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NORM MALENG
PROSECUTING ATTORNEY
DNR-CIVIL DIVISION

BEFORE THE CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD

CASCADE BICYCLE CLUB, a Washington
Corporation, et al,

NO. 07-3-0010c

Petitioner,

CITY'S RESPONSE BRIEF

v.

CITY OF LAKE FOREST PARK, a
municipal corporation,

Respondent.

The City of Lake Forest Park ("City") submits this Response to (1) King County's Prehearing Brief and (2) Hearing Memorandum by Cascade Bicycle Club.

I. INTRODUCTION

In this matter, King County and Cascade Bicycle Club (collectively, "Petitioners") challenge the City's enactment of Ordinance No. 951, which amends the City's multi-use trail conditional use regulations. Petitioners allege that Ordinance No. 951 precludes an essential public facility in violation of RCW 36.70A.200(5), violates several Growth Management Act goals, and is not consistent with certain City Comprehensive Plan policies.

Ordinance No. 951 does not violate RCW 36.70A.200(5). Multi-use trails are not an essential public facility under the GMA. But more importantly, Ordinance No. 951 does not preclude multi-use trails from siting or expanding in the City. The Ordinance does not

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1 outright deny such trails the right to locate or expand, nor does the Ordinance render the
2 location or expansion of such trails "impracticable." Rather, the Ordinance provides an
3 appropriate method for the City to require reasonable mitigation of the impacts of multi-use
4 trails. Petitioners' position ignores the fact that Board and judicial decisions establish that
5 local jurisdictions have authority to require that proponents of essential public facilities,
6 including regional essential public facilities, mitigate the impacts of those facilities.
7 Moreover, Ordinance No. 951 did not enact the language that Petitioners allege "precludes"
8 multi-use trails. That language was enacted by a prior Ordinance, and is not subject to
9 challenge at this time.

10 Ordinance No. 951 does not violate any GMA goals, and the Ordinance is consistent
11 with the City's Comprehensive Plan. An Ordinance does not violate the goals to encourage
12 multi-modal transportation systems, enhance recreational opportunities, or ensure that public
13 facilities are adequate, by requiring that impacts of transportation or recreation facilities be
14 mitigated. Likewise, Ordinance No. 951 does not create an unfair permit processing system.

15 To the extent that Petitioners allege that the City failed to comply with procedural
16 requirements of the State Environmental Policy Act and to provide notice to the state
17 Department of Community, Trade and Economic Development, the City has met those
18 requirements, rendering those claims moot.

19 Therefore, the Board should deny Petitioners' Petitions for Review, and affirm the
20 City's enactment of Ordinance No. 951.

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23 **II. ISSUES PRESENTED**

24 The Issues presented for review are stated in the Board's Prehearing Order and the
Board's Order on Motions, and are set forth in Appendix F to this Brief.

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III. STATEMENT OF FACTS

A. Description of the City of Lake Forest Park.

The City is a code city operating under Title 35A RCW. The City is located in northern King County, on the northern tip of Lake Washington. The City is bordered by the cities of Mountlake Terrace and Brier in Snohomish County to the north, by the city of Kenmore to the east, by the city of Seattle and Lake Washington to the south, and the city of Shoreline to the west. *App. A (Lake Forest Park Comprehensive Plan), p. 23.*¹ The City is approximately 3.4 square miles in size. *Id.*

The City is primarily a single-family residential community. *Id.* Approximately 80% of the land in the City is developed with residential uses, the vast majority of which are single-family residences. *Id.* at p. 24. Commercial development accounts for less than two percent of the City's area. *Id.* Two state highways run through the City. Bothell Way NE (SR 522) runs from the City's south boundary with Seattle, northeast to Kenmore. *Id.* at 23. Ballinger Way NE (SR 104) runs north-south, from the City's northern boundary to its intersection with Bothell Way. *Id.* The majority of the City's commercial development is located on these state highways, with the City's Town Center at their intersection. *Id.*

B. King County's Burke Gilman Trail Is Located Within the City.

King County owns and operates the Burke Gilman Trail, a segment of which traverses the City. The Burke Gilman Trail is a multi-purpose trail that provides opportunity for a variety of recreational activities, such as walking, jogging, roller-skating, and biking. The Trail covers 2.1 miles within the City, and is approximately 26 miles long in total length. *Ex. 532, p. 3.* The Trail runs along the City's southeastern boundary, generally between Lake Washington and Bothell Way NE. Within the City, most of the property abutting the Trail is developed with single-family residences. *Ex. 532, p. 17; Ex. 595, p. 5.*

¹ The Board can take official notice of provisions in the City's Comprehensive Plan. *WAC 242-02-660.*

1 King County originally acquired the Trail right-of-way pursuant to Resolution No.
2 34571. In that 1967 Resolution, the County authorized expenditure of funds for acquisition
3 and development of "walking paths and trails," for recreational purposes. *Ex. 562, p. 15.*
4 In the City, the Trail right-of-way is generally fifty feet wide, and has a 100 foot wide
5 segment in the southern area. *Ex. 532, p. 3.*

6 Within the City, the Trail is characterized by its proximity to single-family residential
7 properties. At eight locations, the Trail crosses private driveways or streets, each of which
8 provides access to residential properties, ranging in number from a few to thirty-nine. *Ex.*
9 *532, App. 7A.* Access to these residences requires crossing the Trail. *Ex. 595 p. 5.* The
10 Trail also crosses at least three public streets in the City: (1) Bothell Way NE/NE 170th
11 Street; (2) NE 165th Street/Beach Drive NE; and (3) Bothell Way NE/Ballinger Way NE-
12 Beach Dr. NE. The NE 165th Street intersection provides access to the Sheridan Beach
13 Club, and it is necessary to cross the Trail to access the Beach Club. *Ex. 595, p. 5.* In
14 addition, the Trail crosses two salmonid-bearing streams, McAleer Creek and Lyon Creek,
15 which provide important wildlife habitat corridors. *LFP Comp. Plan, at 26.*

16 The Trail is a popular amenity, and is used by persons of all ages for walking,
17 jogging, biking, skateboarding, roller skating, and other forms of non-motorized activity.
18 The increasing level of use of the Trail has created a number of problems. First, as the Trail
19 does not have separate lanes or areas for different types of uses, conflicts exist between
20 persons using the Trail for different activities. Second, conflicts exist between Trail users
21 and the land uses on which the Trail abuts. For instance, owners of residences who must
22 cross the Trail to enter or leave their property have had an increasingly difficult time
23 crossing the Trail to access or leave their homes. *Ex. 532 p. 1.* As a result, stop signs
24 facing the Trail were installed at the intersections providing access to the residences. *Ex.*
532, App. 7A p. 2-6. In addition, the Trail's intersection with NE 165th Street is controlled
by a four-way stop sign, and the Trail's intersections with Bothell Way NE/NE 170th Street

1 and Bothell Way NE/Ballinger Way NE-Beach Dr. NE are controlled by four way traffic
2 signals. *Ex. 532, App. 7A p. 6-7.*

3 **C. King County Proposes to Improve and Expand the Burke Gilman Trail.**

4 Over the years, the County has allowed the Trail, at least in the City, to deteriorate
5 into a state of disrepair. *Ex. 532, p. 1.* In approximately 2000, the County began to
6 develop plans to repair and expand or redevelop the Trail. At that time, the City began to
7 meet with County staff to discuss improvements to the Trail. *Ex. 532, p. 1.* In May of
8 2000, the City held a public meeting to identify stakeholders (who included local residents,
9 businesses, trail neighbors, and trail users), solicit community input, and establish a process
10 for implementing potential improvements to the Trail. *Id.*

11 Two years later, in May 2002, the County met with the City and stakeholder groups
12 to formalize and discuss a program for trail improvements. *Ex. 532, p. 1.* The County
13 contracted with Atelier PS, landscape architects, to prepare a report regarding a program for
14 trail repairs and improvements. *Id.* A draft report was presented to County staff, but was
15 rejected as inadequate because proposed recommendations failed to meet the County's long
16 term vision for regional trails. *Id.*

17 After additional work, the final Atelier PS "Burke-Gilman Trail Redevelopment
18 Study," was issued in October 2005. *Ex. 532.* The Study was prepared for the King County
19 Facilities Management Division of the Department of Executive Services, and the King
20 County Department of Parks and Recreation. *Ex. 532, cover.* The Study contains eight
21 Appendices, which include a Trail Right-of-way Survey, geotechnical, drainage, wetland and
22 streams, wildlife and arborist reports, and a Trail Crossing Plan. *Ex. 532, Appendices.*

23 **D. In October 2005, the City Enacted Ordinance No. 909, Establishing Conditional
24 Use Permit Criteria for Multi-Use Trails.**

Throughout the County's process for the improvements to its Trail in the City,
citizens consistently voiced concerns to City staff and the City Council regarding issues

1 related to the County's operation and maintenance of the Trail, enforcement of Trail
2 regulations, and other issues related to the multiple uses of the Trail and its impact on
3 adjacent land uses, which are predominantly single-family residences. The City is also
4 interested in developing one or more new multi-purpose trails itself in the future. For
5 example, the City is interested in establishing a multi-purpose trail to link trails such as the
6 Interurban Trail to the north of the City with the Burke-Gilman Trail. See *App. A, p. 110*.

7 The City began discussing and considering amendments to the City code that would
8 address issues raised regarding multi-use trails. In 2004, the City adopted Ordinance No.
9 907, which amended certain sensitive areas regulations applicable to multi-use trails. See
10 *Ex. 556*. During the same time frame that the City considered Ordinance No. 907, the City
11 was considering proposed Ordinance No. 909. Ordinance No. 909 amends the City's
12 conditional use regulations by clarifying that multi-purpose trails are subject to the
13 requirement to obtain a conditional use permit. After extensive discussion and public
14 hearings and debate, on October 27, 2005, the City Council adopted Ordinance No. 909,
15 adding a new section to Chapter 18.54 of the City code² as follows:

16 **18.54.047 Multi-use or Multi-purpose trails.**

17 A multi-use or multi-purpose trail facility may be allowed, added to or altered
18 as a conditional use in any land use zone of the City. In granting such
19 conditional use, the hearing examiner is instructed to attach appropriate
20 conditions such as but not limited to, the following: limitation of size, location
21 on property and screening and to only issue conditional use permits conditioned
22 upon compliance with any requirements provided under Chapter 18.54.

23 *Ex. 422, p. 2.*³

24 Neither King County nor Cascade Bicycle Club, nor any party, appealed the City's
adoption of Ordinance No. 909; Ordinance No. 909 is not the subject of this appeal. Thus,

² Chapter 18.54 LFPMC is the chapter in the City's zoning code that governs conditional uses.

³ Although earlier drafts of Ordinance No. 909 contained more detailed conditional use permit provisions, Ordinance No. 909 as passed by the Council contained this provision.

1 the multi-use trail conditional use permit requirement enacted in Ordinance No. 909 cannot
2 be challenged at this time, and will remain in effect regardless of the outcome of this appeal.

3 **E. After Further Public Hearings and Debate, the City Council Adopts Ordinance**
4 **No. 951, Amending the Multi-Use Trail Conditional Use Regulations.**

5 During the time that the City Council was considering Ordinances No. 907 and 909,
6 the City and the County had discussions to attempt to reach agreement regarding issues
7 related to the Trail's repair and expansion, and future maintenance and operation. As part of
8 these discussions, in October 2004 the County and the City entered into a Memorandum of
9 Understanding, in which the County and the City agreed to establish a Citizens Advisory
10 Group ("CAG") to provide a forum for discussion of issues related to trail redevelopment,
11 reflecting a variety of community interests. *Ex. 503; 426.* The CAG held meetings,
12 reviewed consultants reports, and ultimately issued recommendations regarding the repair,
13 expansion, and operation of the Trail. *Ex. 509.*

14 The City continued to consider appropriate regulations for multi-purpose trails in the
15 City. The City sought the assistance of qualified professionals to aide in the evaluation of
16 appropriate regulations. *Ex. 419.* The City contracted with a consultant, Huitt-Zollars, to
17 advise the City on issues concerning development or expansion of such trails, and to address
18 the multitude of concerns expressed by citizens over the previous several years. In April
19 2006, Huitt-Zollars issued a report that provided a summary of standards for shared use
20 paths, and suggested provisions for conditional use regulations. *Ex. 595.*

21 The Huitt-Zollars Report recognized that unique circumstances on the Trail in the
22 City impact the application of any trail standards. *Ex. 595, p. 2.* These special and unique
23 circumstances include proximity of residential uses, topography (steep vertical and acute
24 angular vehicle approaches to the path), and multiple and frequent driveway and roadway
crossings. *Id.* The Report notes that the Trail was originally designed as a walking path.
Id. Certain standards from other states recommend against multi-use paths where there are

1 more than eight crossings per mile, and the Trail's south section in the City has eight
2 crossings in one mile. *Id.* The Report states: "Since cross flow by motor vehicle traffic
3 cannot be minimized along this section of the path due to existing conditions and adjacent
4 residential access needs, the applicability of standards for shared use paths along this section
5 of path should require additional consideration." *Id.*

6 Regarding recommendations for conditional use permit conditions, the Report states:

7 The safety of all Lake Forest Park's citizens and visitors using surface streets
8 and the trail is the paramount concern. The Lake Forest Park section of the
9 Burke Gilman Shared Use Path is unique because of the large number of
10 residential street and access crossings along this section of trail and the acute
11 vertical and horizontal angles of approach that limit visibility. This is of
12 particular concern for motor vehicle operators, especially trucks and delivery
13 vehicles with limited visibility past 90 degrees of the passenger side.

