

62379-6

62379-6

NO. 623796-I

**COURT OF APPEALS FOR DIVISION 1  
STATE OF WASHINGTON**

THE CITY OF BELLINGHAM,  
a Washington municipal corporation,

Appellant.

vs.

SKEERS CONSTRUCTION, INC.,  
a Washington corporation, HANNAH CREEK  
PRESERVE, L.L.C., a Washington limited liability company,  
and GALBRAITH MOUNTAIN PRESERVE, L.L.C.,  
a Washington limited liability company,

Appellees.

**BRIEF OF APPELLANT CITY OF BELLINGHAM**

Jeff H. Capell, WSBA No. 25207  
Counsel for Appellant  
City of Bellingham  
747 Market Street, #1120  
Tacoma, WA 98402  
(253) 591-5638

FILED  
COURT OF APPEALS DIVISION 1  
STATE OF WASHINGTON  
2010 FEB 29 AM 10:36  
31110-72

## TABLE OF CONTENTS

	<u>Page</u>
A. INTRODUCTION.....	2
B. ASSIGNMENTS OF ERROR.....	3
C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....	5
D. BRIEF SUMMARY OF PROCEEDINGS AT SUPR. COURT.....	6
E. STATEMENT OF THE CASE.....	9
1. Statutory Framework.....	9
2. Additional Relevant Facts .....	12
3. Detailed Statement of Procedural History.....	13
3. Standard of Review.....	15
(a) LUPA.....	15
(b) Summary Judgment.....	16
F. ANALYSIS AND ARGUMENT.....	17
1. If a "[s]tatute is susceptible to more than one reasonable interpretation, it is to be construed as ambiguous.".....	18
2. When a Statute or Ordinance is Ambiguous, it Must be Construed so as to Effectuate the Legislative Intent.....	20
3. Two Additional Rules of Statutory Construction Require Reinstatement of the Hearing Examiner's Decision.....	23
(a) <u>First Rule—Harmonize the Whole</u> .....	23
(b) <u>Second Rule—Deference to the Enforcing Authority</u> .....	24
4. Application of the Doctrine of Waiver Prevents a Finding that the City Waived PIFs Years Before They were Enacted.....	25
5. <u>Pavlina, New Castle and Belleau Woods Directly Control the Outcome of this Case</u> .....	29
(a) <u>The Controlling Precedents</u> .....	29
(b) <u>Impact Fees have no Backward Reach</u> .....	31
(c) <u>Is a Preliminary Plat a Contract?</u> .....	32
(d) <u>If PIFs are not a New Condition on the Plat, can there be a Breach of Contract as a Result of their Imposition, Even Assuming the Plat to be a Contract Under the Present Facts?</u> .....	33

