this as an unfunded critical link affecting the Lakepointe project. *Testimony of Richard Warren, King County Transportation Planner.*

12. The intersection of 68th Avenue NE and Lakepointe Way NE will function at an LOS F, will carry 30 more added vehicles in any one hour, and will be impacted by 20 percent of the new traffic generated from the Lakepointe development. ITP Rule 6.3.2 requires mitigation by development projects that result in or add to a LOS F condition at intersections providing direct access to the proposed project. ITP Rule 6.3.3 authorizes exceptions to this requirement when “extraordinary conditions exist which make full compliance infeasible.” This determination is made by the Manager of the Road and Engineering Division of the Department of Public Works. For Commercial Building Permits, this determination may be appealed to the Hearing Examiner. *ITP 6.3.3.1. County staff testified that an exception must have been granted for this intersection pursuant to the ITP Rules. The exception is not in written form or referred to in the permit approvals. Testimony of Aileen McManus, County Traffic Engineer & Priscella Kaufman, County Planner.*

13. The FSEIS states the expected maximum length of vehicle backups (“queue length”) during peak hour movements at several intersections. There are eight locations (affecting seven intersections) that will be over capacity in the AM as a result of the proposed action. These intersections include SR 522 and SR 104 eastbound; SR 522 and SR 104 left turns; SR 522 and SR 104 southbound; SR 522 and 61st Avenue NE (queues beyond adjacent intersections in both directions); and SR 522 and 68th Avenue NE (eastbound and northbound beyond adjacent intersections). There are nine locations (affecting six intersections) that will be over capacity in the PM due to the increase in traffic from the Lakepointe development. These intersections include SR 522 and SR 104 westbound (extending beyond the 61st Avenue NE intersection); SR 522 and 61st Avenue NE (westbound impacting Lakepointe Way NE); and SR 522 and 68th Avenue NE northbound. *File Exhibit 7, pages 3-63 through 3-66.*

Findings Related to SEPA Mitigation Issue

14. The approval of the Commercial Development Permit by the County on August 13, 1998, was subject to several mitigation measures. These include some required by code (such as construction of Lakepointe Way NE) and some additional required by the county (such as left-turn lanes and re-striping). *File Exhibit 1*. Some mitigation measures identified in the FSEIS were not included as required mitigation measures on the permit approval. These are identified as “potential” mitigation measures in the FSEIS. *File Exhibit 7, pages 3-69 and 3-70*. Other mitigation measures are possible (such as the use of water ferries) were not considered in the FSEIS or attached to the permit approval. *Testimony of Mr. Brown, P.E.*
15. Development of the Lakepointe project will result in adverse impacts to traffic that are not mitigated by the conditions of approval attached to the commercial site development permit or by city or county ordinances. These are identified as “unavoidable significant adverse impacts” in the FSEIS. *File Exhibit 7, page 3-70; Testimony of Mr. Olsen and Mr. Brown, P.E.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner of the City of Kenmore has jurisdiction to hear and decide this appeal pursuant to Interlocal Agreement, Ordinance No. 98-0027 of the City of Kenmore, Chapter 20.24 of the King County Code and the Rules of Procedure adopted by the Examiner. Pursuant to City Ordinance 98-0039, any appeal of the decision of the Examiner must be to King County Superior Court.

Conclusions Based on Findings

1. **King County acted in violation of the Integrated Transportation Program.** Local governments have multiple choices as to how best to implement the requirements of the Growth Management Act. King County chose to adopt voluminous rules governing concurrency and intersection improvement requirements. The County now has an obligation to carry out its Integrated Transportation Program in a manner consistent with those rules. Although it appears the County complied with those rules and regulations in most instances, it failed to do so in two areas of concern to the Appellant. Thus, the County must now re-examine its analysis in accordance with the rules.
 - 1.1 **The County failed to consider the existence of an unfunded critical link (68th Avenue NE) when conducting the level of service analysis of the Transportation Adequacy Measure for testing concurrency.** The ITP Rules clearly identify 68th Avenue NE in the vicinity of the proposed project as an “unfunded critical link.” *Finding of Fact No. 11*. Yet, there is no