14 In a collision between a path user and a motor vehicle, the path user is more
15 likely to experience serious injury or death than the driver of the vehicle. Path
16 users should be warned of potential motor vehicle conflicts at crossings where
17 such potential collisions could occur.

18 *Ex. 595, p. 6.* The Report then recommends that yield signs be used for trail intersections
19 with driveways, and that the existing stop signs and traffic signals remain at the three public
20 streets with those controls. *Ex. 595 p.6-8.* This recommendation is similar to the signage at
21 trail crossings at private driveways along the East Lake Sammamish Trail. *Ex. 392 p. 6.*

22 After receiving the consultant's Report, the City resumed work on Ordinance No.
23 951, to amend LFPMC 18.54.047 (enacted in Ordinance No. 909) to include more specific
24 requirements for the grant of a conditional use permit for multi-purpose trails. Beginning in
25 July 2006, the City Council considered and debated a number of versions of Ordinance No.
26 951. See *Ex. 359 - 368; 382 - 392; 401 - 411.* The City received a great number of public
27 comments on the Ordinance, primarily in the form of emails from citizens. See *Index Nos.*
28 *220.*⁴ King County submitted several comment letters. *Ex. 613, Supp Ex. 3, Supp Ex. 4,*

29 ⁴ The City is not providing copies of each email comment to the Board, but simply cites to the Index as
30 indicating the great number of comments received by the City.

1 *Supp Ex. 7.* On October 5, 2006, the City Council held a public hearing on Ordinance No.
2 951. Approximately 59 people testified, including a King County Parks Department
3 representative. *Ex. 388; 614.* In addition, City representatives met with County
4 representatives, in an attempt to reach agreement on language for Ordinance No. 951. *Ex.*
5 *535.* As of the October 26, 2006 Council meeting, the City believed that the County had
6 only identified three issues that had not been resolved: speed limits, yield signs, and
7 setbacks. *Ex. 390 p. 11; see Ex. 408.*

8 During deliberations on the Ordinance, the City Council revised the draft ordinance
9 to address some of the County's and other concerns. *Ex. 385-392; 404-411; 581; 600-608.*
10 For example, the Council increased the maximum speed limit from 10 to 15 miles per hour,
11 unless two or more accidents occur in an area. *Ex. 392 p. 4.* The Council revised the
12 Ordinance to indicate that the City would provide and maintain radar speed indication
13 devices, rather than requiring the trail owner to provide the devices. *Ex. 390 p. 8.* The
14 Council added a provision authorizing the Hearing Examiner to decrease the ordinary
15 setbacks, if site constraints justify the reduction and enhanced landscaping or fencing is
16 provided. *Ex. 405, 406.* The Council also removed a requirement that a trail owner enter
17 an agreement with the City regarding trail maintenance and enforcement. *Ex. 409.*

18 On November 9, 2006, the City Council adopted Ordinance No. 951. *Ex. 418.*

19 **IV. LEGAL AUTHORITY AND ARGUMENT**

20 **A. Petitioners Cannot Meet their Burden to Prove that the City's Action in 21 Adopting Ordinance No. 951 Is Clearly Erroneous.**

22 In this matter, Petitioners challenge the City's enactment of Ordinance No. 951,
23 alleging that the Ordinance violates RCW 36.70A.200(5) relating to essential public facilities
24 and RCW 36.70A.130(1) relating to consistency between development regulations and
comprehensive plan provisions, and that the Ordinance is not consistent with the GMA goals

1 stated in RCW 36.70A.020(3)(transportation), (7)(fair and predictable permit processing),
2 (9)(recreation), and (12)(capital facilities). Ordinance No. 951 is presumed valid.
3 Petitioners have the burden to demonstrate that the Ordinance does not comply with the
4 requirements of the Growth Management Act ("GMA" or "Act"). *RCW 36.70A.320(1), (2)*.
5 The Board shall find that the Ordinance complies with the GMA, unless the Board
6 determines that the City's actions are **clearly erroneous in view of the entire record before**
7 **the Board**, and in light of applicable goals and requirements of the GMA. *RCW*
8 *36.70A.320(3)(emphasis added)*. For the Board to find the City's actions clearly erroneous,
9 the Board must be left with a definite and firm conviction that a mistake has been made.
Dep't. of Ecology v. PUD No. 1, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

10 The GMA recognizes that cities may exercise a broad range of discretion in their land
11 use planning, consistent with the requirements of the Act. *RCW 36.70A.3201*. As stated in
12 *RCW 36.70A.3201*, the legislature intends that the Board grant deference to cities in their
13 land use planning, consistent with the goals and requirements of Chapter 36.70A RCW:

14 In recognition of the broad range of discretion that may be exercised by . . .
15 cities consistent with the requirements of this chapter, the legislature intends
16 for the boards to grant deference . . . cities in how they plan for growth,
17 consistent with the requirements and goals of this chapter. Local
18 comprehensive plans and development regulations require counties and cities
19 to balance priorities and options for action in full consideration of local
20 circumstances. The legislature finds that while this chapter requires local
21 planning to take place within a framework of state goals and requirements,
22 the ultimate burden and responsibility for planning, harmonizing the
23 planning goals of this chapter, and implementing a county's or city's future
24 rests with that community.

19 *RCW 36.70A.3201*. The deference to a local jurisdiction's planning actions that are
20 consistent with the goals and requirements of the GMA "cedes only when it is shown that the
21 [local] planning action is in fact a 'clearly erroneous' application of the GMA." *Quadrant*
22 *Corp. v. St. of Wash. Growth Man. Hearings Bd.*, 154 Wn.2d 224, 248, 110 P.3d 1132

1 (2005). Thus, the GMA contains an over-riding principle that the Board should defer to a
2 local decision on how to best plan for development in that community, consistent with the
3 goals and requirements of the GMA.

4 **B. Ordinance No. 951 Does Not Preclude Essential Public Facilities in Violation of
RCW 36.70A.200(5).**

5 Legal Issue No. 1 states:

6 *Does Ordinance 951, amending the City's Conditional Use Ordinance by*
7 *providing specific development criteria under which a multi-use or multi-purpose*
8 *trail may be authorized as a conditional use, violate RCW 36.70A.200(5) which*
9 *forbids local jurisdictions from precluding the siting of essential public facilities,*
10 *by:*

- 11 (a) *precluding the siting of regional trails, such as the Burke-Gilman Trail;*
- 12 (b) *making it impracticable, if not impossible, to site or improve such trails; or*
- 13 (c) *both (a) and (b)?*

14 Prehearing Order, p. 6.

15 RCW 36.70A.200(5) provides that "no local comprehensive plan or development
16 regulation may preclude the siting of essential public facilities." The term "preclude" in
17 RCW 36.70A.200 includes not only "flat out exclusions" of EPFs, but also the imposition of
18 impracticable permit conditions. *King County v. Snohomish County*, CPSGMHB No. 03-3-
19 0011, Final Decision and Order ("FDO")(Oct. 13, 2003) p. 25-6 (jurisdictions preclude the
20 siting of EPFs when they are rendered impossible or impracticable to site); see *Children's*
21 *Alliance and Low Income Housing Inst. v. City of Bellevue*, CPSGMHB No. 95-3-0011,
22 FDO, p. 38 ("Preclude" interpreted to mean "make impossible or impracticable"). The term
23 "impracticable" is defined as "incapable of being performed or accomplished by the means
24 employed or at command." *King County v. Snohomish County*, CPSGMHB No. 03-3-0011,
FDO (10/13/03) p. 26; *Dept. of Corrections v. City of Tacoma*, CPSGMHB No. 00-3-0007,
Finding of Compliance (05/22/01).

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However, in the exercise of a city's land use powers, a city may impose reasonable conditions and mitigation requirements that will not effectively preclude the essential public facility by rendering it impracticable. *City of Des Moines v. Puget Sound Reg. Council*, 108 Wn.App. 836, 847, 988 P.2d 27 (1999); *Cent. Pug. Sound Reg. Transit Auth. v. City of Tukwilla*, CPSGMHB No. 99-3-0003, FDO (9/15/99) at 5; *State Dept. of Corr. v. City of Lakewood*, CPSGMHB No. 05-3-1143c, FDO (1/31/06) at 15 (local jurisdiction has authority to impose reasonable conditions to mitigate the impacts of the state EPF).

Here, the City's action in enacting Ordinance No. 951 does not violate RCW 36.70A.200(5). First, multi-use trails are not "essential public facilities" under the GMA. But even if such trails were deemed to be GMA essential public facilities, Ordinance No. 951 does not "preclude" the development or expansion of multi-use trails. Ordinance No. 951 simply provides a mechanism for requiring reasonable mitigation of impacts resulting from such trails.

1. A Multi-use Trail, Such as the Burke-Gilman Trail, Is Not an Essential Public Facility Under the Growth Management Act.

A multi-use or multi-purpose trail, such as the Burke-Gilman Trail, is not an "essential public facility" as that term is defined in the GMA. The GMA defines "essential public facility" as follows:

Essential public facilities include those facilities that are typically difficult to site, such 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.

RCW 36.70A.200(1).⁵

⁵ WAC 365-195-070(4) states: "The term 'essential public facilities' is a specialized term applicable in the context of siting, and refers to facilities that are typically difficult to site. 'Essential public facilities' do not necessarily include everything within the statutory definitions of 'public facilities' and 'public services,' and should include additional items not listed in those definitions. . . ."

1 Multi-use trails, such as the Burke Gilman Trail, are not specifically listed in the
2 GMA definition of essential public facility. Multi-use trails are significantly different from
3 the types of public facilities listed in RCW 36.70A.200(1). In order for a multi-use trail to
4 be an "essential public facility," the trail must be "essential." See *Children's Alliance and*
5 *Low Income Housing Inst. v. City of Bellevue*, CPSGMHB No. 95-3-0011, FDO, p. 16
6 ("The characteristic [EPF's] share is that they are essential to the common good, but their
7 local siting has traditionally been thwarted by exclusionary land use policies, regulations, or
8 practices"). Multi-use trails are not "essential" in the same manner as those facilities.⁶
9 Trails are not indispensably necessary to a function of life, and there are alternative facilities
10 that provide the same function as trails. While a multi-use trail may be enjoyable, desirable,
11 or convenient, such trails are not essential. Further, unlike sewage treatment plants,
12 correctional facilities, or group homes, multi-use trails have not been traditionally excluded
13 or thwarted by local land use regulations. Historically, they are not "difficult to site."

12 Petitioners argue that multi-use trails provide a transportation function, and therefore
13 are essential public facilities. However, only very limited transportation facilities are listed
14 in the EPF definition, being "state or regional transportation facilities as defined in RCW
15 47.06.140." Multi-use trails are not one of these types of facilities. RCW 47.06.140
16 provides:

17 The legislature declares the following transportation facilities and services to be
18 of statewide significance: The interstate highway system, interregional state
19 principal arterials including ferry connections that serve statewide travel,
20 intercity passenger rail services, intercity high-speed ground transportation,
21 major passenger intermodal terminals excluding all airport facilities and
22 services, the freight railroad system, the Columbia/Snake navigable river

21 ⁶ While the GMA does not define the term "essential," dictionaries define "essential" as: "Indispensably
22 necessary; important in the highest degree; requisite. That which is required for the continued existence of a
23 thing." Black's Law Dictionary (6th Ed. 1990); see also American Heritage Dictionary (New College Ed.
24 1981)("1. Constituting or part of the essence of something; basic or indispensable: . . . 2. Of the fullest degree
or extent; absolute; undiluted: . . . n. a fundamental, necessary, or indispensable part, item, or principle").

1 system, marine port facilities and services that are related solely to marine
2 activities affecting international and interstate trade, and high-capacity
3 transportation systems serving regions as defined in RCW 81.104.015. The
4 department, in cooperation with regional transportation planning organizations,
5 counties, cities, transit agencies, public ports, private railroad operators, and
6 private transportation providers, as appropriate, shall plan for improvements to
7 transportation facilities and services of statewide significance in the statewide
8 multimodal plan. Improvements to facilities and services of statewide
9 significance identified in the statewide multimodal plan are essential state public
10 facilities under RCW 36.70A.200. . . .

11 RCW 47.06.140.⁷ By listing this limited type of transportation facility in statutory definition
12 of essential public facility, the legislature demonstrated intent not to include other
13 transportation facilities in the definition. See *State v. Sanchez*, 146 Wn.2d 339, 365, 46
14 P.3d 774 (2002)(Rule of statutory construction, *expressio unius est exclusio alterius*, states
15 that specific inclusions exclude implications); *Harmon v. DSHS*, 83 Wn.App. 596, 601, 922
16 P.2d 201 (1996)(the expression of one thing is the exclusion of another).

17 Interestingly, while Petitioners claim that the Burke Gilman Trail is a transportation
18 facility, the Trail is operated and maintained by the County's Parks and Recreation
19 Department. The only County Department to comment on Ordinance No. 951 while it was
20 before the City Council was the Parks Department. *Ex. 613, Supp Ex. 3, Supp Ex. 4, Supp*
21 *Ex. 7*. King County originally acquired the Trail right-of-way pursuant to Resolution No.
22 34571, which authorized expenditure of funds for acquisition and development of "walking
23 paths and trails," for recreational purposes. *Ex. 562, p. 15*. The City lists the Trail as a
24 recreational facility in the City's Comprehensive Plan. *App. A, p. 110*.

To the extent that Petitioners argue that the Burke Gilman Trail is an "essential"
recreational facility, the legislature did not include any recreational facilities on the list of

⁷ RCW 81.104.015 defines "high-capacity transportation system" as "a system of public transportation services within an urbanized region operating principally on exclusive rights of way, and the supporting services and facilities necessary to implement such a system, including interim express services and high occupancy vehicle lanes, which taken as a whole, provides a substantially higher level of passenger capacity, speed, and service frequency than traditional public transportation systems operating principally in general purpose roadways." Thus, it does not include a multi-purpose trail such as the Burke-Gilman Trail.

