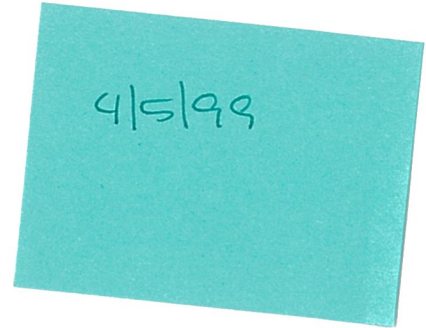




The City Of Kenmore

P. O. Box 82607 • Kenmore, Washington 98028-0607

April 6, 1999



To: Jennifer Dold
Jack McCullough
Mike Kenyon
Dennis McMahon
Bob Derrick
Paul Toliver

From: Gregg Dohrn

Subject: LakePointe Appeal

Attached is a copy of the final decision of the Hearings Examiner on the LakePointe Appeal. As you will note the Examiner has vacated the decision by the County to grant an exception from the intersection standards for the intersection of 68th Ave NE and the proposed LakePointe Way. As a result, the commercial site development permit issued by the County has, in effect, been suspended.

The official date of this decision is April 6, 1999 and in accordance with the provisions of the Land Use Petition Act the administrative appeal process for this project is now complete. If you have any questions on this or related issues please don't hesitate to give me a call at (425) 398-8900. Thanks.

Cc: Pricilla Kaufmann
John Shively
Aileen McManus
Ron Paananen
Paul Reitenbach

**BEFORE THE HEARINGS EXAMINER
OF THE CITY OF KENMORE**

In Re: An Appeal of The Lakepointe Commercial Site Development Permit (B96cs005) And Master Plan (A95PO105))))))	NO. OHE 98-1 (B96CS05)
By Dan Olsen, Appellant)))	FINDINGS, CONCLUSIONS & DECISION ON APPEAL OF REMAND

PROCEDURAL BACKGROUND

Summary of History of Application

Pioneer Towing Company (Applicant) filed an application with King County in 1995 for a master plan approval and a commercial site development permit (CSDP) 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.

The County prepared a draft and final supplemental environmental impact statement (SEIS) for the Lakepointe project application¹ as required by the State Environmental Policy Act (SEPA). The Final SEIS was published in July 1998. There was no appeal of the Final SEIS.

In August 1998, King County approved the master plan and CSDP for the Lakepointe project. Lakepointe is required under these approvals to be a mixed-use project. As one of the conditions of mitigation under SEPA, the Applicant was required to enter into a "Transportation Mitigation Agreement" (TMA), a copy of which is appended to the CSDP approval. The TMA imposes a number of conditions on the project designed to mitigate the potential transportation impacts of the development. The conditions include construction of Lakepointe Way, improvements to nearby intersections and roads, construction of enhanced transit stops on both sides of SR 522, implementation of a Transportation Demand Management Plan (TDM), and pedestrian/bicycle path improvements.

Summary of History of Appeal

On August 27, 1998, Mr. Dan Olsen (Appellant) filed an appeal of the Commercial Site Development Permit with King County. On August 31, 1998, the City of Kenmore (City) incorporated and the jurisdiction for processing land use appeals of permits issued by King

¹ The Lakepointe EIS was prepared as a supplement to the EIS prepared previously for the Northshore Community Plan.

County was transferred to the City by Interlocal Agreement. The City retained a Land Use Hearings Examiner and assigned jurisdiction to that Examiner to hear and decide the appeal.

On October 13, 1998, the Hearings Examiner conducted a prehearing conference and issued a prehearing order on October 30, 1998. 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 Hearings Examiner conducted a hearing on the appeal on November 19, 1998.

On December 11, 1998, the Hearings Examiner issued a decision on the appeal. That decision required that King County and the City re-examine two aspects of the review of the Lakepointe project under the County's Integrated Transportation Program, Ch. 14.65 KCC. The decision required the County and the City to provide additional documentation demonstrating that the project satisfies the critical link standard of KCC 14.70.020, and a written decision supporting the grant of a special exception under the Intersection Standards for the LOS "F" condition projected to occur at the 68th Avenue NE/Lakepointe Way NE intersection. All other claims in the Appellant's original appeal were denied.

