

January 28, 1998

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

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**RECONSIDERATION**

**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:	Appeal denied
Examiner's Reconsideration Decision:	Appeal denied

**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; *sua sponti*, 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

On December 29, 1997, Maxine Keesling, representing Appellant Zembruski, requested reconsideration of the Examiner's December 22, 1997 Report and Decision, whereupon the Examiner reopened the matter in order to obtain written response from the Department of Transportation. On January 9, 1998, the Examiner further extended the opportunity for Department of Transportation response due to respondent representative Sue Osterhoudt's illness. Upon receipt of the Department's response at 2:28 p.m., January 16, 1998, the record in this matter finally closed.

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

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

**FINDINGS:**

1. On December 29, 1997, Maxine Keesling, representing Appellant Zembruski, requested reconsideration of the Examiner's December 22, 1997 Report and Decision, whereupon the Examiner reopened the matter in order to obtain written response from the Department of Transportation. On January 9, 1998, the Examiner further extended the opportunity for Department of Transportation response due to respondent representative Sue Osterhoudt's illness. Upon receipt of the Department's response at 2:28 p.m., January 16, 1998, the record in this matter finally closed.

The Zembruski request for reconsideration contains six issues. They are discussed separately in each of the following six findings.

2. **Existing Deficiencies.** The Appellant questions whether there is evidence that King County has identified "existing deficiencies" for roadways and intersections; and, further, whether these deficiencies will be eliminated in a reasonable time (as required by statute).

The Department responds that, although RCW 82.02 uses the term "existing deficiencies", it leaves the definition and calculation methodology to local governments. The Department further argues that it uses sound methods in its existing deficiency calculation and determination procedures.

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

3. **Census Tracts.** Appellant Zembruski asks whether census tracts are adequate to meet the RCW 82.02.090(8) requirement that service areas shall be designed on the basis of “sound planning and engineering principles.”

The Department responds that census tracts are accepted and used industry-wide by land use and transportation planners and engineers. The Department further notes that technical adjustments can be, and are, made to tract boundaries based upon field checks, geographic data and “other appropriate engineering information.”

4. **Computer Modeling.** Appellant Zembruski expresses concern that the Examiner has ignored the Department’s “extreme reliance on computer modeling.” As proof, the Appellant observes that there is substantial variation of fees among neighboring MPS zones.

The Department responds that the fee variations observed by the Appellant are due to differences in travel patterns and project costs. Both as standard procedure, and in response to this appeal, the Department has re-examined (“double checked”) the analysis and calibration contained in the computer modeling and have reached the same conclusions as those which were first appealed.

5. **Project Pooling.** RCW 82.02 requires that project fees be expended or encumbered for a “permissible use” within six years of receipt from an approved-project applicant. The Appellant argues against the practice of pooling to one project from various projects in order to “circumvent” the six year refund requirement. The Appellant alleges that this is a “misappropriation” and that it occurs even though roadway projects for which developers paid fees have been canceled.

The Department responds that the statute allows pooling of fees, a common and approved practice among the various jurisdictions which impose fees pursuant to RCW 82.02.

6. **Woodinville-Duvall Road.** The Appellant complains that the Examiner’s December 22, 1997 Report and Decision does not discuss the impact upon MPS zone 383 resulting from the elimination of the Woodinville-Duvall Road project elimination. The Appellant believes that the fee was \$4,029 both before and after elimination of that project.

The Department responds, and the hearing record shows, that the fee for MPS zone 383 from January 3, 1992 to October 4, 1993 was \$6,293. On October 4, 1993, upon elimination of the Woodinville-Duvall highway from the project needs list, the fee was adjusted to \$4,029 and remains such.

7. **Rural Road Levy Sufficiency.** The Appellant expresses concern that fees collected within unincorporated rural areas are occasionally spent inside corporate city limits, suggesting to the Appellant that rural area road levies are sufficient for improving and maintaining rural roads without further assessing impact fees upon projects within rural areas. In making this argument, the Appellant observes that King County’s GMA-implementing policies do not allow capacity expansions of roads within rural areas.

The Department replies that rural dollars are not spent only in rural areas because dollars follow the transportation impacts created by projects. There is no mechanism whereby rural residents are or could be prohibited, voluntarily or otherwise, from driving their vehicles on urban or incorporated streets. Consequently, they do exactly that. Hence, when rural traffic-generating projects affect urban roads, they are assessed appropriate impact fees.

8. **Adopted Findings.** Findings nos. 1 through 11, as contained on pages 2 through 5 of the Examiner's December 27, 1997 Report and Decision, are accurate. They are adopted and incorporated here by this reference.

#### CONCLUSIONS:

1. **Conclusions Adopted.** Conclusions nos. 1 through 5, as stated on page 5 of the Examiner's December 22, 1997 Report and Decision, are adopted and incorporated here.

