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**BEFORE THE HEA
FOR THE CITY**

In Re: the Appeal of Mr. Dan Olsen,)
)
 On the Issuance of a Commercial Site)
 Development Permit for the Project)
 Known as "Lakepointe")
)
)

NO. OHE 98-1
 (B96CS05)
 FINAL DECISION
 ON APPEAL

SUMMARY OF DECISION

The Appeal is DENIED. The City's decision that the proposed intersection of Lakepointe Way NE and 68th Avenue NE will operate at LOS E or better with the Lakepointe development was not arbitrary and capricious. The City reasonably relied upon the results of the Transyt 7F methodology to conclude that the traffic mitigation measures included in existing ordinances, transportation improvement plans, and the traffic mitigation agreement will be sufficient to meet the intersection standards.

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

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

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 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?

On December 11, 1998, the Hearings Examiner issued a decision on the appeal. The 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 satisfied 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, the City affirmed the initial decision on the Lakepointe project without additional conditions. The decision incorporated 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.

On February 4, 1999, the Appellant filed an appeal of the City's decision. 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. An open record appeal hearing was held on March 10, 1999. At the outset of the hearing, Appellant withdrew that portion of the appeal challenging the critical link analysis. Thus, the decision on that appeal was limited to the issue of the special exception from the Intersection Standards.

On April 5, 1999, the Hearing Examiner vacated the grant of the special exception and remanded the application "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." *Findings, Conclusions & Decision on Appeal of Remand, No. OHE 98-1 (1999)*. The Applicant subsequently submitted a Revised Supplemental Traffic Study to the City of Kenmore. The City reviewed the traffic study and, after additional correspondence with the Applicant, decided to reinstate the CSDP. The City issued a Notice of Decision on May 26, 2000. The Notice states that the traffic study and additional correspondence incorporated several additional road improvements and mitigating measures in the vicinity of the intersection of Lakepointe Way NE and 68th Avenue NE. Those improvements and mitigating measures are set forth in the Notice of Decision. The Notice also contains the following finding and decision:

The City of Kenmore finds that the Lakepointe project is now in full compliance with all applicable regulations and standards, which is the standard under which this project is vested. With this finding, the Commercial Site Development Permit has, in effect, been reinstated and Lakepointe is authorized to proceed in accordance with their approved permits, subject to the execution of a revised Transportation Mitigation Agreement with the City of Kenmore, that fully provides for the implementation of the improvements proposed in the Revised Supplemental Traffic Study and related correspondence. *Notice of Decision dated May 26, 2000.*

Dan Olsen and Bonnie Olsen, along with Lyle and Joyce Sellards and Karen McFadden, appealed the reinstatement of the CSDP on June 12, 2000. The Statement of Appeal alleged the following errors:

- A. The City erred by reinstating the CSDP before the Revised Transportation Mitigation Agreement is final.
- B. The City erred by failing to follow City notice procedures when it issued the May 26, 2000 Notice of Decision.
- C. The City erred by failing to produce data available to the City to Appellants in a timely fashion. (This issue has since been withdrawn).
- D. The City erred in accepting errors in the traffic analysis.
- E. The City erred by disregarding the Hearing Examiner's previous rulings regarding Lakepointe.

Statement of Appeal. An open record appeal hearing was held before the Hearing Examiner on August 2, 2000. Numerous pre-hearing motions and responses to those motions were filed by the parties to the appeal. The various Motions filed by the parties required the Examiner to decide the following:

1. Was the May 26, 2000 Notice of Decision final for purposes of appeal?
2. Was notice of the Notice of Decision properly given?

3. Can persons other than the original Appellant appeal the Notice of Decision?
4. Should appeal issues II-A, II-B and II-E be dismissed?

The Hearing Examiner issued a pre-hearing order on August 1, 2000, that addressed these motions as follows:

1. The Appellants asked that the appeal be stayed until the Revised Transportation Mitigation Agreement (TMA) is final. The Notice of Decision specified additional road improvements to be made by the Applicant and listed five of them. The decision of the City authorized the Applicant to proceed with the proposed project "subject to the execution of a revised Transportation Mitigation Agreement" that "fully provides" for the implementation of the additional strategies identified in the Revised Supplemental Traffic Study and related correspondence. *Notice of Decision, page 2.*

