

CONCURRENCY – AN OVERVIEW

PRESENTED BY:

DUANA KOLOUŠKOVÁ

JOHNS MONROE MITSUNAGA PLLC

1601 114th Avenue SE, Suite 110

Bellevue, WA 98004

425-467-9966

kolouskova@jmmlaw.com

Duana Koloušková is a partner at Johns Monroe Mitsunaga PLLC, which represents a variety of private clients on land use, real estate, and construction issues. Ms. Koloušková represents developers, property owners and developer/builder organizations in all phases of real estate development, including land use, environmental, municipal, construction, and real estate law. Her work includes consultation in the preparation of permit applications, negotiation with agencies, and representation at public hearings before hearing examiners, city and county councils, and other public agencies. She has also litigated numerous judicial challenges related to land use decisions in the trial and appellate courts of the State of Washington. Prior to joining Johns Monroe Mitsunaga, Ms. Koloušková was a deputy prosecuting attorney for Snohomish County in the Land Use Department of the Civil Division. Ms. Koloušková received her J.D. *cum laude* from Seattle University in 1997. She is involved in several organizations including serving on the Master Builders Association University Board of Governors.

Introduction

With the adoption of the Growth Management Act (the “GMA”), chapter 36.70A RCW, Washington State ushered in new priorities and requirements for long range land use and public facility planning for most jurisdictions in the state. A central component of GMA planning and implementation is concurrency. While the idea of evaluating concurrency was not a totally new concept nation-wide or for a couple larger jurisdictions (Seattle and Bellevue), the GMA took the idea of concurrency to a new level, that local jurisdictions and the development community are still grappling with.

Regulatory Underpinnings

Concurrency Generally

Under the GMA, concurrency as a general principle is found in GMA Goal 12.

(12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

RCW 36.70A.020.

The purpose of Goal 12 is to ensure that public facilities such as sewer, water, parks, fire, schools, and roads are in place at a level that is adequate to serve development when that development is ready for use or occupancy, in a manner that does not decrease service levels below locally established minimum standards. Implicit in Goal 12 is the concept that a local jurisdiction must first set service levels and minimum standards for public facilities and services.

Washington Administrative Code provisions loosely address concurrency, stating for public facilities other than transportation that a “comprehensive plan should designate those public facilities in addition to transportation facilities for which concurrency is required.” WAC 365-195-510. This provision supports the discretion the GMA affords to local jurisdictions to decide whether or not each jurisdiction wishes to establish concurrency review for any public facility other than transportation.

Statutory and state administrative rule guidance for concurrency related to all public facilities apart from transportation is limited to the foregoing provisions of Goal 12 and WAC 365-195-510. Transportation concurrency is separately addressed with detail under RCW 36.70A.070 and under WAC 365-195-510, and discussed below.

For any public facility or service, including transportation, a local jurisdiction must first set a level of service (“LOS”) standard. An LOS is a tool that allows the local jurisdiction to evaluate

concurrency. An LOS standard is only required for transportation; an LOS for any other facility or service is optional. RCW 36.70A.070; WAC 365-195-510. A local jurisdiction establishing an LOS, whether for transportation or another facility, has ‘broad discretion’ in determining what is adequate. *Sky Valley v. Snohomish County*, CPSGMHB Case No. 95-3-0068c (March 12, 1996).

WAC 365-195-510 acknowledges the interplay between the setting of an LOS and the other duties that local jurisdictions have under the GMA:

Levels of service should be set to reflect realistic expectations consistent with the achievement of growth aims. Setting such levels too high could, under some regulatory strategies, result in no growth. As a deliberate policy, this would be contrary to the act.

WAC 365-195-510 (3)(b).

Despite the lack of statutorily imposed duty, the Western Washington Growth Management Hearings Board has held that Goal 12 requires concurrency for those public facilities and services that a local jurisdiction expressly denotes as necessary for development. *Taxpayers for Responsible Government v. Oak Harbor*, WWGMHB Case No. 96-2-2002 (July 16, 1996). The term “necessary to support development” is not defined in the GMA and was not given a definition by the Western Board in the *Oak Harbor* case. Instead, the Western Board directed that a local jurisdiction should make a reasoned decision as to which facilities and services are necessary to support development and how to apply concurrency thereto. This case serves as a warning to local jurisdictions that they must be internally consistent in comprehensive planning: if a legislative decision is made to elevate a public facility to the level of being ‘necessary to support development’, that local jurisdiction may be taking on the responsibility of significant work to establish an LOS and concurrency measurement method.

