

**King County****Department of
Natural Resources and Parks**

Director's Office

King Street Center

201 South Jackson Street, Suite 700

Seattle, WA 98104-3855

September 28, 2006

City Council
City of Lake Forest Park
17425 Ballinger Way NE
Lake Forest Park, WA 98155

Dear Council members,

I am writing to you as a follow up to the September 14th letter from King County to Councilmember Sterner requesting that the City work with the County on outstanding issues of concern in regard to revised Ordinance 951 which appears on your September 28, 2006 agenda. As mentioned in this letter, the County would not be submitting application for permit prior to February 2007 and we hope to utilize the time between to work cooperatively with the City of Lake Forest Park. As you know, a substantial segment of King County's Burke-Gilman Trail runs through the City of Lake Forest Park, and the County is planning to make improvements to the Trail in the near future. If the Council adopts Ordinance 951, then presumably the County will have to apply for a conditional use permit ("CUP") under the terms and conditions of Ordinance 951.

I am pleased to see that revised Ordinance 951 provides clarification to some of the provisions of earlier drafts. However, even in its current form the ordinance would make it next to impossible for the County to move forward with making critical safety improvements to the trail. First, the sheer costs of the additional planning efforts, accessory improvements, development restrictions, maintenance requirements, and mitigation which would be required as a result of this ordinance would make it impracticable to improve multiuser or multipurpose trails in the City. Examples of this include detailed accessory Trail Development and Trail Traffic Plans, landscaping of a contiguous 12' buffer and installation and maintenance of radar control devices. Secondly, the ordinance as outlined could make it impossible to even accommodate designing improvements within the existing trail corridor based on restrictions identified in Ordinance 951 such as required setbacks, screening, and grade changes.

The revised ordinance would also leave CUP applicants subject to standardless or discretionary requirements that would make it unpredictable whether the applicant would receive a CUP at the end of the application process. The ordinance would also reserve to the City broad discretion to deny a CUP application outright. Viewing each of these

flaws alone, as well as together, I believe that if revised Ordinance 951 is enacted in its present form, it would violate the Growth Management Act, RCW 36.70A, which dictates that local jurisdictions may not stop the construction or improvement of essential public facilities ("EPFs").

Ordinance 951 Would Be Impracticable

As outlined in the County's letter dated August 24, 2006, the GMA establishes that local comprehensive plans or development regulations cannot preclude the siting of essential public facilities like the Burke-Gilman Trail and other regional multiuser or multipurpose trails. Nor may local development regulations like Ordinance 951 make it impracticable to site or improve EPFs. "Impracticable" is defined as "incapable of being performed or accomplished by the means at the [EPF proponent's] command." See, e.g., *Port of Seattle v. City of Des Moines*, CPSGMHB Case no. 97-3-0014 (1997). Among other things, impracticability may take the form of restrictive zoning, comprehensive plan policies, or the imposition of unreasonable requirements. See *King County v. Snohomish County*, CPSGMHB Case no. 03-3-0022, Final Decision and Order, at section V.B.2.b (citing GMHB decisions).

Revised Ordinance 951 imposes several requirements that are unreasonable and would make it impracticable for applicants to build or improve EPFs consisting of multiuser or multipurpose trails. First, the nature of regional EPFs in general is that they tend to be detrimental to some degree to surrounding uses; that is why they can be hard to site. Linear transportation corridors like multiuser or multipurpose trails do tend to affect the "traffic flows and patterns that are normal and customary" to the surrounding uses. As such the Ordinance's absolute regulatory requirement that multiuser trails not alter such flows and patterns and not impede ingress and egress violates RCW 36.70A.200(5) because the Ordinance would prohibit that class of EPFs. See Combined Order in *King County v. Snohomish County*, CPSGMHB No. 03-3-0011, 03-3-0025, and No. 04-3-0012, at Section V.C.2b ("*King County v. Snohomish County I-III*") (declaring invalid a Snohomish County ordinance requiring that EPFs not be materially detrimental to their surroundings).

