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7 BEFORE THE STATE OF WASHINGTON
8 GROWTH MANAGEMENT HEARINGS BOARD
9 FOR CENTRAL PUGET SOUND

CASCADE BICYCLE, et al

Petitioner,

v.

LAKE FOREST PARK,

Respondent.

CPSGMHB Case No. 07-3-0010c

HEARING MEMORANDUM BY
CASCADE BICYCLE CLUB

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16 **I. INTRODUCTION**

17 On November 9, 2006 the City of Lake Forest Park ("the City") enacted Ordinance 951,
18 amending its conditional use permit procedures as applicable to multi-use and multi-purpose
19 trails by imposing substantial limitations upon their development and improvement. The City
20 has but one multi-use trail to which this ordinance would apply, the Burke-Gilman Trail.

21 Cascade Bicycle Club ("Cascade Bicycle") and King County seek Board review of
22 Ordinance 951 on several grounds, including its conflict with provisions for essential public
23 facilities under RCW 36.70A.200(5) and its substantial interference with a number of GMA's
24 goals, including those requiring the encouragement of multi-modal transportation, the
25

HEARING MEMORANDUM
BY CASCADE BICYCLE CLUB - 1

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1 predictability in permitting, the enhancement of recreational opportunities, and the adequacy of
2 public facilities and services. RCW 36.70A.020(3), (7), (9) and (12). Cascade Bicycle and the
3 County also seek review of the City's failure to comply with the State Environmental Policy
4 Act in the adoption of Ordinance 951. And Cascade Bicycle seeks review of the City's failure
5 to adopt a process for the siting of essential public facilities, as required under RCW
6 36.70A.200(1).

7
8 By of relief, Cascade Bicycle asks the Board to find that Ordinance 951 fails to comply
9 with the GMA and SEPA. Because its continued validity would substantially interfere with the
10 goals of the Act, Cascade Bicycle also asks the Board to invalidate Ordinance 951.

11 II. PARTIES

12 A. The Cascade Bicycle Club

13 Founded in 1970, the Cascade Bicycle Club is a statewide organization formed to
14 promote bicycling, for transportation, recreation and for health. Cascade Bicycle seeks to
15 accomplish this objective through education, such as classes on bicycle safety, through special
16 events, such as ride to work month (the month of May), through involvement in public affairs,
17 such as its work on Ordinance 951 and Seattle's Master Bicycle Plan, and through public
18 information, such as through its newsletter.¹

19
20 Cascade Bicycle is the largest organization in the state that promotes bicycling and
21 bicycle safety. It presently has over 7200 active members. An even larger number participate
22 in its many activities. For example, the organization's signature event, the Seattle to Portland
23 bicycle ride annually attracts its maximum participation of 9,000 riders.
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25

1 **B. King County**

2 King County of course is one of 39 counties in the state and the operator of a number of
3 regional facilities, such as transit, sewage disposal, stormwater drainage and an extensive
4 network of parks and trails, including the 17-mile long Burke-Gilman Trail that roughly
5 extends from the City of Seattle to the City of Kenmore, through Lake Forest Park. See
6 Supplemental Ex. 11, King County Regional Trails Plan at 18, previously provided to the
7 Board within King County's Motion to Supplement and incorporated by this reference. King
8 County owns this trail in fee and is responsible for its operation and maintenance. *Id.* The
9 Burke-Gilman Trail is the most extensively used trail within King County's Regional Trail
10 system. The County's interests are more fully set forth within its own Petition for Review and
11 Prehearing Memorandum.
12

13 **C. The City of Lake Forest Park**

14 The City of Lake Forest Park is a municipal corporation organized under Title 35
15 RCW. An approximately two mile long segment of the Burke-Gilman Trail passes through the
16 city, extending from the Seattle city limits at NE 145th Street to the Kenmore city limits at 55th
17 Avenue NE near the north end of Lake Washington. See attached Ex. A, a print out of the
18 City's map of transit, trails and bicycle routes, available at the City's website,
19 www.cityoflfp.com.²
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24 ¹ See generally, the website for the Cascade Bicycle Club at www.cascadebicycleclub.org.

25 ² Pursuant to WAC 242-02-670(2) the Board may take official notice of this map, because it is produced by the City, capable of verification and not subject to reasonable dispute.

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III. Lake Forest Park's Multi-Use Trail

While Ordinance 951 applies generically to any multi-use or multi-purpose trail, practically speaking only one trail is subject to its terms, the Burke-Gilman Trail. The City has only one multi-use trail. Ex. A. Further, all testimony, comment, deliberation and other input on Ordinance 951 was presented to relation to concerns regarding, or its impacts upon the Burke-Gilman Trail. See e.g., the City's Index, containing over 400 references to the Burke-Gilman Trail. While this appeal presents a facial challenge to Ordinance 951 as a development regulation, the compliance and validity of that ordinance must be examined within the context of its effect upon the particular multi-use trail at issue here, the Burke-Gilman Trail, because that is the sole multi-use trail within Lake Forest Park and it is the focus of Ordinance 951.

The segment of the Burke Gilman Trail that passes through Lake Forest Park is the oldest section of the trail. It is also in the poorest repair. See Ex. 532, Atelier Study at 1, 3 and 9, attached to County's exhibits. Within this segment the improved width consists of a 10-foot wide asphalt path bordered by approximately one-foot wide dirt, gravel or grass shoulders for a total width of approximately 11 feet, depending upon the specific location. *Id.* at 7; see also attached Ex. 492, Cross Section of Existing Location, Burke-Gilman Trail Redevelopment Presentation to the Citizens Advisory Group (June 21, 2005).

For the most part, the total width of trail ownership is 50 feet. However, on account of easements and other limitations the County's ownership in some places narrows to 30 feet. See Ex. 532, Atelier Report at 10 and attached Ex.755, Right of Way Survey and Title Analysis, Sheet 2. In some areas the effective width of the trail has been narrowed by encroachments

1 from private properties, such as landscaping, fencing and buildings. See Ex. 532 at 9-10 and
2 attached Ex. 470, Transpo Group, Burke-Gilman Trail Crossing Plan at 2-7 (3/9/05).

3 The segment of the Burke Gilman Trail within Lake Forest Park is substantially
4 degraded and substandard; its shoulders are narrow; its paving is riddled with root heaves, and
5 it is crossed by driveways and minor streets with inadequate visibility. Ex. 532 at 1, 9-10 and
6 attached Ex. 470, Transpo Group Report at 2-7. The width of paving is too narrow to
7 accommodate the present levels of use and site distances at the intersections are inadequate.
8 Compare existing pavement width of 10 feet with minimum pavement width of 12 – 14 for a
9 shared bicycle/pedestrian trail under the Washington Department of Transportation Design
10 Guidelines for Bicycle Facilities (WSDOT Design Guidelines), contained within attached Ex.
11 478 at Figure 1020-13 (within County exhibits).

13 Efforts that culminated in the adoption of Ordinance 951 began with a Memorandum of
14 Understanding (MOU) between King County and Lake Forest Park that was entered into in
15 October 2004, a copy of which is attached at Exhibit 503. Among other things, the MOU
16 recognized that the Burke-Gilman Trail serves a “critical role in the King County Regional
17 Trails System . . . as a regional and local transportation corridor . . .” *Id.* It also established a
18 Citizens Advisory Group (CAG) to provide input to the City and the County on a trail
19 redevelopment study that was being undertaken by King County. *Id.* The CAG’s charter is set
20 forth at attached Ex. 426.