(e) Determining Credit Ends the Inquiry.....36

**G** CONCLUSION.....37

**TABLE OF AUTHORITIES**

	<u>Page</u>
<b>CASES</b>	
<u>Pavlina v. City of Vancouver</u> , 122 Wn. App. 520, 94 P.3d 366 (2004).....	3, 4,
.....	6, 8, 13, 20, 22, 29, 31, 32, 36, 37
<u>New Castle Investments v. City of LaCenter</u> , 98 Wn. App. 224, 989 P.2d 569 (1999), <i>review denied</i> , 140 Wn.2d 1019, 5 P.3d 9 (2000).....	3, 4,
.....	6, 8, 13, 20, 22, 29, 30-32, 36, 37
<u>Belleau Woods II, LLC v. City of Bellingham</u> , 150 Wn. App. 228 (2009) <i>review denied</i> 2009 Wash. LEXIS 1135 (Dec. 2, 2009).....	4, 6,
.....	19, 20, 22-24, 29, 32, 36, 37
<u>Wells v. Whatcom County Water Dist. No. 10</u> , 105 Wn. App. 143, 19 P.3d 453 (2001) .....	15
<u>Seybold v. Neu</u> , 105 Wn. App. 666, 675, 19 P.3d 1068 (2001).....	16
<u>Kahn v. Salerno</u> , 90 Wn. App. 110, 117, 951 P.2d 321 (1998).....	16
<u>Habitat Watch v. Skagit County</u> , 155 Wn.2d 397, 120 P.3d 56 (2005).....	16, 24
<u>Ruff v. County of King</u> , 125 Wn.2d 697, 703, 887 P.2d 886 (1995).....	17
<u>Davies v. Holy Family Hosp.</u> , 144 Wn. App. 483, 491 (2008).....	17
<u>Mill &amp; Logging Supply Co. v. West Tenino Lumber Co.</u> , 44 Wn.2d 102, 265 P.2d 807 (1954).....	18
<u>Wingert v. Yellow Freight Systems, Inc.</u> , 146 Wn.2d 841, 50 P.3d 256 (2002).....	18, 20
<u>State v. McGee</u> , 122 Wn.2d 783, 787, 864 P.2d 912 (1993).....	19
<u>Whatcom County v. City of Bellingham</u> , 128 Wn.2d 537, 909 P.2d 1303 (1996).....	20
<u>Nat'l Elec. Contractors Ass'n v. Riveland</u> , 138 Wn.2d 9, 978 P.2d 481 (1999).....	20
<u>State v. Keller</u> , 98 Wn. App. 381, 990 P.2d 423, 425 (1999).....	23
<u>State v. Roggenkamp</u> , 153 Wn.2d 614, 106 P.3d 196 (2005).....	23
<u>Ford Motor Co. v. City of Seattle, Executive Services Department</u> , 160 Wn.2d 32, 156 P.3d 185 (2007).....	24-25
<u>Bowman v. Webster</u> , 44 Wn.2d 667, 269 P.2d 960 (1954).....	26, 27

<u>Dombrosky v. Farmers Ins. Co. of Washington</u> , 84 Wn. App. 245, 928 P.2d 1127 (1996)	27
<u>Reynolds Metals Co. v. Electric Smith Constr. &amp; Equip. Co.</u> , 4 Wn. App. 695, 483 P.2d 880 (1971)	27
<u>Lincoln Shiloh Assocs. v. Mukilteo Water Dist.</u> , 45 Wn. App. 123, 724 P.2d 1083, 742 P.2d 177, <i>review denied</i> , 107 Wn.2d 1014 (1986)	31
<u>Yakima County Fire Protection Dist. No. 12 (West Valley) v. City of Yakima</u> , 122 Wn.2d 371, 388-89, 858 P.2d 245 (1993)	35
<u>Rosellini v. Banchemo</u> , 83 Wn.2d 268, 517 P.2d 955 (1974)	35
<u>Harris v. Morgensen</u> , 31 Wn.2d 228, 196 P.2d 317 (1948)	35
<u>City of Tacoma v. Taxpayers of City</u> , 108 Wn.2d 679, 743 P.2d 793 (1987)	35

**STATUTES**

RCW 36.70C.040	5, 7, 15, 16, 24
RCW 58.17.020	32
RCW 58.17.033	30, 33
RCW 58.17.070	33
RCW 58.17.110	3, 28
RCW 82.02.050~090 (the "Impact Fee Statute")	2, 9, 10, 11, 14, 19, 20, 22, 29, 30

**ORDINANCES**

BMC 19.04 (The PIF Ordinance)	2, 5, 8-14, 17-19, 21-23, 28, 29, 34, 38
BMC 19.04.030	10, 20
BMC 19.04.040	10, 21
BMC 19.04.070	13, 17, 25
BMC 19.04.130	23
AS "A6B Exemption" only	4, 5, 7, 8, 11, 14, 15, 18, 19, 20, 22, 23-25, 36, 37
BMC 19.04.140	11-14, 22, 37

**TABLE OF EXHIBITS**

**EXHIBIT A**.....The Plat  
**EXHIBIT B**.....Impact Fee Statute  
**EXHIBIT C**.....Park Impact Fee Ordinance  
**EXHIBIT D**.....Superior Court Case Summary

**A. INTRODUCTION.**

Appellee Skeers Construction, Inc. ("Skeers") is a Washington corporation with a long history of building homes in and around the Bellingham area in Whatcom County.<sup>1</sup> The development giving rise to the current appeal is known as the Hannah Creek subdivision (the "Development") which was initially approved, under different ownership, for 172 units of detached single family residential housing by preliminary plat dated December 6, 1999 (the "Plat").<sup>2</sup> The Plat, and its relationship with Appellant City of Bellingham's park impact fee ordinance is the subject of this appeal.