The Central and Eastern Growth Management Hearing Boards have required that local jurisdictions “show their work” when establishing LOS’s and concurrency for facilities and services other than transportation. *Master Builders Assoc. of King and Snohomish Counties v. Sammamish*, CPSGMHB Case No. 05-3-0041 (February 21, 2006); *Miotke v. Spokane*, EWGMHB Case No. 05-1-0007 (February 14, 2006). To establish an LOS and concurrency for facilities and services other than transportation, a local jurisdiction must adopt an element or analysis in its comprehensive plan with the similar level of specificity as required for the transportation element. This analysis must include an inventory, an LOS standard, an inventory of existing deficiencies, a plan to address and resolve those existing deficiencies, and a finance plan.

Finally, a local jurisdiction must bear in mind that concurrency generally and Goal 12 must be weighed along with other GMA goals and requirements. See WAC 365-195-510 (3)(b) (discussed below).

Transportation Concurrency

Goal 12 forms the underpinning for transportation concurrency: to ensure that transportation services necessary to support development are in place by the time of occupancy or use without a decrease in the LOS standard below the locally established minimum. However, transportation concurrency is addressed in detail under RCW 36.70A.070. The purpose of transportation concurrency is to regulate the timing and location of land development based on an adopted LOS standard. RCW 36.70A.070(6); *see also Sammamish Community Council v. City of Bellevue*, 108 Wn. App. 46, 29 P.3d 728 (2001).

Each local jurisdiction planning under the GMA must include a transportation element in its comprehensive plan. RCW 36.70A.070. The transportation element must include several sub-elements summarized as follows:

- Land use assumptions
- Estimated traffic impacts to state-owned transportation facilities derived from the land use assumptions
- Facilities and service needs, including
 - inventory of air, water and ground transportation facilities;
 - level of service standards for all local arterials and transit routes, which should be regionally coordinated;
 - specific actions and requirements for making complaint any and all locally owned transportation facilities or services below the established LOS;
 - forecasts of traffic for at least 10 years; and
 - identification of state and local system needs to meet current and future demands
- Financing, including:
 - An analysis of funding capability to judge needs against resources;
 - A multi-year financing plan based on identified needs which serves as the basis for a six-year transportation program;
 - Discussion of how additional funding will be raised or land use assumptions reassessed to ensure that the LOS is met if probably funding falls short of meeting identified needs; and
 - Intergovernmental coordination efforts;
- Demand-management strategies; and
- A pedestrian and bicycle component.

RCW 36.70A.070 (6)(a).

Once the transportation element is adopted, each local jurisdiction must adopt development regulations to implement LOS and a concurrency system. These regulations must be designed as follows:

local jurisdictions must adopt and enforce ordinances which prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan, unless transportation improvements or strategies

to accommodate the impacts of development are made concurrent with the development.” RCW 36.70A.070 (6)(b). These strategies may include increased public transportation service, ride sharing programs, demand management, and other transportation systems management strategies. For the purposes of this subsection (6) "concurrent with the development" shall mean that improvements or strategies are in place at the time of development, or that a financial commitment is in place to complete the improvements or strategies within six years.

Transportation concurrency is ‘action forcing’ as “its purpose is to assure that development permits are denied unless there is concurrent provision for transportation impacts . . .” *Montlake Community Club v. Central Puget Sound Growth Management Hearings Board*, 110 Wn. App. 731, 735, 23 P.3d 57 (2002).

However, WAC 365-195-510 (3)(b) also reminds each local jurisdiction that transportation concurrency cannot be viewed in a vacuum or used deliberately to stop growth:

Levels of service should be set to reflect realistic expectations consistent with the achievement of growth aims. Setting such levels too high could, under some regulatory strategies, result in no growth. As a deliberate policy, this would be contrary to the act.

This statement serves as a reminder that local jurisdictions cannot forget the other GMA Goals in establishing a transportation concurrency system, for example, Goal 1 (urban growth), Goal 2 (reduce sprawl), Goal 7 (timely and fair permit processing), and Goal 11 (citizen participation).

Methods of Measuring LOS and Transportation Concurrency

There are no GMA criteria or requirements for how a local jurisdiction must measure and set its LOS standard. Each local jurisdiction has the discretion to determine how to measure LOS and implement concurrency. *City of Bellevue v. East Bellevue Community Municipal Corporation*, 119 Wn. App. 405, 81 P.3d 148 (2003). A jurisdiction must decide what are adequate transportation facilities, i.e. adequate LOS for the local roadway system, and adopt a method to measure that LOS.

LOS measurements can take into account components such as number of vehicle trips, delay, speed, or accident rates. The adopted LOS standard can also vary throughout a jurisdiction. The measurement of concurrency is sometimes based on a jurisdiction-wide basis, other times a jurisdiction (more often with counties) will divide its area up into transportation management areas. Other elements of measuring concurrency include establishing screen lines or looking to grouped intersections or subareas.