2. **Burden of Proof.** It is apparently important in this case to remind the Appellant that the burden of proof belongs to the Appellant. The mere posing of questions, concerns and issues, however well framed, does not meet this burden. For the most part, the Appellant's entire case rests upon such questions, concerns and issues, and lacks the production of evidence to support the Appellant's position. This conclusion applies to each of the areas of concern identified in findings nos. 2 through 7, above.

3. **Existing Deficiencies.** The questions raised by the Appellant that are described in finding no. 2 ("Existing Deficiencies") provides a good example of the problem with this appeal that is described in conclusion no. 2, preceding. Proposing the question "Is there evidence that . . . ?" does not carry the burden of proof. Further, the Department correctly responds that the governing statute leaves the definition and calculation methodology to local jurisdictions. There is no evidence in this hearing record that the Department of Transportation has used unsound methods, or has otherwise miscarried its authority with respect to the identification and calculation of "existing deficiencies."

4. **Census Tracts; Computer Modeling.** There is no evidence in this hearing record that the Department has improperly, or inappropriately, or inadequately discharged its responsibility to assign service areas which are based upon "sound planning or engineering principles." Certainly, the Appellant's identification of fee variability among neighboring service areas provides no evidence to support the Appellant's position here. Nor does it undermine what the Appellant describes as the Department's "extreme reliance on computer modeling." The hearing record is comprised of lengthy discussions of the Department's calculation methods and provides no engineering or planning information or analysis which contradicts the Department's conclusions. The Department's responses to the Appellant's concerns regarding service area definition and computer modeling are logical, believable, consistent with industry practice, and, most importantly, consistent with ordinance and statutory requirements.

5. **Project Pooling.** The Appellant suggests that, through the Department's project fund pooling procedures, it has failed to refund monies due to project proponents who were once assessed for the subsequently canceled projects. Rather, the Appellant suggests, because of pooling to an alternative higher priority project, the Department has continued to assess project proponents for discontinued projects.

Having reviewed RCW 82.02.050 and --.060, RCW 36.70A.070, WAC 365-195--850 and KCC 14.75.110, I can find no authorization for use of project pooling in this manner. In fact these statutes, regulations and ordinances may be interpreted to prohibit the inclusion of discontinued roadway projects in MPS fee assessments. For instance:

A. WAC 365-195--850(2)(b) requires that the assessment not exceed a "proportionate share of the costs of system improvements that are *reasonably related to the new development.*" Further, WAC 365-195--850 mandates that impact fees shall be used for system improvements which "will reasonably benefit the new development."

B. KCC 14.75.110.G mandates the Department to pool MPS fees “whenever necessary to insure that fees are expended or encumbered for a permissible use within six years of receipt.” However, KCC 14.75.110 does not authorize the retention of assessed fees in a project fund pool which are related to a canceled project.

C. RCW 36.78.070 provides no authorization for retaining canceled project funding in any fund pool. Nor does RCW 82.02.060. RCW 82.02.050.4 limits the collection and expenditure of impact fees to those public facilities which are addressed by a capital facilities plan element of a comprehensive land use plan. Obviously, if a project has been dropped from such a plan, the fees can not be spent. They can not be transferred to a fund pool. They must be refunded to the contributor(s) of those funds.

All of this having been said, it must be further noted that this hearing record contains no evidence that the Department has collected impact fees for canceled projects. Nor is there any evidence that the Department has failed to refund any impact fees assessed for canceled projects. The Appellant has discussed the Woodinville-Duvall highway as such a project. However, the evidence reviewed above (see particularly finding no. 6) indicates that the Department has not assessed, not pooled, and not kept any canceled project funds. If there is any evidence to the contrary, it has not been brought to this hearing record. Consequently, the appeal should be denied on this basis also.

**6. Woodinville-Duvall Road; Rural Road Levy Sufficiency.** The hearing record supports the Department’s position regarding the effect of deleting Woodinville-Duvall Road from the MPS project list. The answer to the Appellant’s concern about allocating rural impact fees to non-rural areas is obvious, elementary, and fundamental. See finding no. 7, above, and testimony in the record regarding the distribution of project impacts. Recall from the evidence and testimony that, for instance, perhaps once every three months, a vehicle residentially based in the Woodinville vicinity statistically may be expected to pass through the Maple Valley area. The hearing record contains no evidence that the Department erred in its analysis or calculations regarding such trip distribution conclusions. Once again, the expression of concern or the asking of questions can not be accepted as proof sufficient to meet the Appellant’s burden.

DECISION:

For the reasons indicated in the above findings and conclusions:

- A. The request for reconsideration is DENIED.
- B. The appeal is DENIED.

ORDERED this 28<sup>th</sup> day of January, 1998.

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R. S. Titus, Deputy  
King County Hearing Examiner

TRANSMITTED the 28<sup>th</sup> day of January, 1998, via mail, to the parties and interested persons indicated on the attached list.

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 this RECONSIDERED 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