On January 19, 1999, Gregg R. Dohrn, Director of Community Development for the City, transmitted a letter to the Hearings Examiner incorporating the responses of the County to the Examiner's requests under the original decision. Those responses included a letter dated January 13, 1999, from Roy Francis, Manager of the Transportation Planning Division, concerning the critical link test, and a letter dated January 13, 1999, from Ronald J. Paananen, P.E., County Road Engineer, concerning the special exception issue. The City affirmed the initial decision on the Lakepointe project without additional conditions.

On February 4, 1999, the Appellant filed an appeal of the City's decision following the remand. The Appellant contested the grant of a special exception for the intersection at 68th Avenue NE/Lakepointe Way NE and challenged the methodology used in the critical link analysis. On February 11, 1999, the Hearings Examiner issued a prehearing order for the hearing on remand, establishing a hearing date and ordering the release of relevant documents by the County to the Appellant.² An open record appeal hearing was held on March 10, 1999, at the conference center of the Northshore Utility District.

² The Appellant did not receive these documents by the date ordered. A Request for Continuance was made to the Examiner by the Appellant. The Examiner denied this request and directed that the hearing proceed with the information available as of the date of the hearing. The Examiner did indicate that additional time would be made available for review of documents or examination of witnesses following the hearing if Appellant reiterated the Request for a Continuance. No renewed request was made.

At the outset of the hearing, Appellant withdrew that portion of the appeal challenging the critical link analysis. Thus, the decision on this appeal is limited to issues raised by the Appellant regarding the issuance of the special exception from the Intersection Standards.

Exhibits & Testimony

Pursuant to the agreement of the parties, the exhibits and the hearing that led to the December 11, 1998 Examiner's decision are incorporated into the record of the appeal heard by the Examiner on March 10, 1999. In addition, the Examiner considered the following exhibits:

- Exhibit 1: January 19, 1999 Final Decision of the City of Kenmore Reaffirming the Permits Issued by King County for the Lakepointe Project.
- Exhibit 1A: January 13, 1999 letter from Roy Francis to Greg R. Dohrn, entitled "Lakepointe Mixed Use Development, File No. B96CS005, Critical Link Analysis."
- Exhibit 1B: January 13, 1999 letter from Ronald J. Paananen to Greg Dohrn, entitled "Lakepointe Mixed Use Development, File No. B96CS006, Finding of Special Exception."
- Exhibit 2: February 4, 1999 letter of appeal from Dan Olsen.
- Exhibit 3: Pre-Hearing Order (Feb. 11, 1999).
- Exhibit 4: February 25, 1999 letter from King County to Dan Olsen with attachments.
- Exhibit 5: February 25, 1999 letter from King County to Diane Ladwig.
- Exhibit 5A: February 25, 1999 memorandum from Aileen McManus, Senior Engineer, to Bill Hoffman, Manager, Transportation Planning.
- Exhibit 5B: Four documents produced by King County related to the adoption of King County's Integrated Transportation Program ("ITP") Rules and Regulations.
- Exhibit 5C: King County's Integrated Transportation Program Rules and Regulations.
- Exhibit 5D: Excerpts from King County Code, chapters 14.65-.80.
- Exhibit 5E: King County Ordinance No. 11617 (Dec. 30, 1994).
- Exhibit 6: March 8, 1999 letter from King County to Dan Olsen.

Exhibit 7: January 22, 1999 letter from Diane Ladwig to King County.

Testimony

The Examiner considered the statements of the following witnesses who testified at the March 10, 1999 hearing:

Christopher Brown, P.E.
Aileen McManus, and
Kristen Langley.

Legal Counsel

Appellant was represented by Jennifer Dold; Applicant was represented by John C. McCullough; and the City of Kenmore was represented by Michael C. Kenyon.³

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

FINDINGS

Findings of General Applicability

1. Portions of the Examiner's December 11, 1998 Findings, Conclusions, and Decision are directly relevant to this decision. The Examiner bases his decision, in part, upon those findings specified below taken from the December 11, 1998 Findings and Conclusions:

1.1.⁴ 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.*

³ The Examiner wishes to recognize the skill, courtesy and efficiency demonstrated by all attorneys in this proceeding. As land use hearings become increasingly complex, it is helpful to have the participation of attorneys that have an understanding of both the procedural and substantive issues involved in making land use decisions.

⁴ The numbering of the original Finding is retained following the designation as Finding "1."

