

December 22, 1997

**OFFICE OF THE HEARING EXAMINER  
KING COUNTY, WASHINGTON**

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**REPORT AND DECISION ON APPEAL OF MITIGATED PAYMENT SYSTEM FEE**

SUBJECT: King County Department of Transportation,  
Transportation Planning Division File No. **B97R0318**

**MARK S. ZEMBRUSKI**

Mitigated Payment System Fee Appeal

Location: 23604 Northeast 183rd

Appellant: Mark Zembruski, *represented by:* **Maxine Keesling**  
15241 NE 153<sup>rd</sup> Street, Woodinville, WA 98072

*and by*

Randy Newell, 19937 NE 154<sup>th</sup> Street  
Woodinville, WA 98072

Department: KC Department of Transportation, *represented by:*  
**Sue Osterhoudt**, Supervising Transportation Planner  
821 Second Avenue, Seattle, WA 98104

**SUMMARY OF RECOMMENDATIONS:**

Department's Preliminary:	Deny the appeal
Department's Final:	Deny the appeal
Examiner's Decision:	Deny the appeal

**PRELIMINARY MATTERS:**

Appeal submitted:	September 29, 1997
Notice of appeal received by Examiner:	October 3, 1997

**EXAMINER PROCEEDINGS:**

Pre-Hearing Conference:	October 17, 1997
Hearing Opened:	November 21, 1997; <i>sua sponte</i> , the Examiner further continued the hearing record open until receipt of written summary argument from both parties, whereupon the hearing record closed. <sup>1</sup>
Hearing Closed:	December 12, 1997

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<sup>1</sup> The Examiner's office received summary argument from neither party until December 12, 1997.

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

ISSUES ADDRESSED:

- Fee calculation
- “Benefit” calculation

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. General Information:

Appellant: Mark Zembruski, *represented by: Maxine Keesling*  
 15241 NE 153<sup>rd</sup> Street, Woodinville, WA 98072  
*and by*  
 Randy Newell, 19937 NE 154<sup>th</sup> Street  
 Woodinville, WA 98072  
 Location: 23604 Northeast 183<sup>rd</sup> Street  
 MPS Zone: 383  
 Road Impact MPS Fee: \$4029.00

2. Mark Zembruski, represented by Maxine Keesling, appeals the mitigated payment system (MPS) fee applied to the Zembruski property at 23604 Northeast 183<sup>rd</sup> Street in association with his building permit application. His appeal raises the issues which are addressed in finding nos. 4 through 11, below.

3. The MPS is established by KCC 14.65 and KCC.14.75 with the intention of providing a fair and consistent means of collecting fees which are proportionally based on the impacts of new development on certain growth related roadway projects. Fees are assessed based on the number of new trips the development is likely to put on the County road system and the impact of those trips on certain King County road projects which make up the MPS project list. The MPS project list is a sub-set of the Transportation Needs Report (TNR) project list which is the transportation capital facilities element of the King County Comprehensive Plan. *The MPS project list includes only those projects which add capacity to the roadway system* and that can be funded in a multi-year time frame of approximately 20 years.

For residential development, MPS fees are assessed based on a fee schedule adopted by the King County Council which is in effect at the time of development permit application. Fees for residential development vary by small geographic areas called MPS zones. The fees are proportional to the impact of the average residence within a given MPS zone. The amount of the MPS fee varies from zone to zone based on differences in average traffic patterns for residences in each zone and the location and cost of MPS projects. If paid at the time of building permit issuance, these are taken from the fee schedule in effect at the time of building permit application. In this case, the amount of the MPS fee assessed Appellant Zembruski is \$4,029, the same amount which would have been charged for any single-family residence being built at the time in MPS zone 383 (in which his proposed development is located). This fee represents the average impacts of new trips to and from one new residence within zone 383 during the p.m. peak hour on MPS listed projects.