analysis presented by the County in the FSEIS or elsewhere that discusses how this was taken into account, if at all, in developing the Transportation Adequacy Measure. The ITP Rules state that “only those links which exceed the critical link threshold and which are unfunded for construction in the current CIP will be used for concurrency denial.” *ITP 6.1.4.2*. This implies that there may not be a determination of concurrency if the unfunded critical link is properly considered. The County’s analysis of how this link was considered must be described in writing so that the Appellant and others can determine if the County properly administered the ITP Rules.

1.2 The County failed to properly determine whether an exception should be granted to Intersection Improvement requirements. Developments that result in a LOS F condition at their access intersection may be required to comply with a wide range of conditions of final approval. These include intersection improvements, fair share contributions and reducing traffic impacts by reducing the size or mix of the proposed project. The designation of LOS F at an access intersection clearly makes a difference as to what might be required in conditions of approval. It is undisputed that the access intersection for the Lakepointe project will operate at LOS F from its inception. *Finding of Fact No. 12*. Under ordinary circumstances, additional conditions would be required of the developer pursuant to the ITP Rules. Although the County and the Applicant argue that an exception to this rule was granted by the Manager, no one could produce it during the hearing. Exceptions for commercial permits may only be granted “extraordinary conditions exist which make full compliance infeasible.” The grant of an exception may be appealed to the Hearing Examiner. Minimum considerations of due process require that any exception be issued in writing, that some basis in fact is given for any exception and that any one who disagrees with an exception be given an opportunity to appeal. *Pease Hill Community Group v. County of Spokane, 62 Wn.App. 800, 806 (1991)*; *Chaussee v. Snohomish Cy. Coun., 38 Wn.App. 630 (1984)*.

Except for the two failures detailed above, the County complied with concurrency requirements and intersection requirements as set forth in its ordinances and rules. *Findings of Fact No. 4,5,6, 7, 8, 9, 10 & 13*. The County is not required to consider those road segments that have HOV facilities in its TAM analysis. A transit only lane is an HOV facility as defined by state law. Although the County apparently has not defined HOV facility within its ITP, the state law definition would control in this instance as SR 522 is under the jurisdiction of the state. The intersection analysis conducted by the County is also consistent with its ordinances and rules with the one exception detailed above. The intersections reviewed in the FSEIS were evaluated using the County’s Intersection Standards. This review shows that there is compliance with the county ordinances and rules in most instances. The Appellant may disagree with the methodology used in the ITP, but the County (with the exceptions noted) complied with it as required in its ordinances and rules.

2. **King County did not fail to adequately mitigate impacts under SEPA. King County chose not to use its authority to mitigate significant traffic impacts from the proposed project.** The FSEIS for the Lakepointe project identifies “unavoidable significant adverse impacts” that are not mitigated by any condition of approval. *Findings of Fact No. 14 & 15*. The Appellant alleges that the County erred by not requiring mitigation. The Appellant contends that there is a duty embodied in SEPA to mitigate significant adverse impacts. He cites three Washington Supreme Court decisions in support of this argument. These cases, however, do not require the conclusion urged by the Appellant nor do they strongly support it.

