

John C. Belcher  
Jack O. Swanson  
Chester T. Lackey  
Terrance G. Lewis  
Douglas K. Robertson

# Belcher | Swanson

LAW FIRM, PLLC

Jeffery J. Solomon  
Bradley D. Swanson  
Scot S. Swanson  
Peter R. Dworkin  
Mark A. Lackey

May 4, 2010

RECEIVED

MAY 06 2010 W L W

Whatcom County Planning Commission  
5280 Northwest Road  
Bellingham, WA 98226  
Via Email: [PDS.Planning.Commission@co.whatcom.wa.us](mailto:PDS.Planning.Commission@co.whatcom.wa.us)

Whatcom County P&DS

Re: Fire LOS Public Hearing

Dear Commissioners:

This firm represents a number of landowners within Fire District 21 and Fire District 14. On behalf of all of our clients, I thank the Planning Commission for addressing this issue head-on. Through an organized planning process at the county level, our communities can establish functional levels of service and a coordinating set of funding mechanisms to meet any actual deficiencies. Please accept these written comments on behalf of this firm's clients as follow-up to my comments at the public hearing. I do apologize for the delay in submitting the letter, but I was out of the office for a week with a flu bug.

## I. RESPONSES TO WARNER WEBB QUESTIONS.

1. **Should we (the County) establish a Level of Service for fire?** Yes. The GMA establishes that the County is the party to be setting countywide planning policies affecting Urban Growth Areas and that provide for uniform provision of urban services.<sup>1</sup> In its update to the Comprehensive Plan, the County affirmatively assumed the responsibility to establish levels of service.<sup>2</sup> The GMA recognizes that setting the level of service has a significant impact upon coordinated planning. That is why the GMA and related administrative code specifically identify that LOS should not be set so high so that "no growth results."<sup>3</sup>

In contrast, setting a level of service is not a role for fire districts. Fire Districts have no planning authority. The boundaries of the District are not limited to areas defined as rural, suburban and urban. And there are multiple fire districts in the county.

<sup>1</sup> RCW 36.70A.210 (3); WAC 365-196-415; WAC 365-196-840(3).

<sup>2</sup> Whatcom County Comprehensive Plan (Comp. Plan), Chapter 4, page 4-3.

<sup>3</sup> WAC 365-196-840(3).

Coordinated planning required by the GMA cannot be achieved if the individual fire districts attempt this planning process.

2. **Do we want an LOS for both urban and rural areas in Whatcom County?** Yes. The GMA and associated administrative codes direct that levels of service be based upon the urban vs. rural characteristics of the community.<sup>4</sup> Differentiated levels of service are required since LOS is the foundation of establishing funding mechanisms for capital facilities.

3. **Should we establish an LOS for both fire and EMS?** Yes. As we have seen, EMS is a different service addressed by different capital facilities. These services have different funding mechanisms and costs. Variations in levels of service of one (i.e., EMS) may have a much more significant impact upon required funding levels. Finally, EMS does not fit within the GMA definition of "public services," which are specifically and repeatedly limited to only fire protection and suppression.<sup>5</sup> These must be separate to reach functional data for funding and GMA compliance.

4. **What measures should we use to establish an LOS for fire and, possibly, EMS?** As set forth below in more detail, the LOS for fire protection and EMS must be based upon a "Fire Unit" per Capital calculation. This is the only method that will result in a funding mechanism applicable only to capital facilities and not operational expenses.

5. **Should we continue to let the fire districts do their own capital facilities plan?** Yes and No. The first step in developing an effective capital facilities plan (CFP) is the determination of levels of service. A CFP not based upon approved LOS is not a practical or useable document. Once an LOS is established, the respective Fire Districts are the parties that must undertake current inventory of capital facilities, identification of any existing facility deficiencies, and the budgets to meet replacement/expansion needs for these capital facilities plans. But the approval process of these capital facilities plans must be undertaken by the County for proper incorporation into the comprehensive plan and any impact fee ordinance. This will require a coordinated effort amongst the fire districts, the County and the citizens.

6. **Should Whatcom County work with the fire districts to help them collect of impact fees?** Yes and No. If there is a need to fund capital facilities, an impact fee must be adopted. Only formal impact fees provide for the proper accounting systems and reimbursement requirements. The current system of informal "voluntary" impact fees is unsupported in law and shown to not be workable.

---

<sup>4</sup> WAC 365-196-840 (3)(e).

<sup>5</sup> RCW 36.70A.030 (18); WAC 365-196-320; Whatcom County Comprehensive Plan, Chapter 4, page 4-1, 4-3. List of citations not comprehensive of all such references.

The County must be the entity that formally adopts an impact fee ordinance. Through that ordinance, the fire districts will make a request to the county for the collection of impact fees. The county, after appropriate public hearing, will adopt a capital facilities plan for each district and adopt impact fees (if needed) to be collected by the county. This must be a formal process akin to what has been adopted for school impact fees.

## II. WHAT LOS TO USE

Simply put, the level of service to be adopted must be whatever level of service currently exists in each particular community. The County cannot adopt a one size fits all LOS and/or base our LOS on some national standard. Either of these latter options would result in artificially created deficiencies and resulting impediments to proper planning.