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, pages 3-48.*

* * *

1.4. 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 (“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.*⁵ 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.*

* * *

1.7. Approximately 82 percent of the 12,700 Lakepointe development traffic trips that 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. *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

⁵ The issue raised by Appellant related to concurrency was withdrawn at the outset of the March 10th hearing. This issue will not be discussed in this decision.

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.*

1.8. 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 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.*

* * *

1.12. The intersection of 68th Avenue NE and Lakepointe Way NE will function at 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 6.3.2⁶ 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 Hearings Examiner. *ITP 6.3.1.* County staff testified that an exception must have been granted to this intersection pursuant to the ITP Rules.

⁶ 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”.

The exception is not in written form or referred to in the permit approvals.⁷ *Testimony of Aileen McManus, County Traffic Engineer & Priscella Kaufman, County Planner.*

2. The Final SEIS for the Lakepointe project concluded that there would be unavoidable significant adverse impacts of Kenmore traffic operations caused by the Lakepointe proposal even with the creation of Lakepointe Way NE. The Final SEIS states:

During the PM peak period, the intersection of SR 522 with 80th Ave NE, 68th Ave NE, 61st Ave NE, and SR 104, and the intersection of 68th Ave NE with NE 175th St and NE 170th St are projected to operate at LOS F in 2005 with or without the Proposed Action. However, overall traffic operations in the Kenmore area would deteriorate even more in the PM peak period with the Proposed Action despite the new Lakepointe Way NE connection and other traffic mitigation that would be provided. This is based on an analysis of three travel corridors -- between SR 104 and 80th Ave NE via SR 522, between SR 104 and NE 170th St via the intersection of SR 522/68th Ave NE, and between SR 104 and NE 170th St via SR 522 and Lakepointe Way NE. Travel time and delay would increase and average speed would decrease. With the Proposed Action, congestion would increase at all intersections analyzed other than SR 522/68th Ave NE and 68th Ave NE/NE 175th St. This is especially true at intersections not immediately adjacent to the Lakepointe site, and, in some cases, the impact would be significant.

While modeling cannot predict future traffic conditions with precision, data from the queuing analysis (Table 32B) and the LOS analysis (Table 31A) indicates that in the year 2005, with the Proposed Action, PM peak-hour queuing and delay at SR 522/61st Ave NE is likely to be significantly greater with the Proposed Action than without it, and traffic is likely to back up to the intersection of SR 522/NE 145th St at the Seattle/Lake Forest Park city limits. Traffic entering Kenmore via NE 170th St at the 68th Ave NE intersection is likely to back up beyond the intersection one-half mile more than it would without the Proposed Action.

Despite the additional capacity that would be provided by Lakepointe Way NE, even more capacity improvements are needed in order to alleviate the additional queuing and delays along the SR 522 and 68th Ave NE corridors that are likely to result

⁷ This Finding is now updated by Finding of Fact No. 6.

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2. The Final SEIS for the Lakepointe project concluded that there would be unavoidable significant adverse impacts of Kenmore traffic operations caused by the Lakepointe proposal even with the creation of Lakepointe Way NE. The Final SEIS states:

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Despite the additional capacity that would be provided by Lakepointe Way NE, even more capacity improvements are needed in order to alleviate the additional queuing and delays along the SR 522 and 68th Ave NE corridors that are likely to result

⁷ This Finding is now updated by Finding of Fact No. 5.

from project-generated traffic. However, no apparent improvements in capacity are possible without major right-of-way acquisition and local business disruption. Thus the Proposed Action is likely to result in a significant adverse impact that cannot be mitigated.

File Exhibit No. 7 - Final SEIS at 3-70.

3. KCC § 14.80.040 provides that, if a review of a proposed project reveals an Intersection Standard will be exceeded, then the Applicant shall:

provide improvements which bring the intersection into compliance with IS, or that return it to its pre-project condition, as may be required by the director. Approval to construct the proposed development shall not be granted until the owner has agreed to build or pay fair and equitable costs to build the improvements required by the director within the time schedule set by the director.

Section 6.3.2 of the ITP Rules (implementing this section of the ordinance) provides that developments which will result in or add to an LOS “F” condition at intersections providing direct access to a project will be subject to the following conditions for final approval:

- (i) Developer will fund or provide for improvements needed to conform to the road standards;
- (ii) Developer will fund or provide for the intersection improvements needed to achieve LOS “E”;
- (iii) Developer will contribute fair share of the cost to complete the needed intersection improvements as determined by the traffic study;
- (iv) Developer may reduce the traffic impacts of the proposed development by reducing the size of the project, altering the mix of uses of the project, or by using approved transportation demand management (TDM) strategies to reduce the number of new peak hour direction trips.

