

**RESOLUTION NO. 437A**

**A RESOLUTION OF THE EAST BELLEVUE COMMUNITY COUNCIL DISAPPROVING BELLEVUE ORDINANCE NO. 5308, WHICH IS AN ORDINANCE RELATING TO THE TRAFFIC STANDARDS CODE (TSC) AND AMENDING SECTION 2 (PART) OF THE BELLEVUE CITY CODE; CREATING AN ADDITIONAL EXEMPTION FROM THE TSC FOR NEIGHBORHOOD SHOPPING CENTERS WHICH MEET SPECIFIC CRITERIA.**

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WHEREAS, the Bellevue Planning Department received an application for a rezone for the Lake Hills Shopping Center redevelopment; and

WHEREAS, the application submitted for the Lake Hills Shopping Center did not request any rezone of property, but only to amend the language of an existing concomitant agreement; and

WHEREAS, the Bellevue Planning Department did not perform any Traffic Standards Code concurrency analysis for the Lake Hills Shopping Center rezone application (Staff Report for Lake Hills Rezone, p. 21); and

WHEREAS, the Bellevue Planning staff admits that the Lake Hills Shopping Center rezone application is dependent upon the City's adoption of an ordinance exempting the proposed development from compliance with the City's Traffic Standard's Code. Here is the staff's own statement regarding the consistency of the rezone application with the existing codes:

Because the level of traffic in MMA 9 exceeds the 1-hour standard that is applicable within that area, and may exceed the 2-hour standard due to increasing volume, future additional development of this site may not be permitted even with the proposed modification of the concomitant agreement.

(Staff Report on Lake Hills Shopping Center Rezone, No 3, p. 4.)

WHEREAS, the Bellevue responsible SEPA official issued a mitigated determination of nonsignificance (MDNS), admitting that the exemption in Ordinance 5308 "covers multiple sites within the city," but no site specific traffic analysis was performed for these sites (City's SEPA Checklist, p .11); and

WHEREAS, the East Bellevue Community Council considered Ordinance No. 5308 during a courtesy public hearings held on June 5, and July 3, 2001; and

WHEREAS, on July 6, 2001, the East Bellevue Community Council submitted written comments to the City in the form of a letter addressed to Mayor Mosher and the Bellevue City Council; and

WHEREAS, the Bellevue City Council considered Ordinance No. 5308 at a July 9, 2001 study session; and

WHEREAS, the Bellevue City Council held public hearing on Ordinance No. 5308 on July 30, 2001, and voted to approve it; and

WHEREAS, on September 5, 2001, the East Bellevue Community Council held a public hearing on Ordinance No. 5308 and voted to disapprove the Ordinance; and

WHEREAS, on September 19, 2001, the East Bellevue Community Council reviewed its written Resolution containing findings and conclusions supporting its decision to disapprove said Ordinance and Resolutions; Now, Therefore,

BE IT RESOLVED by the Community Council of the East Bellevue Community Municipal Corporation of the City of Bellevue:

Section 1. The East Bellevue Community Council makes and enters the following findings of fact:

A. **Public hearing -- notice and record.** The public hearing before the East Bellevue Community Council was convened on September 5, 2001. All required public notice of the hearing had been provided. The following evidence was introduced into the record:

1. Public hearing notice of the Community Council public hearing; and
2. Ordinance No. 5308, and all exhibits and attachments thereto, including the entire administrative record before the City Council on this Ordinance; and
3. Ordinance No. 5307, (the Lake Hills Shopping Center rezone), and all exhibits and attachments thereto, including the entire administrative record before the City Council on this Ordinance.

