

August 21, 2002

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

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REPORT AND DECISION

SUBJECT: Department of Transportation File No. **02-03-13-01**

MILLER & MILLER CONSTRUCTION, INC.
Concurrency Appeal

Location: 27003 SE 224th Street, Maple Valley WA

Appellant: Miller and Miller Construction, Inc., *represented by*
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King County: King County Department of Transportation,
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SUMMARY OF DECISION/RECOMMENDATION:

Department's Preliminary Recommendation:

Deny the appeal

Department's Final Recommendation:

Deny the appeal

Examiner's Decision:

Grant the appeal

EXAMINER PROCEEDINGS:

Hearing Opened:

August 15, 2002

Hearing Closed:

August 15, 2002

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.

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

FINDINGS OF FACT:

1. On April 5, 2002 the King County Road Services Division issued a notice of transportation concurrency denial to Miller & Miller Construction, Inc. regarding their proposal to subdivide into seven lots 36.28 acres located in the RA5 zone on the south side of Southeast 244th Street. The property currently has a single family residence and is situated south of SR18 and east of Maple Valley.
2. Miller & Miller Construction, Inc. initially requested that the staff provide a 90 day review period for the concurrency denial and thereafter filed a timely appeal on the basis that the Department of Transportation committed a technical error. As elaborated at the public hearing, the Appellant's contentions are that the failing TAM score for the project was the result of an incorrect determination of the centroid connectors for the concurrency zone in which the property is located, and that the capacity of 276th Avenue Southeast was underestimated due to the use of a volume delay function (VDF) type 5 classification instead of a more appropriate type 4 classification. The TAM score for concurrency zone 272 has been calculated by the Department at a value of 0.7165, which exceeds 0.69 maximum permitted for the Rural Area. The Appellant believes that if the two errors identified within its testimony were corrected, the zone 272 TAM score would decline below the 0.69 threshold and a concurrency certificate could be issued for the proposed development.
3. A public hearing was held on the concurrency appeal by the King County Hearing Examiner's Office on August 15, 2002. For purposes of this appeal the parties have agreed that the Appellant's concurrency application should be evaluated based on the property's location within zone 272 on the concurrency map generated by the May 10, 2001 model update and that the standards applicable to review of this appeal include the most recent amendments contained in Ordinance 14375. At the outset of the hearing the Department made a pre-emptive motion to strike the Appellant's witness testimony on the basis that all of the issues raised by the appeal are outside the scope of the administrative appeal authority conferred by KCC Chapter 14.70. This motion was denied, but with the understanding that the arguments made by the Department would be given full consideration in ruling on the ultimate disposition of the appeal.
4. The Appellant's argument with respect to the alleged improper use of centroid connectors for zone 272 is based on a comparison of that zone's concurrency status vis a vis the area lying directly to its north within zone 271. Both zones are bounded on the east by Southeast 276th Avenue Southeast, a minor arterial, and receive the major portion of inbound PM peak hour traffic via SR18, which angles in a southwesterly direction across the northern boundary of zone 271. For south-bound vehicles passing through the intersection of SR18 and the Issaquah-Hobart Road, the traffic model for zone 272 distributes all such traffic to 276th Avenue Southeast, while for zone 271 two-thirds of such traffic is projected to continue southwest on SR18 and exit at 244th Avenue Southeast. Because 276th Avenue Southeast has been assigned a V/C ratio of 1.23

while SR18 has a V/C ratio of 0.61, the resultant trip distribution has the effect of elevating the TAM score for zone 272, while zone 271 remains under the 0.69 TAM threshold.

As stated within the report submitted on behalf of the Appellant by TPE, Inc. (exhibit no. 4) the following consequences appear to occur:

“Clearly, the TAM score for zone 272 is severely worsened due to the inbound trips from the north on SR18 using 276th Avenue SE rather than 244th Avenue SE. . . . we believe the reason the model assigned these trips to 276th Avenue SE is the centroid connection to 276th Avenue SE at node 3339. This connection should be removed and the model rerun for this plat since there is no direct connection from the Miller parcel to 276th Avenue SE. Furthermore, it is illogical for vehicles to select a route (276th Avenue SE) that is much more congested (i.e., much higher V/C ratio) than an alternate route that is much less congested (SR18 to 244th Avenue SE).”

