December 23, 2004

OFFICE OF THE HEARING EXAMINER
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REPORT AND DECISION

SUBJECT: Department of Transportation File Nos. **B01L0618 & B01L0467**

POLYGON NORTHWEST COMPANY
Appeal of MPS Fees

Location: Intersection of SR 169 and 152nd Avenue Southeast

Appellants: Polygon Northwest Company,
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And

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SUMMARY OF DECISION/RECOMMENDATION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Appeal granted

EXAMINER PROCEEDINGS:

Hearing Opened:	November 23, 2004
Hearing Closed:	November 23, 2004

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.

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

FINDINGS:

1. Polygon Northwest Company has filed a timely appeal of the King County Road Services Division's final determination of credit and reimbursement due for the Mitigation Payment System (MPS) fees paid for the Aqua Barn project under building permits B01L0618 and B01L0467. A July 8, 2004, final determination issued by the Road Services Division determined that Polygon was entitled to $33,150 in credits and reimbursements against a total MPS fee of $941,514.60. Polygon contends that the total of credits and reimbursements due should be the sum of $337,066 that it expended on its share of a signal improvement costing $488,502 installed at the intersection of SR 169 and 152nd Avenue Southeast as part of the Elliott Bridge Capital Improvement Project no. 401288.

2. The essential facts are not in dispute and are recited within a stipulation of facts that appears in the record as exhibit no. 1. A mitigated determination of non-significance was issued for the Aqua Barn rezone on July 28, 2000, and imposed the following condition on the proposal:

> "The proponent shall design and install a traffic control signal at the State Route 169/152nd Avenue Southeast intersection. If the King County bridge and roadway realignment project (# 400588) is still being considered, the signal shall be designed and constructed to facilitate the future north leg of the intersection."

3. It is undisputed that the Elliott Bridge CIP project was on the County's MPS list in July 2000 when the MDNS was issued, and it has remained on the CIP list ever since. It is also undisputed that the $488,502 expended jointly by Polygon and the New Life Church on signal construction at the SR 169/152nd Avenue Southeast intersection provided a facility that is a component of the Elliott Bridge CIP project. Polygon Northwest did not appeal the July 28, 2000, MDNS, and a rezone approval incorporating the MDNS conditions was approved by the King County Council in November 2000.

4. The building permits at issue within this appeal comprise the residential component of the Aqua Barn mixed use proposal. The Aqua Barn properties lie southeast of the intersection of SR 169/152nd Avenue Southeast and possess no other public road access connections. The Aqua Barn traffic impact analysis dated October 8, 1999, identifies a current level of service "F" for the SR 169/152nd Avenue Southeast northbound left-turn movement, with the intersection projected to improve to level of service C after installation of the CIP signal. The attorney for Polygon Northwest estimated that the residential portion of the project would add approximately 177 p.m. peak hour trips to the SR 169/152nd Avenue Southeast intersection. Without the signal mitigation requirement trips exiting the Aqua Barn site would contribute to a worsening of the level of service "F" northbound left-turn movement.

5. The original appeal filed in this proceeding also included appeals concerning nearby properties owned by the Aqua Barn Ranch and the New Life Church. The parties stipulated that, assuming no later timely amendments to the regulatory framework, the Aqua Barn Ranch and New Life Church of Renton appeals should be dismissed from this proceeding subject to a commitment from the Department of Transportation to apply to the Aqua Barn and New Life Church credit and reimbursement requests the same benefit factor determination formula regarding Elliott Bridge CIP impact fees adjudicated within a final decision for the instant appeal.

CONCLUSIONS:

1. The King County traffic Mitigation Payment System imposes impact fees authorized by RCW Chapter 82.02 and are subject to its regulatory terms and requirements. RCW 82.02.020 prohibits the imposition of taxes, fees or charges on residential construction by local governments except in the manner authorized by RCW 82.02.050 – 090. RCW 82.02.050 allows the county to impose impact fees only for system improvements that do not exceed a proportionate share of the costs of such improvements reasonably related to the new development, and only for system improvements that will benefit the new development. RCW 82.02.060(3) requires the local jurisdiction to "provide a credit for the value of any dedication of land for, improvement to, or new construction of any system improvements provided by the developer, to facilities that are identified in the capital facilities plan and that are required by the county, city, or town as a condition of approving the development activity."

