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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) LFP
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

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

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

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

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

12 *Ex. 418, p. 4-5.*

13 When this provision is read in its entirety, it plainly does not "preclude" trail
 14 improvements or authorize conditions that render trail improvements "impracticable."
 15 Rather, LFPMC 18.54.047D.4.b.vi provides for setbacks, to mitigate impacts to adjacent
 16 land uses. The provision takes into account the fact that pre-existing circumstances, such as
 17 existing structures, topographical features or sensitive areas, and right-of-way width, might
 18 make compliance with the setbacks impossible even if the trail is realigned within the right-
 19 of-way. In those situations, the provision authorizes the Examiner to condition the trail
 20 proposal by either reducing trail width or reducing the width of the setback or landscaping,
 21 or a combination of those two. The trail applicant is free to propose which option should
 22 occur. To ensure that the trail's impacts are mitigated, the provision requires that in cases
 23 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