5. The Department’s response to the Appellant’s analysis asserts that 276th Avenue Southeast serves a significant element of local neighborhood traffic having direct or nearby access to the arterial, and that 276th Avenue Southeast provides a shorter and more direct connection to SR18 at the Issaquah-Hobart Road than does the SR18 to 244th Avenue Southeast route. Aaron Grimes of the Department’s staff calculated that the distance from the intersection of SR18 and the Issaquah-Hobart Road to the zone 272 centroid was 3.4 miles via 276th Avenue Southeast and 4.53 miles via the 244th Avenue Southeast exit. In addition, the decision to distribute the major portion of zone 271 traffic to the 244th exit route is supported by the fact that the distance from this exit to the zone 271 centroid is only about one mile. In view of these factors, it was the staff’s position that the centroid connector decisions of the Department were reasonable choices within the scope of its professional judgment.
6. The argument over the proper volume delay function to be assigned to 276th Avenue Southeast is focused on a lookup table entitled “King County Recommended Link Type Capacity Values” adopted by the Department of Transportation in 1995. This table identifies 32 road link types and differentiates among them on the basis of the number of lanes involved, whether they are located in the Urban or Rural Area, pavement type, lane width, types of intersection control, and functional elements such as shoulder width, distance between controlled intersections, turn lanes and access control. 276th Avenue Southeast south of SR18 is denominated a type 5 link within the 2001 traffic model whereas the Appellant asserts that it should have been given a type 4 rating.
7. Type 4 and 5 links are similar to the extent that they both involve two lane paved roads with traffic lane widths between 20 and 24 feet. They differ in that a type 4 link can be either Urban or Rural in designation, while the type 5 link is rated Urban only. Also, the type 4 link can have any type of intersection control while the type 5 link is designated for stop sign control. The most important distinction between the two designations, however, relates to the distance between intersection controls. The type 4 link is rated for “long distance between controlled intersections” while the type 5 link is not. The Highway Capacity Manual defines a link characterized by long distance between controlled intersections as being a roadway section that has at least two miles between intersection controls.

8. Applying these link type definitions to 276th Avenue Southeast, we find that this roadway meets the qualifications listed for a type 4 link. It is a two lane Rural road characterized by long distance between intersections. The testimony of the Appellant's consultant, Victor Bishop, was that 276th is signalized at the north end at its intersection with the Issaquah-Hobart Road and runs without signals or stop signs south to the Kent-Kangley Road, a distance somewhat greater than five miles. By way of comparison, 276th Avenue Southeast conflicts with the type 5 standards in that it is not located in the Urban area and has no stop sign controls within the stretch of road under analysis.
9. There is a significant capacity difference within the link type table between the type 4 and type 5 classifications. The type 4 link, due to its lack of intersection controls, is assigned a peak capacity in one direction of 1,240 vehicles per hour, while the type 5 link is assigned a capacity of 760 vehicles per hour. The Department's defense of its use of the type 5 classification for 276th Avenue Southeast relies primarily on the fact that, compared with the Issaquah-Hobart Road to its north, it has a minor rather than principle arterial classification and therefore serves a different transportation function. In a similar vein, the Department's August 13, 2002 letter (exhibit no. 6) argues that a VDF 4 classification "would allow up to 500 more units to be developed which is contrary to the Comprehensive Plan's policies of maintaining a rural character for this area." The letter also notes that, in the Department's most recent model update, 276th Avenue Southeast has been boosted to a capacity of 900 vehicles per hour. Under questioning the Department agreed that a roadway's vehicular capacity is unrelated to its arterial classification.

