

No. 67019-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

BELLEAU WOODS II, LLC, a Washington limited liability company,

Appellant,

v.

CITY OF BELLINGHAM, a Washington municipal corporation,

Respondent.

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

1. The trial court erred in upholding the Bellingham Hearing Examiner's land use decision that denied Belleau Woods II, LLC ("Belleau Woods") credit toward park-impact fees for the value of the entire Conservation and Public Access Easement over half of Belleau Woods' property, which easement Belleau Woods had conveyed to the City of Bellingham ("City") as a condition of development.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether the City's Park Impact Fee Ordinance, Bellingham Municipal Code ("BMC") 19.04.140, and RCW 82.02.060(3) require the City to provide Belleau Woods credit for the value of the entire Conservation and Public Access Easement, as opposed to the value of the trail through the easement, when:

(a) Belleau Woods conveyed the Conservation and Public Access Easement to the City as a condition of development;

(b) the entire easement, which contains a regulated stream, wetlands, and wetland buffers, is protected from future development in perpetuity and was recorded as "public access";

(c) the easement makes accessible to the public "open space" classified in Bellingham's Parks, Recreation and Open Space Plan ("Park Plan") as a part of the City's park system; and

(d) the Park Plan identifies the entire easement as part of the “open space corridor” in the Recommended Facilities Plan.

2. Whether the City is estopped from denying Belleau Woods park-impact fee credit for the conveyance of the entire Conservation and Public Access Easement when Bellingham’s Director of the Parks and Recreation Department committed, in writing, to extending park-impact fee credit for the “public access” component of the easement, and when the entire easement, drafted and recorded by the City in 2004 and again in 2008, is designated as “public access.”

III. STATEMENT OF THE CASE

Belleau Woods is a Washington limited liability company. It is the owner of 7.39 acres located in areas 10 and 16A of the Guide Meridian Neighborhood, at 631 W. Bakerview Road, in Bellingham, Whatcom County. CP 290. Tim Carey is the majority shareholder of Belleau Woods. In 2004, Belleau Woods entered into a Planned Development Contract (“Development Agreement”) with the City as a condition of Belleau Woods’ proposed residential development in the Guide Meridian Neighborhood. The Development Agreement provided that Belleau Woods would (1) grant to the City a Conservation and Public Access Easement over approximately half of its property, (2) dedicate a public

trail through the easement, and (3) agree to pay the City park fees in the amount of \$8,912. CP 186-202, 85, 290.

In 2006, Bellingham passed a Park Impact Fee Ordinance, BMC Chapter 19.04, which imposed exponentially higher park-impact fees on new development. However, the ordinance exempted any development activity

for which park impacts have been mitigated pursuant to an agreement entered into with the City to pay fees, dedicate land or construct or improve park facilities . . . provided that the agreement predates the effective date of the fee imposition

Former BMC 19.04.130(A)(6)(b).¹

When Belleau Woods applied for a building permit, the City denied that its development was exempt under BMC 19.04.130(A)(6)(b) and imposed park-impact fees of \$313,710.79.² The City maintained that Belleau Woods was entitled only to partial mitigation credit in accordance with BMC 19.04.140 rather than the full exemption under BMC 19.04.130(A)(6)(b). The dispute led to the decision in *Belleau Woods II*,

¹ In October of 2007, in response to the Belleau Woods dispute, the City amended the former BMC 19.04.130(A)(6)(b), limiting the exemption to “partial credit,” and then repealed it in 2009. *See Belleau Woods II, LLC v. City of Bellingham*, 150 Wn. App. 228, 234 n.1, 237-38, 208 P.3d 5 (2009).

² CP 67.

LLC v. City of Bellingham, 150 Wn. App. 228, 231, 208 P.3d 5 (2009),

which held:

The city imposed the fee against a landowner who had already contributed land for a neighborhood trail by way of an easement over wetlands. Considering the ordinance as a whole and indicators of legislative intent, we conclude the exemption for past mitigation does not apply. The city is entitled to impose the fee ***so long as the landowner is given credit for the value of the previous contribution.***

(Emphasis added.)

Belleau Woods sought credit for the value of the Conservation and Public Access Easement it conveyed to the City. The conveyance was drafted and recorded by the City in 2004. CP 204-207, 65. It was amended and recorded again in 2008 at the City's request to include additional land to make the entire easement area accessible from West Bakerview Road. CP 17-21. The 2004 and 2008 conveyances provided for the benefit of the City of Bellingham "A CONSERVATION AND PUBLIC ACCESS EASEMENT" over approximately half of Belleau Woods' property, which easement is protected from future development in perpetuity. The conveyances also prohibit in perpetuity all tree removal and any other activities "that could cause degradation to the wetland or wetland buffer." CP 19, 205. The duty to maintain the Conservation and

Public Access Easement remains with the grantor and runs with the land.

Id.

