

October 26, 1998

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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REPORT AND DECISION ON APPEAL OF TRANSPORTATION CONCURRENCY DENIAL.

SUBJECT: King County Department of Transportation File No. **98-01-16-01**

**JUBILEE HOMES
IN ASSOCIATION WITH EUGENE & BETTY KLINEBURGER**
Appeal of Transportation Concurrency Decision

Location: 4702 – 231st Avenue SE

Applicant: Karnail Johal, Jubilee Homes, *represented by*
Larry Deisher
Land Planning Northwest
2208 Rucker Avenue
Everett, WA 98201
Telephone (425) 339-1302

Appellant: Eugene Klineburger, *represented by Larry Deisher and*
Joan Brown, John L. Scott
12910 Totem Lake Blvd.
Kirkland, WA 98034
Telephone (425) 823-6655

Department: **Dick Etherington**
King County Department of Transportation
821 Second Avenue MS 65
Seattle, WA 98104-1598
Telephone (206) 689-4709

SUMMARY OF RECOMMENDATIONS:

Department's Preliminary:	Deny appeal
Department's Final:	Deny appeal
Examiner:	Deny appeal

PRELIMINARY MATTERS:

Application or petition submitted:	January 16, 1998
Notice of appeal received by Examiner:	July 28, 1998
Statement of appeal received by Examiner:	August 24, 1998

EXAMINER PROCEEDINGS:

Pre-Hearing Conference: September 9, 1998
Hearing Opened: October 20, 1998, 10:50 a.m.
Hearing Closed: October 20, 1998, 1:00 p.m.

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.

ISSUES/TOPICS ADDRESSED:

- ♦ Water availability
- ♦ Traffic distribution
- ♦ Concurrency
- ♦ Traffic impacts mitigation

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

FINDINGS:

1. **Circumstances.** Jubilee Homes, a land development company, proposes a formal plat comprising 46 single-family residential building lots on an East Sammamish Plateau property owned by Eugene and Betty Klineburger. Together, Jubilee and Klineburger will be referred to in this report interchangeably as the "Applicant", or "Appellant". As a pre-application requirement, the Applicant sought transportation concurrency certification from King County Department of Transportation ("KCDOT", or the "Department"). On February 19, 1998, the Department denied the requested certification. The Applicant timely appealed that decision.
2. **Appeal Arguments.** The Appellant's arguments are these:
 - a. The subject property is located within the Sammamish Plateau Sewer and Water District service area, which has been subject to moratorium due to lack of availability of adequate water supply. Earlier this year, the District held a random drawing whereby certain development proposals received certificates of water and sewer availability while the remaining majority of development proposals did not. The Klineburger/Jubilee proposal was lucky, winning the requisite utility availability certification.

The Appellants now argue that the KCDOT transportation concurrency certifications have been granted to projects on the Plateau that are unable to move forward due to lack of water availability. Thus, the Appellants reason, there is "excess capacity" in the transportation concurrency program for the East Sammamish Plateau. It would make more sense, the Appellants argue, to grant transportation concurrency certification to a project that can actually move forward.
 - b. Two comparable development proposals in the vicinity of the Klineburger property, Cambria Division III and Uplands Division II, have been allowed to move forward through the preliminary plat review process; and, in fact, have been granted preliminary plat approval. It is the Appellants' understanding that necessary off-street improvement requirements were applied as *conditions of development approval*. The Appellant asks that this same procedure be applied to the Klineburger property.

- c. Mr. and Mrs. Klineburger are elderly. The development of this property comprises a significant portion of their retirement and estate plans. In the absence of development of their property, they stand to lose out on considerable financial gain. They ask that some rule of equity be applied to relieve their anticipated hardship.

3. **Relevant Findings.** The following findings are relevant:

- a. The operations of KCDOT regarding transportation concurrency certification are established by KCC 14.65 and KCC 14.70, incorporated in these findings by this reference.
- b. KCDOT has no authority to withdraw concurrency certification for those development proposals that have failed to obtain water supply certification. Thus, the Department has no authority to "tap into" any perceived "reservoir" of traffic capacity based upon the fact that some vicinity projects have been stalled on account of inability to obtain water availability certification.
- c. Although the Appellant has demonstrated that there is some difference between the list of transportation concurrency certifications granted by KCDOT and water availability certifications granted by Sammamish Plateau Sewer and Water District, the Appellant has not demonstrated that any of the "waterless" project proposals share the very same roadway *links* at issue. The *critical links* are these:
 - ◆ Issaquah-Fall City Road, from East Lake Sammamish Parkway to SE 56th Street;
 - ◆ Issaquah-Fall City Road, from SE 56th Street to Issaquah-Pine Lake Road; and
 - ◆ Sahalee/228th Avenue NE/SE from Interstate 90 to Issaquah-Fall City Road.

There are at least 50 other critical links which constitute the monitored corridors which are subject to transportation concurrency review on the East Sammamish Plateau.