1 EPF's in the statutory definition. *RCW 36.70A.200(1)*. No Board or judicial decision has
2 held that any recreational facility is "essential."

3 Petitioners argue that in determining whether a facility is an essential public facility,
4 the "broadest possible view should be taken of what constitutes a public facility," citing to
5 WAC 395-165-340(2)(a)(i) and *City of Des Moines v. Puget Sound Reg. Council*, 108
6 Wn.App. 836, 844, 988 P.2d 27 (1999)(relying in part on WAC 395-165-340 to hold that
7 the requirement not to preclude an EPF includes the requirement not to preclude activity
8 necessary for construction of an EPF). While Petitioners accurately repeat the regulation,
9 that regulation only indicates that a broad view of what constitutes a **public facility** is
10 warranted, not what constitutes an **essential public facility**. In general, the GMA does not
11 "contain the requirement that it be liberally construed." *Skagit Surveyors & Eng'rs v.*
Friends of Skagit County, 135 Wn.2d 542, 565, 958 P.2d 962 (1998). Not every public
12 facility is an essential public facility.

13 Petitioners would like to equate the phrase "regional trail" with "essential public
14 facility." However, the fact that a trail may be "regional" does not require the conclusion
15 that it is "essential." While King County and other planning documents indicate that the
16 Burke Gilman Trail is regional, King County has not listed the Trail on any list of essential
17 public facilities.⁸ To the extent that Petitioners argue that the Trail serves transportation
18 purposes, as a factual matter, the Trail is not "essential" for those purposes. The Board can
19 take notice of the fact that the Trail's route parallels streets that can serve the same
20 transportation purpose. *WAC 242-02-670*. While those streets are not devoted solely to
21 bicycles and pedestrians, a "stand-alone" bicycle and pedestrian path is not "essential" in the

22 ⁸ Cascade Bicycle Club argues that statements in the Memorandum of Understanding between the City and
23 the County that the Burke Gilman Trail serves a "critical role" in the County's regional trails system and that it
24 serves as a "regional and local transportation corridor and recreational facility supporting walkers, joggers and
bicyclists" proves that the Trail is an EPF. Cascade Bicycle Club Brief, p. 14. However, these statements do
not establish that the Trail is "essential" or an "essential public facility" as defined in the GMA.

1 same manner as a solid waste handling facility or correctional facility, which are the only
2 facilities that can accomplish their intended purpose.

3 Cascade Bicycle Club argues that the Burke Gilman Trail is an essential public
4 facility because King County has designated it as such. Cascade Bicycle Club Brief, p. 12-
5 3. However, Cascade Bicycle Club provides no citation to any County document
6 specifically designating the Trail as an EPF. Instead, Cascade cites to the County's general
7 criteria for determining whether a facility is an essential public facility. *Id.* at 13-4.⁹
8 Contrary to Cascade's position, the Burke Gilman Trail does not meet those criteria. The
9 Trail does not meet the GMA definition of essential public facility. The Trail is not on any
10 state, county or local list of essential public facilities. While the Trail certainly serves a
11 portion of the County, there is no evidence that it is part of a "countywide" service system.
12 The County has a number of multi-use trails, each of which serves a different area of the
13 County. Finally, the Trail is not the sole existing facility in the County providing the
14 service. The County has other such trails, and a similar "service" for bicyclists and
15 pedestrians is provided by streets, roadways and parks.

16 Because multi-use trails are not "essential public facilities" under the GMA, RCW
17 36.70A.200(5) simply does not apply to the City's enactment of Ordinance No. 951.

18 **2. Ordinance No. 951 Does Not Preclude Multi-Use Trails, Such as the**
19 **Burke-Gilman Trail.**

20 Even if multi-use trails, such as the Burke-Gilman Trail, were deemed to be
21 "essential public facilities," Ordinance No. 951 would not violate RCW 36.70A.200(5). On
22 its face, Ordinance No. 951 does not preclude multi-use trails from being sited in the City.

23 ⁹ Those criteria are: (a) The facility meets the Growth Management Act definition of an essential public
24 facility. (b) The facility is on a state, county or local community list of essential public facilities. (c) The
facility serves a significant portion of the county or metropolitan region or is part of a countywide service
system. (d) The facility is the sole existing facility in the county for providing that essential public service.
Cascade Bicycle Club Brief, p. 13, citing to County Comp. Plan Policy F-222.

1 To the contrary, the Ordinance expressly authorizes such trails to be located or expanded in
2 the City as a conditional use.

3 While a local jurisdiction does not have the authority to preclude an essential public
4 facility, or to deny permits for a state or regional essential public facility, local jurisdictions
5 do have authority to require that the state or county mitigate the impacts of the EPF. *City of*
6 *Des Moines v. Puget Sound Reg. Council*, 108 Wn.App. 836, 847, 988 P.2d 27 (1999);
7 *Cent. Pug. Sound Reg. Transit Auth. v. City of Tukwilla*, CPSGMHB No. 99-3-0003, FDO
8 (9/15/99) at 5; *Dept. of Corr. v. City of Lakewood*, CPSGMHB No. 05-3-1143c, FDO
9 (1/31/06) at 15. The fact that mitigation measures might make construction of the essential
10 public facility more costly does not relieve the proponent of the duty to comply with the
11 local mitigation requirements. *City of Des Moines*, 108 Wn.App. at 847 ("The fact that
12 these requirements may make the expansion more costly does not relieve the Port of these
13 obligations").

14 The Board has expressly approved the use of the conditional use permit process as an
15 appropriate method for determining the impacts of EPFs, both local and regional, and
16 requiring the mitigation of those impacts. *Dept. of Corr. v. City of Lakewood*, CPSGMHB
17 No. 05-3-0043c, FDO (1/31/06) at 15, citing *King County v. Snohomish County*,
18 CPSGMHB No. 03-3-0011, Order on Court Remand (7/29/05) at 10 ("The Board has
19 previously found the conditional use permit process to be appropriate for a local
20 jurisdiction's determination of reasonable conditions and mitigating measures for state and
21 regional EPFs"). The City has enacted such a process. See *App. B (Chapter 18.54 LFPMC,*
22 *as amended by Ordinance Nos. 909 and 951)*.¹⁰

23 Petitioners object to the use of the word "may" in the multi-use trail section in the
24 conditional use chapter of the City code, and to the incorporation of general conditional use

¹⁰ The Board can take official notice of provisions in the City code. WAC 242-02-660.

1 permit criteria into that section. King County Brief, p. 10; Cascade Bicycle Club Brief, p.
2 15-16 (both citing LFPMC 18.54.047C). However, Ordinance No. 951 did not establish the
3 conditional use permit process for multi-use trails, nor did Ordinance No. 951 enact the
4 language in LFPMC 18.54.047 that includes the word "may" and authorizes conditions
5 based on general conditional use permit criteria. Ordinance No. 909, passed on October 27,
6 2005, clarified that such trails are subject to the CUP process, and enacted the language that
7 Petitioners allege authorizes the Hearing Examiner to deny a CUP for a multi-use trail:

8 **18.54.047 Multi-use or Multi-purpose trails.**

9 A multi-use or multi-purpose trail facility may be allowed, added to or altered
10 as a conditional use in any land use zone of the City. In granting such
11 conditional use, the hearing examiner is instructed to attach appropriate
12 conditions such as but not limited to, the following: limitation of size, location
13 on property and screening and to only issue conditional use permits conditioned
14 upon compliance with any requirements provided under Chapter 18.54.

15 *Ex. 422, p. 2.*¹¹

16 Neither King County nor Cascade Bicycle Club, nor any other party, appealed the
17 City's enactment of Ordinance No. 909, and the time for appealing Ordinance 909 is long
18 past. See *RCW 36.70A.290(2)*(petition must be filed within 60 days after publication of the
19 ordinance being challenged). To the extent that Petitioners argue that language enacted in
20 Ordinance No. 909 does not comply with *RCW 36.70A.200(5)*, the Board cannot consider
21 that argument. Because this pre-existing language provides the sole basis for Petitioners'
22 allegation that Ordinance No. 951 authorizes outright denial of a multi-use trail CUP, the
23 Board should dismiss (or at least not consider) Petitioners' claim that Ordinance No. 951
24 violates *RCW 36.70A.200(5)* because it authorizes outright denial.

¹¹ Ordinance No. 951 was prepared in "legislative format." In the Ordinance, the new language added to LFPMC 18.54.047 is underlined; the language that already existed in LFPMC 18.54.047 is not underlined. Thus, Ordinance No. 951 clearly shows that the term "may" and the reference to requirements of Chapter 18.54 were in existence before the amendment contained in Ordinance No. 951. *Ex. 418, p. 2.*

1 Further, even if some multi-use trails were "essential public facilities" under the
2 GMA, Ordinance No. 951 does not require denial of conditional use permit applications for
3 such facilities. The word "deny" is not found in the Ordinance. See *King County v.*
4 *Snohomish County*, CPSGMHB No. 03-3-0011 (*King County I - III*), Combined Order
5 Finding Cont. Noncompliance and of Dismissal (5/26/04) p. 17 (Board disapproves of term
6 "deny" in CUP ordinance that applied to state and regional EPFs, but does not disapprove
7 the phrase "approve, approve with conditions" in same ordinance). The Board cannot
8 assume that the Hearing Examiner will apply the Ordinance in an unlawful manner; the
9 Ordinance authorizes the Examiner to condition approval of an application for a conditional
10 use permit for a multi-use trail so that facility's impacts are mitigated and the facility meets
11 the requirements of Chapter 18.54 LFPMC. *Cent. Pug. Sound Reg. Transit Auth. v. City of*
12 *Tukwilla*, CPSGMHB No. 99-3-0003, FDO (9/15/99) at 5 ("When . . . development
13 regulations allow the City a range of discretion in their application, from lawful to unlawful,
14 the Board cannot assume the City will elect to act unlawfully. Instead, the Board will
15 assume that the prospective governmental actions will be taken in a good faith effort to
16 comply with the Act").

17 Petitioners allege that words such as "compatible," "adequate," and other phrases
18 found in Chapter 18.54 are subjective and provide the Examiner with unlawful discretion.
19 However, similar phrases are found in virtually all CUP regulations. For instance, the term
20 "compatible" is routinely included in conditional use regulations; the purpose of the
21 conditional use process is to determine conditions that mitigate a proposed use's impacts so
22 that the use is compatible with surrounding land uses.¹² The DCTED regulations use the

23 ¹² Regarding conditional uses (also referred to as special uses), one commentator states:

24 Nearly all zoning ordinances make some use of special-permit procedures. Most ordinances impose a
broad division of land uses and, in addition, provide that specified uses may be established or
maintained in named districts, only pursuant to a special permit . . . commonly, they authorize the
board to impose conditions designed to protect abutting landowners and preserve the character of the
neighborhood. The special-permit technique is employed to control uses which are regarded as

1 phrase "not incompatible with" to define consistency under the Act; thus DCTED does not
2 believe that the term "incompatible" is inappropriate, unduly vague, or difficult to apply.
3 WAC 365-195-210.

4 The Board has approved of CUP provisions governing essential public facilities that
5 contain similar phrases. For example, recently in *Dept. of Corr. v. City of Lakewood*, the
6 Board addressed the issue of whether Lakewood's moratorium on applications for
7 correctional facilities "precluded" siting of an essential public facility. The Board stated that
8 prior to enactment of the moratorium, the City's EPF comprehensive plan policies and
9 development regulations did not preclude the siting of essential public facilities. *Dept. of*
10 *Corr. v. City of Lakewood*, CPSGMHB No. 05-3-1143c, FDO (1/31/06) at 13-4, 15
11 (holding that moratorium on application for correctional facilities precludes EPFs). The
12 Lakewood regulations included a conditional use permit requirement. *Id.* at App. D, p. 28-
13 32. The regulations stated that the CUP shall only be granted after the Examiner finds that
14 all standards and criteria in the regulation were met or could be met with conditions. *Id.* p.
15 29. Those criteria included:

16 A. The size and physical characteristics of the site are **appropriate for the**
17 **proposed use** including all facilities and amenities that are required by this title
18 or desired by the applicant.

19 B. The **proposed use will not be detrimental to the public health, safety, and**
20 **general welfare** of the community and will not introduce hazardous conditions
21 at the site that cannot be mitigated to protect adjacent properties and the vicinity.

22 C. The proposed use will not be injurious to, or adversely affect the uses,
23 property, or improvements adjacent to, or in the vicinity of, the site upon which
24 the proposed use is to be located. The proposed use will be **compatible with**
adjacent land uses and consistent with the character of the surrounding area.

D. The proposed use will be supported by **adequate** water, sewer, storm
drainage, schools, electrical, police, and fire protection facilities and services.

especially troublesome, and to soften the impact of certain uses upon areas where they will be
incompatible unless conditioned in a manner suitable to a particular location.

3 Anderson's American Law of Zoning (4th Ed. 1996) § 21.01, p. 693-4.

1 The use will not overburden or adversely affect said public facilities and
services. . . .

2 I. The proposed use complies with the appropriate development and
3 performance standards and all other applicable provisions of the City of
Lakewood Land Use and Development Code.

4 *Id.* p. 30. Thus, the Lakewood conditional use criteria that the Board approved contain
5 language similar to that which Petitioners allege is inappropriate. The Lakewood regulations
6 contain the term "compatible," "adequate," "appropriate," and similar phrases. The
7 *Lakewood* Board indicated that these conditional use provisions did not preclude siting
essential public facilities in violation of RCW 36.70A.200(5).