22 Concluding two years of work, the CAG produced final recommendations in two
23 phases, a Phase One Final Report dated February 17, 2006 and a Phase Two Final Report dated
24 October 3, 2006. See attached Exhibits 750 and 751. Among other recommendations, the
25

- 1 • A required Traffic Control Plan must include “signs that provide primary right-
2 of-way for ingress and egress to uses conforming to zoning code; §
3 18.54.047.C.1.b
- 4 • Any trail permit must contain a Trail Development Plan that “[p]rovides for
5 compatibility with the character and appearance of development in the
6 vicinity...”; §18.54.047.D.4.b
- 7 • The required Trail Development Plan must preserve “the privacy of adjacent
8 uses by the use of setbacks, screening, landscaping, fencing or grade changes to
9 buffer adjacent properties;” §18.54.047.D.4.b;
- 10 • The Trail Development Plan must specify such details “sight distances, trail
11 surfaces, trail widths and speed control measures;” §18.54.047.D.4.b;
- 12 • The Trail Development Plan must provide for “screening/landscaping width
13 [that] shall be no less than 12 feet” adjacent to single family residential zones;
14 §18.54.047.D.4.b.iv;
- 15 • The Trail Development Plan must include lighting that “minimize[es] light
16 shining into residences to the extent reasonably possible consistent with safety;”
17 §18.54.047.D.4.b.v;
- 18 • The required Trail Development Plan shall provide for minimum setback from
19 private property lines to the edge of the trail shoulder of 12 feet adjacent to
20 residential zones; §18.54.047.D.4.b.vi;
- 21 • If available right of way, topography or pre-existing structures prevent
22 minimum setback and right of way requirements, the trail may be further
23 conditioned to reduce its width; §18.54.047.D.4.b.vi.1; the Examiner may also
24 reduce setback or landscaping, but only if enhanced landscaping or fencing is
25 required. *Id.*;
- And under §§18.54.047.D.4 and 18.54.030, a conditional use permit for a multi-
use trail may only be issued upon a determination by the Hearing Examiner that
the proposed use:
 - A. ...is consistent with policies and goals of the comprehensive
plan;
 - B. ...is not be materially detrimental to other property in the
neighborhood;

- C. ...will supply goods or services that will satisfy a need of the community;
- D. ...is compatible with the character and appearance with existing and proposed development in the vicinity of the subject property;
- E. ...is compatible with the physical characteristics of the subject property;
- F. Any requested modifications to the standards of the underlying zoning shall require a variance . . . ;
- G. ...is not in conflict with the health and safety of the community;
- H. ...pedestrian and vehicular traffic associated with the use will not ... conflict with existing and anticipated traffic in the neighborhood;
- I. ... will not adversely affect public services in the surrounding area; and
- J. The applicant's past performance regarding permit compliance . . . shall be considered . . .

A copy of Chapter 18.54 relating to conditional uses is attached at Exhibit C.

The Examiner's decision on a conditional use permit is a final, Type I action and is only appealable to court. Lake Forest Park Municipal Code, §16.26.030.A.1 and 16.26.110.D.

The City adopted Ordinance 951 over the strenuous objections by the County that it would render improvement of the trail impracticable, see attached Supplemental Ex. 3, 4 and 7. letters by King County of August 24, September 28, and November 8, 2006, respectively, and over objections by Cascade Bicycle that the ordinance was contrary to law. Supp. Ex. 5, letter of October 5, 2006. The City adopted the Ordinance 951 anyway.

1 On January 3, 2007 the Cascade Bicycle Club filed this petition for review. King
2 County filed its separate Petition for review on January 22, 2007. The two cases were
3 consolidated on January 26, 2007.

4 **V. ISSUES PRESENTED**

5 Cascade Bicycle addresses the issues as presented within the Board's Prehearing Order
6 at IX. Those issues are re-stated within the arguments below.

7 **VI. THE STANDARD OF REVIEW**

8 Comprehensive plans and development regulations (and amendments thereto)
9 adopted pursuant to Growth Management Act ("GMA" or "Act") are presumed valid upon
10 adoption. RCW 36.70A.320. Cascade Bicycle accepts that it has the burden of demonstrating
11 that any challenged actions do not comply with the Act. In general, the Hearings Board grants
12 deference to how counties and cities choose to plan under the Act. RCW 36.70A.320. But of
13 course, that deference is limited. As the court has observed, "local discretion is bounded,
14 however, by the goals and requirements of the GMA." *King County v. Central Puget Sound*
15 *Growth Management Hearings Board*, 142 Wn.2d 543, 561, 14 P.2d 133 (2000). Further,
16 "[c]onsistent with *King County*, and notwithstanding the 'deference' language of RCW
17 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not
18 'consistent with the requirements and goals of the GMA.'" *Thurston County v. Cooper Point*
19 *Association*, 108 Wn. App. 429, 444, 31 P.3d 28 (2001). Accordingly, under RCW
20 36.70A.320(3) the Board shall find compliance unless [it] determines that the action by the
21 county is clearly erroneous in view of the entire record before the Board and the goals and
22 requirements of the Act. *Id.* In order to find the county's action clearly erroneous, the Board
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1 must be “left with the firm and definite conviction that a mistake has been made.” *Department*
2 *of Ecology v. Public Utility Dist. 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

3 Under SEPA, a jurisdiction’s threshold determination is reviewed under the clearly
4 erroneous standard. *Moss v. City of Bellingham*, 109 Wn. App. 6, 13, 31 P.3d 703 (2001)(“A
5 governmental agency's SEPA threshold determination is reviewed under the “clearly
6 erroneous” standard.”). However, at issue in this appeal is not the defensibility or
7 reasonableness of a SEPA threshold determination, but the City’s total failure to comply with
8 SEPA at all, an issue that must be reviewed *de novo* under the error of law standard. See
9 *Pierce County Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 693-94, 658 P.2d 648 (1983)(An
10 agency's violation of rules that govern its decision-making is contrary to law.)

12 VII. ARGUMENT

13 **A. Ordinance 951 Violates RCW 36.70A.200(5) by Allowing Lake Forest Park to** 14 **Deny an Essential Public Facility, the Burke-Gilman Trail, and by Granting** 15 **Discretion to Impose Conditions that Would Render Impracticable, if Not** 16 **Impossible, the Improvement of This and Other Essential Public Facilities.**

17 Under this argument, Cascade Bicycle addresses Issue 1, as framed by the Board:

18 *Does Ordinance 951, amending the City's Conditional Use Ordinance by providing*
19 *specific development criteria under which a multi-use or multi-purpose trail may be*
20 *authorized as a conditional use, violate RCW 36.70A.200(5) which forbids local*
21 *jurisdictions from precluding the siting of essential public facilities, by:(a)*
precluding the siting of regional trails, such as the Burke-Gilman Trail; (b) making
it impracticable, if not impossible, to site or improve such trails; or (c) both (a) and
(b).

22 Cascade Bicycle demonstrates within this section that Ordinance 951 impermissibly grants the
23 City Hearing Examiner both the authority to deny and preclude an essential public facility and
24 the discretion to impose conditions that would render impracticable, if not impossible, the
25 improvement and expansion of an essential public facility.