4. KCC 14.65.040.B establishes the criteria for MPS fee appeal review. It requires that the King County Department of Transportation (hereinafter, the “Department” or “KCDOT”) have [a] committed an error in either calculating the development’s proportionate share or in granting credit for benefit factors; or [b] based the final decision on incorrect data; or [c] gave inadequate consideration to alternative data or mitigation submitted to the Department.

5. RCW 82.02.050.2.a requires impact fees be imposed only for system improvements that are reasonably related to new development. The KCDOT trip generation, distribution and assessment model calculates the extent of vehicle usage expected from a given development to roadways throughout the affected area. Sometimes that area can be quite far reaching, though the impact on a far away system improvement may be slight. The Department calculates MPS fees using well established travel demand forecasting and assignment methodology to identify average travel patterns of all land use development to and from each MPS service area or zone. The fee for MPS zone 383 was developed using travel patterns derived from the Department’s MPS computer model.

The Appellant questions the validity of the MPS computer model because the base year for modeling was 1987, this concern is addressed further in finding nos. 5 and 7, below.

MPS fees cannot be used to correct an “existing deficiency.” In making this finding, it should be noted that RCW 82.02 does not use the term “existing deficiency.” Rather, RCW 82.02.050.3.a requires that impact fees “shall only be imposed for system improvements that are reasonably related to the new development . . .” In addition, RCW 82.020.060.1.a requires that, when determining proportionate share, the county formula or other method of calculating impact fees shall incorporate, among other things, “the cost of public facilities necessitated by new development.”

Further, KCC 14.75.030.d requires that impact fees “shall not be used to correct existing deficiencies.” Existing deficiencies were determined using the King County travel demand forecasting and assignment model. Many projects are placed on the TNR having no existing deficiency. However, by the time the system improvements are actually constructed, the demand projection at the time the system improvement was placed on the TNR has been realized (in whatever degree) thereby creating a “present deficiency.” *Thus, the Appellant refuses to accept the Department’s conclusion that the actualization of the projected growth generated demand comes from projects such as the Zembruski development as they have occurred over the years.* The Appellant argues that the definition of “existing deficiency” for each roadway segment or intersection should be updated, probably annually. *If that were the case, the Department correctly observes, then no impact fees would ever be calculated or imposed because “existing deficiencies” are exempt.* “Existing deficiencies” as the Appellant uses the term, are inevitable in a system which raises its project budget before construction, and which identifies target projects up to 20 years before construction.

6. The MPS fees will be limited to impacts created by the proposed development. The mathematical trip distribution and impact calculation computer model used by KCDOT calculates fees which are limited only to projected demand resulting from the proposed project. For instance, in this Zembruski case, 2.85 per cent of the trip generation from MPS zone 383 is expected to load TIP 200582 (TNR #2039.00), better known as Northeast 195<sup>th</sup> Street, resulting in a residential fee distribution of \$114.89. The hearing record contains no evidence that these calculations are in error. The Appellant argues that the model base is too old, provides no direct evidence that the base data used is actually erroneous. And, in fact, as indicated in finding no. 5 it is necessary to use the 1987 base in order to determine existing deficiency consistent with KCC 14.75.

7. The proposed residential development probably will effect/exacerbate roadway conditions as they are experienced by the individual driver today. However, neither this Appellant, nor any other residential development applicant, is assessed an MPS fee based upon that impact. MPS fees are not based upon 1997 roadway intersection deficiencies. Projects are selected (typically long before the current year) on the basis of projected capacity shortfall. Even as that projection comes true, the basis for the assessment was established long before the currently experienced level of service problems. RCW 82.02 leaves the definition of “existing deficiencies” to the county comprehensive planning process. KCDOT planners have defined “existing deficiency” as having a “volume to capacity ration of greater than 1.0 as shown on the King County travel model, which is calibrated to the latest year for which the base data are available.” *At the time the six MPS projects which are responsible for over 95% of the MPS fee for zone 383 were added to the MPS system, the base year for modeling was 1987. At that time, none of these projects had a volume to capacity ratio greater than 1.0. Any deficiency in the capacity of these roadways does not meet the County’s definition of existing deficiency. Any such capacity deficiency is, instead, the product of new developments, such as Mr. Zembruski’s, for which MPS fees are being collected, presently and through preceding years.*

8. A. RCW 82.02.060 states:

The local ordinance by which impact fees are imposed:

. . . (6) shall establish one or more reasonable service areas within which it shall calculate and impose impact fees for various land use categories per unit of development; . . .