A. LOS Community Specific: The GMA, supporting WAC and the Comprehensive Plan carry a consistent overreaching intent—planning must be done at the local level to meet the needs of each locality. The Act provides for comprehensive plans for each city in the county as well as sub-area plans for urban growth areas within unincorporated Whatcom County. Such detail is provided to allow for community specific determination of all planning goals.

Consistent with that intent, the WAC's specifically provide that levels of service differ community to community:

*The level of service standards adopted by the county or city should vary based upon the urban or rural character of the surrounding area...*<sup>6</sup>

That same administrative code specifies that the level of service is to be locally established.

The different funding mechanisms for separate fire districts require locally defined levels of service. We all know that a change in required levels of service increases/decreases anticipated capital facility and operational costs significantly. Each fire district has separate taxing authority and funding abilities. These are all determined by the voters in each fire district. Because levels of service are directly dependent upon funding, one community may demand a higher level of service and vote for higher taxes in support. Another community may elect not to increase taxes and accept a lower level of service. So voter control over the funding side of the equation can only be accommodated if the levels of service vary from community to community.

---

<sup>6</sup> Id.

B. LOS must be each Community's Existing Level: If the LOS is set for each community, that LOS must be what currently exists. First and foremost, there has been no assertion that the actual service provided by any fire district is insufficient. The CFP by Fire District 21 confirms that time to response has been improving since 2005. The voters in FD #21 must be happy with the levels of service for efforts to increase taxation to improve service were voted down. Not a response of an electorate unhappy with fire service.

Further, the GMA depends upon establishing an LOS at current achievable benchmarks. The WAC requires LOS be based upon historic levels. They further define that LOS cannot be set so high as to impede growth.<sup>7</sup> Using artificially created levels would violate such provisions.

Using anything but the existing LOS creates an artificial outcome. The best example of this is Fire District #21's CFP. As noted above, there is no outcry of deficient service. Yet instead of determining what the actual LOS was in their coverage area, the FD adopted a nationwide standard based upon response time. So the day after the CFP was approved, a huge existing deficiency was created. Yet the fire trucks and EMS vehicles were rolling faster in 2009 than in 2005. The result of using an artificial number is the creation of an alleged funding deficit. That alleged funding deficit is causing the FD to refuse to issue "will serve" letters and effectively stopping development in established UGA's.

This is exactly what the GMA and Comp. Plan are designed to avoid:

*Setting levels of service too high could, under some regulatory strategies, result in no growth. As a deliberate policy, this would be contrary to the act.<sup>8</sup>*

Such an artificial bar to development can only be avoided if actual current levels of service are adopted as the base line. Any other measure will create long term planning problems.

C. LOS Based Upon Capital Facilities Only. The entire purpose of setting levels of service is to establish funding mechanisms for *capital facilities*.<sup>9</sup> The GMA uses levels of service as the foundation for a county to establish its **capital facilities planning**. The GMA does not authorize using LOS to establish operational funding.

---

<sup>7</sup> WAC 365-196-320(1)(a).

<sup>8</sup> WAC 365-196-840(3)(c).

<sup>9</sup> RCW 36.70A.020(12); RCW 36.70A.070(3); RCW 36.70A.110(3); WAC 365-196-320(1)(e); WAC 365-196-840(3); Comp. Plan, Chp 4, page 4-2 and 3.

Further, impact fees can only be used for capital facilities:

*Impact fees may be collected and spent only for the public facilities defined in RCW 82.02.090 which are addressed by a capital facilities plan element of a comprehensive land use plan...*

Operational costs cannot be funded through impact fees.

Finally, funding operations through impact or “voluntary mitigation fees” is simply bad financial planning. The simple result would be that when growth stops, funding for operations stops. All of our funding statutes provide that operations are to be paid out of current taxes, not on the back of development.

Accordingly, LOS must be based upon a capital facilities quantification only.

D. Fire Unit per Capita is the Only Feasible LOS. Warner Webb provided a thorough background to the various measures of LOS used throughout the state. But based upon the foregoing, only one can be used.

*Response Time:* Use of response time as the measure for LOS would violate GMA/Impact Fee limitation to capital facilities. Response time is keenly dependent upon the amount of staff, the training of staff, the efficiency of allocation of resources and many other operationally based factors. As an example, imagine if wage rates increased for a FD. Without additional operational funding, the FD would have to lay off staff (responders). With fewer responders, the response time must increase. Accordingly, the established LOS would not be met because of operational problems—unrelated to availability of capital facilities and unrelated to growth. Yet the result would be to deny permits until operational funding is achieved to pay the higher wage rates to meet the LOS. A result contrary to statutory and constitutional requirements.<sup>10</sup>

*Washington Surveying & Rating Bureau:* This is a possible option. But it too is dependent upon rating of operationally related items. Maintenance programs, training levels, response time, staffing levels, etc. are all keys to the rating program that are operational, not capital facility, based items. Additionally, the mix of factors upon which the rating is based is controlled by a third party and may be changed to incorporate additionally inappropriate items. And the cost to the county/various fire districts is not known.