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BY CASCADE BICYCLE CLUB - 10

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1 Ordinance 951 violates RCW 36.70A.200(5) in at least three respects: first, it allows
2 Lake Forest Park to outright deny and thereby preclude an essential public facility; second, it
3 allows the City to impose mitigations that would render impracticable the improvement of an
4 essential public facility; third, it renders improvement of an essential public facility
5 impracticable, if not impossible, by imposing standards that conflict with standards adopted
6 under state and federal statutes. Each of these grounds is explored below.

7
8 **1. RCW 36.70A.200 Prohibits GMA Cities and Counties from Precluding
or Rendering Impracticable Essential Public Facilities.**

9 Adopted as part of the 1991 amendments to the Growth Management Act, RCW
10 36.70A.200 requires that all counties and cities planning under the Act provide for the
11 identification and siting of essential public facilities. In relevant part, subsection .200(1)
12 requires each county and city to include within its comprehensive plan a “process for
13 identifying and siting essential public facilities.” Not only are GMA counties and cities
14 required to plan for essential public facilities, but they are prohibited from precluding them.
15 Subsection .200(5) provides that:

17 No local comprehensive plan or development regulation may preclude the siting of
18 essential public facilities.

19 As defined at subsection .200(1):

20 Essential public facilities include those facilities that are typically difficult to site, such
21 as airports, state education facilities and state or regional transportation facilities as
22 defined in RCW 47.06.140, state and local correctional facilities, solid waste handling
23 facilities, and in-patient facilities, including substance abuse facilities, mental health
24 facilities, group homes, and secure community transition facilities as defined in RCW
25 71.09.020.

By no means does this statutory definition contain an exclusive list of essential public facilities.

The regulations promulgated by Community Trade and Economic Development (CTED) at

1 WAC 365-195-340(2)(A)(i) direct that “the broadest view should be taken of what constitutes
2 a public facility,” a construction specifically affirmed and followed by the court in *City of Des*
3 *Moines v. Puget Sound Regional Council*, 108 Wn.App. 836, 844, 988 P.2d 27 (1999)
4 (applying subsection .200(5) to the expansion of an existing essential public facility, the Sea-
5 Tac Airport)

6 The unlawful preclusion of essential public facilities may occur by a local
7 government’s outright denial, by the imposition of conditions that would render
8 “impracticable” the siting or expansion of an essential public facility, see *Port of Seattle v. Des*
9 *Moines*, Case No. 97-3-0014 FDO at 5 (August 13, 1997), and by subjecting such a facility to
10 an open-ended process that provides no certainty of outcome. See *King County, et al v.*
11 *Snohomish County, (King County I)*, Case No. 03 -3-0011, FDO at 12. Ordinance 951 contains
12 all of these defects.
13

14 2. Ordinance 951 Applies to Essential Public Facilities

15 Although by its terms Ordinance 951 applies to “multi-use or multi-purpose trails” in
16 general, it was enacted to address a particular trail, the Burke-Gilman Trail, because there
17 exists only one multi-use trail within Lake Forest Park. Moreover, the focus of all study, public
18 comment, testimony, debate, and deliberation on Ordinance 951 has been the Burke-Gilman
19 Trail. See e.g., Ex. 430 (Memorandum of Understanding) and Ex 750 and 751 (final reports of
20 CAG).
21

22 Numerous regional plans establish the Burke-Gilman Trail as an essential public
23 facility. Essential public facilities are not only those listed within subsection .200(1), but also
24 include those designated by cities and counties. See WAC 365-195-340(2)(a)(ii)(A) and (B).
25

1 At Policy F-222 the County's Comprehensive Plan contains its own provisions for identifying
2 essential public facilities:

3 A facility shall be determined to be an essential public facility if it has one or more of
4 the following characteristics:

- 5 a. The facility meets the Growth Management Act definition of an
6 essential public facility.
- 7 b. The facility is on a state, county or local community list of
8 essential public facilities.
- 9 c. The facility serves a significant portion of the county or metropolitan
10 region or is part of a countywide service system; or
- 11 d. The facility is the sole existing facility in the county for providing that
12 essential public service.

13 Even though the term "regional bicycle trail" is not specifically included within
14 subsection .200(1) or within the referenced section RCW 47.06.140, the Burke-Gilman Trail –
15 the only multi-use trail to which Ordinance 951 presently applies – qualifies as an essential
16 public facility under at least three of the categories set forth under Policy F-222.

17 First, the Burke-Gilman Trail is listed on several regional transportation plans,
18 including King County Regional Trails Plan at 18 (October 1992), the County's Non-
19 Motorized Transportation Plan at the Bicycle Network & Facility Plan (May 1993) and
20 Destination 2030, the Regional Transportation Plan adopted by the Puget Sound Regional
21 Council at Map 4-4 (May 2003). See Supp. Ex. 11 – 13, incorporated by this reference. The
22 third plan has been adopted by the Regional Transportation Planning Organization for the
23 Puget Sound area as designated under Chapter 47.80 RCW and 23 U.S.C. §134.
24
25

1 Second, the Burke-Gilman Trail serves a significant portion of the County and is part of
2 a county-wide service system. The Burke-Gilman Trail connects to the Sammamish Trail and
3 provides the non-motorized travel route linking the cities of Redmond, Woodinville, Bothell,
4 Kenmore, Lake Forest Park and Seattle, and is used by commuters and recreational travelers
5 alike. Ex 532 at 3 and 7. Counts taken at five year intervals between 1980 and 2005 during the
6 month of May at Lake Forest Park have reported daily weekend volumes of bicycle trips of
7 between 1493 to 2531 and volumes of pedestrian trips of between 315 to 438. During the same
8 periods, weekday volumes ranged between 366 and 1240 for bicycles and 173 and 417 for
9 pedestrians. See attached Ex. 736, Burke-Gilman/Sammamish River Trails Survey.

11 And third, because the Burke-Gilman Trail is the only dedicated bicycle and pedestrian
12 trail that connects all of these jurisdictions, it meets the fourth criterion as the sole existing
13 facility in the County that provides that essential service.

14 The Burke-Gilman Trail's status as an essential public facility cannot be disputed by
15 the City, since it has already acknowledged the regional function served by the Burke-Gilman
16 Trail. In October 2004 the City and the County entered into a Memorandum Of Understanding
17 to establish a process for the redevelopment of the Burke-Gilman Trail through the City.

18 Among the guiding principles for establishing this process, the City agreed:

- 20 • The Burke-Gilman Trail serves a critical role in the King County
21 Regional Trails System.
- 22 • The Burke-Gilman Trail serves both as a regional and local
23 transportation corridor and recreational facility supporting walkers,
24 joggers, and bicyclists.