B. The King County MPS service areas or zones were developed based on these criteria (exhibit no. 4):

- Consistency with regional zone systems established by the Puget Sound Regional Council and census tract boundaries (to facilitate data transfer and comparison among jurisdictions);
- Reasonable homogeneity of land use with a zone to minimize intra-zonal trips and data loss due to aggregation;
- Greater density of zones, using smaller zone areas, in more heavily developed areas and larger zone areas in rural areas; and,
- Areas separated by natural boundaries, such as freeways, railroads and rivers in separate zones.

These criteria are consistent with travel modeling principles or industry standards according to the Department. The Appellant provides no evidence to the contrary.

9. King County Planning Policy T-17 requires, in part:

Impact fees shall not be assessed to cure that portion of the improvement attributed to correcting “existing deficiencies.”

This language is similar to the guideline established by KCC 14.75.030. The Appellant disagrees with the Department's definition and use of the term "existing deficiency."

10. The MPS zones used by the Department in its fee calculations are the very same zones that were used in the development of the 1994 King County Comprehensive Plan (which, in turn, was developed to implement the 1994 amended County-wide planning policies and the State Growth Management Act). The fees may be applied to projects which do not comply with KCCP policies 110 and 111, which limit rural road improvements to those necessary for safety and maintenance. However, the hearing record contains no clear and explicit evidence that the County intends to violate or circumvent these policies. Further, these rural roads are not on appeal here.

Implementing the 1994 Comprehensive Plan, the Council "down-zoned" some properties in rural designated areas, limiting lots to 5 acres or larger in locations where greater development density was once permitted. The Appellant argues that this "down-zoning" skews the fee calculations in an unfair manner.

11. The Appellant has not provided alternative trip generation data for this review.

#### CONCLUSIONS:

1. This hearing record contains no evidence that the Department erred in calculating Zembruski's proportionate share of the fee load carried by MPS zone 383.
2. The record contains no evidence that the Department erred in calculating or granting credit for "benefit factors."
3. The record contains no evidence that the Department's final decision was based upon incorrect data.
4. No alternative data, fee calculation, or mitigation has been submitted or offered in this hearing record.
5. The appeal rests principally upon the Appellant's novel argument that, when the passage of time demonstrates that the Department's growth-generated demand projections are accurate, the name should be changed to "existing deficiency." Such a name change, of course, would then make the properties who contribute to this (previously projected growth-generated demand) exempt from fee payments! There is nothing in the statute or local ordinance which suggests that anyone ever intended for the MPS calculation and assessment system to work this way. For this reason, and for the reasons indicated in the preceding conclusions, which are based upon KCC 14.75 appeal criteria. The appeal will be denied.

#### DECISION:

The appeal is DENIED.

ORDERED this 22<sup>nd</sup> day of December, 1997.

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R. S. Titus, Deputy  
King County Hearing Examiner

TRANSMITTED the 22<sup>nd</sup> day of December, 1997, via mail, to the parties and interested persons indicated on Attachment A.

The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision.

MINUTES OF THE NOVEMBER 21, 1997 PUBLIC HEARING ON KING COUNTY DEPARTMENT OF TRANSPORTATION FILE NO. B97R0318 – ZEMBRUSKI MITIGATED PAYMENT SYSTEM APPEAL:

R. S. Titus was the Hearing Examiner in this matter. Participating at the hearing were Maxine Keesling, Randy Newell, Sue Osterhoudt/KCDOT, and Sean Wellander/KCDOT.