Second, section 1.C.3.a.v of the ordinance would require at least one radar-activated speed indication device facing each direction. It is not reasonable to install and maintain permanent, automated speed-indicating radar equipment on multiuser or multipurpose trails. Experience with trail speed signage indicates that such equipment would be quickly and regularly damaged by vandalism, so that it would be of little use while resulting in great cost to the trail owner. Moreover, the City does not require such equipment on other, similar EPFs, such as state highways (for example, State Route 522, which daily carries up to 40,000 motor vehicles through the City at posted speeds up to 45 mph. It is unreasonable to require such equipment on multipurpose trails like the Burke-Gilman, which currently handles only 1500 - 2000 nonmotorized travelers each day at posted speeds up to 15mph.

Ordinance 951 Would Be Unpredictable

Another issue is that the Ordinance would conflict with RCW 36.70A.020(7), which provides that "[a]pplications for both state and local government permits should be processed in a timely and fair manner to ensure predictability" (underlining added). Many of the requirements set forth in the Ordinance do not ensure predictability, because their terms are ill-defined, standardless and subject to broad interpretation. See Table 1, attached. Each one of them would leave City free to deny an EPF proponent's CUP application based on undefined criteria bounded only by the hearing examiner's personal discretion. The City may not do so. See *King County v. Snohomish County*, CPSGMHB No. 03-3-0011 at Section VI.B.2 ("an [o]rdinance that purports to authorize denial of applications for all EPFs . . . facially precludes EPFs in violation of RCW 36.70A.200.").

The ordinance would cause unpredictability for applicants and violate RCW 36.70A.020(7) for other reasons as well. For example, it would require traffic signage contrary to state and federal law and best practices for multiuser trail design. See Table 2, attached. An applicant would have to file a land use petition under RCW 36.70C to resolve the question whether state and federal traffic signage regulations trump these requirements. As a result, Ordinance 951 violates RCW 36.70A.020(7) because it creates uncertainty whether an applicant's trail could be built to meet the City's requirements as well as requirements of state and federal law and best engineering practices.

Ordinance 951 Would Be Impermissible

Finally, Ordinance 951 is problematic because it would allow the City to deny CUP applications for EPFs, contrary to the GMA. The City's code authorizes the Hearings Examiner to deny CUP applications that do not meet the relevant criteria. See, e.g., LFPMC 16.26.100 (requiring applicant to show that proposal permits approval); LFPMC 16.26.110 (application that meets criteria shall be approved); LFPMC 18.54.010 (conditional uses require hearing examiner approval); LFPMC 18.54.030 (conditional uses that meets specified criteria "may" be authorized). Under the Code, the hearing examiner could deny a CUP application based on his or her discretionary decision that the application did not meet one or more of the conditions in the Ordinance; but the GMA does not allow the City to deny a CUP for an EPF. See *King County v. Snohomish County*, CPSGMHB No. 03-3-0011 at Section VI.B.2 ("when a permit process . . . purports to reserve to a local government the discretion to deny that which it may not lawfully deny, it will be found to violate RCW 36.70A.200.").

The Ordinance also requires that an applicant must execute an interlocal agreement, or IIA, containing a variety of terms and conditions concerning trail use rules, traffic control devices and measures, maintenance and replacement measures, emergency measures, CUP enforcement, and law enforcement. See Attachment A to Ordinance 951. IIAs are not an appropriate tool to implement permit conditions for EPFs, because IIAs are discretionary; the City could decline to execute one and leave an applicant unable to satisfy the CUP's IIA requirement, which would effectively require the application to be denied. See Combined Order in *King County v. Snohomish County I-III*, at Section

V.C.1.b. ("[s]igning an interlocal agreement under RCW 39.34 is a voluntary local government exercise. Accommodating a regional EPF under RCW 36.70A RCW is not.")

In sum, if Ordinance 951 is enacted in its current form, it would violate the GMA for three reasons. First, it would make it impracticable for jurisdictions like King County to site or improve EPFs like the Burke-Gilman trail, contrary to RCW 36.70A.200(5) and the Growth Management Hearings Board decisions interpreting that statute. Second, it would make the EPF permit application process unpredictable, contrary to RCW 36.70A.020(7). Third, it would give the City discretion to deny outright an application to site or improve an EPF, contrary to RCW 36.70A.020(5).

As identified earlier, the County believes that the legislation included in Ordinance 951 will result in increased project costs to the extent where the project may not be feasible. Design and planning requirements as outlined could also make it impractical to develop. In addition, the County also believes that the proposed ordinance would still violate RCW 36.70A.020(9) and RCW 36.70A.020(12), which require timely enhancement of recreational opportunities and public facilities; and that the proposed ordinance would still violate various goals, policies, and other provisions of the City's own comprehensive plan, including but not limited to planning goal 12, and Recreational and Open Space Goal RO 2.