25 Ex. 503, Memorandum of Understanding (emphasis supplied).

1 **3. Ordinance 951 Impermissibly Allows the City to Outright Deny and**
2 **Thereby Preclude the Improvement of an Essential Public Facility.**

3 Ordinance 951 reserves to the City's Hearing Examiner the authority to ultimately deny
4 the siting, improvement or expansion of a multi-use trail, including the Burke-Gilman Trail.
5 The newly adopted §18.54.047 coupled together with existing provisions under §18.54.030
6 grants the Hearing Examiner that authority. As outlined above, the conditional use permit
7 criteria set forth at §18.54.030 require that in order for the improvement of a multi-use trail to
8 receive a conditional use permit, the Hearing Examiner must determine that each of 10 general,
9 subjective criteria must be satisfied, including that the proposed trail improvement:

10 would not be "materially detrimental to . . . the neighborhood";

11 would be "compatible with the character and appearance with the existing or proposed
12 development in the vicinity . . . ;

13 would not "conflict with the health and safety of the community;" and

14 "pedestrian and vehicular traffic associated with the use will not . . . conflict with
15 existing and anticipated traffic in the neighborhood";

16 §18.54.030.B, D, E, G and H. These and the other subjective criteria under §.030 (see Ex. C)
17 grant the Examiner the discretion to deny a permit for the development or improvement of a
18 multi-use trail bounded only by his or her creativity in articulating findings as to why a
19 proposal would fail to conform with these standards.
20

21 This Board has already held that "a permit process [that] purports to reserve to a local
22 government the discretion to deny that which it may not lawfully deny, . . . will be found to
23 violate RCW 36.70A.200." *King County I*, FDO at 12. The above criteria under §.030 are
24 similar to those which this Board in its Order Finding Continuing Noncompliance, etc. at 17 in
25 *King County I, etc.* found to be noncompliant with GMA. For example the "problematic"

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1 criterion within Snohomish County's ordinance that a use "not be materially detrimental to
2 uses or property in the immediate vicinity" is nearly identical to two of the above-cited
3 provisions within the City's conditional use permit criteria.

4 In Lake Forest Park a conditional use permit application for an essential public facility
5 is treated no differently than an application for any other conditional use, such as a church, a
6 daycare, a cemetery or a dog kennel. See §§18.54.043 and .048.C and G and .049. Of course,
7 the City is completely wrong in doing so. As previously held by this Board, "it is not
8 appropriate for a local government to create criteria that purport to revisit or 'second guess' a
9 siting decision that has been made by a regional or state entity." *King County I*, FDO at 14.
10 The designation of the Burke-Gilman Trail as a regional facility was made by King County
11 over 15 years ago and approved by the Puget Sound Regional Council four years ago. The
12 City may not lawfully frustrate the improvement of the trail through its conditional use permit
13 process.
14

15
16 **4. Ordinance 951 Impermissibly Allows Lake Forest Park to Impose**
17 **Mitigations That Would Render Impracticable the Improvement or**
18 **Expansion of an Essential Public Facility.**

19 The segment of the Burke-Gilman Trail running through Lake Forest Park is not only
20 the oldest section of the trail, but in the worst condition. The paved surface of the trail narrows
21 to ten feet; the trail surface is scarred with heaves caused by tree roots; landscaping and fencing
22 from neighboring properties have pinched down the usable width of the trail. The reduced
23 width is insufficient for the volumes of use by bicyclists, pedestrians and other trail users. See
24 Ex. 532, Atelier Study at 1, 7-10 and 31-32.
25

1 The County's proposed improvement is straightforward: to replace the paved surface
2 and increase its width to 12 feet; to add three foot shoulders on each side; to improve sight
3 distance and sight triangles in order to improve safety; to establish a priority of trail right of
4 way at driveways and minor roadways in order to reduce the potential for conflicts with motor
5 vehicles; and to resolve encroachment problems. See plans set forth within attached Ex. 492
6 and Ex. 532. These improvements are necessary to bring the trail up to adopted standards for
7 King County shared use trails. Ex. 532 at 31-32.

8
9 Ordinance 951 would allow the City to impose many additional conditions and
10 mitigations that would frustrate the County's objectives and render improvement of the trail
11 impracticable, which would result in continued degradation of the trail. Ordinance 951 at
12 §18.54.047.C compels the Examiner to impose limitations on the size and location of the trail.
13 Section 18.54.047.C states that "the Hearing Examiner is instructed to attach appropriate
14 conditions such as, but not limited to, the following: limitation of size, location on property and
15 screening . . ." (Emphasis supplied). A requirement to limit the size of trail would defeat the
16 county's efforts to improve the safety of the trail by widening its traveled surface.

17
18 Ordinance 951 requires that there be a Trail Development Plan which assures that an
19 approved trail "[i]s compatible with the character and appearance of development in the
20 vicinity and preserves the privacy of adjacent uses by the use of setbacks, screening,
21 landscaping, fencing or grade changes to buffer adjacent properties[.]" §18.54.047.D.4.b. The
22 required Trail Development Plan also imposes a "screening/landscaping width [of] . . . no less
23 than 12 feet," §18.54.047.D.4.b.iv, and it establishes a minimum setback of 12 feet from the
24 edge of the trail shoulder to the property lines of adjacent single-family residences. See
25

1 §18.54.047.D.4.b.iv. The requirements for compatibility with existing character, the privacy of
2 adjacent uses, and for setbacks, screening, landscaping impose limitations that render
3 improvement on the trail impracticable.

4 Apart from the requirements for minimum setback and landscaping of 12 feet, the
5 ordinance contains no objective standards to which the required conditions governing the
6 “limitation of size” and “location on property”, compatibility with appearance in the vicinity
7 and the preservation of “the privacy of adjacent uses” would be guided. The ordinance grants
8 the Examiner unbridled authority to narrow the trail to the extent desired without regard to the
9 effect of such narrowing upon the trail’s operation as a regional transportation facility for non-
10 motorized travel. As a result, the Ordinance fails to comply with GMA’s requirements for
11 essential public facilities. See *King County I* at 13 (“[L]ocal plans and regulations may not
12 render EPFs impossible or impracticable to site, expand or operate, either by outright exclusion
13 of such uses, or by the imposition of process requirements or substantive conditions that render
14 the EPF impracticable.”)

15
16
17 Even the objective standards within ordinance 951 (*i.e.*, required 12 foot setbacks of
18 trail shoulders from residential property lines and 12 feet screening) render improvement of the
19 trail impracticable. Portions of the trail narrow to 30 feet. Ex. 532 at 10. Within those areas
20 the existing improved portion of the trail occupies approximately 10 feet (excluding ditches
21 and sloped portions of the shoulders). The County’s proposed improvement of the trail
22 involves widening the paved surface to 12 feet, enlarging the gravel shoulders to 3 feet,
23 creating proper drainage and ditching on the upslope side and properly stabilizing the shoulders
24 on the downslope side. See Ex. 532 at 24-26. Depending upon the precise location, this work
25

1 would involve expansion to an improved trail width of 18 feet (excluding ditches and shoulder
2 sloping). See Exhibit 492, Cross sections of Existing and Recommended Trail Sections within
3 Burke-Gilman Trail Redevelopment Presentation to CAG (6/21/05) and Ex. 532, *supra*. In
4 areas where the trail narrows to 30 feet, the City's requirement for a 12 foot setback and 12 feet
5 of landscaping on each side would effectively squeeze trail improvements to 6 feet, thereby
6 precluding the County from making any improvement to the trail.

