Chalk Line
By Jay A. Goldstein
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What happens when the City caves in on its higher density comprehensive plan because the neighbors want lower density? This was the question behind the question raised by the recent ruling of the Western Washington Growth Management Hearings Board in Berschauer v. Tumwater. The subject of the appeal was Tumwater's sub-area plan and whether the City's expeditious process was inconsistent with the comp plan.

The narrow issues raised by the Board were primarily procedural, concerning "*considered application* of appropriate goals," "*did the process comply* with public participation requirements," and "*was the deliberation and decision-making process reasoned*." The final question was whether Tumwater's comp plan fell within the discretion granted the decision-maker.

In a nutshell the Board held Tumwater's feet to the fire regarding process at the micro level. Tumwater argued for a macro review, seeking review of the plan only in its entirety. In other words the Board required that the City provide a consistent, reasoned process for each aspect of every sub-area plan, rather than only for the big comp plan.

The hot issue for landowners and developers was whether the City could turn its back on its well-reasoned, consistent, higher density plan when the politics got hot. The City felt the heat, and it started a new expedited process tacked on to the end of its comp plan review.

The result was that Tumwater sacrificed one landowner for political expediency. The City held a series of citizen advisory public participation hearings, but the City failed to go the more serious step. The City, according to the Board, failed to reason through its new lower density sub-area plan. This action by the City made its comp plan inconsistent in a number of respects.

For developers and builders the lesson learned is that public participation by itself is not enough. In an era and region where public participation seems to be an end in itself, the City got caught using a political process as a substitute for substantive follow through.

Public participation, according to the Board, must be followed by reasoned analysis. The City cannot do a good job of encouraging the public to speak up and then forego the other requirements of the Growth Management Act (GMA).

As for discretion the Board held that "the City has discretion to allocate its population among various density designations, but in doing so the City must conduct a proper analysis and comply with the goals and requirements of the [Growth Management] Act."

Chalk one up for fighting City Hall, for limiting the discretion of municipal governments, and for the limits of public participation at the expense of substance.

But back to Tumwater and its comprehensive plan. The Board as an afterthought also found wanting the City's Housing Plan, General Sewer Plan and Capital Facilities Plan, especially as they relate to financing and internal consistency. The Board found there was no analysis of the costs of water, sewer, stormwater facilities and transportation improvements.

Kudos to the Board for addressing municipal finance issues.

In its conclusion the Board held that each element of the comprehensive plan must be consistent with the land use map, the planning goals of the GMA must be considered, and the land use plan must substantively achieve the goals, whether planning on a sub-area or a single plan basis.

Nonetheless, for all that the Board found lacking in Tumwater's plans, the City could go back through the process, do it right, and come out with the same decisions. Tumwater, however, declined the opportunity.

If you would like a copy of the decision, call me at 352-1970.

10/94

What remedies does a new home buyer have for defects that are not egregious but that have the potential to severely restrict habitability? Welcome to the **Implied Warranty of Habitability.**

Washington cases seem to divide into three areas regarding the implied warranty: Cases involving egregious, structural defects (House v. Thornton); cases with no damage to the structure of the house or to the house at all but only to exterior patios and walkways (no recovery) (Stuart v. Coldwell Banker, Klos v. Gockel); and cases in between with multiple defects that have the potential to severely restrict habitability (Atherton v. Blume, Foisy v. Wyman).

The test for breach of the implied warranty of habitability has grown over time since Washington courts adopted the doctrine in House v. Thornton. Originally adopted to remedy egregious structural defects, the court has expanded the doctrine in several areas over the last twenty-five years.

Atherton offers the most comprehensive explanation of the modern doctrine. The court in Atherton noted that the realm of defects within the purview of the implied warranty is not precisely defined. Instead, the court noted that "a more precise definition of the scope of this warranty must await delineation on a case by case basis." Although previous Washington case law has stated that the implied warranty of habitability applies only to egregious defects in the fundamental structure of the home, the court noted that "a strongly worded phase

like "egregious defects" could easily be construed as unnecessarily constrictive."

The court in essence redefined the test for breach of the implied warranty as **defects that have the potential to severely restrict habitability**. In doing so the court relied on policy considerations **to protect the home buyer from latent, hidden construction defects; fixing liability for defective construction on the builder-vendor because of the builder-vendor's superior position to avoid the alleged defect; and the right of a home buyer to expect to receive that for which he has bargained and that which the builder-vendor has agreed to construct and convey to him, that is, a house reasonably fit for use as a residence.**

The court narrowed its decision by noting that **defects not be mere defects in workmanship, neither trivial nor aesthetic, and not procedural breaches such as lack of a certificate of occupancy.**

In Foisy, a landlord tenant action, **the court extended the implied warranty of habitability to residential rental property**. Housing code violations do not establish a prima facie case that the premises are uninhabitable but they aid the court in establishing that the premises are uninhabitable.

Likewise, the court has held that leaks in the roof, improper flashing, leaking water into electrical units, defective plumbing, improperly connected vents, furnace problems, inadequate rain gutters, and external paint problems, cumulatively breached the implied warranty of habitability. Gay v. Cornwall.

Moreover, the court has consistently held that the implied warranty of habitability does not specifically require a purchaser to vacate a home before a breach of the warranty can be proved. Luxon v. Cavizel.

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Developers, builders, and local governments are looking closely at two recent Washington State Supreme Court decisions regarding development impact fees. The Court gave thumbs down to one fee and thumbs up to the other.

In the thumbs down case the Court asked if a *voluntary* agreement to pay park impact mitigation fees was indeed voluntary. The developers paid the fees as a condition of plat approval, and the Court held the fees totally lacked compliance with the statute, were unauthorized, an illegal tax, and unjust enrichment to the City. Henderson Homes v. Bothell, 124 Wn.2d 240 (1994).

On the other hand the Court gave thumbs up to King County's park development fees. Trimen Development v. King County, 124 Wn.2d 261 (1994).

Both these cases are pre-Growth Management Act impact fees, but the Court will likely follow a similar analysis in GMA impact fee cases.

The Court in Henderson looked at the statute that allows *voluntary* agreements to mitigate a *direct impact t*hat has been *identified* as a *consequence* of a proposed development.

The relevant findings of fact disclose Bothell had no formula or standards to determine impacts; Bothell failed to take into account existing park and recreation facilities; Bothell ignored its own plan and gave no credit to school recreation facilities; Bothell had a surplus of recreation facilities; and Bothell undertook no analysis to identify the direct impacts of developments.

In addition no capital improvements were ever identified by Bothell or agreed to by the developers, Bothell made no attempt to correlate expenditures of the fees with any impacts, and Bothell expended part of the fees for other than capital improvements.

The City's own witnesses testified that any correlation between fees paid and expenditures for impacts would be purely coincidental. And most telling was an internal memorandum from the planning administrator that there must be emphasis on making sure that the agreement is voluntary . . . including questioning the developer during the public hearing until the *damning admission* is elicited, and if the impacts are not mitigated through the voluntary agreement, then deny the proposal.

In Trimen the Court said thumbs up because the developer actually negotiated the fee with the

County and did not protest, the County required that the fees be used within the park service area, and the fees were reasonably necessary as a direct result of the development. Further the County had a parks assessment plan.

Prudent developers should pay under protest.

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The lessons learned are that prudent developers should consider paying fees under protest, and impact fees will be closely scrutinized according to the Unites States Supreme Court decision in Dolan v. Tigard (rough proportionality between required dedication and impact of proposed development).