Most jurisdictions use an intersection method to set the LOS standards. An intersection method is “basically a measure of the degree of intersection saturation, expressed as the ratio of the peak traffic volume at the intersection to the capacity of the intersection to handle traffic.” *Sammamish Community Council v. City of Bellevue*, 108 Wn. App. 46, 50, 29 P.3d 728 (2001). Intersections are measured based on turning movements: each turning movement, for example a

vehicle turning right from A Street onto 2nd Avenue, would be measured separately from a vehicle turning left.

Most local jurisdictions also set LOS standards based on A-F (or using a corresponding numbering system) and then select a ‘grade’ at which the intersection would drop below the acceptable minimum level. Again, this ‘grade’ can vary area by area inside the local jurisdiction. For example, one intersection could be set at LOS C, meaning no more trips can be added to the intersection if they would cause the LOS to drop below C. Intersections in another area, or transportation zone, could be set at LOS E.

Other ways to measure LOS than the intersection method are also equally valid. The Western Board has reviewed and upheld using a corridor instead of intersection approach. *Progress Clark County v. Clark County*, WWGMHB 99-2-0038c (May 22, 2000). The City of Seattle has long used ‘screenline’ methodology, which is set up so that no intersection or arterial segment operates in isolation. *Montlake Community Club v. Central Puget Sound Growth Management Hearings Board*, 110 Wn. App. 731, 23 P.3d 57 (2002). The screenline method is a relative measure of traffic flow, based on larger corridors and zones. One can envision an area map that is overlain with lines drawn across several parallel arterials. Under this method, even if one arterial becomes highly congested, the screenline will not drop below the acceptable LOS, as other arterials still have capacity. The screenline method allows for greater flexibility to promote public transit and higher density; conversely, it can artificially overstate an arterial’s capacity and result in high volumes on that corridor if alternative routes are not as desirable. *Montlake*, 110 Wn. App. at 737.

Once a jurisdiction adopts its LOS standard, concurrency is then implemented on a project level. Any proposed development must generally first obtain a ‘certificate of concurrency’, often even before the applicant can submit the development application. The proposed development is translated into a number of vehicle trips and vehicle miles traveled (“VMTs”) and measured under the adopted concurrency system. If the proposed development’s traffic will not cause any measured intersection, segment or screenline (depending on the method of measurement used) to drop below the applicable, acceptable LOS, then the project is entitled to a certificate of concurrency.

Common exemptions from transportation concurrency include state highways and transportation demand management programs. Many jurisdictions also create minimum thresholds for smaller developments. This sort of exemption is common and a practical way to approach what might otherwise be a significant or unreasonable burden on both the jurisdiction and the applicant. However, it should be noted that the Western Board rejected an exemption for development that would generate less than ten p.m. peak hour trips because this exemption would result in an incomplete or inaccurate assessment of transportation levels of service. *Progress Clark County v. Clark County*, WWGMHB 99-2-0038c (May 22, 2000). Despite this holding, many jurisdictions maintain an exemption from concurrency for small developments as a necessary practicality and have not been challenged.

Uses of Transportation Concurrency in the Planning Context

Transportation concurrency is an area of long range planning under GMA where political and planning undercurrents have a direct impact on how the technical transportation LOS standards and concurrency are designed and implemented.

Local jurisdictions use transportation concurrency to accomplish a variety of objectives. Some jurisdictions use concurrency to regulate the speed or location of growth. Other jurisdictions use transportation concurrency to limit or stop growth, particularly where there is political motivation to resist the growth pressures that the GMA otherwise requires a local jurisdiction to accommodate.

On the other end of the spectrum, some jurisdictions take a more pragmatic view of concurrency and set their LOS standard such that concurrency review does not limit growth. Finally, many jurisdictions have a limited LOS standard and concurrency review due to lack of financial resources or different planning priorities.

Seattle's screenline methodology is a good example of how broad policies can affect transportation concurrency. As the *Montlake* Court discussed, even if congestion increases on an arterial, it may not make sense to expand its capacity. For example, Seattle instead "may want to shift traffic to a nearby under-used arterial, or to implement measures that will reduce travel demand – or a combination of these strategies." *Montlake Community Club v. Central Puget Sound Growth Management Hearings Board*, 110 Wn. App. 731, 736, 23 P.3d 57 (2002). The screenline method allows Seattle to recognize "the broader geographic impacts of development and travel patterns." *Id.* A screenline methodology also may be an appropriate way to implement a policy of promoting higher density: with more traffic volumes, the use of public transportation becomes both more financially feasible and more appealing to the affected public.

