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4 BEFORE THE CENTRAL PUGET SOUND GROWTH MANAGEMENT
5 HEARINGS BOARD
6 STATE OF WASHINGTON

6 CASCADE BICYCLE CLUB and
7 KING COUNTY,

8 Petitioners,

9 vs.

10 CITY OF LAKE FOREST PARK,

11 Respondent.

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) No. 07-3-0010c
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) KING COUNTY'S REPLY BRIEF
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13 **I. INTRODUCTION**

14 [T]he GMA requires local governments both to manage change and change to manage.
15 While the GMA recognizes that a community's values and preferences form the core of
16 its comprehensive plan, there are limitations on the exercise of local discretion. The Act
17 prohibits local prerogatives, whether expressed in policy documents or development
18 regulations, from thwarting legitimate regional and state interests. Therefore, when
19 compared to the past, the "change" that the GMA will sometimes require in local plans
20 and development regulations is nothing less than transformational. Children's Alliance
21 and Low Income Housing Inst. v. City of Bellevue, CPSGMHB No. 95-3-0011, FDO at
22 p.3 (1995) (citations omitted) ("Children's Alliance").

23 This concise statement of the GMA's purpose, goal, and effect from Children's Alliance,
together with the Board's decision in that and subsequent cases, establish the framework for
resolving this dispute. Here, the City of Lake Forest Park ("the City") adopted an ordinance in
an attempt to regulate the construction or improvement of an essential public facility—in this
case, interurban multiuse or multi-purpose trails, including King County's Burke-Gilman trail
("the Trail"). However, Ordinance 951 ("the Ordinance") exceeds the permissible scope of

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KING COUNTY'S REPLY BRIEF

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1 regulation, because it enables the City to deny or preclude such facilities. Consequently, the
2 Ordinance violates the letter as well as the spirit of the GMA.

3 King County's Prehearing Brief, incorporated here by this reference, provides a sufficient
4 rejoinder to most of the arguments in the City's Response. This Reply makes just four points:

- 5 (A) Under the Board's precedents and the plain text of the Ordinance, the County's
6 petition properly and timely challenges all elements of LFPMC 18.54.047, including
7 those originally enacted in 2005, and the Board may review those elements for GMA
8 compliance;
- 9 (B) The record demonstrates that multi-purpose trails like the Burke-Gilman constitute
10 essential public facilities under RCW 36.70A.200(5) because they are public
11 facilities that are typically difficult to site;
- 12 (C) The Ordinance suffers from flaws comparable to those that the Board identified in
13 the development regulations which it struck down in Children's Alliance, above; Port
14 of Seattle v. City of Des Moines, CPSGMHB No. 97-3-0014; King County v.
15 Snohomish County, CPSGMHB No. 03-3-0011; and DOC/DSHS v. City of Tacoma,
16 CPSGMHB No. 00-3-0007;
- 17 (D) The City's later SEPA analysis and its GMA notice to CTED do not pertain to
18 Ordinance 951, because they were completed in connection with a later-adopted
19 ordinance not at issue here; as such they do not cure the City's failure to comply with
20 SEPA and CTED regulations when it adopted Ordinance 951.

21 Taken individually or together, and viewed against the Board's precedents, these points
22 demonstrate clear error and provide a sufficient basis for the Board to rule the Ordinance out of
23 compliance with the GMA. Furthermore, the Board should invalidate Ordinance 951 because
the continued validity of the Ordinance would substantially interfere with the goals of the GMA.

24 II. ARGUMENT

25 A. The Board May Review All Elements of LFPMC 18.54.047

26 This discussion relates to all Legal Issues that the Board identified in the Prehearing
27 Order, except Legal Issues 2, 7, 9, and 10. The City argues that the Board cannot review certain
28 elements of LFPMC 18.54.47 because those elements of that section were adopted in 2005, and
29 the 60-day window for challenging them has closed. City's Response Brief, at pp. 17-18. The

1 City's argument falls short. There are at least three reasons. First, the Board's prior decisions
2 teach that the Board can and will review a previously-enacted development regulation where the
3 Board is considering a timely challenge to a new regulation that incorporates the older one. See,
4 e.g., Combined Order in King County v. Snohomish County, CPSGMHB Nos. 03-3-0011, 03-3-
5 0025, and 03-3-0012 (May 26, 2004) ("King County I-III, Combined Order"), at p.12 (reviewing
6 SCC section 30.42.C.100 and finding it noncompliant even though it was merely incorporated by
7 the ordinance at issue in that case, and not amended by it).

8 Ordinance 951 weaves together several code provisions in a manner virtually identical to
9 Snohomish County's Ordinance 04-019, which the Board ultimately found noncompliant and
10 invalidated in King County I-III. See *id* at 16 (invalidating Snohomish County ordinance 04-
11 019). The City adopted Ordinance 909, which added to the City's code a conditional use permit
12 ("CUP") requirement for multi-use or multi-purpose trails. Ex. 422 at p.2. However, Ordinance
13 909 did not define the term "multi-use or multi-purpose trails." See generally Ex. 422. Nor did
14 any other portion of the City's code. See generally LFPMC Chapters 1, 16, 18. So, while the
15 City may have intended to regulate the Trail through Ordinance 909, nothing in that ordinance or
16 the code expressly did so. Then the City adopted Ordinance 951 to amend LFPMC 18.54.047
17 and to define "multi-use or multi-purpose trails" to include paved paths that connect with or
18 continue with paths in other cities. Ex 418 at p.2.

