Firehouse Lawyer

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Inside This Issue

Two Good Conferences

In October, it was my pleasure to attend two different fire service conferences—one at Ocean Shores and the other in Pasco, so I got to visit the wet side and the dry side of the State of Washington. The first conference was the Washington State Fire Marshals' Roundtable, sponsored by the Washington State Patrol's Office of the State Fire Marshal. My only involvement was to facilitate two "breakout" sessions, in which approximately 30 persons participated, on the subject of "impact fees" and other methods of attempting to obtain from developers some mitigation for the impacts on the local fire department of the ever-increasing residential and commercial developments we are experiencing in parts of the State of Washington. We discussed at length the issue of "concurrency" under the Growth Management Act, the "substantive" aspects of the State Environmental Policy Act (SEPA), and how those issues may be used in this effort to obtain some mitigating measures or conditions of approval, especially from the developers of the large projects. We also discussed, in addition to RCW 43.21C.060 (part of SEPA), the importance of RCW 58.17.110, which is the section in the subdivision law that empowers the county or city officials approving plats to protect the health, safety and welfare. It seems to us that approving development without ensuring adequate fire protection and emergency medical services ignores the mandate of that statute.

I explained, by discussing a few actual examples of large developments, how we have presented to the proper Planning Department or Hearing Examiner the detailed evidence of what impact a large development may have upon a fire district. In some cases, those letters have resulted in detailed negotiations with the developer, culminating in mitigation agreements providing for literally millions of dollars in mitigation. The participants discussed a few "success stories" or cases in which some mitigating measures or conditions of approval have been imposed after fire department concerns were expressed. Participants from Maple Valley Fire and King County Fire District 37 near Kent explained their process for developing a good case for "level of service contribution" fees. They have done a sophisticated analysis of what it takes to provide an Effective Response Force, which can be used in conjunction with development of a Capital Facilities Plan for the fire department.

This in turn ties in well with the "level of service" and response standards that must be developed for all "substantially career" fire departments in Washington, due to the passage of House Bill 1756, now codified as chapter 52.33 RCW.

It was evident from the discussion in Ocean Shores that, while there are a few successes, and a way of using SEPA and other laws does exist, we are a long way from having any state-wide consistency among planning departments or hearing examiners on this issue. Since the fire districts have had no success at all in convincing the State Legislature that fire districts should be entitled to impact fees like cities get under current law, it is readily apparent to this writer that the SEPA approach is the next best alternative.

That experience was followed almost immediately—the next week—with a presentation on the same subject by Brian Snure, Attorney, and Larry Rabel of King 37 at the Pasco Conference. That conference, the annual event of the Washington State Fire Commissioners Association, included many pertinent presentations, but the land use segment was very well attended. (This writer was simultaneously presenting on the scintillating topic of purchasing, bid laws, and the like in another room, so I could not attend.) My understanding is that many good questions were asked and excellent points made by the presenters. Since I have obtained a copy of the outline from Brian Snure, I will summarize herein some of the highlights.

Brian and Larry discussed the same basic sources of authority as above cited, for seeking mitigation for development impacts, but also laid out step by step a methodology to be used to make the case for mitigation effectively. They pointed out the necessity of working with your county or city planners to ensure you are involved in the SEPA process. You should request notice of all SEPA actions involving new construction. Under WAC 197-11-502 the district should receive notice, as an "agency with jurisdiction". Using that process, provide comments on all developments, advising the environmental official of the significant impacts to public safety attributable to the development. Then request mitigation under RCW 43.21C.060 and RCW 82.02.020. If a threshold determination, such as a DNS or an MDNS is made, appeal it as necessary, but also comment during the 14-day comment period.

What if it is a categorically exempt development from SEPA due to small size? These standards are adopted locally, and in King County for example, within the urban growth area residential developments of 20 units or less are generally exempt from SEPA review. Outside the UGA it is 8 units or less. In those situations, you can still base

arguments on the subdivision code, i.e. RCW 58.17.110, as pointed out above, according to Brian.

As mentioned above, Brian and Larry noted that SEPA, at 43.21C.060, states that governmental action may be conditioned or denied pursuant to this chapter, but such conditions or denials shall be based upon policies identified by the appropriate governmental authority. They stressed, therefore, the importance of integrating into your local comprehensive land use plan at the city or county, the right provisions to establish a policy *requiring* that developments only be approved if they are consistent with the capital facilities plan of the fire department that serves the area.

They suggest a mitigating condition such as the following: "The applicant shall negotiate and enter into a voluntary agreement with the Fire District pursuant to RCW 82.02.020. The agreement shall identify the direct impacts on the district's ability to provide and fund fire protection and emergency medical services caused by the development. The agreement shall also identify how the applicant will mitigate the impacts in a manner that protects the life safety, health and property in the District. The applicant will also collaborate with the District in the design of emergency fire service and emergency medical service access for the project." If you keep urging your environmental official to include such a condition, eventually you may register some success.

As Brian and Larry pointed out, the process may be complex and a lot of hard work, but it will pay off. You need to educate the county or city as to the issues of concern to the fire district, establish your department's performance measures and a capital facilities plan, as well as the district's "Growth Management Policy". It is best to derive a fee formula, such as Level of Service Contributions. Brian and I can both provide you with the names of consultants who can help with that work. When the work is done, developers need to be alerted in advance. Finally, you need to participate in the SEPA and planning/land use process, including hearings if necessary. You might be pleasantly surprised that some developers will work with you, as they may see this as another "cost of doing business" that they will pass on to purchasers. In some areas, developers are already used to paying either impact fees or mitigation measures like these.