The Appellant argued that the issuance of a CSDP without a final TMA "precludes Appellants from being able to know what specific mitigation measures will be required as part of project approval." *Statement of Appeal, page 1.* The Hearing Examiner disagreed. The Notice of Decision on the CDSP references documents and correspondence that are available to the Appellant. The mitigation measures specified in those documents – as well as within the Notice of Decision itself – are sufficiently detailed to allow an assessment of them. They include, for example, the addition of a northbound lane at 68th Avenue NE and Bothell Way NE; a third northbound lane from the north end of the bridge to NE 175th Street; and a dedicated north turn lane for northbound 68th Avenue NE at Lakepointe Way NE. The Examiner found that these descriptions of mitigation strategies were sufficiently detailed to allow an assessment of them without the need for specific details of implementation.

The references in the Notice of Decision are *not* to mitigation strategies that are to be developed in the future. The TMA must "fully implement" the mitigation strategies specified in the Notice of Decision. This approach allows specific mitigation measures to be reviewed without the expense and delay of developing a final agreement. The Appellant can ascertain sufficient information from the Notice of Decision and related documents to determine if the required mitigation strategies will achieve the Level of Service predicted in the Notice of Decision.

- 2/3. This is an appeal of an administrative decision made by the City following a *remand* of the initial decision. The Examiner decided that Mr. Olsen is the sole Appellant involved in this appeal. There is no allegation that the initial Notice of Decision failed to comply with notice requirements. Yet, Mr. Olsen is the one person who chose to file an appeal. Others who may be interested in appealing the Notice of Decision *made on remand* have waived their right to an appeal of the administrative decision *following remand* by not participating in the initial appeal. This result is consistent with the view of the Washington Court as stated in *Prekeges v. King County*, 98 Wn. App. 275 (1999). Here, as in that case, Mr. Olsen had actual notice

of the decision and has chosen to appeal the action of the City. In *Prekeges*, the Appellant had failed to file a notice of appeal; Mr. Olsen has already done so. Because the notice by the City was sufficient to provide Mr. Olsen with an opportunity to appeal, Motion 2 is a moot point. The Examiner decided that other citizens (Lyle & Joyce Sellards and Karen McFadden) who attempted to join in Mr. Olsen's appeal cannot now, for the first time, successfully assert a right to appeal a decision made on remand.

4. The City moved that Issues II-A, II-B II-C and II-E in the Appellant's Statement of Appeal be dismissed. Issue II-A relates to whether the Notice of Decision is a final decision prior to execution of a TMA. That issue was dismissed from the appeal under the ruling on the Appellant's Motion to Stay the Proceedings (Motion number 1). Issue II-B relates to notice. That issue was dismissed from the appeal under the ruling on the Appellant's Motion to Stay the Proceedings (Motion number 1). Issue II-C relates to production of documents and was withdrawn by the Appellant. Issue II-E relates to compliance with the Hearing Examiner's ruling that remanded the decision to the City "for a review of transportation demand strategies that could be applied to bring the project into compliance with intersection standards..." *Decision of the Hearing Examiner, April 5, 1999*. The City has completed its review. The issue before the Examiner, as identified by the Appellant, is whether there are errors in that traffic impact analysis. This is issue II-D in the Statement of Appeal. That is the sole issue before the Hearing Examiner in this appeal.

EXHIBITS & TESTIMONY

Exhibits and testimony relied upon in this decision are from three hearing dates: November 19, 1998; March 10, 1999; and August 2, 2000. The Exhibit list consists of all Exhibits admitted at the two previous hearings, those Exhibits agreed on by the parties, and those Exhibits admitted at the August 2nd hearing. They are listed below by hearing date in the order that they were entered into the record. The Exhibits are further subdivided into File Exhibits (those submitted in advance of the hearing), Hearing Exhibits (those submitted at the hearing) and Post Hearing Exhibits (those submitted following the hearing). The Exhibits remain numbered in the order they were entered into the record, to ensure that the Exhibit list is documented in accordance with the record.

November 19, 1998 Exhibits

File Exhibits:

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

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).

Hearing Exhibits:

The Hearing Examiner also considered the following Exhibits admitted during the open-record hearing on November 19, 1998:

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

Post Hearing Exhibits:

These exhibits were not presented during the open-record hearing and the other parties were not given an opportunity to review them or object to their admission. Thus, the Examiner did not admit these exhibits.² These were:

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 submitted during the hearing.

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.