The County recognizes that the City has the legitimate right to condition the siting and improvement of essential public facilities like the Burke-Gilman Trail, but the GMA dictates that the City may not use its regulatory authority to preclude such facilities, either directly or indirectly. The County remains prepared to work with the City towards the former goal; but the County and the law will not tolerate the latter.

Sincerely,



Pam Bissonnette
Director

Cc: The Honorable Ron Sims, King County Executive
The Honorable Bob Ferguson, King County Council
The Honorable David Hutchison, Mayor, Lake Forest Park
Bob Burns, Deputy Director, Department of Natural Resources and Parks
Kevin Brown, Division Director, King County Parks and Recreation Division
Bud Parker, Supervisor, Facility Management Division, Department of Executive Services

TABLE 1

Ordinance 951 Section	Summary	Violates GMA Section	Reason	Representative CPSGMHB decisions
1.C.3.a.i.	Applicant must submit "Traffic Control Plan" addressing trail user safety and "maintenance of reasonable convenience for traffic crossing the trail."	RCW 36.70A.020(7); RCW 36.70A.200(5)	Terms not defined (e.g. "reasonable convenience"); hearings examiner has discretion to deny CUP application for failure to comply	King County v. Snohomish County, CPSGMHB No. 03-3-0011 at §VI.B.2.b;
1.C.3.b.i	Applicant must submit "Trail Development Plan" that is "compatible with the character and appearance of development in the vicinity."	RCW 36.70A.020(7); 36.70A.200(5)	Terms not defined (e.g. ""compatible," "character," "appearance," "vicinity"); hearings examiner has discretion to deny CUP application for failure to comply	Combined Order in King County v. Snohomish County I-III, CPSGMHB Nos. 03-3-0011, 03-3-0025, and 04-3-0012, at V.C.2.b
1.C.3.b.iv	Trail Development plan to include screening/landscaping not less than 12 feet in width unless hearing examiner determines that 12 foot width is not "practicable."	RCW 36.70A.020(7); 36.70A.200(5)	Terms not defined (e.g. "practicable"); hearings examiner has discretion to deny CUP application for failure to comply	See above
1.C.3.b.v.	Trail Development Plan to include "lighting providing adequate trail lighting for safety at drives and intersections while "minimizing" lights shining into residences "to the extent reasonably possible consistent with safety"	RCW 36.70A.020(7); 36.70A.200(5)	Terms not defined (e.g. "adequate," "minimizing"); hearings examiner has discretion to deny CUP application for failure to comply	See above

TABLE 2

Ordinance 951 Section	Summary	Violates GMA	Reason	Representative CPSGMHB Decisions
1.C.1.a	Requires stop or yield sign for trail users where trail intersects with drive or street serving less than 50 homes, contrary to RCW 46.61, MUTCD, and AASHTO trail design standards	RCW 36.70A.020(7); 36.70A.200(5)	Creates uncertainty whether EPF can comply with both Ordinance 951 and state law; hearings examiner has discretion to deny CUP application for failure to comply	King County v. Snohomish County, CPSGMHB No. 03-3-0011 at §VI.B.2.b
1.C.1.b	Requires stop or yield sign for trail users where trail intersects with drive or street serving more than 50 homes, contrary to RCW 46.61, MUTCD, and AASHTO trail design standards	RCW 36.70A.020(7); 36.70A.200(5)	Creates uncertainty whether EPF can comply with both Ordinance 951 and state law; hearings examiner has discretion to deny CUP application for failure to comply	Combined Order in King County v. Snohomish County I-III, CPSGMHB Nos. 03-3-0011, 03-3-0025, and 04-3-0012, at V.C.2.b
1.C.3.a.ii	Requires traffic control devices to provide primary right-of-way to traffic crossing the trail, contrary to RCW 46.61, MUTCD, and AASHTO trail design standards	RCW 36.70A.020(7); 36.70A.200(5)	Creates uncertainty whether EPF can comply with both Ordinance 951 and state law; hearings examiner has discretion to deny CUP application for failure to comply	See above