The Bellingham City Council enacted a park impact fee (hereinafter "PIF") ordinance pursuant to the authority provided in RCW 82.02.050~090 (the "Impact Fee Statute") on February 27, 2006 (the "PIF Ordinance"). Although Skeers' predecessor obtained preliminary approval for the Development in 1999, Skeers did not begin obtaining building permits for the units in the Development until mid 2006, after the PIF ordinance had taken effect.

---

<sup>1</sup> <http://www.skeers.com/AboutUs.php>. The other two named appellees are affiliated entities of Skeers and all appellees are referred to collectively herein as "Skeers."

<sup>2</sup> The Plat is attached hereto as Exhibit A.

Prior to the enactment of PIFs, the City of Bellingham (the “City”) required payment of a minimal fee as a provision for parks and open space under Bellingham Municipal Code (“BMC”) chapter 18.44 (the “Subdivisions” chapter of the municipal code) pursuant to authority found in RCW 58.17.110. Fees collected under BMC title 18 were not impact fees and were not calculated in a way that allowed for effective mitigation of the impacts of new growth in the City. These fees (referred to hereinafter as the “Former Fees”) for the Development would have amounted to approximately \$60.00 per unit of residential development,<sup>3</sup> but the City agreed to waive them in the preliminary plat approval process in 1999 in exchange for certain dedications of land that would serve the subdivision as open space and allow for certain recreational activities.

That notwithstanding, the City did not agree to waive PIFs should they be later enacted, nor did Skeers or its predecessor request such a forward reaching waiver in the Plat process.<sup>4</sup> Such a waiver simply was not contemplated. When Skeers began pulling building permits for the Development in mid 2006, it believed, at first, that it was vested against having to pay PIFs. After being made aware of the holdings in Pavlina v. City of Vancouver, 122 Wn. App. 520, 94 P.3d 366 (2004), and New Castle Investments v. City of LaCenter, 98 Wn. App. 224, 989 P.2d 569

---

<sup>3</sup> See Testimony of Leslie Bryson at p. 253 of the Transcript of Recorded Hearing, CP pg. 732.

<sup>4</sup> See Testimony of Butch Kvame at pgs. 28, 31-32 of the Transcript of Recorded Hearing, CP pgs. 836, 839-840.

(1999), *review denied*, 140 Wn.2d 1019, 5 P.3d 9 (2000), Skeers turned its attention to claiming an exemption from PIFs pursuant to language originally contained in BMC 19.04.130 A.6.b which will be discussed further below.

**B. ASSIGNMENTS OF ERROR.**

1. The Whatcom County Superior Court (herein the "Court") erred by determining Bellingham Municipal Code 19.04.130 A.6.b to be unambiguous,<sup>5</sup> and thereby grant Skeers an exemption from the payment of PIFs. In doing so, the Court ignored the City's evidence of the intent of the ordinance and neglected to construe the ordinance according to the rules of statutory construction.

2. The Court erred in ruling that Skeers is exempt from the payment of PIFs by virtue of the approval of the Plat, through waiver, without making any value-based determination of whether the Development's impacts had been mitigated prior to the time of permitting.

3. The Court erred when it did not follow the precedents set forth in Pavlina v. City of Vancouver, 122 Wn. App. 520, 94 P.3d 366 (2004), and New Castle Investments v. City of LaCenter, 98 Wn. App. 224, 989 P.2d 569 (1999), *review denied*, 140 Wn.2d 1019, 5 P.3d 9 (2000), thereby

---

<sup>5</sup> This same Whatcom County Superior Court judge had considered this very issue in the case that led to the opinion in Belleau Woods II, LLC v. City of Bellingham, 150 Wn. App. 228 (2009) *review denied* 2009 Wash. LEXIS 1135 (Dec. 2, 2009). In that case, the Superior Court Judge found the A6b Exemption unambiguously granted developers an exemption from PIFs regardless of whether park impacts were fully mitigated. That ruling was overturned by Division One in Belleau Woods.

allowing the Plat to take precedence over the later enactment of the PIF Ordinance even though the Plat did not deal with how such a future enactment of impact fees would be handled.