Select Background Board Decisions

- i. McVittie v. Snohomish County (McVittie VIII)*, CPSGMHB Case No. 01-3-0017 (January 8, 2002)

Snohomish County's Ordinance 01-040 adopted amendments to its Transportation Element consisting of amendments to the arterial circulation map, bikeway system map, and high capacity transit alignment map, and adopted additions for state-owned highways. This Ordinance also adopted LOS objectives approved by the Washington State Transportation Commission.

The Central Board found the County's adoption of LOS objectives was appropriate in this circumstance, even though such were not 'standards'. Generally, minimum LOS standards must be adopted; objectives or guidelines are insufficient. However, in this case, the Central Board agreed with the County that it could rename the State approved terminology of LOS 'standards' to LOS 'objectives'.

Under RCW 36.70A.070(6)(a) and (c), the Central Board found the County must include state LOS standards in order to monitor, evaluate and facilitate coordination between state and local

plans. The County must provide information to the state, but does not have any authority to bind the state to undertake any specific road project.

The Board dismissed the remainder of Petitioner's claims without any particular import. However, Board Member Tovar issued an interesting concurring opinion which addressed the importance of state and local coordination of transportation planning and road projects.

ii. *Bennett et al. v. City of Bellevue*, CPSGMHB Case No. 01-3-0022c (April 8, 2002)

In *Bennett*, the Central Board undertook a first impression review of exemptions from the GMA's concurrency requirements. The City of Bellevue adopted an exemption to its LOS standards for neighborhood shopping center redevelopment projects. The City's rationale was that exempting these projects would assist in neighborhood revitalization, and provide necessary goods and services. Further, the City found that these projects would actually decrease traffic by bringing attractive shopping options closer to the neighborhood.

The Central Board held that this exemption was invalid under the GMA. Without ruling on the objective, the Central Board found the mechanism the City chose to achieve the objective was fatal to the ordinance under GMA. The City may not facilitate redevelopment by carving out exemptions from LOS standards for those development permits that a concurrency ordinance is meant to govern. While the City must weigh certain goals, the Central Board found there are other GMA compliant approaches to achieve the policy, for example, reviewing and re-setting an LOS standard. The City does not have license to carve out exemptions from the GMA's concurrency requirements.

Bellevue appealed the Central Board's decision to Superior Court. *City of Bellevue v. East Bellevue Community Municipal Corporation*, 119 Wn. App. 405, 81 P.3d 148 (2003).

The Court of Appeals affirmed the Board's decision that the GMA does not allow for exemptions from compliance with LOS standards related to transportation concurrency. The Court found that transportation concurrency is just not a GMA goal under RCW 36.70A.020 but a requirement under RCW 36.70A.070. The Court noted that if a proposed development would violate the City's adopted LOS standards, the City can change the relevant LOS, modify traffic patterns or otherwise "creatively" address traffic mitigation expenses. However, "a city cannot simply exempt the proposal from compliance with traffic standards it has adopted pursuant to the GMA." *Bellevue*, 119 Wn. App. at 415.

The City removed its concurrency exemption and is in compliance with the GMA on this issue. *Bennett et al. v. City of Bellevue*, CPSGMHB Case No. 01-3-0022c, Order Finding Compliance & Rescinding Invalidity (Feb. 3, 2005).

iii. *Miotke v. Spokane County*, EWGMHB Case No. 05-1-0007 (February 14, 2006)

The Eastern Board reviewed the validity of Spokane County's Urban Growth Area expansion by over 200 acres. The Board took a detailed look at Goal 12 and held that it requires a prospective view regarding growth and capital facilities planning. The Board held that the UGA expansion failed to comply with GMA because the County did not amend its Capital Facilities Element as required under RCW 36.70A.070 and did not engage in planning for facilities with cities under RCW 36.70A.210.

iv. Master Builders Association of King and Snohomish Counties v. Sammamish, CPSGMHB Case No. 05-3-0041 (February 21, 2006)

The Master Builders Association of King and Snohomish Counties challenged the City of Sammamish' adoption of a growth phasing lottery/metering system which would have placed an annual restriction on the number of lots the City would review and approve for regular subdivision or short subdivision. The lottery would have taken effect immediately upon the expiration of a six year moratorium that the Board had previously determined did not comply with the GMA.

The Board held that the lottery/metering system failed to comply with GMA, noting in particular that the City had sufficient capacity on its roadway system to accommodate the currently forecast twenty-year population growth target without triggering a concurrency problem with any intersection under the LOS standards. The idea of 'rationing' without any relationship to actual infrastructure issues did not comply with Goal 12 and the requirement for coordinated planning and duty to accommodate urban growth.