7
8 Ostensibly to address such a result, Ordinance 951 at §18.54.47.D.4.b.iv and vi allows
9 the Examiner to reduce the width of the required setbacks and the required landscaping where
10 the Examiner determines that those minimum widths cannot be met on account of such things
11 as topographical features and the available right-of-way, but only if landscaping is enhanced or
12 a visual barrier such as fencing is installed. And even where the actual or the effective trail
13 width is inadequate, the Examiner still has the authority to condition a permit "by reducing the
14 width of the proposed trail, but only to the extent consistent with trail user safety[,]" again, in
15 the sole determination of the Hearing Examiner. See §18.54.D.4.b.vi. Even under these
16 setback and landscaping exceptions, the Examiner still retains the near limitless discretion to
17 narrow and confine the trail. The narrowing of the trail to an undetermined extent effectively
18 would preclude the County from bringing the trail up to minimum standards to meet its
19 volumes of use. See e.g. Ex. 478, WSDOT Design Manual, Figure 1020-13, providing for a
20 minimum 12-14 foot trail width.
21
22
23
24
25

1 **5. Ordinance 951 Precludes Improvement of an Essential Public**
2 **Facility by Imposing Conditions that Conflict with Standards**
3 **Adopted under State and Federal Law.**

4 Ordinance 951 further precludes improvement of the Burke Gilman Trail, an essential
5 public facility, by imposing limitations that directly conflict with standards adopted under state
6 and federal laws.³ In particular, the right-of-way, signage, landscaping and fencing
7 requirements within Ordinance 951 violate standards imposed through Chapter 47.36 RCW
8 and Federal Highway Administration Regulations.

9 The adopted §18.54.47.A.4 adopts a set of “principles” that are intended to provide
10 “guidance” to the hearing examiner in the consideration of conditional use permit applications
11 for multi-use trails, one of which instructs the Hearing Examiner to:

12 Avoid, whenever possible, altering traffic flows and patterns that are normal and
13 customary to neighborhoods through which a trail passes or will pass, or impeding the
14 safe and efficient ingress and egress to and from adjacent or near-by uses and areas, or
15 degrading access for fire and emergency medical equipment and personnel.

16 §18.54.47.A.4.a.

17 Ordinance 951 carries forward this principle through mandatory signing requirements
18 that force trail users to yield the right-of-way to traffic on driveways and minor roadways.
19 Section 18.54.47.D.1 requires that any conditional use permit for a multi-use trail “[s]hall
20 require for trail crossings with driveways and minor roadways:”

- 21 a. providing access to less than 50 homes a yield sign for the trail users,
22 maintaining right-of-way to motor vehicular traffic with advance
23 warning signs on the trail and road (unless there are known conflicts that

24 ³ While the Board’s Prehearing Order at 7 frames this issue as presenting a question of unpredictability of the
25 permitting process under the GMA goal at RCW 36.70A.020(7), Cascade Bicycle has alleged that it more directly
raises an issue of non-compliance with RCW 36.70A.200(5).

1 require a stop sign for the trail and/or additional traffic control
measures); or

- 2 b. providing access to 50 or more homes a stop sign for the trail users,
3 maintaining right-of-way to motor vehicular traffic with advance
4 warning signs on the trail and road (unless there are known conflicts that
require additional traffic control measures for the trail).

5
6 (Emphasis added). Thus for each of the eight crossings of the trail with driveways and minor
7 roadways, traffic on the trail must either yield or stop to cross traffic. See Ex. 470, Transpo
8 Report at 2-5. For the most part, the driveways and minor roadways exist by private easements
9 across county ownership. Ex. 755, Right of Way Survey and Title Analysis and Ex. 532 at 10.
10 The general principle that trail use not interfere with motor vehicle traffic from driveways and
11 minor roadways and the specific requirements for yield and stop signs directly conflict with
12 standards imposed through state and federal law that require streets carrying the lower volumes
13 of traffic, such as the driveways and minor roadways here, to yield to trail traffic, not the other
14 way around as the City would have it. Ex. 532 at 18.

15
16 Right-of-way and signage requirements applicable to the Burke-Gilman Trail, or any
17 other multi-use trails, are established by Manual on Uniform Traffic Control Devices
18 (MUTCD) that is adopted by both federal and state law. The MUTCD at ¶2B.05 and 2B.08
19 and .09 expressly requires that the street carrying the lowest volume of traffic should be signed
20 to stop or to yield to those streets carrying higher volumes, the opposite of which Ordinance
21 951 requires. See Ex. 477, within the County's exhibits.

22
23 Compliance with the MUTCD is required by state law. Under RCW 47.36.060 the
24 Washington State Department of Transportation is charged with the responsibility of
25 establishing a uniform system of signing on public roads, including paths and trails. In

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1 carrying out this responsibility the WSDOT has adopted its own manual, commonly referred to
2 as the WSDOT Design Manual. See attached Ex. 478 (excerpts) The WSDOT Design Manual
3 in turn requires that the signage of multi-use trails conform with the MUTCD. See WSDOT
4 Manual at §1020.06(4). Further, the MUTCD has been adopted by regulation under WAC 468-
5 95-010. Thus, the requirement that signage favor higher volume routes applies by state law to
6 multi-use trails and to the Burke-Gilman Trail in particular.

7
8 The MUTCD also applies by federal law. To be eligible for federal funding,
9 improvements to the Burke-Gilman Trail must conform with federal standards. 23 CFR
10 §652.7(b)(5) (2006). Federal design standards for bicycle and pedestrian facilities require that
11 such facilities be constructed in compliance with standards set forth within the AASHTO
12 Guide For Development Of New Bicycle Facilities, or equivalent standards. 23 CFR
13 §652.13(a) (2006). The most recent version of the AASHTO Guide in turn requires that traffic
14 control devices on roadways and bicycle paths conform to the MUTCD. See Ex. 443,
15 AASHTO Guide at 53 (1999) (“In general, uniform application of traffic control devices, as
16 described in the MUTCD, provides minimum traffic control measures which should be
17 applied.”), attached to County exhibits. As noted above, the MUTCD requires that roadways
18 carrying the lower volumes of traffic must stop or yield to cross traffic.
19

20 And further, compliance with the MUTCD, the AASHTO Guide and the WSDOT
21 Design Manual is required by the County Road Standards at §3.10.D, adopted under KCC
22 14.42.010. See Supp. Ex.1.

23
24 As regards the Burke Gilman Trail, driveways and minor streets carry far less traffic
25 than the Burke-Gilman Trail by approximately a third. Ex. 470, Transpo Report at 15. The

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1 signage and right-of-way requirements contained within Ordinance 951 are not discretionary or
2 optional, but must be imposed in any conditional use permit for a multi-use trail. See
3 §18.54.047.D (“Any conditional use for a multi-use trail . . . [s]hall require for trail crossings . .
4 . a yield sign . . . or . . . a stop sign for the trail users.”) (emphasis supplied). Conditioning
5 consistent with Ordinance 951 would therefore impose limitations upon the trail with which the
6 County could not comply, without foregoing federal funding and without violating state and
7 county law. As a result, the City’s right-of-way and signage requirements effectively preclude
8 the County’s improvement of the Burke-Gilman Trail.
9

10 **B. The City Has Failed to Adopt a Process for the Siting of Essential Public**
11 **Facilities.**

12 Under this argument Cascade addresses the Board’s Issue 2:

13 *Did the City violate RCW 36.70A.200(1) by failing to adopt a process for*
14 *identifying and siting essential public facilities, a process that was required by*
15 *September 1, 2002 or, at the latest, at the time of adoption of the City’s*
16 *Comprehensive Plan?*

17 This issue was earlier briefed in response to the City’s unsuccessful motion to dismiss.

18 Even though the City admits to not having adopted a processing for identifying and siting
19 essential public facilities, it is not willing to concede this issue. Accordingly, the section below
20 borrows from prior briefing.