4. The Court erred by failing to properly apply the Doctrine of Waiver when it found that the City had waived PIFs approximately seven years before they were enacted based on a cross reference in the Bellingham Municipal Code.

5. The Court erred by finding that the Plat was a contract.

6. The Court erred by finding that the City had breached the Plat, as a contract, by imposing PIFs on the Development.

**C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.**

1. Did the Court err by failing to construe Bellingham Municipal Code 19.04.130 A.6.b to determine its proper intent, purpose and application to the Development? (*Assignment of Error 1*)

2. Did the Court, in its appellate role under LUPA (RCW 36.70C.040[1]) give sufficient deference to the construction of a law [and the effect of the Plat] by a local jurisdiction with expertise, when it ruled that the cross reference to BMC 19.04 in BMC 18.44 constituted a waiver of not-yet-enacted PIFs? (*Assignments of Error 2, 3 and 4*)

3. Did the Court err in failing to uphold the Hearing Examiner's determination that Skeers had to follow the provisions of the PIF Ordinance to determine whether it had fully mitigated park impacts prior to permitting and was therefore exempt from Bellingham's Park Impact Fee Ordinance? (*Assignments of Error 1 and 2*)

4. Did the Court err by granting Skeers *de facto* "vested" status against PIFs, contrary to the controlling precedents of the Pavlina, New Castle Investments, and now Belleau Woods II, LLC v. City of Bellingham, 150 Wn. App. 228 (2009) *review denied* 2009 Wash. LEXIS 1135 (Dec. 2, 2009) cases? (*Assignment of Error 3*)

5. Did the Court err in determining that the City's waiver of the Former Fees constituted a forward reaching waiver of PIFs based on a cross reference in the BMC indicating that the Former Fees were no longer charged? (*Assignment of Error 4*)

6. Did the Court err by finding that the Plat is a contract between the City and Skeers and that the City had breached that contract by imposing PIFs on the Development? (*Assignment of Error 5 and 6*)

**D. BRIEF SUMMARY OF PROCEEDINGS**

**AT SUPERIOR COURT**

After the Bellingham Hearing Examiner found (1) that the Development was not vested against PIFs, (2) that the City had not waived

the imposition of PIFs on the Development, (3) that Skeers had not followed the correct procedure to determine what amount of credit it qualified for, and (4) that Skeers was not otherwise exempt from paying PIFs under BMC 19.04.130 A.6.b. (hereafter the “A6b Exemption”) without properly valuing its credit, Skeers appealed to the Whatcom County Superior Court under the Land Use Petition Act (“LUPA”), RCW 36.70C, and also filed a general civil suit for breach of contract. The Court heard oral argument on this matter on June 5, 2008, allowing for a consolidated hearing to address both the LUPA appeal and Skeers’ summary judgment motion asking the Court to find that the Plat was a contract and that the City had breached that contract.

Skeers’ primary arguments were that (1) the Development was exempt under the A6b Exemption<sup>6</sup> because the Plat was a contract or agreement and that any mitigation of park impacts, whether partial or complete, entitled it to exemption, (2) the City had breached that agreement by imposing PIFs on the Development, and (3) alternatively

---

<sup>6</sup> The A6b Exemption, as originally enacted read:

A. The following development activities shall be exempted from payment of impact fees:... ***6. Previous mitigation where:...***

b) 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, unless the terms of the agreement provide otherwise; provided that the agreement predates the effective date of fee imposition as provided herein.

that the City had waived the application of PIFs to the Development when it waived the Former Fees.