The stated purpose of the conveyances was to

[p]rotect, in perpetuity, those areas within the property labeled “CONSERVATION AND PUBLIC ACCESS EASEMENT” on Exhibit A, and to provide for public trail access. The Easement includes a regulated stream (Spring Creek), regulated wetlands and wetland buffers. These features have been preserved for the ecological benefits and functions they provide. A public trail will be constructed within one of the areas labeled “CONSERVATION AND PUBLIC ACCESS EASEMENT” on EXHIBIT A.

CP 18-19, 205-206.

In 2004 and again in 2008, Exhibit A to the conveyance provided a map of the Conservation and Public Access Easement, with a clear, visible notation in the upper right corner stating that the “public access and conservation easement” included “all shaded areas.” CP 21, 207. The entire easement on Exhibit A was shaded. *Id.* The easement does not specify where within the easement the trail will be located. *Id.*, CP 65. In an internal memorandum dated July 29, 2008, prepared in connection with the amendment, Parks and Recreation Department officials stated that “the trail easement shall be *across entire Tract B.*” CP 16 (emphasis added).

Paul Leuthold, the Director of Bellingham’s Parks and Recreation Department, issued a decision on Belleau Woods’ request for credit by

letter dated August 31, 2009. CP 221. His letter stated: “As director, I will accept dedication of the **public access component of the conservation easement** as credit towards the required fees. Credit for the dedication shall be valued at fair market value established by a private appraiser acceptable to the City.” *Id.* (emphasis added). Mr. Leuthold then discussed the trail portion of the easement, stating that “credit for park-impact fees is given pursuant to the adopted Capital Facilities Plan,” and that “[a] trail through the Belleau Woods’ development is identified in the Capital Facilities plan as a neighborhood trail element for the north Bellingham area.” *Id.* He stated that “[t]he conservation easement . . . is not an element of the parks capital facilities plan.” *Id.* Mr. Leuthold concluded the letter by reiterating that “the credit must be limited to the value of the **public access component** of the Conservation Easement.” *Id.* (emphasis added).

When Mr. Carey became aware that the City did not intend to provide credit for the value of the Conservation and Public Access Easement, Belleau Woods appealed Mr. Leuthold’s decision. The Bellingham Hearing Examiner held a hearing to determine what “land and facilities qualif[y] for credit.” CP 290. At the hearing, Mr. Leuthold testified that the City required Belleau Woods to convey the entire Conservation and Public Access Easement as a condition of development:

[I]t was determined that in order for him to proceed with his development he was going to be responsible for preserving an area restrictive of what the Parks and Recreation Department aspect of the comprehensive plan was saying. . . . It was a conservation easement . . . required by the City for Mr. Carey to continue his development.

CP 99-100.

Mr. Leuthold conceded that the entire easement is open to public access and “benefit[s] . . . the public,” but insisted that his department wished to provide the public the “trail experience” only as a method of “transportation” unrelated to the protected “ecological benefits”³ of the space around it:

Q: What is going to prevent the public from walking off the trail?

A: Nothing.

Q: In fact they will be entitled to walk anywhere throughout this conservation easement, isn't that correct?

A: We have trails through a lot of areas that we provide a trail experience [sic]. The intent of a trail is to go from point A to point B, have a trail experience while they're on the trail. What some people choose to do is maybe not, maybe extend the boundaries of that trail experience but for the most part people pretty much stick to the intent of the trail which is a lineal corridor between point A and point B in which they could enjoy or use for either a) recreational enjoyment or b) transportation.

³ CP 19.

Q: But there is nothing that's going to prevent the public from walking off the trail. They will not be cited for trespassing, correct?

A: Correct.

CP 95-96; *see also* CP 107 (agreeing that “[t]he benefit [of the Conservation and Public Access Easement] accrues to the people who live in that wholesome healthy environment”).

Mr. Leuthold further conceded that *the entire area* of the Conservation and Public Access Easement comprised “open space,” and that Bellingham’s Comprehensive Plan⁴ describes “open space” as a “park.” CP 98-100, 137; *see also* CP 102, 142 (excerpt from the Park Plan, providing that “[o]pen space sites are generally lands set aside for preservation of significant natural resources, remnant landscapes, open space and visual aesthetic or buffering functions”; one “major purpose[.]” of open space is to “enhance the livability and character of a community by preserving . . . sites that . . . are unsuitable for development but that offer other natural resource potential,” such as “wetlands”).

⁴ Bellingham’s 1995 Comprehensive Plan was adopted pursuant to the Growth Management Act, which was passed in 1990. The Comprehensive Plan was updated in 2004-2005. Chapter 7 of the current Comprehensive Plan covers “Parks, Recreation and Open Space,” and is referred to herein as the “Park Plan.” *See* 2006 Bellingham Comprehensive Plan, Introduction at 2-3, 5, *available at* www.cob.org/services/neighborhoods/community-planning/comprehensive-plan.aspx.