21 As relevant to this issue, RCW 36.70A.200 states as follows:

22 (1) The comprehensive plan of each county and city that is planning under RCW
23 36.70A.040 shall include a process for identifying and siting essential public facilities.
24 Essential public facilities include those facilities that are typically difficult to site, such
25 as airports, state education facilities and state or regional transportation facilities as
defined in RCW 47.06.140, state and local correctional facilities, solid waste handling
facilities, and in-patient facilities including substance abuse facilities, mental health
facilities, group homes, and secure community transition facilities as defined in RCW
71.09.020.

1 The above section was initially adopted as part of the GMA amendments of 1991 and it
2 was in effect both upon the deadline for Lake Forest Park's adoption of an initial GMA
3 comprehensive plan on July 1, 1994, RCW 36.70A.040(3), and upon the date that Lake Forest
4 Park's original GMA plan was actually adopted, on April 19, 1995. As a result, Lake Forest
5 Park was required to have adopted a process for identifying and siting essential public facilities
6 in its original comprehensive plan.

8 Within its capital facilities element the Lake Forest Park Comprehensive Plan sets forth
9 goals and policies relating to capital facilities and the siting of the essential public facilities.
10 Policy CF 4.2, the policy that most directly addresses GMA's requirement for a process to
11 identify and site essential public facilities, provides that the City shall:

13 Establish a process for reviewing proposals for siting essential public facilities,
14 including federal, state, regional or local proposals. The process should include
15 requirements that siting of proposed public facilities be reviewed for
16 compatibility with adjacent land uses and those land uses designated on the
17 future land use map, particularly residential neighborhoods and city centers.
18 Design standards shall be required to ensure compatibility with adjacent land
19 uses and mitigate any negative impacts. The City's siting process may include
20 requirements that facilities provide amenities or incentives to the neighborhood
21 as a condition of approval. At least one public hearing shall be required to
22 ensure adequate public participation.

23 Ex. B. Thus, this policy describes what should be included within some future siting process,
24 but it does not establish such a process itself.

25 In response to a request by Cascade Bicycle for the siting process the City Clerk
responded on December 13, 2006 that:

City Records show that a process has not been established for reviewing
proposals for siting essential public facilities.

1 Supp. Ex. 8, Letter of Susan Stein, City Clerk to Jeffrey M. Eustis, December 13, 2006.

2 Accordingly, Lake Forest Park admits to having failed to comply with the requirements of
3 GMA requiring the adoption of a process for identifying and siting essential public facilities.

4 On this issue, Cascade Bicycle asks the Board to find the City out of compliance with GMA.

5 **C. Ordinance 951 Violates RCW 36.70A.030(3) Because It Fails to**
6 **Encourage Multi-modal Transportation.**

7 Under this argument Cascade Bicycle considers Issue 3:

8 *Does Ordinance 951, amending the City's Conditional Use*
9 *Ordinance by providing specific development criteria under*
10 *which a multi-use or multi-purpose trail may be authorized as a*
11 *conditional use, violate RCW 36.70A.020(3), the GMA's*
12 *Transportation goal, because it fails to encourage multi-modal*
13 *transportation which is based on regional priorities and*
14 *coordinated with county and city comprehensive plans?*

15 The goals of GMA serve to guide the adoption of comprehensive plans and
16 development regulations. RCW 36.70A.020 (preamble). Goal .020(3) requires GMA plans
17 and development regulations to:

18 Encourage the efficient multi-modal transportation systems that are based on regional
19 priorities and coordinated with county and city comprehensive plans.

20 Not only must plans and regulations conform with the GMA goals, but substantial interference
21 with these goals by a noncompliant plan or regulation serves as grounds for invalidity under
22 RCW 36.70A.302(1)(b).

23 The only multi-use trail passing through Lake Forest Park, the Burke-Gilman Trail, is a
24 regional facility, so designated by King County's Regional Trails Plan (October 1992), the
25 county's Non-Motorized Transportation Plan (May 1993) and by the Puget Sound Regional
Council's Destination 2030 Regional Transportation Plan adopted in May 2003, *supra*.

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1 The Burke-Gilman Trail is part of a multi-modal transportation system because it
2 provides the principal route for non-motorized travel for a number of jurisdictions in northern
3 King County. Encouraging, improving and expanding non-motorized transportation is
4 becoming ever more important to confront the challenges of increased population, traffic
5 congestion, rising fuel prices and even the need to reduce carbon dioxide emissions. But far
6 from encouraging this existing, non-motorized transportation facility, Ordinance 951 seeks to
7 obstruct its improvement.
8

9 First, an articulated principle of Ordinance 951 is to elevate motor vehicle travel over
10 non-motorized travel by directing the Hearing Examiner to:

11 [a]void, whenever possible, altering traffic flows and patterns that are normal and
12 customary to neighborhoods through which a trail passes or will pass, or impeding the
13 safe and efficient ingress and egress to and from adjacent or near-by uses and areas. . .

14 Section 18.54.47.A.4.a. As noted above the Ordinance carries forward this general principal
15 with specific signing and right of way requirements, also subordinating non-motorized travel to
16 motor vehicles in driveways and minor roads. §18.54.047.D.1. In other words, Ordinance 951
17 expressly directs the Examiner “wherever possible” to not upset the norm and custom of
18 dependency upon single occupancy vehicles. Within the formalities of legislation, a more
19 hostile position against competing modes of travel could not be taken.
20

21 Second, other provisions within Ordinance 951 subordinate multi-use trails, and the
22 Burke-Gilman Trail in particular, to the parochial, subjective interests of “the privacy of
23 adjacent uses,” and to what the Examiner may determine to be “compatible with the character
24 and appearance with residential uses.” §§18.54.047.D.4.b.i. Of course, trail improvements not
25 meeting the City’s subjective standards of preserving privacy, compatibility with residential

1 uses, and avoiding interference with existing traffic flows would be denied. Rather than
2 encouraging multi-modal transportation, Ordinance 951 consciously discourages any
3 improvement to the multi-modal transportation provided by the Burke Gilman Trail, or by any
4 multi-use trail.

5 **D. Ordinance 951 Conflicts With RCW 36.70A.020(7) Because It Creates an**
6 **Unfair and Unpredictable Permit Processing System.**

7 Under this argument Cascade Bicycle Addresses Issue 4:

8 *Does Ordinance 951, amending the City's Conditional Use Ordinance by providing*
9 *specific development criteria under which a multi-use or multi-purpose trail may be*
10 *authorized as a conditional use, violate RCW 36.70A.020(7), the GMA's permit*
11 *processing goal, because it: (a) fails to provide multi-use trail proponents with a fair*
12 *and predictable permit processing system; (b) creates conflict between the City's*
13 *regulations and the regulations or state, federal, and/or other regulatory entities; or (c)*
14 *does both (a) and (b)?*

15 Cascade Bicycle demonstrates below that Ordinance 951 fails to comply with Goal
16 020(7) because the ordinance creates an unfair and unpredictable permit review process. Under
17 Argument A.4 above Cascade Bicycle demonstrates that the ordinance conflicts with state and
18 federal standards.