B. **Findings.**

1. Traffic. The traffic on 156<sup>th</sup> has already reached congested and unsafe levels. The 2000 Average Annual Weekday Traffic was 17,600 vehicles north of Main Street and 14,500 vehicles south of Main. 156<sup>th</sup> Avenue is designated as a collector arterial in the Comprehensive Plan, however, it looks more like a residential street with many direct driveway accesses from single family residences along both sides. The Draft Environmental Impact Statement for the 2001-2012 Transportation Facilities Plan issued in May, 2001 predicts that 156<sup>th</sup> Avenue NE north of Main Street will have 25-26% increases in Average Traffic Volumes, in vehicles per hour, averaged over 2 hours in the PM Peak (Table 3-1). Tables B-5 & B-6 of the same report show increases of 26-27% and 27-28% depending on the 2 hour or 1 hour standard. Hourly traffic counts for 2000 show that 156<sup>th</sup> north of Main Street has 9-11 hours of traffic volumes that exceed 1000 vehicles per hour. The same counts for 156<sup>th</sup> south of Main Street show 5 hours during the day when there are more than 1000 vehicles per hour. In a staff response to questions about the Lake Hills Shopping Center rezone, staff stated that the proposed changes to the zoning could add 1800 additional daily trips. These trips plus the 2012 forecast increases overwhelm the safety and quality of life issues for the neighborhood along 156<sup>th</sup>. No plans or examples to mitigate any of these impacts have been proposed.

2. SEPA. SEPA requires that the City complete appropriate consideration of the environmental impacts of a proposal before the City commits to a particular course of action. WAC 197-11-055(2)(c). The City has admitted that the proposed exemption to the Traffic Standards Code "covers multiple sites within the City," but "site specific [traffic] analysis has not been completed for all possible sites." (City's SEPA Checklist, p. 11.) Apparently, it is the City's plan to ignore the actual environmental impacts of any of these "multiple sites" or even the redevelopment proposal for the Lake Hills Shopping Center until a development application is submitted to the City. (Id., see also, Staff Report on the rezone for the Lake Hills Shopping Center, p. 5 ("The rezone action . . . is not subject to the Traffic Standards code. However, any new development proposed for the site will be subject to Design Review."))

In addition, the traffic impacts associated with this particular site have not been identified or addressed. On page 11, No.14(f) of the SEPA Checklist, the question is asked: "How many

vehicular trips per day would be generated by the completed project?" The City's answer is "the redevelopment of this shopping center shows an increase in p.m. peak hour trips of 122 above the existing p.m. peak hour vehicular trips."

This type of analysis is contrary to the provisions in SEPA and is inappropriate for phased environmental review (if that is how the City plans to avoid disclosure of the actual vehicular trips per day of the development or the "multiple sites within the City.") Phasing is inappropriate where:

(ii) it would merely divide a larger system into exempted fragments or avoid discussion of cumulative impacts; or (iii) it would segment and avoid present consideration of proposals and their impacts that are required to be evaluated in a single environmental document under WAC 197-11-060(3) or 197-11-305(1); . . .

WAC 197-11-060(5)(d). Furthermore, the Growth Management Act specifically directs cities to place "major emphasis on the quality of SEPA analysis at the front end of the growth management process B the local legislative phases of plan adoption and regulation adoption." WAC 365-195-760.

3. Growth Management and Equal Protection. The ordinance is vulnerable to a challenge that it violates a property owner's equal protection rights. The Equal Protection Clause of the Fourteenth Amendment provides that a state may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Constitutional Amendment XIV, Sec. 1. It requires that the states apply each law, within its scope, equally to persons similarly situated, and that any differences of application be justified by the law's purpose. Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 561-62, 64 L.Ed. 989 (1920).

According to the City Attorney, the purpose of the proposed ordinance is to give an advantage "to certain kinds of development because the overall public benefit provided by the development outweighs the possible effect on the level of congestion."

In order for a property owner to succeed in a challenge to the exemption (under the rational basis test, which is the least restrictive), he or she would only need to prove that:

The classification applies unequally to those within a class, that no real basis exists for distinguishing between classes, or that the classification bears no rational relation to the statute's purpose.

Merseal v. Department of Licensing, 99 Wn. App. 414, 419, 994 P.2d 262 (2000). Obviously, an ordinance creating an exemption for a particular development creates a classification that applies unequally to the class of development that is not exempt from the Traffic Standards Code. There is also no real basis for distinguishing between the classes of exempt and non-exempt development, given the mandate of the Growth Management Act. Under the GMA, the City is required to:

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 the development are made concurrent with the development.