Yet, Mr. Leuthold testified that he did not consider the open space protected by the Conservation and Public Access Easement to be part of the City's park system:

Q: (By Ms. Hoisington): Mr. Leuthold this conservation easement was not acquired by the Parks Department for any purpose is that correct?

A: That's correct.

Q: And in fact the park classification in the plan the intent of those is just to aid you in making decisions about acquisitions, isn't that correct?

A: It – the different classifications are to help us make those decisions. We need to be the public entity that makes the decision on what is or is not a park. As soon as we allow someone else to make the decisions and define what a park is then we completely lose control over what the size of the park and where the parks are going to be located within the city. So we have to retain that ability.

CP 104-105.

Leslie Bryson of Bellingham's Planning Department testified:

Q: And this conservation easement that's been under discussion here was that included in the Bellingham Parks Recreation and Open Space Plan?

A: No not in the recommended capital facilities portion of the plan which is Chapter 9.

CP 116. Ms. Bryson's answer was incomplete. Chapter 6 of the Park Plan includes the entire Belleau Woods' property in the map of Recommended Facilities, which shows the property as part of the

proposed “open space corridor” the City plans to maintain and develop. CP 30 and Appendix A.

The Hearing Examiner denied Belleau Woods’ appeal and affirmed the City’s decision limiting the park-impact fee credit to the trail area. CP 289-296. The Hearing Examiner’s Finding of Fact 19 states that “the City’s Capital Facilities Plan for Parks, Recreation and Open Space includes a proposed trail through the Belleau Woods II development. No other facilities are identified in the Plan to be located or developed on the site.” CP 292; *see also* CP 294 (Conclusion of Law 3) (“Open space areas, including wetlands, streams and buffers may be included as facilities qualifying for credit towards park impact fees, however, none of these areas have been shown to be identified on this property in the Capital Facilities Plan.”).

Belleau Woods appealed the Hearing Examiner’s decision to Whatcom County Superior Court. CP 283-288. The Honorable John Meyer, visiting Skagit County Judge, affirmed the Hearing Examiner’s decision in a two-sentence decision. CP 9. This appeal followed. CP 8-10.

IV. ARGUMENT

A. The Standard of Review Is De Novo

On review of land use decisions under the Land Use Petition Act, the Court of Appeals stands in the shoes of the Superior Court and reviews the Hearing Examiner's decision on the basis of the administrative record. Relief should be granted when (1) the land use decision is an erroneous interpretation of the law, or (2) the land use decision is a clearly erroneous application of the law to the facts. RCW 36.70C.130(1)(b)-(c). "Statutory construction is a question of law reviewed de novo under the error of law standard. . . . We review . . . factual findings under the substantial evidence standard and conclusions of law de novo." *Wenatchee Sportsmen Ass'n v. Chelan Cnty.*, 141 Wn.2d 169, 175-76, 4 P.3d 123 (2000); *see also Belleau Woods*, 150 Wn. App. at 238 ("[W]e review the hearing examiner's [legal] conclusions de novo, just as the superior court did."). "An application of law to the facts is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Whatcom Cnty. Fire Dist. No. 21 v. Whatcom Cnty.*, 171 Wn.2d 421, 427 (2011) (internal quotation marks and citation omitted).

B. The Hearing Examiner Erred in Interpreting BMC 19.04.140

1. The Hearing Examiner Failed to Follow the GMA

Bellingham’s Park Impact Fee Ordinance, BMC Chapter 19.04, was adopted in February of 2006, pursuant to the authority granted to the City under the Growth Management Act (“GMA”), RCW Chapter 36.70A and RCW 82.02.020, *et seq.* See BMC 19.04.010(E); *see also Isla Verde Int’l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 753 n.9, 49 P.3d 867 (2002). The GMA generally prohibits local governments from imposing on developers taxes, fees, or charges – in dollars or in kind – as a condition of development:

Except as provided in RCW 64.34.440 and 82.02.050 through 82.02.090, no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space . . . or on the development, subdivision, classification, or reclassification of land.

RCW 82.02.020. The prohibition “applies to ordinances that may require developers to set aside land as a condition of development.” *Citizens’ Alliance for Prop. Rights v. Sims*, 145 Wn. App. 649, 663, 187 P.3d 786 (2008) (holding that King County Code 16.82.150, which limited clearing on property zoned “rural area residential” to maximum of 50 percent, violated RCW 82.02.020); *see also Isla Verde*, 146 Wn.2d at 745-46 & n.2

(holding that 30 percent “open space” set-aside imposed by the City of Camas as a condition for approval of a preliminary plat for residential subdivision, “in addition to any area required to be dedicated . . . for . . . parks,” violated RCW 82.02.020 (quoting Camas Municipal Code)).