On November 21, 1997 the following exhibits were offered and entered into the hearing record:

Exhibit No. 1	[ KCDOT exhibit A ]	KCDOT, Transportation Planning Division, <i>Traffic Mitigation Payment System Information Brochure</i>
Exhibit No. 2	[ KCDOT exhibit B ]	KCDOT Mitigated Payment System(MPS) fee schedule, effective October 4, 1993
Exhibit No. 3	[ KCDOT exhibit C ]	MPS project list, effective October 4, 1993
Exhibit No. 4	[ KCDOT exhibit D ]	Memo, dated November 6, 1997, from Sean Wellander/KCDOT, to file, re: King County Travel Demand Forecasting Model Zone Development Methodology
Exhibit No. 5	[ KCDOT exhibit E ]	Projects impacted by traffic to and from zone 383, and revenue collected from January 1991 – August 1997
Exhibit No. 6	[ KCDOT exhibit F ]	Appeal documents from Mr. Zembruski: <ul style="list-style-type: none"> <li>• Appeal Form, dated February 19, 1997</li> <li>• Detailed explanation of appeal</li> <li>• Fee Invoice</li> </ul>
Exhibit No. 7	[ KCDOT exhibit G ]	Appeal form, dated March 11, 1997, (final decision, subject to appeal process)
Exhibit No. 8	[ KCDOT exhibit H ]	Graph/map showing trip distribution to and from zone 383
Exhibit No. 9	[ KCDOT exhibit I ]	Bar graph showing MPS chargeable capacity
Exhibit No. 10	[ KCDOT exhibit J ]	Chart showing MPS existing conditions and projects impacted by traffic to and from zone 383
Exhibit No. 11	[ KCDOT exhibit K ]	Map showing 1993 King County MPS Fees
Exhibit No. 12	[ KCDOT exhibit L ]	Letter, dated January 30, 1992, from KCDOT (Public Works), to Maxine Keesling, re: MPS fees, with attachments
Exhibit No. 13	[ KCDOT exhibit M ]	Map showing Major MPS Projects near zone 383
Exhibit No. 14		KCDOT, Transportation Planning Division, staff report to the KC Hearing Examiner for the November 21, 1997 public appeal hearing of B97R0318/Mark Zembruski
Exhibit No. 15	[ Appellant's exhibits Z1 through Z16]	
	[ Z-1 ]	Detailed explanation of appeal
	[ Z-2 ]	10-17-96 testimony to Transportation Committee of KC council
	[ Z-3 ]	1-14-92 letter to Director of KC Public Works
	[ Z-4 ]	11-2-97 request letter to Sue Osterhoudt/KCDOT
	[ Z-5 ]	10-24-97 request letter to Sue Osterhoudt/KCDOT, with attachment
	[ Z-6 ]	Copied County Policies
	[ Z-7 ]	Excerpts from 1991 Road MPS brochure
	[ Z-8 ]	Excerpts from current brochure

- [ Z-9 ] Matrix, data from 10-10-95 WA St. Senate Oper. legislative committee hearing
  - [ Z-10 ] 1993 KC Residential MPS fee schedule w/ service district map
  - [ Z-11 ] December 1994 Potential Capacity Projects Identified
  - [ Z-12 ] Excerpts from KCC Comm. For Unicorp. Areas staff report, 10-21-97
  - [ Z-13 ] Copies of newspaper clippings – Redmond, Woodinville
  - [ Z-14 ] Copy of newspaper clipping – Avondale Road
  - [ Z-15 ] Composite of 1993 Road Benefit Projects Assigned to Pertinent Areas
  - [ Z-16 ] Map
- Exhibit No. 16 Written copy of Maxine Keesling's verbal testimony at public hearing 11-21-97
- Exhibit No. 17 Letter, dated March 1, 1997, from KC Road Engineer Louis Haff, to Maxine Keesling, re: MPS for Fure short plat

RST:vam  
Attachment  
Misc/b97/b97r0318 rpt