8 Likewise, in *King County I - III*, the Board disapproved of a CUP regulation that
9 required denial of a CUP for a state or regional EPF if the proposal was not consistent with
10 the comprehensive plan, or was materially detrimental to property in the immediate vicinity.
11 However, the Board held that the other criteria in the CUP regulations "are sufficiently clear
12 that they are not impermissibly vague and over-reaching when applied to regional, state or
13 federal EPFs." *King County I - III*, CPSGMHB No. 03-3-0011, Combined Order Finding
Cont. Noncompliance and of Dismissal (5/26/04) at 17. The approved criteria included:

14 (d) The proposal is **compatible with** and incorporates specific features,
15 conditions, or revisions that ensure it **responds appropriately** to the existing or
intended character, appearance, quality of development, and physical
16 characteristics of the site and surrounding property.

17 (2) As a condition of approval, the hearing examiner may:

18 (a) Increase requirements in the standards, criteria, or policies established by
this title;

19 (b) Stipulate the exact location as a means of minimizing hazards to life, limb,
property damage, erosion, landslides, or traffic; . . .

20 (e) Assure that the degree of **compatibility** with the purpose of this title shall be
maintained with respect to the particular use on the particular site and in
21 consideration of other existing and potential uses, within the general area in
which the use is proposed to be located;

22 (f) Recognize and compensate for variations and degree of technological
processes and equipment as related to the factors of noise, smoke, dust, fumes,
vibration, odors, and hazard or public need; . . .

1 (h) Impose any requirement that will protect the public health, safety, and
2 welfare.

3 *King County I - III*, Combined Order Finding Cont. Noncompliance and of Dismissal
4 (5/26/04) at 17, and note 5 (emphasis added). The criteria in Ordinance No. 951 are far
5 more specific than these criteria, which the Board approved as not violating RCW
6 36.70A.200(5).

7 Regarding Petitioners' objection to the term "satisfied," the decision-maker will
8 always have to be satisfied that code criteria are met. The terms "incompatible" and
9 "satisfaction" do not give an Examiner an inappropriate level of discretion, any more than
10 does any other CUP criteria in a multitude of jurisdictions across the state.

11 The term "adequate" in the Ordinance does not provide the Examiner with
12 "unfettered discretion," particularly when the term is read in context. The Ordinance
13 actually states that the applicant must provide a "Trail Development Plan that: . . . v.
14 Provides a design of adequate trail lighting for safety at drives and intersections while
15 minimizing light shining into residences to the extent reasonably possible consistent with
16 safety." *Ex. 418*, p. 4 (LFPMC 18.54.047D.4.b.v.). The trail lighting design must be
17 adequate The applicant will be able to provide engineering and other support for the lighting
18 design, to demonstrate that the lighting is adequate for the stated purpose of "safety at drives
19 and intersections while minimizing light shining into residences . . .". If any interested
20 person with standing does not agree, they can submit evidence to support their position at the
21 hearing before the Examiner. The Examiner will weigh the evidence, and make a
22 determination. In rendering the decision, the Examiner will be held to standards established
23 by the state and federal constitutions and statutes; the Examiner will not have "carte blanche"
24 or "unfettered discretion" to deny the CUP application. This is no different than any other
permit process.¹³

¹³ While Petitioners do not use the word "vague," the essence of their complaint regarding terms such as "satisfaction," "compatible," and "adequate" is the allegation that those words are impermissibly vague, as they

1 **3. Ordinance No. 951 Does Not Render the Location or Expansion of Multi-**
2 **Use Trails "Impracticable."**

3 Petitioners allege that Ordinance No. 951 violates RCW 36.70A.200(5) by allowing
4 impracticable permit conditions, for reasons that can be summarized as: (1) LFPMC
5 18.54.047C requires the Hearing Examiner to impose limitations on the size and location of
6 the trail (Cascade Bicycle Club Brief, p. 17); (2) the Ordinance authorizes the Examiner to
7 require the trail to be realigned or reduce its width (King County Brief, p. 11-12; (3) the
8 Ordinance requires the applicant to provide a Trail Development Plan that is compatible with
9 adjacent land uses (King County Brief, p. 12; Cascade Bicycle Club Brief, p. 17); (4) the
10 Ordinance contains requirements for setbacks, landscaping, and fencing (King County Brief,
11 p. 12-13; Cascade Bicycle Club Brief, p. 17-19); and (5) the Ordinance contains signage
12 requirements that conflict with state and federal law (King County Brief, p. 13-4; Cascade
13 Bicycle Club Brief, p. 20-23). However, none of these Ordinance provisions "preclude" the
14 location or improvement of a trail, or require conditions that render trail development or
15 improvements "impracticable."

16 The City has the authority to require that the proponent of an essential public facility
17 mitigate the impacts of that facility. *City of Des Moines v. Puget Sound Reg. Council*, 108

18 do not provide the Hearing Examiner with sufficient standards. A claim that an ordinance is impermissibly
19 vague is a constitutionally-based challenge, for violation of the due process clause. See, eg., *State v. Watson*,
20 154 P.3d 909, 2007 Wash. LEXIS 211, 216 (April 5, 2007)(Under the due process clause of the Fourteenth
21 Amendment, a statute is void for vagueness if: (1) the statute does not define the criminal offense with
22 sufficient definiteness that ordinary people can understand what conduct is proscribed; or (2) the statute does
23 not provide ascertainable standards of guilt to protect against arbitrary enforcement). Any claim that Ordinance
24 No. 951 is impermissibly vague is beyond the scope of the Board's jurisdiction. *RCW 36.70A.280(1)*(Growth
boards shall hear and determine *only those petitions alleging* either: (a) That a . . . city planning under this
chapter is not in compliance with the requirements of this chapter, . . . , or chapter 43.21C RCW as it relates
to plans, development regulations, or amendments, adopted under RCW 36.70A.040 . . ."; *Wen. Sportsmen*
Ass'n v. Chelan County, 141 Wn.2d 169, 178, 4 P.3d 123 (2000)(Unless a petition alleges that a
comprehensive plan or a development regulation is not in compliance with the requirements of the GMA, the
Board does not have jurisdiction); *Gutschmidt v. Mercer Island*, CPSGMHB No. 92-3-0006, FDO at 10
("Board does not have jurisdiction to determine federal and state constitutional issues arising from the City's
implementation of the Act. Challenges to the constitutionality of a local jurisdiction's actions under the GMA
or to the constitutionality of the Act itself must be filed with the superior courts"); *Salish Village Homeowner's*
Assoc. v. Kirkland, CPSGMHB No. 02-3-0022, Order Granting Disp. Mot. (03/19/03) p. 5-6.

1 Wn.App. 836, 847, 988 P.2d 27 (1999); *Cent. Pug. Sound Reg. Transit Auth. v. City of*
2 *Tukwilla*, CPSGMHB No. 99-3-0003, FDO (9/15/99) at 5; *Dept. of Corr. v. City of*
3 *Lakewood*, CPSGMHB No. 05-3-1143c, FDO (1/31/06) at 15. The fact that mitigation
4 measures make construction of the essential public facility more costly does not relieve the
5 proponent of the duty to comply with the City's mitigation requirements. *City of Des*
6 *Moines*, 108 Wn.App. at 847 ("The fact that these requirements may make the expansion
7 more costly does not relieve the Port of these obligations"). The conditional use permit
8 process is an appropriate method for determining conditions for mitigating impacts of
9 essential public facilities. *Dept. of Corr. v. City of Lakewood*, CPSGMHB No. 05-3-0043c,
10 FDO (1/31/06) at 15, citing *King County v. Snohomish County*, CPSGMHB No. 03-3-0011,
11 Order on Court Remand (7/29/05) at 10 ("The Board has previously found the conditional
12 use permit process to be appropriate for a local jurisdiction's determination of reasonable
13 conditions and mitigating measures for state and regional EPFs"). The provisions in
14 Ordinance No. 951 simply address the impacts of multi-use trails on neighboring land uses
15 and trail users.

16 Regarding Petitioners' claim that the language of LFPMC 18.54.047C violates RCW
17 36.70A.200(5), as noted above, Ordinance No. 951 did not enact this language. This
18 language was established by Ordinance No. 909. Arguments based on this pre-existing
19 language must be disregarded, and cannot be the basis for a determination that Ordinance
20 No. 951 violates RCW 36.70A.200(5).

21 Regarding Petitioners' claim that Ordinance No. 951 authorizes the Examiner to
22 "realign" the trail, Petitioners cite to LFPMC 18.54.047D.4.b.vi. That Section states that a
23 multi-use trail applicant shall provide a Trail Development Plan that:

24 vi. Provides for the following minimum setbacks from the property line of the
trail right of way to the edge of the trail shoulder:

Adjacent Property

Zoning Designation	Minimum Required Setback
RS-RM	12-foot setback to shoulder of trail
BN, CC, TC	10 foot setback to shoulder of trail

Provided however, whenever by reason of a pre-existing structure or topographical feature, width of available right of way or applicable environmental laws and regulations, the setback or landscaping requirements of this ordinance cannot be met by realignment of the proposed or expanded trail, the hearing examiner may condition a conditional use permit

1. by reducing the width of the proposed trail, but only to the extent consistent with trail user safety; or
2. by reducing the width of the required setback or landscaping by only that amount necessary to accommodate the proposed trail; or
3. by a combination of 1 and 2 above.

Whenever the hearing examiner conditions a conditional use permit by reducing the width of the required setback or landscaping, the hearing examiner shall include as a condition of the permit enhanced landscaping to provide screening that meets or exceeds screening provided by the combination of the required setback and landscaping; provided that, if the remaining setback or landscaping is not adequate in size to allow for enhanced landscaping, the hearing examiner may require installation of fencing that shall provide an effective visual barrier to the proposed trail.

Ex. 418, p. 4-5.

When this provision is read in its entirety, it plainly does not "preclude" trail improvements or authorize conditions that render trail improvements "impracticable." Rather, LFPMC 18.54.047D.4.b.vi provides for setbacks, to mitigate impacts to adjacent land uses. The provision takes into account the fact that pre-existing circumstances, such as existing structures, topographical features or sensitive areas, and right-of-way width, might make compliance with the setbacks impossible even if the trail is realigned within the right-of-way. In those situations, the provision authorizes the Examiner to condition the trail proposal by either reducing trail width or reducing the width of the setback or landscaping, or a combination of those two. The trail applicant is free to propose which option should occur. To ensure that the trail's impacts are mitigated, the provision requires that in cases where setback or landscaping width is reduced, enhanced landscaping must be provided, or

1 if that is not possible, a fence must be installed. Thus, this Ordinance does not render trail
2 improvements "impracticable," but simply states a reasonable mitigation requirement
3 (setbacks), and then provides applicants with multiple alternatives in the event that
4 compliance with the setbacks is not possible.

5 These setback provisions in LFPMC 18.54.047D.4.b.vi do not constitute
6 impermissible "second-guessing" of the County's decision to site or expand the Burke-
7 Gilman Trail. The City is not preventing the County from improving the Trail; the City is
8 simply mitigating impacts of the Trail. The County has not and cannot establish that the
9 setback requirements will prevent or render "impracticable" its planned improvements to the
10 Trail. Petitioners can point to no authority for the proposition that local setback
11 requirements violate RCW 36.70A.200(5), particularly when options are given as
12 alternatives to the setback requirement. The fact that the Trail might have to be slightly
13 realigned in a few places within the right-of-way does not mean that the Trail improvements
14 have been rendered "impracticable", or that the City is "second-guessing" the County's
15 decision to site, improve, or expand the Trail. While Petitioners complain that the County
16 may not be able to comply with the full setback and landscaping requirements due to right-
17 of-way width and obstructions in the Trail right-of-way, the Ordinance takes these concerns
18 into account by providing for alternatives to the full setback width. Even if the County was
19 required to slightly reduce the width of the Trail improvements in a few locations due to
20 physical constraints, no authority supports Petitioners' assertion that local requirements that
21 lead to slight alterations to an essential public facility violate RCW 36.70A.200(5). Further,
while the City does not believe that this will be necessary, nothing in Ordinance No. 951
prevents the County from acquiring additional right-of-way width or removing private
encroachments, so that the County could comply with the provisions of Ordinance No. 951.¹⁴

22 ¹⁴ Indeed, when road right-of-way width is deemed insufficient for planned improvements, governmental
entities routinely acquire additional right-of-way area, either by negotiated purchase or condemnation. If multi-

1 Petitioners' claim that the Ordinance renders trail improvements "impracticable"
2 because the Ordinance requires a Trail Development Plan that "is compatible with the
3 character and appearance of development in the vicinity and preserves the privacy of
4 adjacent uses by the use of setbacks, screening, landscaping, fencing or grade changes to
5 buffer adjacent properties." Again, this argument is based on the word "compatible." The
6 concept of compatibility was already incorporated into the City's multi-use trail conditional
7 use criteria by Ordinance No. 909, which was not challenged. *Ex. 422 (Ord. No. 909*
8 *Section 1); App. B (LFPMC 18.54.030)*. As stated previously, conditional use regulations
9 routinely include the concept that the use must be conditioned so that it is compatible with
10 surrounding land uses. While Petitioners argue that "many EPF's are inherently
11 incompatible" with neighboring uses (King County Brief, p. 12), they do not provide any
12 evidence, or even allege, that multi-use trails are so "inherently incompatible" with other
13 land uses that it will not be possible to condition a trail application in a manner that mitigates
14 the trail's impacts and renders the trail "compatible."