Brian and Larry presented a five-step process for getting such a program started. It is not quite a turnkey operation or "one size fits all" approach, nor can it be, for every jurisdiction is a bit different. Needless to say, growth is more rampant in certain areas, and not all fire departments are totally overwhelmed by development to the exact same degree. Here is a quick outline of the five steps: Step 1: Develop policies by identifying your level of service (LOS) standards, your district's stance on development and options to support development. Comply with the GMA and other state laws such as SEPA and the subdivision law, chapter 58.17 of the RCW. Step 2: Collect your data, by analyzing response times for fire and EMS to determine your resource deployment needs. Step 3: Using actual costs or estimates, develop average fees for resources, including overhead. Step 4: Structure the fees to reflect your policies and recover costs, while also implementing a fee collection procedure. Step 5: Update the fees annually or every three years to take account of inflation.

Obviously, Step 1 is very similar to the work required to develop performance standards as required by

RCW 52.33 (HB 1756) for all "substantially career" departments. As we have said in these pages before, that law is in effect, so many of you should have done that work and be readying your first annual report, which is due in 2007. And a capital facilities plan is necessary anyway, to assess the adequacy of your facilities for the long term. Many of the districts already have a long-range plan, master plan, or strategic plan done or in the works anyway.

As you work through the planning steps, the information, policies and data you develop should be communicated to and shared with the appropriate city and county planners to educate them regarding the need for mitigation payments. Similarly, you may find it advantageous to share this information with developers in such a manner as to educate the developers of the benefits (lower insurance rates, better marketing opportunities, etc.) of working with their local fire department to provide adequate funding for fire protection and EMS in the communities they are building.

There is not sufficient room here to do justice to their entire presentation, but I think it is exciting that some departments are starting to take an active role in requesting mitigation of the impacts of new developments on their local fire departments. I am sure that Brian, Larry, or this writer would be happy to provide some direction to departments that want to begin moving in the direction suggested in this article and their presentation.

As you can see, the WFCA conference was excellent this year as always, with some seminars of interest to everyone. For me, it was also exciting to see the formation of a Lawyers Committee, which is an informal group of attorneys who represent or advise numerous fire districts in the state. Roger Ferris, with the help of attorney Frank Chmelik of Bellingham, and other lawyers from Frank's firm, got this ball rolling. Clark Snure, Brian Snure and I were all pleased with this development. I think all agree that this committee can stimulate discussion of legal issues of interest to the fire service in the State of Washington. We not only intend to communicate with each other more often informally, the Lawyers Committee will gather for a sort of "catchall" discussion of hot legal topics each year at the WFCA Conference. And of course our talks will be open to other lawyers and the general membership of WFCA; when we met this year, about 15-20 observers seemed to enjoy the discussion. As in many endeavors, two heads are better than one, and believe it or not, many lawyers can agree on how to tackle a problem. Let's face it, we are all in this together—all on the same side-- and our common goal is to support and advise our municipal clients. Thanks to Frank Chmelik, who has agreed to be the informal coordinator of this committee for the next year.

BREAKING NEWS – STATE SUPREME COURT STRIKES DOWN I-747

Surprisingly to most of us, on November 8, 2007, the State Supreme Court struck down Initiative 747, the 1% property tax revenue growth limitation, affirming the earlier trial court decision. The decision was rendered by a whisker-thin 5-4 majority, with two of the majority justices being temporary judges "on loan" from Division I of the Court of Appeals. Lest we jump too quickly to conclusions, or change tax levy strategy, it would be good to note that the initiative supporters could file a motion for reconsideration. If

they were to do so, the Court might issue a stay pending determination of that motion. And students of our Supreme Court might note that sometimes a motion to reconsider can be under advisement for quite some time. Under the Court's rules, I believe the losing party has 20 days to file such a motion. If no such motion were filed, the mandate would issue on November 28, 2007.

It was widely reported today—November 9, 2007, as this is written—that Governor Gregoire asked government agencies to refrain from tax increases, stating that she will be working with the Legislature to "thoughtfully" reinstate a property tax cap. Obviously, all she can do is ask at this point. Rumors abound that some want to call a special emergency session of the Legislature to deal with the issue now, rather than wait until January, when they will be in session anyway.

If one looks for trends in the general election results of November 6, 2007, it is not difficult to sense a strong anti-tax increase bias or anti-government spending sentiment right now. Maybe it is the economy, or the burst of the housing bubble, but voters did not give a huge vote of confidence to state and local government. Hmmm, and then virtually the next day the Supreme Court proceeds to fire another shot across the bow of the anti-tax increase proponents, by rendering this decision on I-747! I wonder what their reaction will be if your fire district now proposes to raise taxes by 6%. Could the timing be any worse? Frankly, voters have been incredibly supportive of the vast majority of my clients' lid lift proposals, including multi-year lid lifts. Yes, of course, a few have failed but that is attributable to very localized issues. In other words, the 1% limit is only a huge problem if your voters do not support the fire department and will not "lift the lid". Since most voters are wise enough to set public safety as the highest priority they have, the 1% limit is not *nearly* as big a problem for most fire districts as it is for cities and counties. I certainly agree that some limit tied to inflation would make more sense, given the ever-increasing costs of running your fire department. Let us hope that some such compromise can be reached during the upcoming session, or Tim Eyman will be back with a 1% limit proposal or worse.

My advice is to stay the course yet again, and proceed as if this decision were not rendered yet in final form (as it may well not be at this point—who knows?). Only districts that are in dire need of more revenue should even consider using this court decision, if the mandate should come down on November 28, 2007. At least, that is my opinion.

BREAKING NEWS

On November 4, 2007 the U.S. House of Representatives passed the Heroes Earnings Assistance and Relief Act (HEART) of 2007, which would exclude from taxable income -- up to $360 per year -- any payments a volunteer firefighter or EMT receives from a local government. Any property tax rebates and the like are also excluded. However, this bill has not yet been signed into law.

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