4. The County attached conditions of approval following the environmental review and permit review process that require the Applicant to mitigate impacts related to increased traffic associated with the Lakepointe project proposal. The Applicant agreed to make physical improvements to conform to the Intersection Standards at some affected intersections.⁸ The

⁸ The Applicant has not appealed any conditions of approval. It is assumed the Applicant agrees to conditions of approval that were not appealed.

Applicant agreed to fund fair share amounts (as determined in the traffic study) to mitigate impacts at other intersections. The Applicant also agreed to reduce the traffic impacts of the project by altering the mix of uses in the project. These revisions resulted in a reduction of overall project PM peak hour trips from as high as 1548 trips identified in the Draft EIS to 1329 trips in the FSEIS, the number used in approval of the permit.⁹ In addition, the Applicant has agreed to enhancement of transit stops and pedestrian walkway improvements (including improvements to the Burke-Gilman Trail). *Testimony of A. McManus (November 1998); Exhibit 1B; File Exhibits No. 1 & 7 - DEIS, Appendix D, p. 12; FSEIS, Appendix C, Table 3.*

5. The intersection of 68th Avenue NE/Lakepointe Way NE would be a new intersection constructed as a result of a condition of project approval that requires construction of the Lakepointe Way bypass to the intersection of SR 522/68th Avenue NE. This new intersection is projected to operate at LOS F in the PM peak hour. This PM peak hour condition is caused, in part, by the proximity of the new intersection to SR 522/68th Avenue NE. The intersection at SR 522/68th Avenue NE is fully developed within existing right-of-way without damages to existing developed properties. The County's expert submitted that further physical improvements to this intersection within the existing right-of-way are not feasible. *Exhibit 1B, paragraph 8, page 3.*

6. King County granted an exception for the Lakepointe project from compliance with the Intersection Standards when it released a document entitled "Finding of Exception" on January 13, 1999.¹⁰ *Exhibit 1B.* The County relied upon exception language in ITP Rule 6.3.3.1 to permit "one new intersection in this mitigation project to operate at LOS 'F'" (the intersection of Lakepointe Way NE and 68th Avenue NE). *Exhibit 1B, page 6.* The exception was based on that portion of ITP Rule 6.3.3.1 that states: "Exceptions to the ... IS [Intersection Standards] ... may be granted by the Manager when, in his judgment, extraordinary conditions exist which make full compliance infeasible." *ITP Rule 6.3.3.1.* The "Finding of Exception" consists of nineteen numbered paragraphs and is signed by Mr. Ronald J. Paananen, P.E. *Exhibit 1B, page 6.*

7. On January 19, 1999, the City of Kenmore issued a final decision reaffirming the permits issued by King County for the Lakepointe project based in part upon Exhibit 1B. The City's approval adopted the County's "Finding of Exception" in total, noting that it does not have the time or resources to independently review the Lakepointe permit process and "must continue to rely on King County staff work and conclusions." *Exhibit 1 - Letter to Hearings Examiner from Mr. Gregg Dohrn.*

8. King County adopted the ITP Rules in 1995. ITP Rule 6.3.3, which the County relied upon for the "Finding of Exception", was used by the County for the first time in its review of

⁹ This limited review of the mix of uses is one example of a transportation demand strategy. Many more strategies are available.

¹⁰ The City of Kenmore granted the ITP Rule 6.3.3.1 exception for the Lakepointe project on January 19, 1999. Although King County staff persons testified at the hearing that it was their belief that the exception was implicitly included in the original project approval granted in August, 1998, no evidence supports an "implicit" grant of exception. No mention of an ITP Rule 6.3.3.1 exception as applied to the Lakepointe project is found in any King County document until the "Finding of Exception" dated January 13, 1999.

the Lakepointe application. No further explanation or definition of what constitutes the “extraordinary conditions which make full compliance infeasible” exists in the ITP rules. No criteria for or definition of the “extraordinary conditions which make full compliance infeasible” standard exists in any other County documents. The exception identified in ITP Rule 6.3.3.1 is not specifically provided for in the King County Code or in Ordinance 11617. *Testimony of Kristen Langley; Testimony of Aileen McManus; Review of King County Code.*