19 There is only one such path in the City—the County's Burke-Gilman Trail. It and other
20 County-owned trails are regional facilities. See, e.g., RCW 36.70A.210(1) ("The legislature
21 recognizes that counties are regional governments within their boundaries."); see also City of
22 Des Moines v. PSRC, CPSGMHB No. 97-3-0014, FDO at p.11 n.11 (J. Tovar, concurring)
23 (citing same) ("City of Des Moines"). Like Snohomish County ordinance 04-019, Ordinance
951 thus created a GMA compliance issue where there was none before: "[B]y its explicit terms,
[LFPMC 18.54.047] requires regional, state or federal EPFs to a [sic] get a CUP and therefore

1 subjects them to the criteria at [LFPMC 18.54]." King County I-III, Combined Order at p.12
2 (bracketed material added).

3 Second, a separate provision in Ordinance 951 independently reenacts and incorporates
4 the CUP requirement in LFPMC Ch. 18.54. See Ex. 418 at p.3, section 1.D.4 ("Any conditional
5 use for a multi-use trail or multi-purpose trail . . . [s]hall comply with all applicable requirements
6 of this Chapter."); accord, In re LaBelle, 107 Wn.2d 196, 223-24, 728 P.2d 138 (1986)
7 (compulsory waiver statute regarding 14-day involuntary commitments is applicable to 90-day
8 and 180-day commitments because those statutes each incorporate by reference the requirements
9 of RCW 71.05.310); Cf LFPMC 1.01.050 (reference to code or portion thereof includes not only
10 code section, but also all amendments, corrections and additions thereof). Section 1.D.4's
11 separate and independently reenacted CUP requirement would be effective even if the
12 preexisting language in section 1.C. were struck down or deleted. Ex. 418 at p.6, §2 (severability
13 provision; remaining portions of the Ordinance are valid even if other portions are invalidated).
14 As such, the plain text of Ordinance 951 puts the City's CUP requirements squarely before the
15 Board.

16 Third (and assuming for the sake of argument that Ordinance 909 applied to regional
17 trails in its original form), the GMA permits the Board to consider earlier-enacted development
18 regulations under the circumstances present here. In RCW 36.70A.302(4), the GMA specifies:

19 If the ordinance that adopts a plan or development regulation under this chapter includes
20 a savings clause intended to revive prior policies or regulations in the event the new plan
21 or regulations are determined to be invalid, the board shall determine under subsection
22 (1) of this section whether the prior policies or regulations are valid during the period of
23 remand.

24 Under the conditions enumerated in RCW 36.70A.302(4), the Board may even consider and
25 invalidate development regulations that were enacted prior to the GMA. Skagit Surveyors and
26 Engineers, LLC, v. Friends of Skagit County, 135 Wn.2d 542, 560, 958 P.2d 962 (1998). Where
27 the statutory conditions exist, the Board's ability to review pre-GMA development regulations

1 that "spring back" surely permits the Board to review a revived post-GMA regulation that was
2 first adopted only two years ago.

3 In this case, if Ordinance 951 were invalidated, the City's code specifies that Ordinance
4 909 would spring back in its original form. LFPMC section 1.01.100 (if any section, subsection,
5 sentence, clause or phrase of the City's code is for any reason held to be invalid or
6 unconstitutional, such decision shall not affect the validity of the remaining portions of the code,
7 and the original ordinance or ordinances shall be in full force and effect.). The County's petition
8 regarding Ordinance 951 was timely, so under RCW 36.70A.302(4) and Skagit Surveyors and
9 Engineers, and for the other reasons set forth above, the Board may consider the preclusive effect
10 of all elements of LFPMC 18.54.047 as amended by Ordinance 951, including those that may
11 have been originally enacted through Ordinance 909 and reenacted through Ordinance 951.

11 B. Trails Constitute Essential Public Facilities

12 This discussion relates to Legal Issues 1 and 6 as identified in the Board's Prehearing Order.
13 The City questions whether trails constitute essential public facilities (EPFs). City's Response
14 Brief, pp.12-16. It does so to no avail. The City first argues that trails are not listed in the GMA
15 definition at RCW 36.70A.200(1). City's Response Brief, at p.13. But the plain text of that
16 definition is illustrative, not exclusive:

17 The definition of "essential public facilities" is contained in [RCW 36.70A.200], rather
18 than in RCW 36.70A.030. By the terms of subsection (1), "essential public facilities"
19 include those facilities that are typically difficult to site, such as airports, state education
20 facilities and state or regional transportation facilities, state and local correctional
21 facilities, solid waste handling facilities, and in-patient facilities including substance
22 abuse facilities, mental health facilities, and group homes."