- d. The Uplands and Cambria developments were granted traffic concurrency certifications before the East Sammamish Plateau water service moratorium became effective. Moreover, these earlier applications were reviewed pursuant to earlier critical link factors. Today, they might not be so fortunate; they might be denied both water availability and transportation concurrency. However, they have exercised their vested right in the earlier approvals.
- e. The *conditions of final plat approval* applied to Cambria were applied through the State Environmental Policy Act (SEPA) requirements, not through KCC 14.65 and --.70 transportation concurrency requirements. Further, the off-site development conditions of final approval applied to Cambria resulted from *traffic impact analysis*, not transportation concurrency analysis. Those conditions of final plat approval were necessary to assure both adequate capacity and safety through neighboring intersections and to prevent a probable significant adverse impact upon those intersections.
- f. The appeal argument -- that there must be some untapped reserve of traffic capacity on the critical links at issue -- assumes that the transportation concurrency certification program is based upon *capacity*. Such is not the case, however. The key triggering factor in transportation concurrency analysis is not trip generation (volume) but rather trip distribution. When the probable vehicle trips generated by the proposed development are expected to pass through designated critical links, the application is denied traffic

concurrency certification if the volume/capacity ratio equals 1.1, combining 30% of site peak direction trips (in this case, 8.69) to existing vehicle trip volumes on those critical links. In some cases, the volume/capacity ratio on a given critical link already exceeds the 1.1 threshold ratio before any trips from any proposed development are factored in. In this case, the volume/capacity ratios for the three links are among the higher (and therefore less acceptable) ratios of all of the critical links on the East Sammamish Plateau; 1.34, 1.25, and 1.37. See Exhibit No. 1. *However, before any of this volume/capacity analysis need be applied to any critical link, the trip distribution must show the relevance of the critical link! None of the Appellants' analysis has considered whether any of the other plats without water have similar trip distribution.* Thus, even if the Department had authority to withdraw traffic concurrency certification from proposals having water availability certification, the Appellants' analysis does not show that any plats with similar trip distribution exist that would "free up" capacity for Jubilee.

- g. The Department has no code authority to reverse or modify a concurrency certification based upon water availability.
- 4. Except as noted above, the facts and analysis contained in the Department's Preliminary Report for the October 20, 1998 public hearing are correct and are incorporated here by reference.
- 5. Any portion of any of the following conclusions which may be construed as a finding is incorporated here by reference.

CONCLUSIONS:

- 1. The argument regarding the interruption of the Klineburger retirement and estate plans is based upon a concept which some call the "petite court of equity". The Hearing Examiner has no authority or jurisdiction to function in such a manner. The Examiner's decisions must be based upon authority established by the King County Code. Unfortunately, in this case, the Examiner has no authority to base his decision on any consideration of equity.
- 2. KCC 14.65.040.A establishes the acceptable grounds for granting an appeal of a transportation concurrency denial, as follows:
 - ◆ The Department committed a technical error;
 - ◆ Alternative data or traffic mitigation plan...submitted to the Department was inadequately considered;
 - ◆ The action of the Department would substantially deprive the owner of all reasonable use of the property;
 - ◆ Conditions required by the Department for concurrency are not related to the concurrency requirement; or
 - ◆ The action of the Department was arbitrary and capricious.

The Appellants have not demonstrated that any of these criteria apply. The Appellants' equity argument approaches the third criteria ("substantially deprive the owner of all reasonable use of the property"); however, the Department testimony that a short subdivision probably could be approved for this property disallows using even that standard. If it should later be shown that neither a building permit nor a short subdivision may be approved for this property due to transportation concurrency requirements, then the appeal should be reinstated for further review by the Examiner. "All reasonable use" is a difficult standard to prove.

3. For the reasons indicated in the preceding conclusions, and in Finding Nos. 3.a through 3.g, the appeal will be denied.

DECISION:

The appeal is DENIED.

ORDERED this 26th day of October, 1998.

R. S. Titus, Deputy
King County Hearing Examiner

TRANSMITTED this 26th day of October, 1998, to the following parties and interested persons:

Joan Brown	Sarah Moore
Larry Deisher	Dick Etherington
Karnail Johal	Dennis McMahon
Eugene & Betty Klineburger	Richard Warren

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding appeals of transportation concurrency. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's 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 OCTOBER 20, 1998 PUBLIC HEARING ON DEPARTMENT OF
TRANSPORTATION FILE NO. 98-01-16-01 - JUBILEE HOMES:

R.S. Titus was the Hearing Examiner in this matter. Participating in the hearing were Dick Etherington, Richard Warren, Larry Deisher, Joan Brown, and Eugene Klineburger.

The following exhibits were offered and entered into the record:

- Exhibit No. 1 Department of Transportation Preliminary Report to the Hearing Examiner for the October 20, 1998 public hearing
- Exhibit No. 2 Concurrency Map by Sammamish Water District, with 3 pages attached, presented by Appellant
- Exhibit No. 3 Sammamish Water & Sewer District Lottery Allocation of ERUs by Specific Applicants, dated June 15, 1998
- Exhibit No. 4A Current Transportation Certificate Holders in Sammamish Plateau, by KCDOT, faxed September 24, 1998
- Exhibit No. 4B Current Transportation Certificate Holders in Sammamish Plateau, by KCDOT, with parcel number and water lottery column added)
- Exhibit No. 5 Database prepared by Appellant, comparing Exhibit Nos. 3 and 4, organized by plan areas, file number, and parcel number

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