In *SAVE v. Bothell*, 89 Wn.2d 862, 871-72 (1981), the Supreme Court ruled that a decision by the City of Bothell to approve a rezone to allow construction of a regional was invalid because the City did not consider impacts on the region surrounding the City. The court did not impose a “duty to mitigate” as espoused by the Appellant, but specifically referenced and adopted a “duty to serve regional welfare” as imposed by other courts. Although the court did discuss the necessity for specific mitigation measures to protect areas outside the City, it stopped short of requiring mitigation of all impacts. *Supra*, at 871. The case of *Cathcart v. Snohomish County*, 96 Wn.2d 201 (1981), cited by Appellant in support of the “duty to mitigate” argument involves a question of EIS adequacy. The court, in a discussion of a moot case, stops short of establishing a “duty to mitigate.” Rather, the court states that “the secondary and cumulative impacts of the entire affected area, as defined in *Save*, must be quantitatively assessed and the costs of mitigating them identified.” *Supra*, at 211. The third case cited by Appellant in support of a duty to mitigate is *Save Our Rural Environment v. Snohomish County*, 99 Wn.2d 363, 372 (1982). In that case, the Court referenced *Cathcart* as a case to *compare* with the opinion it was writing at the time. The Court’s opinion in *Save Our Rural Environment* upheld the actions of the county council because it had “properly considered and acted to mitigate the effects of its land use decisions on the entire affected area.” *Supra*, at 372. The focus of the Court was on the duty to consider the region impacted, not on a duty to mitigate. The Court noted that some mitigation had been imposed in that case; as it has in this matter on appeal. The Appellant would extend mitigation requirements to every significant impact identified in the FSEIS. This is not required by the statute or by the courts.

There is no reference by the Court in any of these decisions to a statutory section that imposes a duty to mitigate all impacts identified within an EIS. In fact, the Department of Ecology in its interpretation of the statute has stated that only those mitigation measures that are “reasonable and capable of being accomplished” can be imposed. *WAC 197-11-660 (1)(c)*. Nothing in SEPA *prohibits* an agency from imposing such mitigation measures for every significant impact; but there is nothing in SEPA that *requires* an agency to do so. There are undoubtedly mitigation measures that could have been imposed by King County that would

provide additional mitigation of traffic impacts identified in the FSEIS. It is likely that many of these would be found to be “reasonable and capable of being accomplished.” However, the County, for whatever reasons, elected *not* to impose those mitigation measures. The Examiner cannot now require them to do so. As noted in *Maranatha Min., Inc. v. Pierce County*, 59 Wn.App. 795 at 804: “The law does not require that all adverse impacts be eliminated; if it did, no change in land use would ever be possible.”

It is unfortunate that the county elects not to attempt mitigation when there is a clear opportunity and authority to do so. Under its existing ordinances, the county transportation planners could engage in significant site specific or project specific SEPA mitigation since there are environmental impacts not mitigated by the transportation regulations. They elected not to do so. The Examiner cannot order mitigation under SEPA if the county chooses not to pursue it. Perhaps the City of Kenmore will adopt ordinances that require mitigation of significant impacts or select personnel that will be more aggressive in identification of mitigation measures. Common sense suggests that the addition of 12,700 vehicle trips per day would require a more creative approach mitigation of traffic impacts than that shown by the County. The County demonstrates no initiative or creativity in attempting to address a serious traffic problem in the Kenmore area. Instead, it uses a “bureaucratic analysis” approach to reach a conclusion that there “is nothing more that can be done” to address traffic problems. This is precisely the type of thinking that has contributed to traffic congestion throughout the county. The county transportation planners do have the authority to explore creative mitigation, but they appear to be unwilling or afraid to use it to help solve traffic problems in the area.

DECISION

The appeal is **GRANTED** in part. The City and/or County pursuant, to the Interlocal Agreement, is ordered to do take the following actions:

1. The approval of the Commercial Site Development Permit must be re-examined to determine how the consideration of 68th Avenue NE as an “unfunded critical link” affects the determination of concurrency issued by the County.
2. Potential mitigation measures for the proposed intersection at Lakepointe Way NE and 68th Avenue NE must be re-examined to determine if conditions of approval should be imposed or if an exception is appropriate. If an exception is issued, the “extraordinary conditions which make full compliance infeasible” must be specified, the decision must be in writing, and a reasonable period to appeal any exception to the Hearing Examiner must be allowed.

This re-examination must take place within 30 days at which time the decision on the permit will be deemed a final decision that may be appealed to the Hearing Examiner pursuant to city ordinances.

The appeal is **DENIED** in part. Although it has the legal authority to do so, the County does not have a legal obligation under SEPA to mitigate significant impacts identified in the FSEIS.

So decided this 11th day of December, 1998


THEODORE PAUL HUNTER, Hearing Examiner