CONCLUSIONS:

1. The original Integrated Transportation Program enacted by the King County Council in 1994 under authority of Ordinance 11617 provided a broad authority for both applicants and the public to challenge the accuracy of the Department's transportation concurrency determinations. These provisions led in the late 1990s to a series of highly contentious and very technical challenges to concurrency determinations that called into question the fundamental premises underlying the County's traffic model. As a consequence of these demanding and protracted proceedings, the Department proposed to the County Council modifications to the Integrated Transportation Program that both simplified the concurrency determination and circumscribed the appeal process. These changes were embodied in Ordinance 14050 as modified by Ordinance 14375, and instituted for residential concurrency determinations a map-based system that eliminated individualized calculations. A fundamental question raised by this appeal is how far did these changes go in limiting the appeal process. It appears to be the Department's position, as manifested in its pre-emptive motion, that the appeal process as currently configured only extends to the correction of egregious clerical mistakes. That is to say, an appeal may be entertained which seeks to correct the Department's placement of a property in the wrong concurrency zone or its inability to accurately distinguish on the concurrency map a red zone from a green one. It is argued that unless the Department's error is of such a rote and mechanical character, no appeal is permitted from its decision.
2. In making its argument, the Department makes a number of important points. It first notes that for residential applications the only action required of the Department is to look at the existing concurrency map and determine if the concurrency zone in which a property is located is colored red, green or yellow. If it is red, the analysis proceeds no further, and the concurrency

application is denied. A site-specific analysis is only authorized if the concurrency application is for the review of a non-residential proposal. Second, the Department calls attention to the statement within KCC 14.70.270B that the concurrency map “is a result of the values inputted into the traffic model.” The Department also points out that under the ordinance only the County Council can change the concurrency map and that for appeals based on technical error, the Appellants may not “call into the question the underlying traffic model or its inputs” (KCC 14.70.260D). This appeal limitation is also emphasized at KCC 14.70.260F, wherein it states that “any issues relating to the adequacy of the traffic model shall be raised to the county council during the annual council adoption of the concurrency map.” Finally, the Department argues that the sanctity of its determinations is protected from serious examination by the provisions of KCC 14.70.260E, which allows that for appeals on grounds other than technical error “the department’s dependence on its professional judgment and experience will be given due deference by the hearing examiner.” In the Department’s view, these provisions collectively shield its concurrency determinations from further administrative review within the appeal process in all instances where they require the exercise of discretion or the application of intelligent analysis.

3. The Appellant, on the other hand, argues that KCC 14.70.260 enumerates a number of separate bases for appeals, that these bases are not utterly trivial in nature, and therefore that one must conclude that the County Council intended there to be some element of meaningful content to the appeal process. The appeal bases set out within the ordinance are that the Department committed a technical error, failed to adequately consider alternative data or traffic mitigations, imposed conditions unrelated to concurrency, or took action that was arbitrary and capricious. The Appellant also points out that the definition of technical error within KCC 14.70.260C(1) includes a mistake in “table and map lookups”, which specifically includes the link type capacity table upon which one of its appeal arguments is based.
4. Before moving on to a specific analysis of the appeal issues, a few general observations are in order. First, the fact that residential concurrency applications are granted or denied simply on the basis of locating the property on the concurrency map and reading the zone color does not necessarily imply that the appeal scope is also limited to that level of operation. It is entirely possible to make the concurrency certificate issuance merely an exercise in map reading, but to provide an appeal process that is more complex. And, indeed, the ordinance appeal provisions do not suggest that appellate issues are simply limited to map reading questions. Second, the fact that only the County Council can formally change the concurrency map does not preclude individual appeal decisions that vary from the mapping designation. A successful appeal does not automatically invalidate the map or amend it, although it may suggest the possibility that other appellants within the same zone also may reasonably expect a measure of success.
5. Further, the contention that all data inputs into the concurrency calculation are beyond appellate review is not supported by the language of the ordinance. Specifically, the appeal reference to “table and map lookups” identifies data that is fed into the concurrency determination calculation. The existence of this reference contradicts the proposition that all data inputs are outside the scope of the appeal process.
6. Finally, we agree with the Appellant that the provision of detailed appeal requirements within KCC 14.70.260 evidences an intent on the part of the County Council that at least some categories of meaningful appeals should be retained. Had it been the actual intent of the Council

to limit appeals to rote functions requiring little or no intelligence, it would have made more sense simply to eliminate appeals altogether. The level of detail provided within the appeal section at the very least divulges an intent that some type of meaningful challenge be entertained.