23 The word "include" implies that there are other unnamed facilities that are difficult to
site that may qualify as "essential public facilities."

Significantly, essential public facilities may be large or small, many or few, and may be
either capital projects (e.g., airports and prisons) or uses of land and existing structures
(e.g., mental health facilities and group homes). The characteristic they share is that they
are essential to the common good, but their local siting has traditionally been thwarted

1 by exclusionary land use policies, regulations, or practices. For this reason, RCW
2 36.70A.200 has, in effect, pre-empted such behavior.

3 Children's Alliance, FDO at pp. 5-6 (bracketed material, italics, underlining added). The City's
4 first argument fails.

5 The City next resorts to dictionary definitions in an attempt to differentiate trails from
6 "truly" essential facilities. City's Response Brief at p.13. But the City's approach is destructive
7 rather than edifying: Other than correctional facilities and perhaps a few select mental health
8 facilities, virtually all of the facilities expressly designated as EPFs in RCW 36.70A.200(1)—
9 airports, education facilities, waste handling facilities, substance abuse facilities, and even secure
10 community transition facilities—would be stripped from that category under the City's
11 straitjacketed dictionary approach. The GMA properly acknowledges that these facilities are all
12 discretionary government activities that contribute to the well-being of the community as a
13 whole, and are difficult to site because they are "precisely the type of land uses which provoke
14 'NIMBY' (Not in My Backyard) responses." Children's Alliance, FDO at p.13; see also Okeson
15 v. City of Seattle, 150 Wn.2d 540, 550, 78 P.3d 1279 (2005) ("[t]he principal test in
16 distinguishing governmental functions from proprietary functions is whether the act performed is
17 for the common good of all, or whether it is for the special benefit or profit of the corporate
18 entity.").

19 At bottom, the City's reductionist, definitional approach would effectively slash all public
20 facilities from the GMA's textual definition of EPFs, save only those that serve the "core but
21 limited government function to protect lives and property." Weden v. San Juan County, 135
22 Wn.2d 678, 725, 958 P.2d 273 (1998) (citing and quoting Wash. Const. Art I. §1 for the
23 proposition that "[g]overnments . . . are established to protect and maintain individual rights.").
In Children's Alliance, above, and its later decisions, the Board has correctly interpreted the plain
text of the GMA, and rightly discerned that the Legislature had an open-ended and much broader
category of facilities in mind. The City's dictionary argument is incurably flawed.

1 The City's arguments are further diminished by the fact that the text of the GMA is
2 replete with goals, references and requirements for recreational facilities, all of which serve to
3 demonstrate that the Legislature plainly recognized that parks, trails, sports fields, and similar
4 public amenities are of significant concern—indeed, are mandatory—for a growing and
5 increasingly densely housed population.¹ Given that the Legislature has richly embroidered the
6 GMA tapestry with robust public recreation mandates, it seems positively natural that such
7 facilities should constitute EPFs—subject, of course, to the caveat in RCW 36.70A.200(1) that a
8 given class of recreation facilities must also be typically difficult to site.

9 The City makes much of the fact that the County's Parks and Recreation Division is the
10 custodial agency for the Burke-Gilman trail and others like it, rather than the County's
11 Department of Transportation. City's Response Brief, at p.14. The City argues that because the
12 trail is recreational, it is not a transportation facility. See *Id.* The City's arguments falsely and
13 unnecessarily cleave the two functions apart. As an initial example, the City omits the fact that
14 County's Department of Transportation prints and updates the County's bicycle trails map, which
15 integrates bicycle and other paths (including the Trail) with on-road bike lanes and routes.²

16 More broadly, the GMA itself mandates that the transportation element of a
17 comprehensive plan must include (among other required sub-elements) a "pedestrian and bicycle
18 component to include collaborative efforts to identify and designate planned improvements for
19 pedestrian and bicycle facilities and corridors that address and encourage enhanced community

19 ¹ See, e.g., RCW 36.70A.020(9) (stating GMA goal to retain open space, enhance recreational opportunities,
20 conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and
21 recreation facilities); RCW 36.70A.030(12) (defining "public facilities" to include recreational facilities); RCW
22 36.70A.030(14) (defining "recreational lands"); RCW 36.70A.070(1) (mandatory land use element of
23 comprehensive plan must include recreation, open space, and other public facilities); RCW 36.70A.070(3)
(mandatory capital facilities element of comprehensive plan must include park and recreational facilities); RCW
36.70A.070(8) (comprehensive plan must include a park and recreation element that implements and is consistent
with the capital facilities plan element as it relates to park and recreation facilities); RCW 36.70A.150
(comprehensive plans must identify lands useful for public purposes, including recreation); RCW 36.70A.171
(identifying certain playing fields as compliant with the GMA).

² See <http://www.metrokc.gov/kcdot/roads/bike/map.cfm> (visited May 18, 2007). The County will bring an
illustrative copy of the KCDOT Bicycling Guidemap to the hearing on the merits on June 1, 2007.