March 10, 1999 Exhibits

Hearing Exhibits:

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 submitted during the hearing on March 10th:

- 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;

¹ 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 submitted during the hearing.

- 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.

August 2, 2000 Exhibits

Hearing Exhibits:

Pursuant to the agreement of the parties, the record of the November 19, 1998 and the March 10, 1999 hearings are incorporated into the record of the appeal heard by the Examiner on August 2, 2000. In addition, the Examiner considered the following exhibits submitted during the hearing on August 2, 2000:

City Exhibits:

- Exhibit 1: Preliminary Supplemental Lakepointe Traffic Analysis dated July 20, 1999 and transmittal memorandum dated July 20, 1999;
- Exhibit 2: Supplemental Traffic Analysis dated September 20, 1999, and transmittal memoranda dated October 7, 1999 and September 20, 1999;
- Exhibit 3: BWR memorandum dated October 14, 1999 regarding the September 20, 1999 Supplemental Traffic Analysis;
- Exhibit 4: Letter to Dan Olsen transmitting Revised Traffic Study October 27, 1999;
- Exhibit 5: Memo from Dan Olsen requesting access to the City of Kenmore file on the Lakepointe Development, dated October 29, 1999;
- Exhibit 6: Letter from Bob Sokol, City of Kenmore, dated November 3, 1999, in response to Dan Olsen letter of October 29, 1999;

- Exhibit 7: Memorandum to Jack McCullough et al., Lakepointe Project, regarding the Lakepointe Revised Traffic Study dated November 19, 1999;
- Exhibit 8: Memorandum to Jim Summers, Lakepointe Project, from Jeff Schramm, The Transpo Group, dated December 21, 1999, responding to City of Kenmore letter of November 19, 1999;
- Exhibit 9: Revised Supplemental Traffic Analysis dated December 21, 1999 and transmittal letter dated December 23, 1999;
- Exhibit 10: Letter to Jim Summers, Lakepointe Project, dated December 23, 1999 identifying additional information needed by the City;
- Exhibit 11: Letter to Jack McCullough, Lakepointe Project, dated January 12, 2000 outlining modifications that must be made to the draft Revised Supplemental Traffic Study dated December 21, 1999;
- Exhibit 12: Memorandum from Jack McCullough, Lakepointe Project, regarding the Revised Traffic Study, dated January 13, 2000;
- Exhibit 13: E-mail from Gregg Dohrn, BWR, to Jack McCullough, Lakepointe Project, transmitting a BWR memorandum from Ron Loewen, BWR, dated January 23, 2000, outlining additional concerns;
- Exhibit 14: Letter from Gregg Dohrn, BWR, to Dan Olsen, dated February 19, 2000, transmitting the updated Revised Supplemental Traffic Analysis dated February 4, 2000 and transmittal letter dated February 9, 2000;
- Exhibit 15: Memorandum and e-mail from Jeff Schramm, The Transpo Group, dated February 29, 2000, responding to Ron Loewen's BWR memo of January 23, 2000;
- Exhibit 16: Letter dated March 14, 2000 to Dan Olsen from Bob Sokol, City of Kenmore, regarding a public records request for the Lakepointe Development;
- Exhibit 17: E-mail from Jeff Schramm, The Transpo Group, to Ron Loewen, BWR, dated March 25, 2000;
- Exhibit 18: Memorandum from Ron Loewen, BWR, to Gregg Dohrn, BWR, dated April 27, 2000, regarding updated, Revised Supplemental Traffic Study;