“There are . . . three exceptions to the prohibition against direct or indirect taxes, fees or charges on the development or subdivision of land . . .” *Isla Verde*, 146 Wn.2d at 753-54. “RCW 82.02.020 ‘does not preclude dedications of land or easements within the proposed development or plat which *the county, city, town, or other municipal corporation can demonstrate* are reasonably necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply.’” *Id.* at 753 (emphasis added) (quoting RCW 82.02.020).

RCW 82.02.020 also permits voluntary agreements that allow a payment in lieu of dedication of land or to mitigate a direct impact that is a consequence of a proposed development, subdivision or plat. In both instances, payment may be required as part of a voluntary agreement *only where the county, city, town, or other municipal corporation establishes* it is reasonably necessary as a direct result of the proposed development or plat.

Id. at 754 (emphasis added).

The City did not maintain below that it imposed the park-impact fee on Belleau Woods pursuant to RCW 82.02.020 because it was

“reasonably necessary as a direct result” of Belleau Woods’ development. CP 49-62. Rather, it relied on one of the exceptions contained in RCW 82.02.050-.090. CP 55. “Impact fees under RCW 82.02.050 through .090 may be imposed on development activity by counties, cities, and towns that are required to or choose to plan under RCW 36.70A.040 as part of public facilities financing. RCW 82.02.050(2).” *Isla Verde*, 146 Wn.2d at 753 n.9.⁵ Under the additional exceptions,

[t]he impact fees may be imposed only for system improvements reasonably related to the new development, shall not exceed a proportionate share of system improvements reasonably related to the new development, and the improvements must reasonably benefit the new development. RCW 82.02.050(3)(a), (b), (c). “System improvements” are public facilities included in the capital facilities plan to provide service to service areas within the community at large, in contrast to project improvements. RCW 82.02.090(9). . . . “**Public facilities**” are **capital facilities owned or operated by government entities**: public streets and roads, publicly owned parks, **open space**, and recreation facilities

Id. (emphasis added); *see also* RCW 82.02.090(7); *City of Olympia v. Drebeck*, 156 Wn.2d 289, 297 n.2, 126 P.3d 802 (2006).

In enacting the exceptions in RCW 82.02.050-.090, the legislature “expressly stated” that it intended to ensure that ““impact fees are imposed

⁵ *See also Whatcom Cnty. Fire Dist.*, 171 Wn.2d at 427.

through established procedures and criteria so that specific developments do not pay arbitrary fees or duplicative fees for the same impact.” *Drebick*, 156 Wn.2d at 296 (quoting RCW 82.02.050(1)(c)). To this end, the legislature set mandatory standards for imposing impact fees, including the credit requirement. A local ordinance imposing impact fees

[s]hall provide a credit for the value of any dedication of land for, improvement to, or new construction of any system improvements provided by the developer, to facilities that are identified in the capital facilities plan and that are required by the county, city, or town as a condition of approving the development activity[.]

RCW 82.02.060(3) (emphasis added). An ordinance that violates this and other standards in RCW 82.02.060 is invalid. *Drebick*, 156 Wn.2d at 299-300.

In *Drebick*, based in part on the analysis of RCW 82.02.060, the Washington Supreme Court held that the

GMA impact fee statutes support the conclusion that the legislature authorized local governments to calculate the fees by tying the particular development to the service area’s improvements *as a whole*, not to *particular* system improvements within the service area.

Id. at 300; *see also id.* (requirement in RCW 82.02.060(4) that impact ordinance “must allow” for the adjustment of standard impact fee based on “unusual circumstances in specific cases,” as well as “the distinction between ‘system improvements’ and ‘project improvements’ . . . makes it

clear that a particular development's impact fee is computed with reference to **all** improvements in the service area, not simply with regard to those individual projects that the particular development directly affects" (emphasis added; internal quotation marks omitted)).

The logic of *Drebick* requires that the credit mandated by RCW 82.02.060(3) is due for dedications of land for system improvements **as a whole**. The Hearing Examiner erred in accepting Bellingham's narrow interpretation of BMC 19.04.140, which credited only the trail within the Conservation and Public Access Easement but excluded the easement as a whole. That construction dilutes the GMA's flat prohibition on "any tax, fee, or charge . . . on . . . development," which "requires strict compliance," *Citizens' Alliance*, 145 Wn. App. at 656-57 (quoting RCW 82.02.020), and should be reversed.

The Hearing Examiner also erred by imposing on Belleau Woods, rather than the City, the burden of proof in establishing that the City complied with the GMA when it denied credit for the Conservation and Public Access Easement as a whole. CP 294 (Conclusion of Law 7). The Washington Supreme Court in *Isla Verde* unequivocally held that the burden of proof on compliance with the GMA – including all exceptions – is on the City. *Isla Verde*, 146 Wn.2d at 759 ("The . . . question is whether the 30 percent set aside is unlawful under RCW 82.02.020 or

whether it falls within an exception. . . . *Under RCW 82.02.020 . . . the City has the burden of showing that one of the statute’s exceptions applies.*” (emphasis added)); *see also Castle Homes & Dev., Inc. v. City of Brier*, 76 Wn. App. 95, 107, 882 P.2d 1172 (1994) (“It is incumbent under the statute and case law that the City show . . . [compliance with the GMA]. If the City cannot make that showing, the assessment is invalid.” (citation omitted)).