15 Finally, Petitioners allege that Ordinance No. 951 violates RCW 36.70A.200(5)
16 because it contains signage requirements that conflict with state and federal law and other
17 publications, authorizing the Hearing Examiner to impose "impracticable" conditions.¹⁵
18 First, to the extent that Petitioners claim that Ordinance No. 951 violates any state or federal
19 law other than the GMA, the claim is beyond the scope of the Board's jurisdiction. RCW
20 36.70A.290. Second, Petitioners allege that federal grant regulations require compliance

21 purpose trails are truly "essential," as Petitioners argue, then the County should be willing to take necessary
22 steps to provide for a trail facility that includes appropriate and reasonable mitigation of impacts on
23 surrounding uses.

24 ¹⁵The County also alleges that the Ordinance's signage provisions violate GMA Goal 7 (RCW
36.70A.020(7), relating to fair and predictable permit processing. King County Brief, p. 15-19. The
Prehearing Order frames this issue under Legal Issue No. 4, relating to the allegation that Ordinance No. 951
violates Goal 7. Thus, the City addresses the issue of whether the Ordinance's signage provisions conflict with
any state or federal law or publication in connection with Legal Issue No. 4.

1 with certain design publications, and the County will not be able to obtain federal grants to
2 fund the Trail improvements if the County must comply with the Ordinance. However, the
3 fact that mitigation is costly or that an applicant will have to look to alternate sources of
4 funding does not render a mitigation condition "impracticable." No authority supports the
5 Petitioners' argument in this regard. Further, Petitioners provide no evidence that any grant
6 agency has denied a County application for funding, revoked existing grants, or informed the
7 County that grant funds will not be available based on Ordinance No. 951. It is pure
8 speculation that Ordinance No. 951 will prevent the County from receiving grant funds for
the Trail improvements.

9 Most importantly, the Ordinance's signage provisions do not conflict with any state
10 or federal law, regulation or publication. None of the cited publications **require** that stop
11 signs or yield signs be placed on the "lower volume" street in every instance, without regard
12 to other factors. The Ordinance's signage provisions are consistent with an expert report,
13 contained in the record, that was prepared to address the issue of signage, among other
conditions. *Ex. 595*. See Section IV.C.2 below, which fully addresses this argument.

14 Thus, Ordinance No. 951 does not violate RCW 36.70A.200(5) by precluding
15 essential public facilities.

16 **C. Ordinance No. 951 Is Not Inconsistent with the GMA Goals Stated in RCW**
17 **36.70A.020(3)(transportation), .020(7)(permit processing), .020(9)(recreation), or**
18 **.020(12)(public facilities).**

19 Legal Issues No. 3, 4, 5 and 6 state:

20 *Issue No. 3: Does Ordinance 951, amending the City's Conditional Use Ordinance by*
21 *providing specific development criteria under which a multi-use or multi-*
22 *purpose trail may be authorized as a conditional use, violate*
23 *RCW 36.70A.020(3), the GMA's Transportation goal, because it fails to*
24 *encourage multimodal transportation which is based on regional priorities and*
coordinated with county and city comprehensive plans?

1 *Issue No. 4: Does Ordinance 951, amending the City's Conditional Use Ordinance by*
2 *providing specific development criteria under which a multi-use or multi-*
3 *purpose trail may be authorized as a conditional use, violate*
4 *RCW 36.70A.020(7), the GMA's permit processing goal, because it:*
5 *(a) fails to provide multi-use trail proponents with a fair and predictable*
6 *permit processing system;*
7 *(b) creates conflict between the City's regulations and the regulations or state,*
8 *federal, and/or other regulatory entities; or*
9 *(c) does both (a) and (b)?*

10 *Issue No. 5: Does Ordinance 951, amending the City's Conditional Use Ordinance by*
11 *providing specific development criteria under which a multi-use or multi-*
12 *purpose trail may be authorized as a conditional use, violate*
13 *RCW 36.70A.020(9), the GMA's open space and recreational goal, because it*
14 *fails to enhance recreational opportunities and fails to provide for the*
15 *development of parks and recreational facilities?*

16 *Issue No. 6: Does Ordinance 951, amending the City's Conditional Use Ordinance by*
17 *providing specific development criteria under which a multi-use or multi-*
18 *purpose trail may be authorized as a conditional use, violate*
19 *RCW 36.70A.020(12), the GMA's Public Facilities and Services goal, because*
20 *it would render impracticable the improvement of the Burke-Gilman Trail, an*
21 *essential public facility?*

22 Prehearing Order, p. 6-7.

23 The GMA goals stated in RCW 36.70A.020 are adopted for the exclusive purpose of
24 guiding the development and adoption of comprehensive plans and development regulations.
RCW 36.70A.020 (preamble). The Board must uphold the City's enactment of Ordinance
No. 951, unless the Board determines that the City's action was clearly erroneous in view of
the entire record before the Board, in light of applicable GMA goals. RCW 36.70A.320(3).

**1. Ordinance No. 951 Does Not Violate GMA Goal 3, Relating to
Transportation (Legal Issue No. 3).**

GMA Goal 3, relating to transportation, states:

Transportation. Encourage efficient multimodal transportation systems that are
based on regional priorities and coordinated with county and city comprehensive
plans.

RCW 36.70A.020(3).

1 Petitioners allege that Ordinance No 951 violates Goal 3 because the Ordinance (1)
2 authorizes the Hearing Examiner to deny a CUP for a multi-purpose trail (King County Brief
3 at 14); (2) allows the Examiner to realign or reduce the width of a proposed trail (King
4 County Brief at 14); (3) states as a general guiding principle that the Examiner should avoid,
5 whenever possible, altering traffic flows and patterns that are normal and customary to
6 neighborhoods through which a trail passes (Cascade Bicycle Club Brief at 26); and (4)
7 provides for a Trail Development Plan that is "compatible with character and appearance of
8 development in the vicinity" and "preserves the privacy of adjacent uses by the use of
9 setbacks, screening, landscaping, fencing, or grade changes" (Cascade Bicycle Club Brief at
10 26, citing LFPMC 18.54.047D.4.b.i). To the extent these arguments repeat Petitioners'
11 positions presented under Legal Issue No. 1, the City incorporates its responsive arguments
12 stated in Section IV.B above.

13 In sum, Ordinance No. 951 provides for reasonable mitigation of the impacts of a
14 multi-use trail. The Ordinance does not "preclude" trail development, improvement, or
15 expansion; such actions are specifically allowed as a conditional use in all zones in the City.
16 Requiring reasonable mitigation does not "effectively prevent" a trail from being sited or
17 expanded. Contrary to Petitioners' allegation, the screening and landscaping requirements to
18 mitigate impacts on adjacent uses do not "prioritize screening and landscaping over trail size
19 and alignment;" rather, the Ordinance provides a number of alternatives that allow for
20 expansion while mitigating impacts, and allow the Examiner to take into account physical
21 characteristics of a particular site. The Goal to "encourage efficient multi-modal
22 transportation systems" does not prohibit local jurisdictions from requiring that impacts of
23 such facilities be mitigated; Petitioners can cite to no authority for the novel proposition that
24 Goal 3 prohibits local mitigation requirements.

 Cascade Bicycle Club alleges that LFPMC 18.54.047A.4.a elevates motor vehicle
travel over non-motorized travel, by "expressly directing" the Examiner to "not upset the

1 custom of dependency on single occupancy vehicles," and that "a more hostile position
2 against competing modes of travel could not be taken." Cascade Bicycle Club Brief, p. 26.
3 However, LFPMC 18.54.047A.4.a does not "direct" the Examiner to impose any particular
4 condition, nor is that provision "hostile" toward non-motorized travel. The provision does
5 not take any position whatsoever toward "single-occupancy" vehicles.

6 To the contrary, LFPMC 18.54.047A.4 states one of four findings by the City
7 Council to support the provisions in LFPMC 18.54.047. Paragraph A.4 states:

8 The City Council finds that the interests of the citizens of Lake Forest Park,
9 trail users, and those living near trails are best served by regulating the
10 development, improvement and operation of trails through a conditional use
11 process designed to enhance the public's safety, to accommodate the interests of
12 those living near trails, and to provide for the interests of all trail users; and, to
13 that end, the City Council sets forth the following principles, not as sources of
14 additional authority for regulation, but as guidance for the City's Hearing
15 Examiner, when that official considers applications under this section:

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

21 *Ex. 418*, p. 2. Thus, the Ordinance specifically states that Paragraph 4 does not contain
22 regulations, but should be used as guidance by the Examiner when formulating conditions
23 under the Ordinance's regulatory provisions, with the overriding purpose to enhance public
24 safety, accommodate interests of those living near trails, and provide for the interests of all
25 trail users. The provision is not "hostile" to non-motorized travel, unless one considers it
26 hostile to require a trail proponent to mitigate impacts to adjacent uses. Likewise, Ordinance
27 No. 951 does not "consciously [discourage] any improvement to the multi-modal
28 transportation provided by the Burke-Gilman Trail, or by any multi-use trail," any more than
29 does any local ordinance requiring that a transportation facility applicant mitigate impacts.
30 See Cascade Bicycle Club Brief, p. 27.

1 2. **Ordinance No. 951 Does Not Violate GMA Goal 7, Relating to Permit**
2 **Processing (Legal Issue No. 4).**

3 GMA Goal 7, relating to permit processing, states:

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

6 *RCW 36.70A.020(7).*

7 King County first argues that Ordinance No. 951 violates Goal 7 by failing to provide
8 a "fair and predictable" permit process, because the Ordinance reserves discretion to the
9 Hearing Examiner to deny a trail CUP application, and there is no way to judge in advance
10 whether the Examiner will approve the CUP. King County Brief, p. 15. Even if the
11 Ordinance did provide the Examiner with authority to "deny" a CUP to a trail applicant, a
12 local regulation or permit process is not "unfair" or "unpredictable" simply because the
13 decision-maker can deny an application that does not meet regulatory requirements or
14 provide required information.

15 This argument simply restates Petitioners' allegation that the Ordinance provides the
16 Examiner with "unbridled discretion." The City incorporates its response to this argument at
17 Section IV.B.2 and 3 above. The fact that the Ordinance provides the Examiner (and hence
18 the applicant) with various options for mitigating impacts (setbacks, enhanced landscaping,
19 or fencing) does not render the permit process unpredictable. Further, to the extent that
20 Petitioners argue that a trail applicant will not know whether the Examiner considers that a
21 trail proposal meets the criteria of LFPMP 18.54.047 until the Examiner conducts the
22 hearing on the application, reviews evidence submitted, and issues a decision, a trail
23 applicant is in no different position than any property owner submitting a quasi-judicial land
24 use application, such as for a variance, conditional use permit or subdivision.

 Cascade Bicycle Club argues that the Examiner is allowed "unbounded discretion" by
 provisions for "limitations of size," "compatibility with the character and appearance of
 development in the vicinity," "privacy of adjacent uses," "enhanced landscaping," and ten

1 additional subjective CUP criteria (referring to LFPMC 18.54.030). Cascade Bicycle Club
2 Brief, at p. 28. Again, Ordinance No. 951 did not enact most of this language; most of this
3 language was established in Ordinance No. 909 and therefore is not subject to challenge in
4 this appeal.

5 King County's primary argument is that the Ordinance does not provide a "fair"
6 permit process because it contains signage requirements that conflict with federal and state
7 regulations regarding trail design.¹⁶ In particular, Petitioners claim that the other regulations
8 require that stop and yield signs be placed on the street with the lowest traffic volume, in
9 every instance. However, the cited regulations are not so absolute and inflexible.

10 First, Petitioners claim that the Ordinance's signage provisions will make the County
11 unable to obtain federal grant funding for trail improvements, because the signage provisions
12 conflict with federal grant regulations that incorporate the Manual for Uniform Traffic
13 Control Devices. King County Brief, p. 17. However, the federal grant regulations state:

14 The implementation of pedestrian and bicycle accommodations may be
15 authorized for Federal-aid participation . . . where all of the following
16 conditions are satisfied. . . . (5) The project will be designed in **substantial
17 conformity** with the latest official design criteria. (See § 652.13).¹⁷

18 23 CFR 652.7(b)(*emphasis added*).¹⁸ Thus, the federal regulation only states that projects
19 must be designed in "substantial conformity" with official design criteria; even if AASHTO
20 or MUTCD did contain absolute, inflexible standards for signage that conflicted with
21 requirements in Ordinance No. 951, it is speculative as to whether compliance with the
22 Ordinance would preclude an applicant from obtaining federal grants.

23 ¹⁶ Cascade Bicycle Club makes similar arguments in connection with its contention that the Ordinance
24 imposes requirements that render trail improvements "impracticable." Cascade Bicycle Club Brief, p. 21-23.

¹⁷ Apparently Petitioners are not concerned with the use of the term "satisfied" in this regulation.

¹⁸ 23 CFR § 652.13 provides that the American Association of State Highway and Transportation Officials
"Guide for Development of New Bicycle Facilities, 1981" or equivalent guides developed in cooperation with
State or local officials and acceptable to the FHWA shall be used as standards for the construction and design
of bicycle routes.