Legal Counsel

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

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

FINDINGS

1. A Final Supplemental Environmental Impact Statement (FSEIS) was issued for the Lakepointe development. The FSEIS includes information on the potential adverse impacts associated with the development proposal and possible mitigation of those impacts. The impacts identified include increased traffic volumes and reduced levels of service at several intersections impacted by the proposed project. The study recognizes that the intersection of the proposed Lakepointe Way NE and 68th Avenue NE will operate at LOS F unless mitigation strategies are implemented. *November 19, 1998, City Exhibit 7*. Subsequent analyses by the Applicant and the City identified mitigation measures intended to raise the level of service to LOS E or better. These analyses relied upon traffic data identified in the FSEIS. *See, for example August 2, 2000 City Exhibits 1, 2, 8, 9, 14 & 21*. The environmental review documents, including the FSEIS, were not appealed. The statements of fact contained in those documents are not at issue in this appeal.
2. The Applicant (Lakepointe) completed a Revised Supplemental Traffic Study dated February 4, 2000, authored by The Transpo Group. *August 2, 2000 City Exhibit 14*. The analysis is based on infrastructure improvements and system modifications anticipated by the City and mitigation of traffic impacts proposed by Lakepointe. The Transpo Group used Transyt 7F software to analyze traffic impacts from the project proposal on the intersection of Lakepointe Way NE and 68th Avenue NE and the effect of the proposed mitigation of those impacts. The updated traffic study concludes that the 68th and Lakepointe Way intersection will operate at LOS E or better after the project is fully built and the mitigation measures are fully implemented. Specifically, the document concludes that "the Lakepointe project's impacts can be feasibly mitigated with physical improvements to the subject intersection to provide LOS E or better conditions during the 2005 PM peak hour" and that the proposed mitigation for the intersection "would result in LOS C (23 seconds delay) in the PM peak hour with the Lakepointe project." *August 2, 2000 City Exhibit 14*.
3. In the Notice of Decision dated May 26, 2000, Bob Sokol, the Community Development Director of the City of Kenmore determined that, with the additional mitigation measures proposed by Lakepointe, "the intersection of Lakepointe Way NE and 68th Avenue NE would operate on the average at a Level of Service E or better." The City also determined that "the Lakepointe project is now in full

compliance with all applicable regulations and standards...". *August 2, 2000 City Exhibit 33.*

4. The City retained consultant group Bucher, Willis & Ratcliff (BWR) to review the work done by The Transpo Group. BWR reviewed the Revised Supplemental Traffic Study dated February 4, 2000 and the Transyt 7F File that Transpo used in that study. *August 2, 2000 City Exhibits 17 & 18.* BWR concluded that the assumptions made by Transpo are reasonable and that the analysis of the information and conclusions reached are appropriate. As a result, BWR concurred with the conclusion reached in The Transpo Group study that the intersection as a whole will function at Level of Service E or better during the AM and PM peak hours, and possible as high as Level of Service C. *August 2, 2000 City Exhibit 21.*
5. The Transyt 7F model is a tool that can assist in evaluating how traffic may operate in the future by providing relative comparisons between future conditions with and without the Lakepointe development. The model used in the analyses of the impact of the Lakepointe development was developed by The Transpo Group based on input from King County and the Washington Department of Transportation (WSDOT). The methodology of Transyt 7F focuses on potential differences between analysis scenarios and not the numerical values produced by the mode. Transyt 7F provides system wide measures to evaluate how the total study area roadway might operate. The model was calibrated to 1993 conditions and then used to evaluate conditions in 2005 with and without the proposed development. Specific roadway assumptions were made regarding likely changes in the roadway system planned by King County and WSDOT. The model initially used input from recent WSDOT analyses of the SR522 corridor, but was adjusted to reflect saturation flows based on field studies at the intersection of 68th Avenue NE and SR 522. Both King County and WSDOT reviewed the initial analyses of the model. The model was then revised based upon additional field studies conducted in 1994 including delay studies at 68th Avenue NE and saturation flow rate studies at SR 522/68th Avenue NE and SR 522/61st Avenue NE. These field studies were used to test the reliability of the output of the Transyt 7F methodology and to calibrate it for an analysis of specific scenarios at specific intersections. It was determined that the Transyt 7F model estimates were reliable based on field observations and that, in most situations, the model predicted slower travel speeds than were actually observed. An independent consultant retained by the City also determined that the conclusions reached by The Transpo Group were reasonable and reliable. *Testimony of Mr. Schramm; August 2, 2000, Applicant Exhibit 3.*
6. Robert Bernstein, the Appellant's expert witness, conducted an independent analysis of the impact of the project proposal on traffic at the proposed 68th and Lakepointe Way intersection and concluded that a "Realistic Left Turn Headway", using a "Realistic Lane Utilization" would result in an LOS F for the Northbound Left Turn, the Eastbound Left Turn and the intersection as a whole. Mr. Bernstein used Synchro software to arrive at these conclusions. Mr. Bernstein testified that the Synchro

methodology comes to a different conclusion than the Transyt 7F methodology because the Synchro model uses different "internal assumptions". He also stated that he used different inputs for both saturation flow and lane balance that, in his opinion, are more realistic than those used by The Transpo Group. He also took issue with the numbers in the FSEIS related to growth rate, trip reduction and pass-by percentage.⁴ He testified that the Synchro methodology is easier to use and produces better printouts. He testified, however, that the Transyt 7F software is a "commendable" methodology that examines the entire road system and not just individual intersections and that the software package is "often used" by traffic engineers. *Testimony of Robert Bernstein; August 2, 2000 Appellants Exhibit 16.*