As discussed below, the City failed to carry its burden of demonstrating that it complied with the GMA by extending credit for the trail within the Conservation and Public Access Easement, as opposed to the easement as a whole.

2. The GMA and BMC Require Current Inventory of Park Facilities and Proposed Park Facilities – Including Open Space – to Be Included in the Capital Facilities Plan

The GMA mandates that the local ordinance imposing impact fees “[s]hall provide a credit for the value of any dedication of land for . . . any system improvements provided by the developer, to *facilities that are identified in the capital facilities plan* and that are required by the county, city, or town as a condition of approving the development activity.” RCW 82.02.060(3) (emphases added). Under RCW 36.70A.070(3), “[p]ark and recreation facilities *shall be included* in the capital facilities plan element”

of a comprehensive plan. (Emphasis added.) *See also Clallam Cnty. v. Dry Creek Coal.*, 161 Wn. App. 366, 385 (2011) (“The 2002 legislature added a sentence at the end of the capital facilities plan element subsection, stating, ‘Park and recreation facilities ***shall be included*** in the capital facilities plan element.’” (emphasis added; citation omitted)).

BMC 19.04.050(B) provides:

Capital Facilities Plan (“CFP”): A 6 year plan that is annually updated and approved by the Council to finance the development of capital facilities necessary to support the population projected within Bellingham over the next 6 year projection period. As defined in the GMA, the CFP will include:

1. Forecast of future needs for park facilities and open space;
2. Identification of additional demands placed on existing public facilities by new development;
3. Long-range construction and capital improvement projects of the City;
4. Parks under construction or expansion;
5. ***Proposed locations and capacities of expanded or new park facilities;***
6. ***Inventory of existing park facilities[.]***

(Emphases added.) *See also* RCW 82.02.090(7) (“Public facilities” include “parks” and “open space”).

Thus, under both the GMA and the BMC, Bellingham's existing and proposed park facilities must be included in the CFP. See Dry Creek Coal., 161 Wn. App. at 385 (“A capital facilities plan is a mandatory element of a county’s [Comprehensive] Plan and must . . . inventory existing capital facilities . . .”). The plain language of BMC 19.04.050 requires that, in addition to proposed facilities, the CFP must include the *existing* park and *open space inventory*. The Hearing Examiner erroneously construed BMC 19.04.050 to limit the CFP to facilities to be acquired or constructed in the future. See CP 292 (Finding of Fact 19, stating that CFP “includes a proposed trail through the Belleau Woods’ II development” and that “[n]o other facilities are identified in the Plan *to be located or developed* on the Site” (emphasis added)).

Belleau Woods conveyed to the City, at no cost, a Conservation and Public Access Easement over “open space,” which is forever protected from all development and tree removal and is open to public access. The City did not dispute below that as a result of the conveyance this “open space,” including wetlands and a protected creek, forever became part of Bellingham’s park system. Nor could it. Bellingham follows national guidelines for park classification, which include “open space.” See CP 125, 137 (excerpt from Park Plan’s Appendix A). Consistent with the guidelines, the Park Plan’s explicit goal is to

[p]rovide a high quality, diversified open space system that preserves and enhances significant environmental resources and features to protect threatened species, preserve habitat, retain migration corridors, . . . and protect water resources.

CP 125, 127-128.

To achieve this goal, the Park Plan encourages the acquisition of diversified open space – including wetlands – to “[p]reserve [their] unique environmental features . . . in future land developments.” CP 129. In order to save resources, the Park Plan promotes “[c]ooperat[ing] with . . . private landowners to set aside unique features or areas as publicly accessible resources.” *Id.* See also CP 214 (recommending “preservation techniques” for open space that go “beyond simple fee acquisition” and include “preservation easements, dedications, conservation grants . . . and other ‘trade-offs’”). Having insisted on and obtained the Conservation and Public Access Easement, the City cannot pretend that it does not have it when calculating the park-impact fee credit. BMC 19.04.050 and RCW 36.70A.070(3) affirmatively require the City to “identify” the open space it acquires by including it in the “inventory of existing park facilities.” See *Dry Creek Coal.*, 161 Wn. App. at 385. Mr. Leuthold was not free to avoid BMC 19.04.050 and RCW 36.70A.070(3) – and therefore the full credit due – by arguing that he personally did not view the Conservation and Public Access Easement as a park.