The City's primary arguments were, first, that the A6b Exemption had to be construed because the City's intent, as stated in the PIF Ordinance itself and as testified to at the hearing, was being challenged by Skeers' alternate interpretation that any mitigation meant a full exemption from PIFs, and second, that since the Pavlina and Newcastle cases hold (1) that impact fees are not development regulations, (2) that they are not a new condition imposed on a prior approval (whether a contract or not), and therefore (3) that the vested rights doctrine does not apply to protect Skeers from the imposition of impact fees, PIFs were owed on the Development, the same as for any other development pulling permits after enactment of the PIF Ordinance. The City also pointed out that, under the Doctrine of Waiver, the City could not be found to have waived PIFs over six years before they were enacted, and that since there was no waiver, even if the Plat was considered an agreement of sorts, the City had not breached any such agreement because Skeers was still receiving the benefit of the "bargain" it made by being given credit for the Former Fees as well as for the actual value of the dedications, if appraised correctly.

At the conclusion of the June 5, 2008 hearing, the Court did not rule on the A6b Exemption issue or the application of the Pavlina and Newcastle cases, instead the Court ruled from the bench that the City had

prospectively waived PIFs presumably because the Former Fees were waived in exchange for the dedications made and because the City had discontinued collecting the Former Fees when PIFs were enacted, cross-referencing chapters 18.44 (the Former Fees) and 19.04 the PIF Ordinance in doing so.<sup>7</sup> The Court also granted Skeers' summary judgment motion for breach of contract stating:

I don't know what else to call it [the Plat] other than a contract. It's not a typical contract, I suppose it's fair to say. It's not a contract for goods or services. But I think it is a type of contract. And I find, therefore, it was breached.<sup>8</sup>

#### **E. STATEMENT OF THE CASE.**

##### **1. Statutory Framework.**

RCW 82.02.050~090 (herein the "Impact Fee Statute")<sup>9</sup> is the statutory authority upon which the Bellingham City Council relied in enacting BMC 19.04, the Park Impact Fee Ordinance. Section 050 of the Impact Fee Statute states, in part that:

- 1) It is the intent of the legislature:

---

<sup>7</sup> Report of Proceedings (hereafter "RP"), p. 71-73.

<sup>8</sup> Id., at p. 73.

<sup>9</sup> Attached as Exhibit B.

- (a) To ensure that adequate facilities are available to serve new growth and development;
- (b) To promote orderly growth and development by establishing standards by which counties, cities, and towns may require, by ordinance, that new growth and development pay a proportionate share of the cost of new facilities needed to serve new growth and development; and
- (c) To ensure that impact fees are imposed through established procedures and criteria so that specific developments do not pay arbitrary fees or duplicative fees for the same impact.

This statement of intent is essential to understanding the issues presented herein. The City adopted the State Legislature's intent for impact fees in the PIF Ordinance with the following language stating that its intent and purpose was:

"[t]o assure that new development bears a proportionate share of the cost of capital expenditures necessary to provide parks, recreation, and open space improvements in Bellingham.<sup>10</sup>

The City Council gave further guidance as to how the PIF Ordinance should be interpreted in BMC 19.04.040 with the following:

"The provisions of this ordinance shall be liberally construed and interpreted so as to effectively *carry out its purpose* in the interest of the public health, safety, and welfare." [emphasis added]

---

<sup>10</sup> BMC 19.04.030 B.

Nowhere in the Impact Fee Statute is there a requirement that local ordinances exempt certain developments from payment. In fact, the only language regarding exemptions makes them discretionary.<sup>11</sup> In the PIF Ordinance, the City added a number of exemptions beyond those suggested in the Impact Fee Statute (i.e. low income housing and projects with broad public purposes) that directly proceed the A6b Exemption all of which are situations in which no new demand on park facilities is created.<sup>12</sup> The A6b Exemption was the City's deliberate attempt to recognize the Impact Fee Statute's prohibition on duplicative fees in conjunction with recognizing the requirement that impact fees be imposed in a fair manner. In other words, the A6b Exemption recognized that if a developer had already fully mitigated its park impact by the terms of a pre-existing agreement, the City would exempt that development from additional, duplicative payments.