CONCLUSIONS

Jurisdiction

The Hearings Examiner of the City of Kenmore has jurisdiction to hear and decide this appeal pursuant to Chapter 36.70B of the Revised Code of Washington, Interlocal Agreement between the City and the County, Ordinance No. 98-0027 of the City of Kenmore, Chapters 20.24 21A.42 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.

Guiding Legal Principles Used in Review

Resolution of this appeal requires the Hearing Examiner to apply legal principles and conduct legal analysis in the following areas:

- (1) Interpretation of an ordinance to determine if the required LOS standard must be met by each movement through an intersection or by the intersection as a whole;
- (2) Review of alternative methodologies used to predict whether the LOS standard is met.

The guiding principles include those of appropriate deference to agency decision making and appropriate review of competing methodologies within the context of an appeal.

Agency Deference

In Washington Land Use law an agency's determination is presumed correct and is accorded substantial weight. *Van Sant v. The City of Everett*, 69 Wn. App. 641 (1993). The burden is upon the challenging party to prove incorrectness as it is presumed the agency has acted legally and properly. Thus, it is appropriate for a reviewing body to apply the arbitrary and capricious standard when reviewing a governmental determination. Under the arbitrary and capricious standard, the reviewing body "... does

⁴ The Hearing Examiner recognizes that the experts differ in their views of the adequacy of the data used in the FSEIS. However, those numbers cannot now be altered in the analysis of adequacy of mitigation measures because the Appellant did not challenge the environmental review documents at the time they were issued. The review by the Hearing Examiner is limited to whether the City erred in its acceptance of The Transpo Group analysis of the impact of mitigation measures on the level of service at the subject intersection.

not make an independent assessment, but determines whether the evidence presented adequately supports the actions of the governmental body." *Bitter Lake Partnership, et al. v. The City of Seattle*, 72 Wn. App. 467, 476 (1994).

This standard of review has been formulated into a well-established test for determining whether agency action on land use matters is arbitrary or capricious. "Arbitrary and capricious" action is defined as:

willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action. Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing (body) may believe it to be erroneous.

King Cty. v. Washington State Boundary Review Brd., 122 Wn.2d 648, 680 (1993), quoting *Abbenhaus v. Yakima*, 89 Wn.2d 855 858-59 (1978).

Review of Methodologies

In this appeal, the Hearing Examiner must determine if the City relied upon an appropriate methodology to determine that intersection standards will be met. The Hearing Examiner is *not* called upon to resolve issues of fact regarding the traffic studies; those facts were established during the environmental review of the Lakepointe proposal. Thus facts such as the total number of vehicle trips and AM and PM peak hour trips are not at issue before the Examiner. Thus, the primary role of the Hearing Examiner is to decide whether the City reasonably relied upon the methodology used to analyze that data.

The Washington Court provides some guidance to the Examiner in this role. In *Peterson v. Schoonover*, 42 Wn.2d 621 (1953), the Court was faced with a dispute among experts based on undisputed facts. The Court stated that "the issue is whether certain expert opinions, based upon existing facts, should be give greater weight, and can be said to preponderate over the expert opinion based upon the same facts" and noted that its duty is to "study the exhibits, examine the figures, and consider the opinions of the experts" to determine if the City decision was properly made. *Supra*, at 622.

Similarly, the Hearing Examiner in this case must review all exhibits and consider the opinions of two expert witnesses. The Examiner is not concerned with the veracity and credibility of the expert witnesses; both are recognized experts in their profession. Rather, the Examiner must determine if the City reasonably relied upon the Transyt 7F methodology. If the critique of that methodology offered by the Appellant's expert demonstrates that a different result should have been reached, the Examiner must conclude that the City erred in its reliance upon that methodology. If the Appellant's critique does not meet that burden, the Examiner must conclude that the City did not err. See, e.g., *Petition of City of Seattle, to Acquire Certain Property in Moore's Five Acre Tracts*, 49 Wn.2d 247 (1956)