It is also irrelevant that the Parks and Recreation Department was not the same City agency that obtained the conveyance of the Conservation and Public Access Easement as a condition of development. This Court rejected a similar argument in *Citizens' Alliance*, where King County argued that its clearing-limits ordinance was adopted in response to state statutes requiring local jurisdictions to protect critical areas. “[W]hether or not RCW 82.02.020 applies is not a question of whether another statute authorized the condition.” *Citizens' Alliance*, 145 Wn. App. at 664.

3. The Park Plan Identifies the Conservation and Public Access Easement as Part of the “Open Space Corridor” in the Recommended Facilities Plan

In addition to the inventory of existing park facilities, BMC 19.04.050 requires that the CFP identify proposed locations of expanded or new facilities. Chapter 6 of the Park Plan does that and identifies the Belleau Woods Conservation and Public Access Easement as part of a future “open space corridor” in the Recommended Facilities Plan. CP 23-33. The narrative portion of Chapter 6 highlights the importance of open space and provides that open space areas

generally preserve, restore, and may provide access to wetlands, woodlands, foraging and nesting areas, migration corridors, meadows, agricultural lands and other sensitive or unique ecological features. New

open space areas should link to existing open spaces to create wildlife migration corridors, greenways, and open space networks. These linked areas will visually define and separate developed areas in accordance with the objectives of the Washington State Growth Management Act (GMA). . . .

. . . .

. . . Open space areas may . . . be developed on . . . publicly-owned land subject to public use agreements or easements, or on land acquired for other public purposes including stormwater management, and wastewater treatment sites.

CP 29.

The map of “Recommended Facilities” shows where the City wishes to maintain and develop open space corridors (shown in yellow) and open space anchors (shown in green). CP 30 (Appendix A). It depicts Belleau Woods’ property within one of the yellow open space corridors that starts on the waterfront, extends northeast to West Bakerview Road, runs along West Bakerview Road, and continues northeast through a large open space “anchor.” *Id.*

The Recommended Facilities map is inconsistent with Mr. Leuthold’s contention that the Conservation and Public Access Easement is not a park. Having obtained the easement and put it on the map of *recommended park facilities*, the City cannot deny park-impact fee credit for what it received. The map plainly demonstrates that the easement *was identified* in the Park Plan as a “recommended facility,”

albeit in Chapter 6 rather than Chapter 9. CP 30, 116. BMC 19.04.050 requires no greater showing.

4. The City’s Narrow View That Trails Are “Transportation” Is Inconsistent with the Park Plan.

Similarly, nothing supports Mr. Leuthold’s view that trails provide nothing but “transportation” from point A to point B and that “trail experience” has no relationship to the open space around it. The Park Plan reflects a different view:

5.3 Trails

GOAL: Provide an interconnected system of high quality, accessible multi-use trails and greenway corridors that offer diverse, healthy outdoor experiences within a rich variety of landscapes and natural habitats, accessing significant environmental features, public facilities and developed local neighborhood and business districts.

CP 129; *see also* CP 131 (one of the objectives of Bellingham’s trail system is “preserv[ing] functioning natural habitats” and “greenway corridors”).

The Park Impact Fee Ordinance similarly defines “facilities” together with the “environments” in which they are found:

Environments and Facilities - City-Wide should:

1. Have significant physical qualities;
2. Have historical, cultural or social values;

3. Not be duplicated elsewhere in the City;
4. Be of city-wide interest;
5. ***Protect environmentally sensitive areas[;]*** and
6. ***Be accessible to residents of the city by trails, park features or local roads.***

BMC 19.04.050(I) (emphases added); *see also* BMC 19.04.050(J) (defining local “Environments and Facilities” as a whole).

The integrated view of “environment ***and*** facilities” is consistent with the Park Plan, which considers trails to be part of the “rich variety” of natural environments that the trails make accessible to the public. This view is also consistent with the overall purpose of the Park Impact Fee Ordinance to ensure that

new development bears a proportionate share of the cost of capital expenditures necessary to provide parks, recreation, and open space improvements in Bellingham.

BMC 19.04.030(B); *see also* BMC 19.04.040 (“The provisions of this ordinance shall be liberally construed and interpreted so as to effectively carryout its purpose in the interest of the public health, safety, and welfare.”).

The Park Plan and the Park Impact Fee Ordinance do not support the City’s strained attempt to segregate the trail area from the entire Conservation and Public Access Easement when calculating park-impact

fee credit. Nor does the record. It is uncontroverted that the easement was never divided into separate “conservation” and “public access” areas, and that the easement does not limit the City’s choices in the trail’s location. Instead, the entire easement is designated as both conservation *and* public access. CP 18-21. When the City insisted on amending the easement in July of 2008 to provide for public access from West Bakerview Road, it did not ask that Belleau Woods segregate the conservation and public access areas. CP 16. To the contrary, the City’s internal memorandum stated that “*the trail easement shall be across entire Tract B.*” *Id.* (emphasis added).