---

<sup>10</sup> Additionally, using response time imposes a significant administrative burden on the individual fire districts to monitor and report. Plus, the consulting fees to develop such plans are significant. Not a wise use of tax dollars.

*Fire Unit per Capita:* This is the only measure that is capital facilities based. It quantifies the fire facilities relative to the population. The particular quantification can be tailored community to community to reflect what they currently have. This can then be contrasted with the actual facilities needed to address growth:

- New fire station(s) in areas of planned growth;
- New equipment to address planned growth (ladder truck, hazardous materials capability, residential fire equipment only, etc.).

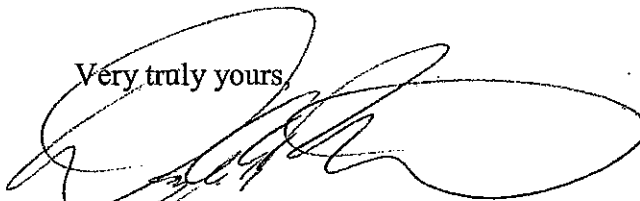
•  
With community specific needs for capital established, future development can more easily provide what is needed for their type of growth.

Importantly, using Fire Unit per Capita does not require the use of expensive third party consultants to create complex CFP's, allows easy establishment of the data sets required, and is the most practical and least (administratively) burdensome manner to track future compliance.

### III. CONCLUSION

To meet the capital facility needs that growth creates, the County must undertake the leadership in setting fire protection and EMS levels of service for each respective community. The LOS to utilize must be one based solely upon capital facilities—Fire Unit per Capita. This will allow the county to accurately establish levels of service and CFP's that can serve as the foundation for impact fees should additional funding be necessary

Very truly yours,



DOUGLAS K. ROBERTSON

Attorney at Law

DKR:kms

cc: Warner Webb  
Executive Pete Kremen

**From:** "Kathy Berg" <kathyberg@comcast.net>  
**To:** "Warner Webb" <wwebb@co.whatcom.wa.us>, "David Stalheim" <DStalhei@co.wh...>  
**CC:** "PlanComm Whatcom" <PDS\_Planning\_Commission@co.whatcom.wa.us>  
**Date:** 5/6/2010 8:04 AM  
**Subject:** Fire LOS - Impact-Mitigation Compensation

Ahhh... The perils of dealing with impact/mitigation compensation in a timely manner as required by law.

The fire district has never shown HOW it will handle the fees/compensation in a timely manner as it dribbles in. Can the district, in fact, afford the necessary matching funds to do so? Can the district comply with all the other requirements of appropriately spending/using impact/mitigation compensation in a timely manner? Shouldn't all these questions be addressed in the adopted capital facilities plan? Just wondering... -kb

May, 5, 2010

Lawsuit: Bellingham must return lot bought by developers for street project  
JARED PABEN / THE BELLINGHAM HERALD

---

BELLINGHAM - Years ago, the city required developers to pay \$75,000 and give the city a home lot so it could build a street between the 175-house Orchard Meadows project and James Street Road.

After five years, the city hadn't built the street. So in November, officials returned the money with interest, totaling \$89,468, as state law requires. But they didn't give back the land.

A lawsuit claims they have to.

The lawsuit, filed in Whatcom County Superior Court in February, says the developers incurred damages when the city unconstitutionally took land in the first place, and they're still incurring damages by the refusal to return it.

It also the city to pay damages, although no specific amount is requested. The lawsuit was filed by developers Ken Tiderington Sr. and Ken Tiderington Jr.

According to a filing by assistant city attorney Alan Marriner, the city still plans to build the street segment, and state law doesn't require returning the land. The developers lost the right to sue for the land for various reasons, Marriner wrote, including the fact that they neglected to challenge the city's requirement at the time but instead provided the money and land.

The developers' lawsuit states the developers "adamantly disagreed" with the requirement that they provide the money and land, but "the economic practicalities of the Project prohibited appealing the condition."

Orchard Meadows, which is now fully developed with homes, is located just north of Orchard Drive and east of James Street Road. The city wants a second street access to James Street Road to relieve pressure on the current access, which is through Orchard Drive and James Street Road.

The City Council in October 2001 approved having developers donate a home lot and pay the \$75,000, as a condition of the project. Developers paid the money in 2003 and provided the lot in 2004.

The city is still waiting to build the street. It would need to cut through land owned by somebody else that's between Orchard Meadows and James Street Road, and the city is waiting for that land to develop before building the street, according to court filings.

Further court dates haven't been set in the case, according to the Superior Court Clerk's Office.

---

**READ THE DOCUMENTS**

To read the lawsuit by developers Ken Tiderington Sr. and Ken Tiderington Jr., [click here](#).

The city's response to the lawsuit, [click here](#).

Reach JARED PABEN at [jared.paben@bellinghamherald.com](mailto:jared.paben@bellinghamherald.com) or call 715-2289. Read his Traffic Blog at [blogs.bellinghamherald.com/traffic](http://blogs.bellinghamherald.com/traffic).