2. KCC 14.75.050 provides the framework for the calculation of MPS fees, including the determination of benefit factors which supply the credit mechanism required by RCW 82.02.060(3). Pursuant to these provisions, the Road Services Division is instructed to reduce the proportionate share charge to any developer under the MPS fee schedule by applying the benefit factors listed at KCC 14.75.050.E. Subsection E.3 lists as a benefit factor "the value of any dedication of land for, improvement to or new construction of any system improvement provided by the developer to transportation facilities that are identified in the MPS project list and that are required by the county as a condition of approving the development activity."

3. The essential rationale for the Road Services Division's unwillingness to credit Polygon Northwest with the entire $337,066 paid for construction of the Elliott Bridge CIP traffic signal

at SR 169/152nd Avenue Southeast inheres in its perception of the relationship between the Aqua Barn SEPA condition and the MPS fee obligation. The Division's brief summarizes this argument as follows:

> "Polygon is trying to lump its SEPA conditions together with its MPS fees and plead that it is paying too much. That is not the way SEPA and GMA interrelate. Each SEPA condition must be related to and roughly proportionate to a development's impacts to be mitigated by that condition. Each MPS fee imposed for an impact on an MPS project must be related to and roughly proportionate to a developments impact on that MPS project. Those requirements have been satisfied. There is not requirement for a general, cumulative consideration of the SEPA conditions and the MPS fees, as Polygon claims."

4. While the Division's position has a certain logic to it, it is not an approach that has been adopted within the impact fee regulatory scheme. First, the credit language found in both RCW 82.02.060 and KCC 14.75.050 makes no distinction between system improvements constructed pursuant to SEPA requirements as opposed to those mandated by any other type of conditioning authority. Thus there is no basis for concluding that projects constructed pursuant to SEPA conditions are in any way ineligible to receive an impact fee credit under KCC 14.75.050.

   Second, and more critically, the impact fee provisions of RCW 82.02.090 draw a bright line between "system improvements" and "project improvements." System improvements are defined at RCW 82.02.090(9) as "public facilities that are included in the capital facilities plan and are designed to provide service to service areas within the community at large, in contrast to project improvements." RCW 82.02.090(6) defines project improvements to be site improvements and facilities "designed to provided services for a particular development project and that are necessary for the use and convenience of the occupants or users of the project, and are not system improvements." This subsection then concludes with the following statement: "No improvement or facility included in a capital facilities plan approved by the governing body of the county, city, or town shall be considered a project improvement."

5. The fundamental error in the Division's position is that it assumes that inclusion of a system improvement in a SEPA condition in some way transforms that improvement in whole or in part into a project improvement. But that is not the case. While it may be assumed that a developer that constructs a system improvement which is necessary for its project to go forward may derive a greater immediate benefit from that improvement than other more remote properties, such fact is not accorded special recognition in the legislative scheme. Once a system improvement is formally included on the County's CIP list, no applicant can be required to pay more than a proportionate share fee towards its construction. In this framework a SEPA condition only operates to affect construction timing. If a developer does not want to wait for public construction of the CIP facility to occur, such entity has the option of accelerating the process by advancing the money necessary to construct the facility and obtaining a later credit or reimbursement for the amount of the cost that exceeds its proportionate share obligation.

   Or to state the matter in the Division's terms, the combined effect of RCW 82.02.060(3) and .090 is precisely to "lump together" MPS fee payments and the substantive exercise of SEPA

authority in those circumstances where the objective is developer construction of a system improvement designated on the County's MPS project list.

6. The foregoing conclusion is not altered by the fact that one can conjure a circumstance where a system improvement could revert back to project improvement status. For example, had the Road Services Division after issuance of the Aqua Barn MDNS accorded due recognition to the fact that the new Elliott Bridge will cross a significant salmon spawning area and decided to abandon its CIP project before Polygon could construct its signal, the signal would have reverted from system improvement to project improvement status. Polygon might then have been stuck with the entire signal cost under the SEPA condition as a project improvement necessary to mitigate a LOS "F" traffic impact. But that's not what happened. The Elliott Bridge CIP went forward, and the signal was constructed by Polygon as a component facility of the CIP. In this context, Polygon's failure to appeal the SEPA MDNS condition for the signal carries no major legal consequence because it retained the option of seeking credit or reimbursement under KCC 14.75.050.

7. Turning now to some of the more specific issues raised within the appeal, the Division is probably correct in its assertion that its partial credit determination avoids violating the various statutory and ordinance requirements against charging a developer twice for the same system improvement. Polygon and its partners paid 100% of the signal cost at construction, but with the partial credit for the signal cost no portion of Polygon's MPS fee can rationally be assigned to that specific facility. The double-charge analysis, however, is not dispositive of the appeal.