The A6b Exemption is followed directly in the PIF Ordinance by BMC 19.04.140 that deals with credit. In accordance with RCW 82.02.060(3),<sup>13</sup> the PIF Ordinance provides developers credit for any

---

<sup>11</sup> Namely, RCW 82.02.060 provides that "The local ordinance by which impact fees are imposed: (2) May provide an exemption for low-income housing, and other development activities with broad public purposes, from these impact fees, provided that the impact fees for such development activity shall be paid from public funds other than impact fee accounts;"

<sup>12</sup> These include such things as reconstruction, remodeling, alteration, and condo conversions.

<sup>13</sup> Which reads:

The local ordinance by which impact fees are imposed: (3) Shall provide a credit for the value of any dedication of land for, improvement to, or new construction

dedications of land or system improvements. Developers seeking credit are required to have a valuation performed by an appraiser “[a]cceptable to the City.”<sup>14</sup>

When the City enacted PIFs in 2006, the decision was made to discontinue collection of the Former Fees with a cross reference to BMC 19.04 to show that the City had replaced this former type of fees dealing with park provisions as part of subdivision approval with PIFs.

## **2. Additional Relevant Facts.**

The section of the Plat that deals with the Former Fees is actually entitled “Impact Fees.”<sup>15</sup> The first two subsections there deal with school and traffic impact fees which had been enacted in the city prior to 1999. The third section references the Former Fees, but differentiates them from impact fees, referring to them only as “park fees” and references BMC title 18, the City’s subdivision code. It should be noted that stormwater fees, another non-impact fee, were also dealt with in this same section.

The Hearing Examiner made a critical distinction here between the two fees, recognizing that the calculation and use was different, and also that the triggering event was different, i.e. the Former Fees were triggered

---

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;

<sup>14</sup> BMC 19.04.140 A.

<sup>15</sup> See the Plat, Exhibit A, pg 8. It is a well settled principle of construction, however, that a section heading does not control over the actual content of the document.

at the point of actually subdividing the land and PIFs are collected when the actual growth happens at the time of permitting.<sup>16</sup> These findings were based on, among other things, the hearing testimony of City Planner Kathy Bell who was responsible for collection of the Former Fees. She testified that the Former Fees were different from the currently effective PIFs in assessment, authority, use, and time of collection.<sup>17</sup> Former City employee Chris Spens gave some testimony that initially seemed like he equated the Former Fees with PIFs, but when pressed, he could not back up that contention.<sup>18</sup>

### **3. Detailed Statement of Procedural History.**

This appeal is an appeal of cause number 08-2-00112-8 which consolidated Skeers' LUPA appeal and its attendant civil action for breach of contract.<sup>19</sup> Both matters were heard in a consolidated hearing before Judge Ira Uhrig in Whatcom County Superior Court on June 5, 2008.

Prior to that, pursuant to BMC §§19.04.070 C. and 19.04.140 G,<sup>20</sup> Skeers appealed the imposition of PIFs on the Development to the Bellingham Hearing Examiner. A hearing was held before the Hearing

---

<sup>16</sup> See Hearing Examiner Conclusions of Law 13 and 14, CP, pgs. 1260-1261.

<sup>17</sup> Transcript of Recorded Hearing, pg. 178, CP, pg. 656

<sup>18</sup> Transcript of Recorded Hearing, pg. 118, CP, pg. 926.

<sup>19</sup> See Superior Court Case Summary attached hereto as Exhibit D, which shows motions and filings for both the LUPA action and the breach of contract cause of action.

<sup>20</sup> The PIF Ordinance, as first enacted is attached hereto as Exhibit C,

Examiner on November 14, 15, and 16, 2007 upon which a ruling was entered denying Skeers' appeal in part and granting it in part on December 28, 2007.<sup>21</sup> The Hearing Examiner based her ruling primarily on the following:

(a) Under the PIF Ordinance and pursuant to the holdings in the Pavlina and New Castle cases, impact fees are imposed at permitting and Skeers applied for permits after the PIF Ordinance became effective;<sup>22</sup>

(b) Under Pavlina and New Castle, the Plat does not give Skeers "vested rights" protection against the imposition of PIFs;<sup>23</sup>

(c) Based on the City Council's legislated determination of what constitutes the impacts on the Bellingham park system, a developer must fully mitigate those impacts before the Development could be considered exempt;<sup>24</sup>

(d) Following the rules of statutory construction and the stated intent of both the Impact Fee Statute and the PIF Ordinance, BMC 19.04.130 A.6.b. had to be read to only exempt prior mitigation activities that had fully mitigated park impacts as determined by the PIF Ordinance;<sup>25</sup>

---

<sup>21</sup> CP, pgs. 1263-1265.