Conclusions Based on Findings

1. **The City reasonably relied upon the results of the Transyt 7F methodology to conclude that the intersection of Lakepointe Way NE and 68th Avenue NE will operate at LOS E or better. The City's decision was not arbitrary and capricious.** The issues raised in this appeal do not challenge the data identified in the FSEIS that was subsequently used in the analyses of mitigation measures. What is at issue is the methodology used by the Applicant - and accepted by the City - that concluded the level of service would be raised to LOS E or better at the intersection of Lakepointe Way NE and 68th Avenue NE. The City relies upon expert Jeff Schramm and the Transyt 7F methodology to conclude that the mitigation measures will meet the required standards. The Appellant argues through expert Robert Bernstein that the Synchro methodology more accurately predicts a level of service that fails to meet the required standard. *Ref., Testimony of Mr. Bernstein & Mr. Schramm; Arguments of Jennifer Dold, Mike Kenyon and Jack McCollough.* The City reasonably relied upon the outcome of the Transyt 7F methodology to conclude that the intersection standards would be met or exceeded if the mitigation measures are implemented concurrently with the proposed development. *Findings of Fact No. 4 & 5.*

The Hearing Examiner need not recount all expert witness testimony in reaching this conclusion. Both experts are credible and relied upon facts that were not in dispute. However, it is noted that the Transyt 7F methodology was reviewed by both King County and WSDOT and calibrated based on actual field observations of the intersections that would be impacted by the Lakepointe development. The Synchro model did not receive the same calibration. In addition, it is noted that the output from the Synchro model has not undergone the close scrutiny of the output from the Transyt 7F model. In part, this is because the Synchro analysis, as presented by the Appellant's expert, does not reveal all its assumptions (such as saturation flow rate). Finally, the Appellant's expert admitted that the Transyt 7F methodology is a commendable approach to analysis of traffic impacts. Although the Examiner recognizes there are limitations in every traffic impact model, it cannot be concluded that the Transyt 7F methodology and the analysis of the intersection of Lakepointe Way NE and 68th Avenue NE was relied upon by the City in error. *See, Discussion of Agency Deference and Review of Methodologies and Cases Cited Therein; Finding of Fact No. 5.*

2. **The City's interpretation of the applicable King County ordinance is a reasonable interpretation that must be given deference by the Hearing Examiner.** The Appellant argues that if any movement within an intersection would operate at LOS F, the applicable standard would not be met and the appeal must be granted. The Appellant's expert provided an analysis based on the Synchro methodology that showed several movements would operate at LOS F. The expert relied upon by the City provided an analysis based on Transyt 7F that concludes the intersection as a whole would operate at LOS E or better. The City also interpreted

the ordinance in question to require that the standard be met by the intersection as a whole and not by each movement. This interpretation is significant because, if the ordinance requires each movement to satisfy the intersection standards, the intersection in question may fail to meet the standard and, thus, be identified as a "significant adverse impact" under the ordinance.

KCC 14.60 defines Significant Adverse Impacts "as any traffic condition directly caused by proposed development that would reasonably result in one or more of the following conditions...:

A. "A roadway intersection that provides access to a proposed development, and that will function at a level of service worse than "E"..."

B. "A roadway intersection or approach lane where the director determines that a hazard to safety could reasonably result."

The issue is whether the word "intersection" should include LOS conclusions based on individual movements, or if only the LOS of the intersection as a whole should be evaluated. In Section B, the ordinance specifically mentions that the "intersection or approach lane" should be analyzed. This language is not used in Section A. If the King County Council intended to include LOS analysis of independent movements within an intersection, they would have prescribed so in Section A of the ordinance as was done in Section B.

Relying upon that interpretation of the ordinance (adopted by the City), Mr. Bob Sokol, Community Development Director of Kenmore, determined that the Lakepointe Project would be in compliance with the King County Intersection Standards by relying upon the outcome of Transyt 7F methodology that concluded the entire intersection of 68th/Lakepointe Way would operate at LOS E or better. Thus, the director charged with administering the code interpreted the word "intersection" in Section A to mean the intersection as a whole. The Hearing Examiner must give this interpretation some deference even if he believes it to be erroneous. See, *Discussion of Agency Deference and Cases Cited Therein; Findings of Fact No. 3.*

DECISION

Based on the preceding Findings and Conclusions, the appeal is DENIED.

Decided this 31st day of August 2000.


THEODORE PAUL HUNTER