1 More importantly, the cited guidelines do not contain absolute, inflexible signage
2 requirements. The AASHTO Guidelines and other cited regulations point to or incorporate
3 the MUTCD provisions for signage. See *WAC 468-95-010; Ex. 478*, p. 1020-11 (WSDOT
4 Manual); *Ex. 443* (AASHTO Guidelines). But the AASHTO Guidelines do not require
5 absolute compliance with the MUTCD. The AASHTO Guidelines state:

6 **Path-Roadway Intersections**

7 Intersections between paths and roadways are often the most critical issue in
8 shared use path design. Due to the potential conflicts at these junctions, careful
9 design is of paramount importance to the safety of path users and motorists
10 alike. **The solutions provided in this chapter should be considered
11 guidelines, not absolutes. Each intersection is unique and will require
12 sound engineering judgment on the part of the designer as to the
13 appropriate solution.**

14 *Ex. 443, p. 46 (emphasis added)*. Likewise, under "Other Intersection Design Issues,"
15 AASHTO states: "Traffic Signals/Stop Signs: A regulatory traffic control device should be
16 installed at all path-roadway intersections. Warrants from the MUTCD **combined with
17 sound engineering judgment** should also be considered when determining the type of traffic
18 control device to be installed." *Ex. 443, p. 50 (emphasis added)*. Under "Signing and
19 Marking," AASHTO states that "in general, uniform application of traffic control devices as
20 described in MUTCD, provides minimum traffic control measures which should be applied."
21 *Ex. 443, p. 53*. Thus, AASHTO does not prescribe absolute adherence to any particular
22 criteria, and recognizes that every intersection is unique and engineering judgment is
23 required to determine appropriate solutions.

24 The WSDOT Manual recognizes that "Use Conflicts" are a factor to consider in
locating a bikeway:

Use Conflicts. Different types of facilities produce different types of conflicts.
. . . Shared use paths usually involve conflicts with other bicyclists, pedestrians,
skaters, and runners on the path, and with motor vehicles at street intersections.
Conflicts between bicyclists and motorists can also occur at highway and

1 driveway intersections, tight corners, and narrow facilities like bridges and
2 tunnels.

3 *Ex. 478, p. 1020-7.* The WSDOT Manual states that "shared use path and roadway
4 intersections must clearly define who has the right of way." *Ex. 478, p. 1020-8.* Similar to
5 AASHTO, the WSDOT Manual states:

6 Other roadway/path design considerations:

7 Traffic Signals/stop signs. Determine the need for traffic control devices at all
8 path/roadway intersections by using MUTCD warrants **and engineering
9 judgment.** . . .

10 Signing. Place path stop signs as close to the intended stopping point as
11 possible. . . . **Yield signs for path traffic are acceptable at some locations,
12 such as low-volume, low-speed neighborhood streets.** . . .

13 *Ex. 478, p. 1020-11, 1020-12 (emphasis added).*

14 The MUTCD, referenced in the other regulations, does not contain an absolute or
15 inflexible rule regarding the placement of stop and yield signs. Section 2B of the MUTCD,
16 cited by Petitioners, states:

17 Section 2B.05 STOP Sign Applications

18 Guidance: STOP signs should be used if engineering judgment indicates that
19 one or more of the following conditions exist: . . .

20 Once the decision has been made to install two-way stop control, **the decision
21 regarding the appropriate street to stop should be based on engineering
22 judgment.** In most cases, the street carrying the lowest volume of traffic
23 should be stopped. . . .

24 Section 2B.09 YIELD Sign Applications

Option: **YIELD signs may be used instead of STOP signs if engineering
judgment indicates that one or more of the following conditions exist:**

A. When the ability to see all potentially conflicting traffic is sufficient to allow
a road user traveling at the posted speed, the 85th-percentile speed, or the
statutory speed to pass through the intersection or to stop in a reasonably safe
manner. . . .

D. An intersection where a special problem exists and where engineering
judgment indicates the problem to be susceptible to correction by the use of the
YIELD sign.

1 *MUTCD § 2B.05, 2B.09, included as Appendix D (emphasis added).*¹⁹ As noted by Huitt-
2 Zollars, the MUTCD provisions regard stop and yield signs for low-volume roadways state:

3 Stop (R1-1) and Yield (R1-2) signs (see Figure 5B-1) should be considered for
4 use on low-volume roads where engineering judgment or study, consistent with
5 the provisions of Sections 2B.04 to 2B.10, indicates that either of the following
6 conditions applies:

- 7
- 8 A. An intersection of less-important road with a main road where application of
9 the normal right-of-way rule might not be readily apparent.
 - 10 B. An intersection that has restricted sight distance for the prevailing vehicle
11 speeds.

12 *Ex. 595, p. 7, citing MUTCD § 5B.02, included as Appendix D.*

13 Likewise, the MUTCD chapter relating to signs related to bicycle operation on
14 roadways and shared use paths states:

15 **Standard:**

16 **STOP (R1-1) signs (see Figure 9B-2) shall be installed on shared-use paths at
17 points where bicyclists are required to stop.**

18 **YIELD (R1-2) signs (see Figure 9B-2) shall be installed on shared-use paths
19 at points where bicyclists have an adequate view of conflicting traffic as
20 they approach the sign, and where bicyclists are required to yield the right-
21 of-way to that conflicting traffic. . . .**

22 **Guidance:** Where conditions require path users, but not roadway users, to stop
23 or yield, the STOP sign or YIELD sign should be placed or shielded so that it is
24 not readily visible to road users.

When placement of STOP or YIELD signs is considered, priority at a shared
use path/roadway intersection should be assigned with consideration of the
following:

- A. Relative speeds of shared-use path and roadway users;
- B. Relative volumes of shared-use path and roadway traffic; and
- C. Relative importance of shared-use path and roadway.

¹⁹ For Section 2B.05 to apply to a multi-use, non-motorized trail, the trail must be classified as a "street," and then the "guidance" must be applied as an absolute requirement. It should be noted that "streets" are used by motorized vehicles, thus allowing a motor vehicle approaching the "street" to turn onto that street if need be rather than crossing all lanes of the street. In contrast, a motor vehicle must cross all lanes of a trail no matter what the conditions, to reach the nearest street. A non-motorized trail is not a "street," and the County's application of this guideline by analogy is a policy choice.

1 Speed should not be the sole factor used to determine priority, as it is sometimes
2 appropriate to give priority to a high-volume shared-use path crossing a low-
volume street, or to a regional shared-use path crossing a minor collector street.

3 *MUTCD § 9B.03, included as Appendix D (emphasis theirs).*²⁰

4 Thus, the MUTCD provides for the exercise of engineering judgment in determining
5 the placement of stop and yield signs. It does not state an absolute requirement that the stop
6 or yield sign face the "lowest volume street." The signage provisions in Ordinance No. 951
7 are based on an engineering opinion. *Ex. 595.*²¹ While the County's consultant may not
8 have reached the same conclusion, that does not mean that the Ordinance conflicts with the
MUTCD.

9 Thus, Ordinance No. 951 does not "conflict" with any federal or state signage
10 requirements. The Ordinance does not create an "unfair or unpredictable" permit process,
and therefore does not violate RCW 36.70A.020(7).

11 **3. Ordinance No. 951 Does Not Violate GMA Goal 9, Relating to Recreation**
12 **(Legal Issue No 5).**

13 GMA Goal 9, relating to open space and recreation, states:

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

16 *RCW 36.70A.020(9).*

17 To support their allegation that Ordinance No. 951 violates GMA Goal 9, Petitioners
18 simply repeat their position that the Ordinance reserves the discretion to the Examiner to
deny a multi-use trail CUP, or to realign or reduce the width of a trail. King County Brief,

19
20 ²⁰ Diagrams included in Chapter 9 show stop signs facing shared-use path users. *App. D.*

21 ²¹ Regarding the Burke-Gilman Trail, many City residents must cross the Trail to access or leave their
22 homes. The Trail poses a significantly different circumstance than does a roadway. If heavy traffic on a
roadway continuously prevents a motor vehicle from traveling straight across the road, the vehicle can turn
right on to the road, into the flow of traffic. In contrast, a motor vehicle can not turn right on to a multi-use
path, if a steady flow of bicycles prevents the vehicle from crossing the path.

1 p. 19; Cascade Bicycle Club Brief, p. 29-30 (the Ordinance "does not allow the County to
2 bring the trail up to trail development standards or to make sufficient improvements to
3 handle present levels of volume). In response to Petitioners' position on Legal Issue No. 5,
4 the City incorporates by reference its response to Legal Issues No. 1, 3, and 4, found at
5 Sections IV.B, C.1 and C.2 above.

6 **4. Ordinance No. 951 Does Not Violate GMA Goal 12, Relating to Public
7 Facilities and Services (Legal Issue No. 6).**

8 GMA Goal 12, relating to public facilities and services, states:

9 Public facilities and services. Ensure that those public facilities and services
10 necessary to support development shall be adequate to serve the development at
11 the time the development is available for occupancy and use without decreasing
12 current service levels below locally established minimum standards.

13 *RCW 36.70A.020(12).*

14 Only Cascade Bicycle Club alleges that Ordinance No. 951 violates GMA Goal 12.
15 Again, Cascade Bicycle Club simply repeats its position that the Ordinance will cause the
16 County to be unable to improve the Burke-Gilman Trail. Cascade Bicycle Club, p. 30. In
17 response, the City incorporates by reference its response to Legal Issues No. 1, 3, 4, and 5,
18 found at Sections IV.B, C.1, C.2 and C.3 above.

19 In addition, a multi-use trail is not "necessary to support development." Cascade can
20 not establish that such trails are "necessary." There is no evidence that the streets and
21 sidewalks in the City cannot accommodate non-motorized travel resulting from new
22 development in the City. Likewise, there is no showing that existing parks and recreational
23 facilities do not provide adequate opportunity for recreation in the City. As demonstrated
24 previously, the Ordinance does not "obstruct" or prevent improvements to the Burke-Gilman
Trail, or any other multi-use trail. Rather, the Ordinance provides a method for determining
appropriate mitigation conditions. Cascade cites to no authority supporting the proposition
that the City's Ordinance violates GMA Goal 12.

1 **D. Ordinance No. 951 Does Not Violate RCW 36.70A.130(1)(d), Requiring**
2 **Consistency Between the City's Comprehensive Plan and Development**
3 **Regulations.**

4 Legal Issue No. 8 states:

5 *Does Ordinance 951, amending the City's Conditional Use Ordinance by*
6 *providing specific development criteria under which a multi-use or multi-purpose*
7 *trail may be authorized as a conditional use, violate RCW 36.70A.130(1),*
8 *requiring internal consistency, because it is not consistent with and fails to fully*
9 *implement the City's Comprehensive Plan Goals including LU-7, CF-1, RO-1,*
10 *and RO-2?*

11 Prehearing Order, p. 7.

12 RCW 36.70A.130(1)(d) provides that "any amendment of or revision to development
13 regulations shall be consistent with and implement the comprehensive plan." Regarding
14 consistency, the DCTED regulations state:

15 **Consistency.** The act calls for "consistency" in a number of contexts. In
16 general, the phrase "not incompatible with" conveys the meaning of
17 "consistency" most suited to preserving flexibility for local variations.

18 *WAC 365-195-070(7).* Likewise, "consistency" is defined as:

19 "Consistency" means that no feature of a plan or regulation is incompatible with
20 any other feature of a plan or regulation. Consistency is indicative of a capacity
21 for orderly integration or operation with other elements in a system.

22 *WAC 365-195-210; see Cit. for Mt. Vernon v. City of Mt. Vernon, WWGMHB No. 98-2-*
23 *0006c, FDO (7/23/98), p. 11 (the consistency required between development regulations and*
24 *the comprehensive plan is adequately defined in WAC 365-195-210 as meaning that "no*
feature of the plan or regulation is incompatible with any other feature of a plan or
regulation"); Bldg. Assoc. of Clark County v. Clark County, WWGMHB No. 04-2-0038c,
Amended FDO (11/23/05) at 33-4 (Consistency, we have held, means that no feature of the
plan or regulation is incompatible with any other feature of the plan or regulation. . . . Said
another way, no feature of one plan may preclude achievement of any other feature of that
plan or any other plan). In determining whether a development regulation is consistent with

1 a comprehensive plan, "the Board will look to the integrated whole of the Plan to determine
2 whether the challenged ordinances are consistent with, and implement the . . . Plan." *Cit.*
3 *for Resp. Growth v. Snohomish County*, CPSGMHB No. 03-3-0013 (2003), at 14. In the
4 context of consistency between comprehensive plan provisions and development regulations,
5 the Board defines "consistency" to mean that:

6 [Plan] provisions are compatible with each other -- that they fit together
7 properly. In other words, one provision may not thwart another. However, the
8 Board also finds that consistency can also mean more than one policy not
being a road block for another; it can also mean that policies of a comprehensive
plan, for instance, must work together in a coordinated fashion to achieve a
common goal.

9 *Pirie v. City of Lynnwood*, CPSGMHB No. 06-3-0029, FDO (4/09/07) at 43-4, citing *West*
10 *Seattle Defense Fund v. City of Seattle (WSDF I)*, CPSGMHB No 94-3-0016, FDO
11 (4/04/95), at 27.

12 Respondents allege that Ordinance No. 951 is not consistent with Comprehensive
13 Plan Goals LU-7, CF-1, RO-1, and RO-2.²² Those Goals state:

14 **Goal LU-7 Land Use: Consistency and Concurrency**

15 Balance the need to provide for adequate housing with the desire to maintain the
16 City's forested, residential character and unique natural sensitive areas,
coordinate the concurrency of new development with the adequate provision of
transportation facilities, utilities, capital facilities, parks and recreation facilities,
human services and encourage economic development.

17 **Goal CF 1 Capital Facilities and Siting Essential Public Facilities: Level of**
18 **Service**

19 To ensure that those capital facilities and services necessary to support existing
20 and future development shall be adequate to serve the development without
decreasing current service levels below adopted level of service standards.

21 **Goal RO 1 Recreation and Open Space: Development and Maintenance**

22 ²² Only King County addresses Issue No. 8 in its brief; Cascade Bicycle Club simply notes that it supports
the County's argument on this issue. Cascade Bicycle Club Brief, p. 34, n. 6.