19 Goal .020(7) provides as follows.

20 Applications for both state and local government permits should be processed in
21 a timely and fair manner to ensure predictability.

22 In construing this goal this Board found to be noncompliant a permit system that was "unfair,
23 untimely and unpredictable." *King County I*, FDO at 11. The principal defects of Ordinance
24 951 are its unfairness and unpredictability.

25 As identified above under Part 3 of this memorandum, Ordinance 951 grants the
Hearing Examiner the unbounded discretion to condition or deny approval based upon his or

1 her determinations of “limitation of size”, “compatibility with the character and appearance of
2 development in the vicinity”, the “privacy of adjacent uses”, “enhanced landscaping”, and ten
3 additional subjective conditional use permit criteria, including discretionary determinations of
4 what would “not be materially detrimental to other property in the neighborhood” and what
5 would “satisfy the needs of the community.” These are the very types of subjective criteria
6 that the Board found to violate the provisions within Section .200 and goal .020(7) of GMA in
7 *King County I*, Order Finding Continuing Noncompliance and Continuing Invalidity and
8 Notice of Second Compliance Hearing at 17.

10 The permit review system is unfair and unpredictable because the determinations under
11 the newly adopted §18.54.047 are not governed by any objective standards and an applicant
12 has no way of knowing in advance what the decision maker would find to be of appropriate
13 size, compatibility, and respectful of privacy. In *City of Seattle v. Crispin*, 149 Wn.2d 896, 905,
14 71 P.3d 208 (2003) the court eschewed such vagaries:

16 “However, as we recognized in *Dillingham*, the statute does not support the
17 distinction the Court of Appeals draws between adjustments that are minor
18 compared with substantial. Nor would such a rule be workable, and would
19 perhaps be unconstitutional. We have recognized that the regulation of land use
must proceed under an express written code and not be based on ad hoc
unwritten rules so vague that a person of common intelligence must guess at the
law's meaning and application.”

21 (Emphasis supplied.) This requirement for specificity applies to Growth Management
22 regulations. Consistent with this and similar judicial holdings, the Eastern Board in *Loon Lake*
23 *Property Owners Ass’n et al. v. Stevens County*, No. 03-1-0006c, Order on Motions at 5
24 (2/6/04) found to be non-compliant a critical areas regulation that relied upon “unenforceable
25 ‘ad hoc’ standards”. And the Western Board in *Citizens for Mount Vernon et al v. City of*

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1 *Mount Vernon*, Case No. 98-2-0006c (FDO, 7/23/98) found to be non-compliant a planned unit
2 development ordinance that required such things as consideration of the character of
3 surrounding areas and unarticulated design factors failed to provide sufficient standards to
4 allow land use decisions to be made. The decision criteria imposed by Ordinance 951 allow
5 similar subjectivity.

6 **E. Ordinance 951 Violates RCW 36.70A.020(9) by Failing to Encourage the**
7 **Development of Parks and Recreation Facilities.**

8 Under this argument Cascade Bicycle addresses Issue 5:

9 *Does Ordinance 951, amending the City's Conditional Use*
10 *Ordinance by providing specific development criteria under*
11 *which a multi-use or multi-purpose trail may be authorized as a*
12 *conditional use, violate RCW 36.70A.020(9), the GMA's open*
13 *space and recreational goal, because it fails to enhance*
14 *recreational opportunities and fails to provide for the*
15 *development of parks and recreational facilities?*

16 Goal .020(9) requires that plans and their development regulations:

17 Retain open space, enhance recreational opportunities, conserve fish and wildlife
18 habitat, increase access to natural resource lands and water, and develop parks and
19 recreation facilities.

20 This goal does not just acknowledge the need to maintain and continue parks and recreation
21 facilities in their existing conditions, but it places an affirmative obligation on counties and
22 cities to "enhance recreational opportunities" and to "develop parks and recreation facilities."

23 Ordinance 951 substantially frustrates this goal by obstructing the County's efforts to improve
24 the Burke-Gilman Trail. The trail lies in a degraded state with paving in poor repair. The
25 improved surface has insufficient width to handle present volumes and the effective width of
the trail is further narrowed by numerous encroachments. Ex. 532 at 10 and 31-32. Ordinance

1 951 does not allow the County to bring the trail up to trail development standards or to make
2 sufficient improvements to handle present levels of volume. See Supp. Ex. 3, letter King
3 County Executive to Lake Forest Park at 1 and Supp. Ex. 7, letter King County DNR to Lake
4 Forest Park at 2. As a result, the condition of the trail would continue to deteriorate, further
5 frustrating the attainment of Goal .020(9).

6 **F. Ordinance 951 Conflicts with RCW 36.70A.020(12) by Failing to Assure That**
7 **Public Facilities Necessary to Serve Non-Motorized Transportation Needs Are**
8 **Available to Meet Future Development.**

9 Under this argument Cascade Bicycle address Issue 6:

10 *Does Ordinance 951, amending the City's Conditional Use*
11 *Ordinance by providing specific development criteria under*
12 *which a multi-use or multi-purpose trail may be authorized as a*
13 *conditional use, violate RCW 36.70A.020(12), the GMA's Public*
14 *Facilities and Services goal, because it would render*
15 *impracticable the improvement of the Burke-Gilman Trail, an*
16 *essential public facility?*

17 RCW 36.70A.020(12) provides as follows:

18 Ensure that those public facilities and services necessary to support development shall
19 be adequate to serve the development at the time the development is available for
20 occupancy and use without decreasing current service levels below locally established
21 minimum standards.

22 Ordinance 951 violates this goal because it effectively obstructs improvement of the Burke-
23 Gilman Trail, a facility necessary to serve future development in north King County with a
24 facility for non-motorized transportation. Within the cities served by the trail of Redmond,
25 Bothell, Kenmore, Lake Forest Park and Seattle, the population is projected to expand within
the next by approximately 50%. See Supp. Ex. 13 at Table 2 (projected increase in households
within Northwest King County from 279,800 to 422,400 in period between 1998 to 2030). The
present condition of the trail already fails to adequately serve pedestrian and bicycle volumes.

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1 Ex. 532 at 31. For shared use paths with substantial use (> 60 bicycles or > 20 pedestrians per
2 day), the WSDOT Design Manual at Figure 1020-13 recommends a minimum width of 12 to
3 14 feet with 2 foot wide graded shoulders. Ex. 478. The continued effectiveness of Ordinance
4 951 would only cause further decline in the ability of the trail to serve future needs for non-
5 motorized travel.