RCW 36.70A.070(6)(b). The administrative regulations implementing the GMA (and RCW 36.70A.070(6)(b)) acknowledge that local governments may design a concurrency system in a variety of ways. WAC 365-195-835. None of these suggested approaches to concurrency included exemptions for "public benefit" development. *Id.* In fact, the use of exemptions is not even mentioned, probably because they would be contrary to GMA.

Assuming that the City could include exemptions in its concurrency regulations for "public benefit" development, the proposed exemption does not fit this category. Every exemption currently included in the Traffic Standards Code is a public facility, park, affordable housing or other institution operated "not for profit." The proposed exemption for "neighborhood shopping center redevelopment projects" is a profit making enterprise. According to the City Attorney, the City Council has made this exemption because it involves the "redevelopment of shopping centers." He also states that redevelopment of shopping centers presents a phenomenon allowing people to shop closer to home, thereby reducing traffic. Apparently, the City's current methodologies do not take into account the fact that "the net [traffic from this development, presumably] will be negligible or favorable." (However, it is difficult to understand how the City can claim that traffic is "negligible or favorable," because the City has not identified either the number of vehicular trips that would be generated per day by the Lake Hills redevelopment project or for any other site that would fit into this exemption. See, SEPA Checklist, No.14(f), p. 11.)

In addition, the proposed exemption bears no rational relationship to the regulation's purpose. As shown by the quote from GMA above, the purpose of the Traffic Standards Code is to comply with the GMA's mandate to prohibit development approval under certain circumstances. RCW 36.70A.070(6)(b). The State has required local governments to comply with GMA, so the City of Bellevue cannot claim that it has some independent "purpose" behind the adoption of its Traffic Standards Code (which apparently is to ensure that "public benefit" for-profit development is constructed, even though concurrency is lacking in the City's transportation facilities.)

As stated in the GMA administrative regulations, here is the purpose of concurrency regulations:

the aim of transportation planning for local jurisdictions is to achieve concurrency for transportation facilities. If concurrency for transportation facilities is not achieved, development may not be approved.

WAC 365-195-510.

'Concurrency' means that adequate public facilities are available when the impacts of development occur. This definition includes the two concepts of 'adequate public facilities' and of 'available public facilities' as defined above.

WAC 365-195-220.

'Adequate public facilities' means facilities which have the capacity to serve development without decreasing levels of service below locally established minimums.

'Available public facilities' means that facilities or services are in place or that a financial commitment is in place to provide the facilities or services within the specified time. In the case of transportation, the specified time is six years from the time of development.

Id. Nothing in the above would support the City's claim that "the City retains discretion to exempt certain kinds of development because the overall public benefit provided by the development outweighs the possible effect on the level of congestion." This is an after-the-fact argument made to sustain the existing exemptions and to justify an additional, dissimilar exemption.

It should also be noted that the definition of "neighborhood shopping center redevelopment projects," which would be exempt from the Traffic Standards Code in Ordinance 5308 is not restricted to "redevelopment" of existing shopping centers. The definition allows an exemption for certain uses (not limited to shopping centers) that are located on a site of a particular size proposed to accommodate an identified floor area ratio. Therefore, the exemption could possibly be utilized by a project that does not provide any "public benefit" at all. Here is the definition from Ordinance No. 5308:

Neighborhood shopping center redevelopment projects, defined as a project located in a Commercial Business (CB) or Neighborhood Business (NB) land use district surrounded by Residential land use districts on a site not greater than eight (8) acres in size that is proposed to accommodate a total Floor Area Ratio (FAR) not to exceed 0.6 and a mix of NB and CB uses.

4. City's adoption of exemption was arbitrary. While the process for adoption of amendments to the City's Traffic Standards Code is legislative, the City Council's discretion is not without limits. A reviewing court would determine whether or not the City's adoption of such an exemption was "arbitrary, capricious or illegal." Leavitt v. Jefferson County, 74 Wash. App. 668, 676, 875 P.2d 681 (1994).

