APPENDIX A

A Brief Discussion of Nexus and Proportionality as It Relates to Concurrency

The "nexus" requirement was established in <u>Nollan v. California Coastal Commission</u>, 483 U.S. 825 (1987). In <u>Nollan</u>, the United States Supreme Court held that permit conditions must be sufficiently related to the government's regulatory interests. The Court added the "proportionality" requirement in <u>Dolan v. City of Tigard</u>, 512 U.S. 374 (1994). In <u>Dolan</u>, the Court held that when governments impose permit conditions, there must be "rough proportionality" between the condition's requirements and the impacts of the development.

Whenever local jurisdictions impose conditions on land use permits, they must be aware of constitutional limits, particularly the "nexus" and "proportionality" requirements of the Fifth Amendment's takings clause. According to the U.S. Supreme Court, while local governments can place conditions on land use permits, the Constitution requires a "nexus" between the permit conditions and a legitimate regulatory interest. A "nexus" exists where the permit conditions are connected to and further the regulatory interest. Even if there is a "nexus" between the conditions and the regulatory interest, the Constitution also requires that the permit conditions be "roughly proportional" to the projected impacts of the land use development. "Proportionality" does not require a precise mathematical calculation, but jurisdictions "must make some sort of individualized determination that the required [condition] is related both in nature and extent to the impact of the proposed development."

Concurrency mitigation requirements are conditions imposed on development permits to comply with the transportation concurrency requirements of the GMA, and thus "nexus" and "proportionality" considerations apply. To satisfy the nexus requirement, the conditions must further a legitimate regulatory interest. The U.S. Supreme Court in <u>Dolan v. City of Tigard</u> recognized that jurisdictions have a legitimate regulatory interest in mitigating traffic impacts and in providing adequate transportation facilities and services.[1] Therefore, conditions imposed through concurrency mitigation satisfy the "nexus" requirement if they directly further the jurisdiction's legitimate transportation interests.

Once a "nexus" is established, jurisdictions must also consider whether there is "proportionality" between the permit conditions and the development impacts. The U.S. Supreme Court's opinion in <u>Dolan</u> is helpful for concurrency mitigation because it provides a clear framework for meeting the proportionality requirement in the transportation context: Jurisdictions must demonstrate how the permit conditions will offset the traffic impacts of the new development.[1] The Court in <u>Dolan</u> does not appear to require that the *expense* (or burden) of the condition be proportional to the impacts of the development. Rather, it appears to require that the *improvements* gained through the condition be proportional to the impacts of the development.

Under current law, concurrency mitigation fits nicely within the proportionality framework set out in Dolan because the law requires that developers mitigate *only* those impacts that exceed the LOS standard.[1] In other words, concurrency mitigation cannot be used to obtain improvements below the LOS standard. Moreover, LOS standards provide a measure of the development's impacts that are above the concurrency requirement. Therefore, there is a direct gauge between the required improvements and the impacts of the development. For example, if a proposed development exceeds the LOS standard by 15 trips, jurisdictions using concurrency mitigation could require a developer to fund ride-share vans that would remove 15 trips from the system. Provided that the jurisdiction could make some showing that the ride-share vans would actually remove trips from the transportation system—and thus offset the impacts of the proposed development—the conditions appear to satisfy Dolan's "roughly proportional" requirement.

As constitutional requirements of land use regulation, the U.S. Supreme Court's "nexus" and "proportionality" tests apply to all permit decisions, and Eastside jurisdictions should be aware of their requirements whenever they use mitigation to meet the GMA's concurrency law. However, the Project Team believes that if concurrency mitigation requirements are imposed as provided in the GMA, the "nexus" and "proportionality" tests will almost always be met. Therefore, while they should always be a consideration, we conclude that "nexus" and "proportionality" are not serious concerns for jurisdictions wanting to pursue concurrency mitigation as provided for in the GMA.