8. The benefit factor determination required by KCC 14.75.050.E.3 is based on "the value of any dedication of land for improvement to or new construction of any system improvements provided by the developer." There is nothing in this language that implies that the developer should receive less than full credit for the amount of the facility construction cost. Moreover, use of this ordinary meaning of the term "value" is supported by the repeated references within both the statute and ordinance to the need to achieve a proportionate share assessment and by constitutional "rough proportionality" requirements. The ordinance mechanism for advancing construction costs subject to later fee credits also parallels the pooling provisions of KCC 14.75.110, which allow MPS revenues from multiple sources to be assigned to priority projects so that the most efficient use of available funds is achieved. The full "value" interpretation is further supported by the language contained at KCC 14.75.050.G, which authorizes reimbursement from other developer fees if the credit due "exceeds the amount of the developer's MPS fee." As with the term "value," the language refers to the total amount of the MPS fee, not simply a fraction of it.

9. KCC 14.75.050.G governs the calculation of the amount of MPS fees from other developers that shall be reimbursed to Polygon if the construction credit owed exceeds the MPS fee. The reimbursement is to be taken from fees collected from other developers "for the same MPS project." The MPS project at issue here is the entire Elliott Bridge CIP, not just the signal portion. There is no basis in the ordinance language for an interpretation that limits the reimbursement to the fraction of the MPS project cost attributable to the traffic signal. We note, however, that this regulatory language could probably be amended consistent with the Division's position to limit the reimbursement obligation to the specific system improvement constructed without violating RCW Chapter 82.02. This is because the statute only requires a credit, not a

reimbursement from other developers' fees, and a reimbursement limitation formulated on the basis of the actual improvement costs as a percentage of the total CIP cost would not necessarily deny recovery of a proportionate share so much as delay its complete execution.

10. Finally, the Division's decision to cut off reimbursements from other developers' fees on the vesting date of the second Polygon building permit application is an arbitrary action unauthorized by the terms of the ordinance. In the absence of language within KCC 14.75.050.G specifying such a limitation, no basis exists for its imposition. Since a developer-constructed facility of the type implemented by Polygon will occur almost inevitably at an early stage of a CIP project, arbitrarily cutting off reimbursement based on the building permit application date could deny a proportionate share recovery to a developer otherwise entitled to it.

11. Polygon is entitled to a credit against MPS fees paid for its building permits in the amount of $337,066, which represents the portion of the SR 169/152nd Avenue Southeast signal that it funded. If such credit is insufficient to compensate Polygon for its costs, Polygon shall be paid an additional reimbursement from other developers' MPS fees for the Elliott Bridge CIP project for the amount remaining.

DECISION:

The appeal is GRANTED.

ORDER:

1. The Road Services Division shall grant Polygon Northwest a credit of $337,066 against its total MPS fees paid under building permits B01L0618 and B01L0467.

2. If the credit disbursed by the Road Services Division under condition no. 1 is less than $337,066, Polygon shall be paid additional reimbursements from MPS fees contributed by other developers for the Elliott Bridge CIP for the remaining amount due. A reimbursement payment and accounting to Polygon shall be made annually by the Division each January for such fee payments received during the preceding calendar year until the total amount due has been liquidated.

3. The payments made by the Road Services Division to Polygon shall include interest calculated as of the date of such credit or reimbursement.

ORDERED this 23rd day of December, 2004.

_____

Stafford L. Smith
King County Hearing Examiner

TRANSMITTED this 23rd day of December, 2004, to the parties and interested persons of record:

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NOTICE OF RIGHT TO APPEAL

The action of the hearing examiner on this matter shall be final and conclusive unless a proceeding for review pursuant to the Land Use Petition Act is commenced by filing a land use petition in the Superior Court for King County and serving all necessary parties within twenty-one (21) days of the issuance of this decision. The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.

MINUTES OF THE NOVEMBER 23, 2004, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. B01L0618 & B01L0467.

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing were Dennis McMahon, Richard Warren and Jeff Lee, representing the Department; and Robert Johns representing the Appellant.

The following exhibits were offered and entered into the record:

Exhibit No. 1	Stipulation of Facts with 2 attachments, received 11/09/04
Exhibit No. 2	Aqua Barn Traffic Impact Analysis from Transportation Planning & Engineering, Inc., dated October 8, 1999
Exhibit No. 3	Distribution of Impacted Projects for MPS Zone 337 adopted 12/27/99
Exhibit No. 4	Hearing Examiner’s report and decision for file no. L03P0004, dated August 10, 2004

SLS:ms
B01L0618 & B01L0467 RPT