9. On February 4, 1999, Dan Olsen appealed the City of Kenmore’s January 19, 1999 decision to this Examiner. *Exhibit 2.*

CONCLUSIONS

Jurisdiction

The Hearings 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. **An exception was issued pursuant to ITP Rule 6.3.3 that can be reviewed on appeal.** In his December decision, the Examiner concluded that “the County failed to properly determine whether an exception should be granted to Intersection Improvement requirements.” In that decision, the Examiner noted that:

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 when “extraordinary conditions exist which make full compliance infeasible.” The grant of an exception may be appealed to the Hearings 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. (Citations omitted). *Findings, Conclusion, and Decision (Dec. 11, 1998) at 4-12.*

The County did, for the first time on January 13, 1999, issue an exception in writing. The City of Kenmore adopted this “Finding of Exception”. Although the Examiner cannot rule on the validity of the administratively created exception within the rules implementing the county ordinance, he can now determine whether the procedure for the grant of an exception has been properly followed.¹¹ The County has provided a specific basis for its Finding of Exception, has

¹¹ The Appellant has questioned the validity of an exception to the Intersection Standards by noting there is no authority for a grant of an exception in the ordinance that establishes those standards and that there are no criteria for

issued it in writing and has allowed for an appeal. Thus, the procedure for issuing a Finding of Exception was properly followed such that the administrative action can be reviewed on appeal. *Findings of Fact No. 6, 7 & 8.*

2. The County has failed to adequately justify an exception to Chapter 14.80 and Section 6.3.2 of the ITP Rules. One clear purpose of the Integrated Transportation Program is to facilitate compliance with concurrency requirements by requiring an Applicant to “provide improvements which bring (an impacted intersection) into compliance with Intersection Standards, or that return it to its pre-project condition.” *Finding of Fact No. 3.* This is a mandatory requirement under Chapter 14.80 and Section 6.3.2 of the Rules to assure capacity, safety and operational efficiency. The Applicant must “fund or provide for intersection improvements.” An Applicant may choose to do this by reducing traffic impacts through transportation demand management; but must comply with the requirements of the director. *KCC 14.80.040; ITP Rule 6.3.2.*

Here, the County chose to issue an exception to this requirement. The basis for the exception as stated in the Finding of Exception is that a road impacted by proposed development (SR 522) is at “ultimate design”; that an intersection already existing on that road (SR 522/68th Avenue NE) is “fully built-out”; and that further improvements to improve this condition (LOS F) are “not feasible for this project.” *Finding of Fact No. 6 - Exhibit 1B, page 3.* The County recognizes that for roadways at ultimate design, “only decreasing the number of cars on the roadway will help alleviate the detrimental impacts of congestion.” *Finding of Fact No. 6 - Exhibit 1B, page 4.* However, despite this recognition of an available traffic impact mitigation strategy, the County issued an exception. The County did not explain what traffic reduction strategies were explored and why they were rejected prior to the issuance of the exception. Available strategies could include increased availability and access to public transit; requirements for private transit (shuttle service); reduction in the number of vehicles allowed by proposed project tenants; an altered mix of uses of the project; and reduction in the size of the project. In a startling admission, the County states that “completion of a new transportation plan for Lakepointe would be necessary to update and clarify mitigation measures” in order to meet County transportation mitigation standards. *Finding of Fact No. 6 - Exhibit 1B, paragraph 10, page 4.* The County states this need not be done because “the level of acceptability of transportation improvements (for roadways at “ultimate design”) cannot be based on County Standards.” *Finding of Fact No. 6 - Exhibit 1B, Finding No. 10, page 5.* In other words, it is not appropriate to even attempt to comply with County standards to reduce traffic impacts from some projects in some areas. This is not acceptable administrative behavior in light of the clear legislative directive to “assure capacity, safety and operational efficiency” of the transportation system. *Findings of Fact No. 1, 3, 4, 6, 7 & 8.*