As initially recorded in 2004 and as amended in 2008, the entire easement protects and makes accessible to the public, in perpetuity, “open space” that became part of the existing “inventory” of Bellingham’s park system for CFP purposes. As a result, the entire easement – not just its trail portion – is entitled to park-impact fee credit. The Superior Court’s decision affirming the Hearing Examiner’s contrary decision should be reversed.

C. The City Is Estopped from Denying Credit Measured by the Public Access Component of the Easement

The Superior Court decision should also be reversed on the alternative and independent ground that the City is estopped from denying

Belleau Woods the park-impact fee credit measured by the value of the entire Conservation and Public Access Easement it conveyed to the City. *See Henderson Homes, Inc. v. City of Bothell*, 124 Wn.2d 240, 877 P.2d 176 (1994); *View Ridge Park Assocs. v. Mountlake Terrace*, 67 Wn. App. 588, 839 P.2d 343 (1992). “Equitable estoppel requires a showing that the party to be estopped (1) made an admission, statement, or act which was inconsistent with his later claim; (2) that the other party relied thereon; and (3) that the other party would suffer injury if the party to be estopped were allowed to contradict or repudiate his earlier admission, statement, or act.” *Henderson Homes*, 124 Wn.2d at 248-49. The party asserting equitable estoppel must prove each of its elements by clear, cogent, and convincing evidence. *Id.* at 249.

In *View Ridge Park*, a developer challenged a city ordinance that required on-site recreational improvements or a cash payment of equal value in multiple-unit developments. *View Ridge Park*, 67 Wn. App. at 592, 597. The developer’s recreational facility cost totaled \$35,166.54. The City agreed to credit \$19,000 for additional landscaping against the recreational facility cost, with the balance to be paid in cash. The developer posted a bond for the balance and sued, challenging the ordinance. *Id.* at 593. When sued, the City reneged on the landscaping credit. *Id.* at 599. The Court of Appeals held that “the City is estopped

from asserting that it is not bound by the agreement” to credit View Ridge \$19,000 in additional landscaping. *Id.*

It is the same here. Mr. Leuthold, the Director of Bellingham’s Parks and Recreation Department, issued a decision on Belleau Woods’ request for a credit by letter dated August 31, 2009. In the letter, he stated:

As Director, *I will accept dedication of the public access component of the conservation easement as credit toward the required fees.*

. . . .

Credit for park impact fees is given pursuant to the adopted Capital Facilities Plan, a six year plan that is updated annually by the City Council to finance the capital facilities necessary to support the population growth projected within Bellingham. . . . The conservation easement was required by the City’s Wetland and Stream Ordinance, regulations mandated by the State of Washington Growth Management Act and is not an element of the parks capital facilities plan. *Therefore the credit must be limited to the value of the public access component of the Conservation Easement.*

CP 221 (emphases added). It is uncontroverted that the entire easement, which was drafted, accepted, and recorded by the City in 2004 and again in 2008, was described as “Public Access.” CP 291 (Finding of Fact 7); CP 84.

Mr. Carey initially took the City at its own written word and the terms of the conveyance the City itself drafted and recorded in 2004 and

2008. Now, as in *View Ridge Park*, the City wishes to renege. The City's current position that only the trail area merits credit is inconsistent with Mr. Leuthold's letter, which explicitly stated that credit would be given based on the value of the public access component of the easement, and the easement itself, which designated the entire area as public access. If allowed, the City's tactic will deprive Belleau Woods of virtually all of the credit it earned under the GMA and BMC 19.04.140, and should be estopped.

D. Summary

As this Court held in *Belleau Woods*, “[t]he city is entitled to impose the fee so long as the landowner is given credit for the value of the *previous contribution*.” 150 Wn. App. at 231 (emphasis added). Belleau Woods' contribution included a Conservation and Public Access Easement over approximately half of its property, which easement became part of the “open space” classified as a “park” under the Park Plan and is identified as part of the “open space corridor” in the Park Plan's Recommended Facilities Plan. CP 30. No more is required. The entire easement warrants park-impact fee credit. The City is not free to avoid this credit by refusing to recognize the open space as a park, or by insisting that trails are nothing but “transportation.” Nor is it free to draft, record, and commit to one thing and then do another.

E. Belleau Woods Is Entitled to Attorney Fees on Appeal

If it prevails, Belleau Woods is entitled to reasonable attorney fees on appeal under RCW 64.40.020(2), as interpreted in *Ivy Club Investors Ltd. v. City of Kennewick*, 40 Wn. App. 524, 699 P.2d 782 (1985).

V. RELIEF REQUESTED

For the reasons discussed above, this Court should reverse the Whatcom County Superior Court's March 22, 2011 Order that affirmed the Hearing Examiner's decision to deny Belleau Woods a park-impact fee credit valued by the entire Conservation and Public Access Easement.

DATED: July 15, 2011.