The City Council's determination that this particular shopping center redevelopment project merits an exemption from the Traffic Standards Code is arbitrary and capricious. Absolutely no standards have been identified as guiding the Council's action. For example, if the Council believed that the Lake Hills Shopping Center project was "blighted," and warranted such an exemption, there is no definition of "blighted" or common understanding used by the Council of what provides the

desirable “public benefit.” Other private property owners will likely attempt to persuade the City Council to determine that their property is “blighted” so that they can take advantage of the enormous benefit provided by an exemption from the Traffic Standards Code. Without a definition of “blighted,” the Council’s arbitrary action will either be the beginning of additional requests for exemptions to be added to the Traffic Standards Code or lawsuits challenging the City’s refusal to adopt exemptions for other projects.

**B. Conclusions.**

1. Traffic. The City’s decision to adopt a traffic concurrency exemption, in the face of the significant traffic congestion in the area that would be created by the exemption (in the vicinity of the Lake Hills Shopping Center redevelopment project), is arbitrary and capricious. Traffic has already reached congested and unsafe levels. The exemption is inconsistent with the City’s Comprehensive Plan Policy TR-35, which requires the City to prohibit development approval if the development will cause the level of service in one or more Mobility Management Areas to fall below the adopted standard, unless demand management or other system improvements are provided to mitigate transportation impacts. The Lake Hills Shopping Center is located within Mobility Management Area 9. (Staff Report, Section C(3), p. 4.) The City is attempting to accomplish an “end-run” by adopting an ordinance exempting developments that would be prohibited by TR-35.

2. SEPA. The City’s decision to adopt this exemption to the Traffic Standards Concurrency Ordinance, without performing the SEPA analysis necessary to consider the environmental impacts in advance of development, and before the City commits to a particular course of action, violates SEPA. The City is required to place emphasis on the quality of SEPA analysis at the front end of the growth management process – the local legislative phases of plan adoption and regulation adoption. Here, the City has effectively deferred and improperly segmented environmental review so that the environmental impacts associated with this exemption and the Lake

Hills Shopping Center rezone will take place after the approvals for development have been granted, except for building permits and design review.

3. Growth Management and Equal Protection. The City's decision to create an exemption to the Traffic Concurrency Standards, which the City is required to adopt under RCW 36.70A.070(6)(b), violates GMA. The City is required to 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. RCW 36.70A.070(6)(b). This exemption violates the clear language of GMA. Furthermore, the exemption violates Equal Protection because the exemption applies unequally to those "Shopping Center Redevelopment Projects" (which are not even required to be shopping center redevelopment projects under the City's definition), no real basis exists for creating an exemption just for these "Shopping Center Redevelopment Projects," and the exemption bears no rational relationship to the purpose of RCW 36.70A.070(6)(b), which is to "achieve concurrency for transportation facilities."

4. Lack of Articulated Standards for Adoption of Exemptions. The City has not adopted any policies or standards for its decision to exempt certain types of "operated for profit" development from the Traffic Standards Code. The adoption of an exemption, which is inconsistent with the purpose of the statute and not even similar to exemptions granted in the past by the City, is arbitrary and capricious.

**C. DECISION. The East Bellevue Community Council hereby disapproves Ordinance No. 5308.**


Section 3. Pursuant to RCW 35.14.040, Ordinance 5308 shall not become effective within the area of the East Bellevue Community Municipal Corporation.



Section 4. The Clerk is hereby directed to certify the original of this Resolution, to file the same and keep the same in her office. The Clerk is further directed to distribute certified or conformed copies of this Resolution to the Bellevue City Council and Planning Department.

PASSED by a majority vote of the East Bellevue Community Council on the 5<sup>th</sup> day of September, 2001, and signed in authentication of its passage this 21<sup>st</sup> day of September, 2001.

APPROVED:

  
ACTING CHAIR, Bill Halgren

ATTEST:

By:   
CLERK

APPROVED AS TO FORM:  
OFFICE OF THE COMMUNITY  
COUNCIL ATTORNEY:

By: \_\_\_\_\_  
CAROL A. MORRIS

FILED WITH THE COMMUNITY COUNCIL CLERK: \_\_  
PASSED BY THE COMMUNITY COUNCIL: \_\_\_\_\_  
RESOLUTION NO. \_\_\_\_\_