1 To maintain a high standard for the development and maintenance of the City's
2 parks for both active and passive use.

3 **Goal RO 2 Recreation and Open Space: Trails**

4 To coordinate with the Transportation Committee in promoting the
5 establishment and maintenance of a safe, interconnected system of trails
6 throughout the City, recognizing the important recreational and transportation
7 roles played by regional and local bicycle and pedestrian trail systems.

8 *App. A.*

9 First, on its face, Goal RO 1 applies to "the City's parks"; Goal RO 1 does not apply
10 to stand-alone multi-use trails, such as the Burke-Gilman Trail.

11 King County argues that Ordinance No. 951 is inconsistent with these Comprehensive
12 Plan Goals because the Burke-Gilman Trail is insufficient to serve existing trail users, and
13 because Ordinance No. 951 allows the Examiner to deny a CUP application for
14 improvements to the Trail, realign a Trail proposal, or reduce Trail width, the Ordinance
15 violates these goals. King County Brief, p. 22-3. In essence, the County argues that the
16 Ordinance will prevent the Burke-Gilman Trail from being improved, and therefore prevents
17 necessary facilities from being available concurrent with new development.

18 However, Ordinance No. 951 is not "inconsistent" with, and does not fail to
19 implement, any of the cited Goals. A requirement that a proposed facility, or facility
20 improvement, be conditioned to mitigate the facility's impacts is not inconsistent with a goal
21 to provide the facility. The facility does not have to be allowed, irrespective of its impact on
22 surrounding uses and environment. The Ordinance does not "fail to carry out" the Goals,
23 simply because it provides a mechanism for imposing reasonable conditions. If it did, then
24 every land use regulation would "fail to carry out" similar comprehensive plan goals.

In fact, the Ordinance is consistent with and implements a number of Comprehensive
Plan policies that address the provision of facilities that do not unduly impact surrounding
uses. For example, Policy CF 1.6 provides: "Promote high quality design and site planning
in the construction of capital facilities. Considerations may include but are not limited to the

1 following: the neighborhood character, cultural and historic heritage, handicap accessibility
2 and environmental considerations." *App. A.* Policy CF 2.1 states: "Ensure that any
3 proposed construction or expansion of capital facilities shall be consistent with the Lake
4 Forest Park Comprehensive Plan." *Id.* Policy CF 2.2 states: "Capital facilities shall not
5 have a negative impact to environmentally sensitive areas and shall be located in a manner
6 that is compatible with the preservation of environmentally sensitive areas." *Id.* Policy CF
7 2.4 states: "Siting of capital facilities shall be based upon criteria including, but not limited
8 to: a. Specific facility requirements (acreage, transportation access, etc.), b. Land use
9 compatibility, c. Potential environmental impacts, d. Potential traffic impacts, and e.
10 Consistency with the comprehensive plan." *Id.* Policy RO 2.1 states: "Promote
11 development and maintenance of safe walking and bicycle paths through and throughout the
12 City." *Id.* And even if multi-use trails were essential public facilities (the City contends
13 they are not), Goal CF 4 states: "To minimize impacts associated with the siting,
14 development and operation of essential public facilities on adjacent properties and the natural
15 environment and to ensure adequate public participation in their development." *App. A.* .

16 Ordinance No. 951 is consistent with and carries out all these Goals and Policies, by
17 providing for the mitigation of impacts of multi-use trail on surrounding uses, and by
18 providing for safe trails.

19 Regarding Goal RO-2, the Ordinance does not prevent the City from "coordinate[ing]
20 with the Transportation Committee in promoting the establishment and maintenance of a
21 safe, interconnected system of trails throughout the City." The Ordinance is not inconsistent
22 with the City coordinating with the Transportation Committee. In fact, a number of the
23 provisions in the Ordinance address the safety of multi-use trails, and thus the Ordinance
24 furthers the goal of establishing a safe system of trails. Assuming that Goal RO-1 applies to
multi-use trails, the Ordinance likewise furthers that Goal by maintaining a high standard for
the development and maintenance of such trails.

1 Thus, Ordinance No. 951 does not "fail to carry out" any Comprehensive Plan goal.
2 To the contrary, the Ordinance is consistent with the goals and policies of the City's
3 Comprehensive Plan.

4 **E. Ordinance No. 951 Does Not Violate RCW 36.70A.130(1), Requiring Consistency
5 with RCW 36.70A.**

6 Legal Issue No. 9 states:

7 *Does Ordinance 951, amending the City's Conditional Use Ordinance by
8 providing specific development criteria under which a multi-use or multi-purpose
9 trail may be authorized as a conditional use, violate RCW 36.70A.130(1),
10 requiring consistency with RCW 36.70A, because it contains generalized criteria
11 that reserves broad discretion to the City to determine whether a proposal is
12 "adequate" or "compatible"?*

13 Prehearing Order, p. 8.²³

14 King County relies on RCW 36.70A.130(1)(d) to support its position that Ordinance
15 No. 951 violates "RCW 36.70A.130(1), requiring consistency with RCW 36.70A." King
16 County Brief, p. 23. RCW 36.70A.130(1)(d) provides:

17 (d) Any amendment of or revision to a comprehensive land use plan shall
18 conform to this chapter. Any amendment of or revision to development
19 regulations shall be consistent with and implement the comprehensive plan.

20 A plain reading of the statute indicates that the first sentence, requiring conformity to "this
21 chapter" (RCW 36.70A), applies to comprehensive plans, not development regulations. The
22 second sentence of that statutory provision applies to development regulations, and requires
23 that development regulations be consistent with and implement the comprehensive plan.
24 Ordinance No. 951 is a development regulation; thus it is governed by the second sentence,

25 ²³ Only King County addresses Issue No. 9; Cascade Bicycle Club simply notes that it supports the
26 County's argument on this issue. Cascade Bicycle Club Brief, p. 34, n. 6. In King County's Brief, the County
27 misstates text of Legal Issue No. 9. The County deletes the phrase "requiring consistency with RCW 36.70A"
28 from its statement of the issue, among other deletions. King County's Brief, p. 21 (States Issue 9 as: "*Does
29 Ordinance 951 violate RCW 36.70A.130(1) because it contains generalized criteria that reserve broad
30 discretion to the City to determine whether a proposal is 'adequate' or 'compatible'?*").

1 not the first. Legal Issue No. 8 addresses whether Ordinance No. 951 is consistent with
2 provisions in the City's comprehensive plan, as required by the second sentence of RCW
3 36.70A.130(1)(d).

4 King County claims that Ordinance No. 951 violates RCW 36.70A.130(1)(d),
5 because the Ordinance "lacks standards." The County repeats its objections to the terms
6 "adequate lighting" and "compatible with development in the vicinity," and to the setback
7 and landscaping provisions, as argued by the County under Legal Issues No. 1 and 4. King
8 County Brief, p. 23. To the extent the County incorporates those prior arguments, the City
9 incorporates its response under Issues 1 and 4. In the context of Issue No. 9, the County
10 does not explain how these phrases are inconsistent with any City Comprehensive Plan
11 provision.

12 *Cit. for Mt. Vernon v. City of Mt. Vernon*, WWGMHB No. 98-2-0006c, FDO
13 (7/23/98), the sole decision cited by King County to support its position, does not require the
14 conclusion Ordinance No. 951 violates RCW 36.70A.130(1)(d). In *Mt. Vernon*, the
15 petitioners challenged one ordinance that amended the zoning code to provide that planned
16 unit developments (PUDs) "may include additional uses recommended by the comprehensive
17 plan," and another ordinance that amended the PUD code to allow permitted uses
18 "recommended by the comprehensive plan . . . subject to the criteria and allowable densities
19 established in this chapter and the recommendations of the comprehensive plan." *Mt.*
20 *Vernon*, at 12. The second ordinance listed criteria that were "primary considerations"
21 before approval of the PUD, which involved "generalized language concerning relationships
22 of the proposal to the type of existing development, site amenities, [and] traffic issues." For
23 multi-family PUDs, the number of dwelling units allowed was determined by
24 "consideration" of criteria, such as "consideration of character and impacts on surrounding
areas, the location and bulk of the proposed units, uses, and densities, critical area
protection, design, and landscaping." *Id.* at 12-13.

1 The Board addressed the then-recent decision in *Citizens v. Mount Vernon*, 133
2 Wn.2d 861 (1997), and held: "In light of the Supreme Court decision that the CP did not, in
3 and of itself, provide sufficient standards to allow land use decisions to be made and that
4 even if it did, the CP was only designed to be a guide, we hold that neither [ordinance]
5 comply with the Act." *Mt. Vernon*, at 13. The Board distinguished between the
6 requirement that development regulations be "consistent" with the comprehensive plan, and
7 the requirement that the regulations "implement" the plan. *Id.* at 11. The Board summarily
8 stated: "The Act requires "implementing" DR's that fully carry out the goals, policies,
9 standards, and directions of the CP. These ordinances do not contain specific standards for
10 deciding in advance whether a project does or does not qualify for approval." *Id.* at 13.

11 Thus, in *Mt. Vernon*, the Board was concerned that the challenged ordinances
12 incorporated "recommendations in the comprehensive plan," which had recently been held to
13 be only a guide, and provided only generalized "considerations" for determining residential
14 densities in PUDs.

15 Here, King County does not state how Ordinance No. 951 fails to implement, or
16 carry out, the City's comprehensive plan. The Board has deemed the conditional use permit
17 process an appropriate method for requiring the mitigation of impacts of essential public
18 facilities. The conditional use permit process is a universally accepted method for allowing
19 uses that a local jurisdiction would like to permit in an area, but which would impact other
20 adjacent uses if not conditioned. Virtually every local jurisdiction in the state has some form
21 of the conditional use permit process. And most, if not all, conditional use permit criteria
22 include concepts of "compatibility" the surrounding land uses. The Board has approved of
23 CUP regulations that contain criteria similar to that in Ordinance No. 951, including the
24 term "compatible." See City's Response, Section IV.B.2.

The detailed provisions of Ordinance No. 951 present a far different regulatory
scheme than the *Mt. Vernon* PUD ordinances. Ordinance No. 951 does not simply refer to

1 "recommendations of the comprehensive plan," nor does the Ordinance simply state
2 generalized "considerations." The Ordinance contains detailed provisions, that allow an
3 applicant to know what must be submitted and proposed to obtain a CUP, and that allow the
4 Examiner to require appropriate mitigation of impacts of the proposal. *Ex. 418* (Ord. 951).

5 **F. Legal Issue No. 7, Regarding Compliance with SEPA, Is Moot.**

6 Legal Issue No. 7 states:

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

10 Prehearing Order, p. 7.

11 Courts generally do not review a case that has become moot. If a question is purely
12 academic, courts are not required to decide the question and ordinarily will not do so. *Grays*
13 *Harbor Paper Co. v. Grays Harbor County*, 74 Wn.2d 70, 73, 442 P.2d 967 (1968). A case
14 is moot if a court can no longer provide effective relief. *Orwick v. Seattle*, 103 Wn.2d 249,
15 642 P.2d 793 (1984). The rule that courts do not review issues that have become moot is
16 particularly applicable to situations where a statute or ordinance on which a claim is based is
17 repealed or amended in a manner that corrects an alleged deficiency or otherwise removes a
18 right to relief. See eg. *Grays Harbor Paper Co.*, *supra*; *Foisy v. Wyman*, 83 Wn.2d 22, 515
19 P.2d 160 (1973); *State v. Amusement Assoc. of Wash.*, 7 Wn.App. 305, 499 P.2d 906
20 (1972); *Wash. St. School Dir. Assoc. v. Dept. of Labor and Industries*, 82 Wn.2d 367, 510
21 P.2d 818 (1973).

22 Growth Boards have dismissed challenges as moot in a number of cases. Boards
23 determine that an issue is moot when a challenged ordinance has been substantially amended
24 with respect to the issue raised, or when the challenged ordinance or ordinance section is
repealed. *Dorgan v. City of Port Townsend*, WWGMHB No. 05-2-0018, FDO (9/29/06) p.

1 8-9; *Giba v. City of Burien*, CPSGMHB No. 06-3-0008, Order of Dismissal (4/17/06) p. 4;
2 *Fallgatter v. City of Sultan*, CPSGMHB No. 05-3-0035, Order of Dismissal (10/27/05) p. 4
3 (Petition dismissed when challenged development regulations were repealed, as there was
4 "no relief the Board can provide").

5 Here, Legal Issue No. 7 raises the question of whether the City's enactment of
6 Ordinance No. 951 violated SEPA's procedural requirements. This issue is moot. The City
7 has prepared an environmental checklist for Ordinance No. 951. On January 19, 2007, the
8 City issued a Determination of Nonsignificance for Ordinance No. 951. *Supp. Ex. 10*. No
9 one appealed that environmental determination. *App. C (Ord. No. 958)*, p. 2. Therefore,
10 after considering the environmental information in the checklist and DNS, on March 8,
11 2007, the City passed Ordinance No. 958, which "approves, ratifies, confirms, readopts,
and reenacts" Ordinance No. 951. *App. C*, p. 2.²⁴ As of the filing of this Response Brief,
no one has appealed Ordinance No. 958.

12 The issuance of the DNS for the provisions of Ordinance No. 951 and the passage of
13 Ordinance No. 958 renders Legal Issue No. 7 moot. Even if Petitioners were to prevail on
14 that Issue, the remedy would be for the Board to remand the matter to the City for the City
15 to follow SEPA's procedural requirements for the provisions in Ordinance No. 951. The
16 City has taken that action already. Petitioners present no compelling public policy reason
not to dismiss Legal Issue No. 7.