6 **G. In Adopting Ordinance 951 the City Violated the State Environmental Policy**
7 **Act by Failing to Conduct Any Environmental Review in Advance of the**
8 **Ordinance's Adoption.**

9 Under this argument Cascade Bicycle addresses Issue 7:

10 *Does Ordinance 951, amending the City's Conditional Use Ordinance by providing*
11 *specific development criteria under which a multi-use or multi-purpose trail may be*
12 *authorized as a conditional use, violate RCW 43.21C (SEPA), because the City failed to*
13 *comply with the procedural requirements of SEPA?*

14 Under RCW 43.21C.030 of the State Environmental Policy Act (SEPA) "all branches
15 of government of this state, including . . . municipal . . . corporations, [like Lake Forest Park] . .
16 . shall . . . include in every recommendation or report on proposals for legislation other major
17 actions significantly affecting the quality of the environment, a detailed statement by the
18 responsible official on (1) the environmental impact of the proposed action . . ." RCW
19 43.21C.030(2)(c). The requirement to prepare an environmental impact statement holds unless
20 the jurisdiction's responsible official has determined the proposal either to be exempt from
21 SEPA or to present no probability of significant adverse environmental impacts. See WAC
22 197-11-305(1) (categorical exemptions are exempt from the threshold determination process)
23 and -340(1) (proposals presenting no probable significant adverse environmental impacts shall
24 be issued a determination of nonsignificance).

1 Proposals for the adoption and amendment of comprehensive plans and development
2 regulations under GMA are not exempt from SEPA review. Such proposals are not listed
3 within any of the categorical exemptions set forth by statute at RCW 43.21C.037-.039 or those
4 created by regulation. See WAC 197-11-800 et seq. To the contrary, through special
5 SEPA/GMA integration procedures, the SEPA regulations require that SEPA review be part of
6 the process for the adoption of GMA plans and regulations. See WAC 197-11-210 -.238. An
7 action subject to SEPA review that is taken by a governmental agency without SEPA
8 compliance is contrary to law and void, a matter that was resolved by the first reported decision
9 under SEPA, *Stempel v. Department of Water Resources*, 82 Wn.2d 109, 508 P.2d 166 (1973).
10 See also *Noel v. Cole*, 98 Wn.2d 375, 655 P.2d 245 (1982) (action taken in disregard of SEPA
11 is *ultra vires* and void).⁴

13 Lake Forest Park adopted Ordinance 951 in violation of SEPA by failing to comply
14 with any of SEPA's procedures prior to the Ordinance's adoption, something that the City
15 freely admits. Supp Ex. 9. To remedy this omission Cascade Bicycle asks that the Board
16 require that in any remand the City be directed to fully comply with SEPA from the earliest
17 stage in any process to address Ordinance 951's noncompliance with GMA, as required by the
18 SEPA regulations. WAC 197-11-055(1) ("the SEPA process shall be integrated with agency
19 activities at the earliest possible time to ensure that planning and decisions reflect
20 environmental values ...")⁵

21
22
23
24 ⁴ Although the holding of *Noel v. Cole*, that action taken in disregard of SEPA is *ultra vires* remains
25 intact, the court in *Dioxin/Organochlorine Center v. PCHB*, 131 Wn. 2d 345, 360, 932 P.2d 158 (1997)
has found another holding of the case to no longer be authoritative.

⁵ After both the adoption of Ordinance 951 and the filing of this appeal, Lake Forest Park prepared an
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1 **H. Ordinance 951 Should Be Invalidated.**

2 The Board has the authority to not only find a plan or development regulation to be
3 noncompliant with GMA, but to be invalid. A ruling of invalidity requires a finding that:

4 The continued validity of part or parts of the plan or regulation would
5 substantially interfere with the fulfillment of the goals of this chapter .

6 RCW 36.70A.302(2)(b). Additionally, an order of invalidity must specify portions of
7 the plan or regulation determined to be invalid and set forth reasons for their invalidity.

8 RCW 36.70A.302(1)(c).

9 An order of invalidity should be entered because the continuing invalidity of
10 Ordinance 951 would substantially interfere with the goals .020(3), .020(7), .020(9) and
11 .020(12), as demonstrated above. The entirety of Ordinance 951 should be invalidated
12 because the non-compliant provisions affect the entirety of the ordinance. The general
13 principles established at §18.54.47.A, subordinating multi-use trails to existing
14 neighborhood traffic and to subjective determinations of neighborhood compatibility
15 and privacy, apply to all other requirements imposed by Ordinance 951 and to all
16 permit applications. Additionally, because Ordinance 951 is part of the conditional use
17 permit chapter, Ch. 18.54, all permit applications for multi-use trails are made subject
18

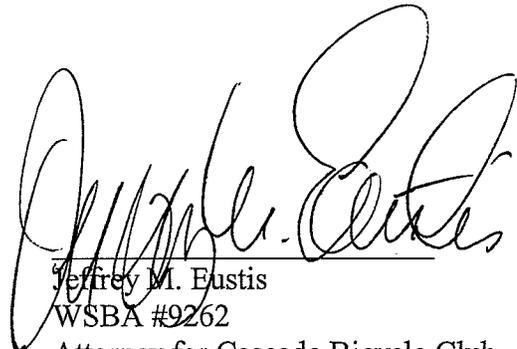
19
20
21 environmental checklist for the previously adopted ordinance. Supp. Ex. 10. Cascade Bicycle
22 understands that the City subsequently has adopted Ordinance 958 that purports to recognize the post
23 Ordinance 951 SEPA process and to re-confirm the adoption of Ordinance 951. Cascade Bicycle would
24 disagree with any contention by the City that these actions render the SEPA issue moot, on grounds that
25 the after-the-fact attempt to comply with SEPA frustrates SEPA's intended purposes of informing the
decisionmaking process, rather than serving as a post-hoc justification for action already taken. See
WAC 197-11-055(1) and (2), each requiring SEPA compliance at the earliest stage in the proceeding.
See also, *International Snowmobile Mfrs. Ass'n v. Norton*, 340 F.Supp.2d 1249,1258 (D.Wyo., 2004)
("... the court will not accept *pro forma* compliance with NEPA procedures, nor *post hoc*
rationalizations as to why and how the agency complied with NEPA. [citing to] *Davis v. Mineta*, 302

1 to the 10 discretionary criteria under §18.54.030. Specific requirements from the
2 adopted §18.54.047 cannot simply be removed to leave a GMA compliant regulation in
3 tact. Because all provisions of Ordinance 951 are affected by overriding provisions that
4 do not comply with GMA, the entirety of the Ordinance must be invalidated.⁶

5 **VIII. CONCLUSION**

6 For the reasons given above, the Board should find that Ordinance 951 fails to
7 comply with GMA and that it is invalid.
8

9 DATED: April 25, 2007

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12 Jeffrey M. Eustis
13 WSBA #9262
14 Attorney for Cascade Bicycle Club
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25 F.3d 1104, 1112-13 (10th Cir.2002).

⁶ Cascade Bicycle fully supports the County arguments under Issues 8, 9 and 10.

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BEFORE THE STATE OF WASHINGTON
GROWTH MANAGEMENT HEARINGS BOARD
FOR CENTRAL PUGET SOUND

CASCADE BICYCLE CLUB, et al,

Petitioner,

v.

LAKE FOREST PARK,

Respondent.

CPSGMHB Case NO. 07-3-0010c

DECLARATION OF SERVICE

I am an employee in the law offices of J. Richard Aramburu and Jeffrey M. Eustis, over
eighteen years of age and competent to be a witness herein. On April 25, 2007, I served copies
of Hearing Memorandum by Cascade Bicycle Club to counsel of record by messenger to:

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Inslee Best Doezie & Ryder, P.S.
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DECLARATION OF SERVICE - 1

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