7. The key to resolving the seemingly contradictory impulses within KCC Chapter 14.70 is revealed by an analysis of the fundamental concept that underlies the concurrency determination. This is the volume to capacity (or V/C) ratio, which compares the volume of traffic demand on any roadway or in any zone with the vehicle capacity of that facility or zone. A V/C ratio of 1.0 indicates that a roadway is operating at maximum capacity and cannot be expected to absorb any more traffic. A V/C ratio greater than one indicates that the level of traffic demand exceeds capacity, and a ratio less than one demonstrates that traffic demand is less than capacity. V/C ratios are computed for individual roadway links in each direction and as a weighted average for the concurrency zone as a whole.
8. As defined at KCC 14.70.210X, the County's traffic model deals with the volume side of this ratio:

“ ‘Traffic model’ means the computer program and data used to forecast traffic volumes. . . . ”

Applying this definition, the references contained in KCC 14.70.260 prohibiting an appellate investigation into the traffic model or its inputs have the effect of precluding review of that part of the concurrency determination that is based on the computation of traffic volumes. These limitations do not apply, however, to the capacity side of the ratio.

9. Turning to the appeal issues under review, we conclude first that the portion of the appeal that challenges the correctness of the centroid connectors for concurrency zone 272 does not lie within the scope of appeals permitted by KCC 14.70.260 because it calls into question the underlying traffic model and its inputs. The existence and location of centroid connectors is embedded in the model and is a primary determinant of traffic volumes for roads within the concurrency zone. Therefore, it relates to the volume side of the V/C ratio, and its configuration or inputs cannot be challenged on appeal.
10. On the other hand, the Appellant's challenge to the Department's use of the VDF link type lookup table not only constitutes a challenge to an operation specifically listed in KCC 14.70.260C(1) as a potential technical error, but also involves a determination that relates exclusively to the computation of road capacity. As such, while it may constitute a data input to the concurrency determination, it is not a component of the traffic model as such is defined within the ordinance. Therefore, the Appellant's challenge to the Department's use of the link type lookup table is not prohibited under the ordinance.
11. There is compelling evidence within the record to demonstrate that the Department committed a technical error when it assigned to 276th Avenue Southeast within concurrency zone 272 a VDF type 5 instead of a VDF type 4. The roadway is clearly Rural and not Urban, and it is characterized by long distance between controlled intersections. Therefore, it completely meets the requirements listed in the lookup table for a type 4 link, and conflicts with the definition for a type 5 link both as to the Urban designation requirement and the long distance characteristics. The appeal therefore must be granted with respect to this issue.

DECISION:

The appeal is **GRANTED** with respect to the allegation of technical error in the use of the Department's VDF lookup table for link-type capacity values.

ORDER:

The Department shall perform a new concurrency run for the Miller & Miller Construction, Inc. site using for 276th Avenue Southeast a type 4 link capacity value. If the new concurrency run with the correct link type value produces a zonal V/C score of 0.69 or less, the Appellant shall be issued a concurrency certificate.

ORDERED this 21st day of August, 2002

Stafford L. Smith
King County Hearing Examiner

TRANSMITTED this 21st day of August, 2002, to the parties and interested persons of record:

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NOTICE OF RIGHT TO APPEAL

The action of the hearing examiner on this matter shall be final and conclusive unless a proceeding for review pursuant to the Land Use Petition Act is commenced by filing a land use petition in the Superior Court for King County and serving all necessary parties within twenty-one (21) days of the issuance of this decision.

MINUTES OF THE AUGUST 15, 2002 PUBLIC HEARING ON DEPARTMENT OF
TRANSPORTATION FILE NO. 02-03-13-01.

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing were Richard Warren, Aaron Grimes and Dennis McMahon, representing the Department; Bob Johns, representing the Appellant; and Victor H. Bishop.

The following exhibits were offered and entered into the record:

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| Exhibit No. 1 | Chapter 14.70 – Transportation Concurrency Management |
| Exhibit No. 2 | Concurrency Map adopted by the King County Council in June, 2002 |
| Exhibit No. 3 | Concurrency Map before the June, 2002 adoption by the King County Council |
| Exhibit No. 4 | Appellant Expert Report with Appeal Documents dated August 13, 2002 |
| Exhibit No. 5 | GIS Map of Area |
| Exhibit No. 6 | Letter to Vince Gaglia from Linda Dougherty dated August 13, 2002 |
| Exhibit No. 7 | Resume of Victor H. Bishop |

SLS:gao
02-03-13-01 RPT