17 **G. Legal Issue No. 10, Regarding Notice to CTED, Is Moot.**

18 Legal Issue No. 10 states:

19 *Does Ordinance 951, amending the City's Conditional Use Ordinance by*
20 *providing specific development criteria under which a multi-use or multi-purpose*
21 *trail may be authorized as a conditional use and adding new section LFPMC*
Chapter 18.54, violate RCW 36.70A.106 because the City failed to notify CTED

22 ²⁴ The Board may take official notice of Ordinance No. 958. WAC 242-02-660.

1 at least 60 days prior to the final adoption of the Ordinance and the City failed
2 to provide a copy of the final ordinance to CTED within 10 days of its final
3 adoption?

3 Prehearing Order, p. 8.

4 Legal Issue No. 10 raises the question of whether the City's enactment of Ordinance
5 No. 951 violated the requirement to provide DCTED with notice of the adoption of
6 Ordinance No. 951. Just as with Legal Issue No. 7, this issue is moot. On December 19,
7 2006, the City provided DCTED with notice of the provisions of Ordinance No. 951;
8 DCTED acknowledged receipt of the notice. *Supp. Ex. 14(a), (b)*. On March 8, 2007, the
9 City passed Ordinance No. 958, which "approves, ratifies, confirms, readopts, and reenacts"
10 Ordinance No. 951. *App. C*. Ordinance No. 958 was passed more than 60 days after the
11 City's notice to DCTED. As of the filing of this Response Brief, no one has appealed
12 Ordinance No. 958.

11 The provision of notice to DCTED and the passage of Ordinance No. 958 renders
12 Legal Issue No. 10 moot. Even if Petitioners were to prevail on that Issue, the remedy
13 would be for the Board to remand the matter to the City for the City to provide the notice to
14 DCTED. The City has taken that action already. Petitioners present no compelling public
15 policy reason not to dismiss Legal Issue No. 10.

15 **H. The City Has Not Violated RCW 36.70A.200(1).**

16 Legal Issue No. 2 states:

17 *Did the City violate RCW 36.70A.200(1) by failing to adopt a process for identifying
18 and siting essential public facilities, a process that was required at the time of
19 adoption of the City's Comprehensive Plan?*

19 Prehearing Order, p. 6, as amended by the Board's Order on Motions, p. 9.

20 RCW 36.70A.200(1) provides:

21 (1) The comprehensive plan of each county and city that is planning under RCW
22 36.70A.040 shall include a process for identifying and siting essential public
23 facilities. Essential public facilities include those facilities that are typically

1 difficult to site, such as airports, state education facilities and state or regional
2 transportation facilities as defined in RCW 47.06.104, state and local
3 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.

4 Cascade Bicycle Club asserts that the City has violated RCW 36.70A.200(1) by failing to
5 adopt a process for siting essential public facilities in the City's Comprehensive Plan.²⁵
6 However, the City has adopted policies regarding essential public facilities in its
7 Comprehensive Plan, within the element titled "Capital Facilities and Siting Essential Public
Facilities." *App. A.*

8 The City's Comprehensive Plan summarizes the Capital Facilities and Siting Essential
9 Public Facilities element as follows:

10 **Capital Facilities and Siting of Essential Public Facilities**

11 The Capital Facilities and Siting of Essential Public Facilities element includes
12 an inventory of current capital facilities owned by the City of Lake Forest Park
13 and other public entities and forecasts the future needs for such capital facilities.
14 A major issue addressed in this element is the implementation of the
15 "concurrency" requirement of the GMA; adequate public facilities must be in
place concurrent with the impacts of new development. A six year capital
facilities plan is outlined in the element, as well as a variety of funding sources
to implement the capital facilities plan. **This element also includes a process
for siting all essential public facilities, including federal, state, regional or
local proposals, within the City of Lake Forest Park.**

16 *App. A (City's Comp. Plan, p. v - vi)(emphasis added).* The City's Plan recognizes that the
17 GMA requires the Countywide Planning Policies to address siting of "public capital
18 facilities," and that the King County Countywide Planning Policies contain a chapter for
19 "Siting Capital Facilities of a County-wide and State-wide Nature." *App. A (City's Comp.
Plan, p. 14).*

20 The Capital Facilities and Siting Essential Public Facilities element states in part:

21
22 ²⁵ Only Cascade Bicycle Club argues in support of Issue No. 2; King County makes no argument in
support of Cascade's position. King County Brief, p. 14, n.17.

1 CRITERIA FOR SITING ESSENTIAL PUBLIC FACILITIES

2 Essential public facilities include those facilities that are typically difficult to
3 site, such as airports, state education facilities and state or regional
4 transportation facilities as defined in RCW 47.06.140, state and local
5 correctional facilities, solid waste handling facilities, and in-patient facilities
6 including substance abuse facilities, mental health facilities, group homes, and
7 secure community transition facilities as defined in RCW 71.09.020.

8 The Growth Management Act and the King County Countywide Planning
9 Policies require that each city or county establish a process for identifying and
10 siting all essential public facilities, including federal, state, regional or local
11 proposals. The policies state that the Growth Management Planning Council
12 shall establish a process by which all jurisdictions shall cooperatively site public
13 capital facilities of a countywide or statewide nature. The process is to include
14 the following: a definition of these facilities, an inventory of existing and future
15 facilities, economic and other incentives to jurisdictions receiving facilities, a
16 public involvement [sic] consideration of alternatives to the facility, including
17 decentralization, demand management and other strategies.

18 *App. A (City's Comp. Plan, p. 99-100).*

19 The Capital Facilities and Siting Essential Public Facilities element includes the
20 following goals and policies.

21 **Goal CF 2 Capital Facilities and Siting Essential Public Facilities: Siting**
22 To establish criteria for the siting of capital facilities in Lake Forest Park.

23 Pol CF 2.1 Ensure that any proposed construction or expansion of capital
24 facilities shall be consistent with the Lake Forest Park Comprehensive Plan.

 Pol CF 2.2 Capital facilities shall not have a negative impact to
 environmentally sensitive areas and shall be located in a manner that is
 compatible with the preservation of environmentally sensitive areas.

 Pol CF 2.3 Encourage the multiple use of corridors for major utilities, trails
 and transportation rights-of-way.

 Pol CF 2.4 Siting of capital facilities shall be based on criteria including, but
 not limited to:

- a. Specific facility requirements (acreage, transportation access, etc.)
- b. Land use compatibility
- c. Potential environmental impacts
- d. Potential traffic impacts
- e. Consistency with the comprehensive plan

1 . . .
2 **Goal CF 4 Capital Facilities and Siting Essential Public Facilities: Impacts
and Public Participation**

3 To minimize impacts associated with the siting, development and operation of
4 essential public facilities on adjacent properties and the natural environment and
5 to ensure adequate public participation in their development.

6 Pol CF 4.1 Should the city become the site of or be affected by the physical
7 location of a facility of a statewide, regional or countywide nature, the City
8 shall seek an agreement with neighboring jurisdictions, state or county agencies
9 to mitigate any financial and other burdens which may fall on the City due to the
10 siting.

11 Pol CF 4.2 Establish a process for reviewing proposals for siting essential
12 public facilities, including federal, state, regional or local proposals. The
13 process should include requirements that siting of proposed public facilities be
14 review for compatibility with adjacent land uses and those land uses designated
15 on the future land use map, particularly residential neighborhoods and city
16 centers. Design standards shall be required to ensure compatibility with
17 adjacent land uses and mitigate any negative impacts. The City's siting process
18 may include requirements that facilities provide amenities or incentives to the
19 neighborhood as a condition of approval. At least one public hearing shall be
20 required to ensure adequate public participation.

21 *App. A (City's Comp. Plan., p. 101-2).*

22 Thus, the City's Comprehensive Plan does include policies relating to essential public
23 facilities, and criteria for siting such facilities, which are one subset of "capital facilities."

24 Cascade Bicycle Club objects to this language, arguing that Policy CF 4.2 describes
what should be included in a future siting process. Cascade Bicycle Club Brief, p. 24.
However, the City adopted its most recent Comprehensive Plan containing this language on
December 1, 2005. *App. A (Ord. No. 932).*²⁶ Although Cascade Bicycle Club frames this
argument as a "failure to act" allegation, in reality, the Cascade objects to the contents and
wording of the Capital Facilities and Siting Essential Public Facilities element, including
Policy CF 4.2, as not meeting the requirements of RCW 36.70A.200(1). This is a "failure

²⁶ The Board may take official notice of Ordinance No. 932. WAC 242-02-660.

1 to comply" challenge, not a "failure to act" challenge. A petitioner cannot escape the
2 deadline for appealing the adoption of a comprehensive plan or development regulation by
3 masking a failure to comply claim as a failure to act. As stated in *Futurewise v. Snohomish*
4 *County*:

5 It appears to the Board that the essence of Petitioner's appeal is that in adopting
6 Ordinance No. 04-130, the County did not do all that it was required to do --
7 that Ordinance No. 04-130 was not the product of a complete compliance review
8 as required by RCW 36.70A.130. Petitioners challenge then, is basically, that
9 Ordinance No. 04-130 did not comply with the compliance review requirements
10 of RCW 36.70A.130. This is clearly a compliance challenge. Had the
11 Petitioners filed a timely PFR, the Board would have been able to address this
12 question. However, as decided supra, they did not file a timely challenge to
13 Ordinance No. 04-130. Therefore, whether this Ordinance complied with the
14 specific compliance review requirements of the Act, or not, is now beyond the
15 Board's authority to review and decide.

16 *Futurewise v. Snohomish County*, CPSGMHB No. 05-3-0020, Order on Motions to Dismiss
17 (5/23/05) p. 5-6; see also *1000 Friends of Wash. v Kitsap County*, CPSGMHB No. 04-3-
18 0031c, Order on Motions (3/15/05), citing *Kitsap Citizens for Rural Pres. v. Kitsap County*,
19 CPSGMHB No. 94-3-0005, Order on Dispositive Motion (7/27/94); *Gain v. Pierce County*,
20 CPSGMHB No. 99-3-0019, Order on Dispositive Motions (1/28/00), n. 3.

21 Here, the Club did not file a timely appeal of the City's adoption of the 2005
22 Comprehensive Plan. See RCW 36.70A.290(1), (2). The Plan contains Goals and Policies
23 intended to comply with RCW 36.70A.200(1). The Club cannot challenge the City's action
24 in this respect at this late date. The Board should dismiss Legal Issue No. 2 as untimely.

Further, even if Board does address Legal Issue No. 2, the City's Comprehensive
Plan contains Goals and Policies addressing essential public facilities, stating criteria for
siting such facilities, and stating concepts that guide the process of siting any essential public
facility. The DCTED reviewed the City's Comprehensive Plan, including the Capital
Facilities element, and did not have any negative comments on these provisions relating to

1 essential public facilities. *City's Supp Ex. 1.*²⁷ The City has not failed to comply with RCW
2 36.70A.200(1).

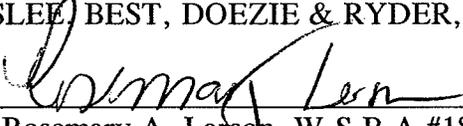
3 Cascade Bicycle Club places great weight on a letter from the City Clerk, alleging
4 that in the letter, the City "admits" that it failed to comply with the requirement to adopt a
5 process for siting essential public facilities. Cascade Bicycle Club Brief, p. 25. However,
6 Cascade provides no evidence that the City Clerk had authority to make a binding
7 interpretation of the City's Comprehensive Plan on this issue. To the extent Cascade argues
8 that the Clerk's letter estops the City, the issue of whether the Comprehensive Plan EPF
9 provisions comply with RCW 36.70A.200 is an issue of law, and the doctrine of estoppel is
10 inapplicable when the representation allegedly relied on is a question of law, rather than fact.
11 *Concerned Land Owners v. King County*, 64 Wn.App. 768, 778, 827 P.2d 1017 (1992);
12 *Dept. of Ecology v. Theodoratus*, 135 Wn.2d 582, 599, 957 P.2d 1241 (1998); *Dept. of*
13 *Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 20, 43 P.3d 4 (2002). In any event, the
14 statement by the City Clerk is contradicted by the language in the Capital Facilities element
15 of the Comprehensive Plan.

14 V. CONCLUSION

15 Based on the foregoing, the City requests that the Board deny King County's and
16 Cascade Bicycle Club's Petitions for Review, and affirm the decision of the City Council to
17 enact Ordinance No. 951.

18 DATED this 9th day of May, 2007.

19 INSLEE BEST, DOEZIE & RYDER, P.S.

20 By 

Rosemary A. Larson, W.S.B.A #18084

Michael P. Ruark, W.S.B.A. # 2220

Attorneys for City of Lake Forest Park

21
22 ²⁷ The City submits with this Response Brief its Motion to Supplement the record with City's Supp. Ex. 1.

1 **CERTIFICATE OF SERVICE**

2 I, Carol Cotto, hereby certify that on this 9th day of May, 2007, I caused to be
3 served a true and correct copy of City's Response Brief and the City's Motion to Supplement
4 the Record on the individual(s) named below in the specific manner indicated:

5 Jeffrey M. Eustis Via Messenger
6 J. Richard Aramburu U.S. Mail
7 Attorneys at Law Fax
8 505 Madison Street, Suite 209
9 Seattle, Washington 98104

8 Andrew W. Marcuse Via Messenger
9 Senior Deputy Prosecuting Attorney U.S. Mail
10 900 King County Administration Fax
11 Building
12 500 Fourth Avenue
13 Seattle, WA 98106

12 I certify under penalty of perjury, under the laws of the State of Washington, that the
13 foregoing is true and correct.

14 DATED this 9th day of May, 2007.

15 Carol Cotto
16 Carol Cotto