STOEL RIVES LLP



Rita V. Latsinova, WSBA #24447

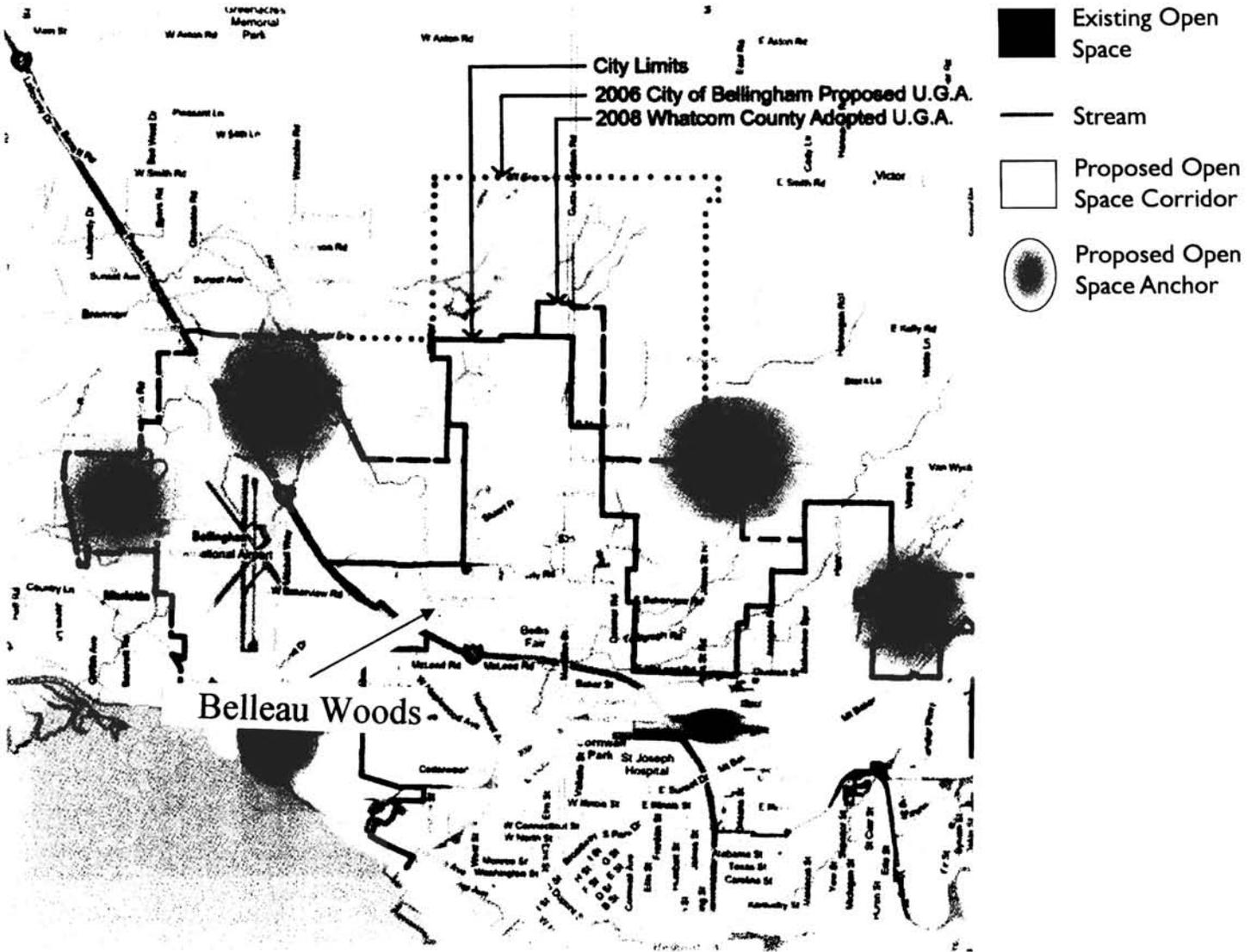
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APPENDIX

| | |
|------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Appendix A | CP 30: City of Bellingham 2008: Parks, Recreation & Open Space Plan, <i>Recommendations, Chapter 6</i> – Recommended Facilities Plan • Open Space (pg. 46) |
|------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------|

Recommended Facilities Plan • Open Space



CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct. I am employed by the law firm of Stoel Rives LLP. At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, and over the age of 18 years, not a party to the above-entitled action, and competent to be a witness herein. I arranged for true and correct copies of the foregoing document to be served on the individuals below by the means described:

Counsel for Parties:

| | |
|-------------------------------------------------------------------------------|-------------------------------------------------------------------------------|
| Joan Hoisington City Attorney 210 Lottie Street Bellingham, WA 98225 | <input checked="" type="checkbox"/> VIA Facsimile & U.S. Mail 360-671-1262 |
| Court of Appeals, Division I | Original & One Copy: with 10 color copies of Appendix A |

Executed July 15, 2011, at Seattle, WA.



Teresa Bitseff, Secretary
STOEL RIVES LLP