Although the County has now issued an exception that can be produced in writing, it has not provided sufficient reasons for the grant of the exception. The ITP policies clearly direct County

making a determination of an exception. These issues are outside the jurisdictional authority of the Examiner and will not be addressed further in this decision. *See, Chausee v. Snohomish County, 38 Wn. App. 630 (1984).*

staff to consider a variety of alternatives to mitigate traffic impacts. An exception, even if authorized, should be the last consideration; after exhausting all other efforts to reduce traffic impacts within acceptable limits. The County appears to recognize this when it states within the Finding of Exception that “a new transportation plan for Lakepointe would be necessary to update and clarify mitigation measures” in order to identify possible improvements to adjacent roadways. *Finding of Fact No. 6 - Exhibit 1B, paragraph 10, page 4.* However, the exclusive focus of the County appears to be on physical improvements to roadways and intersections. There is no discussion in the Finding of Exception of the potential for transportation demand management strategies to reduce the amount of traffic during the PM peak hour period. In fact, the Finding of Exception states that “the only mitigation for this condition (LOS F at the new intersection) is to modify the intersection of SR 522/68th Avenue NE” which, it states, is “infeasible”. *Finding of Fact No. 6 - Exhibit 1B, paragraph 18, pages 5-6.* The County must provide a sufficient basis for the grant of an exception by showing it examined and rejected *all* other reasonably available approaches to meeting the Intersection Standards identified by the legislative body enacting the standards. Those approaches include demand reduction strategies that could include an alteration of the mix of uses; increased use of public or private mass transit; reduction in parking spaces to discourage multiple vehicle ownership; and alternative access to commercial activities. The Lakepointe proposal has vast implications for the future quality of life in the Kenmore area. A proposal of this magnitude requires creative approaches to mitigation of traffic impacts.

3. The determination in the FSEIS that the proposed will result in a “significant adverse impact that cannot be mitigated” does not justify an exception to the ITP rules. The FSEIS contains a fairly thorough analysis of traffic impacts likely to result from development of the Lakepointe project. Chapter 3 focuses on impacts to SR 522 and 68th Avenue NE. The FSEIS examines the additional capacity that would be added by the construction of Lakepointe Way NE and concludes that “no apparent improvements in capacity are possible without major right-of-way acquisition and local business disruption.” This was found to be a significant adverse impact that cannot be mitigated. *Finding of Fact No. 2.* This determination was not appealed.

The Applicant argues that since this determination in the FSEIS was not appealed, there is no justification for further analysis of potential mitigation measures. The Examiner disagrees. A review of potential impacts and mitigation measures under the ITP rules differs from a review under SEPA. The focus of a SEPA review is to determine if there are significant adverse environmental impacts. The focus of the ITP review is to determine how a project can meet specifically identified road and intersection standards in order to provide an efficient and safe transportation system. Under the ITP Rules, an Applicant has a responsibility to bring an intersection above the LOS F standard or return the intersection to pre-project conditions. Thus, mitigation required under ITP review can go beyond that required to address significant adverse environmental impacts under SEPA.¹² Review by the County within the FSEIS focused on

¹² A legislative body may adopt program goals and impose mitigation measures that go beyond that required by SEPA. *See, RCW 43.21C.060; R CW 43.21C.240 (6).*

potential mitigation resulting from capacity improvements;¹³ the review required by the ITP Rules expressly mandates a review of potential mitigation resulting from transportation demand management strategies. The County did not undertake this review. Rather, it focused on possible *physical improvements* to existing intersections, concluded that this was “not feasible” and then granted an exception to the Intersection Standards. This approach is contrary to the legislative scheme articulated in Chapter 14.80 of the King Count Code.¹⁴ *Findings of Fact No. 1 – 8.*

DECISION

The grant of an exception NE by the County (as approved by the City for the intersection at 68th Avenue NE/Lakepointe Way) is vacated. The application is remanded to the County for review of transportation demand strategies that could be applied to bring the project into compliance with intersection standards as required by county ordinances as interpreted in this decision. This analysis, when completed, must be forwarded to the City for a final decision. It is recommended that the County give this review a high priority so that a final decision can be made expeditiously by the City.

Decided this 5th day of April 1999.



THEODORE PAUL HUNTER, Hearings Examiner

¹³ The determination in the FSEIS is that “additional capacity improvements are needed” to alleviate impacts to SR 522 and 68th Avenue NE and that no “improvements to capacity” are possible. There is no similar determination regarding possible *reduction* in demand from enhancements to mass transit, provision of alternate modes of transport other than a single passenger vehicle, or a change in the mix of uses within the proposed project. The ITP Rules require the County to undertake a thorough review of how transportation demand strategies might be utilized to meet the Intersection Standards.

¹⁴ Whether the approach taken by County meets the review requirements of SEPA was not before the Examiner.