<sup>22</sup> CP, pg. 1263.

<sup>23</sup> Id.

<sup>24</sup> CP, pgs. 1266-1267.

<sup>25</sup> Id.

(e) Because of Skeers failure to follow BMC 19.04.140 A.'s requirement of using an appraiser acceptable to the City, and because of flaws in the appraisal that was produced without City approval, it was impossible to determine whether the Development was exempt; and

(f) The City had not waived imposition of PIFs.

Skeers filed its appeal of the Hearing Examiner's decision under LUPA (RCW 36.70C) and the breach of contract action in the Whatcom County Superior Court on January 18, 2008<sup>26</sup> claiming essentially that the Hearing Examiner's decision (a) was an erroneous interpretation of BMC 19.04.130 A.6.b., (b) was a clearly erroneous application of the law to the facts in this case, (c) violated Skeers constitutional rights, and (d) was a breach of contract. As already mentioned, Skeers effectively succeeded in having the Hearing Examiner's decision reversed, with the Court ruling that BMC 19.04.130 A.6.b. was unambiguous, that it clearly exempted Skeers from paying PIFs, and that the Plat was a contract and that the City had breached that contract.<sup>27</sup>

#### **4. Standard of Review.**

##### **1. LUPA.**

In reviewing a LUPA decision, the Court of Appeals "[s]tands in the shoes of the superior court and reviews the hearing examiner's action

---

<sup>26</sup> See Exhibit D.

<sup>27</sup> RP, pgs. 71-73; CP 20-22.

on the basis of the administrative record." Wells v. Whatcom County Water Dist. No. 10, 105 Wn. App. 143, 150, 19 P.3d 453 (2001). In determining whether a land use decision is an erroneous interpretation of the law, the LUPA statute<sup>28</sup> requires that due deference be given to "[t]he construction of a law by a local jurisdiction with expertise."<sup>29</sup> This provision of the LUPA statute determines the standard for evaluating whether the Hearing Examiner's interpretation was erroneous.

## **2. Summary Judgment.**

Summary judgment rulings are reviewed de novo. Seybold v. Neu, 105 Wn. App. 666, 675, 19 P.3d 1068 (2001). When reviewing an order granting summary judgment, this court engages in the same inquiry as the trial court, considering all facts and reasonable inferences in the light most favorable to the nonmoving party—in this case the City. Kahn v. Salerno, 90 Wn. App. 110, 117, 951 P.2d 321 (1998). Summary judgment is only appropriate if the record before the court shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Ruff v. County of King, 125 Wn.2d 697, 703, 887 P.2d 886 (1995); Davies v. Holy Family Hosp., 144 Wn. App. 483, 491 (2008).

---

<sup>28</sup> RCW 36.70C.130(1)(b).

<sup>29</sup> *Id.* See also Habitat Watch v. Skagit County, 155 Wn.2d 397, 412, 120 P.3d 56, 63 - 64 (2005)(*Local jurisdictions with expertise in land use decisions are afforded an appropriate level of deference in interpretations of law under LUPA. RCW 36.70C.130.*)

## F. ANALYSIS AND ARGUMENT.

Before the Hearing Examiner, testimony showed that neither Skeers, nor its predecessor ever considered an exemption from the payment of PIFs, should they be enacted and imposed at some later date, to be part of the purported bargain struck in the Plat.<sup>30</sup> PIFs did not exist and would not be enacted for another six plus years. It is uncontested that the City waived the Former Fees, however, those fees were not PIFs and Skeers presented no evidence at any stage of these proceedings that the City or Skeers' predecessor expressly intended for PIFs to be preemptively waived in the event that they were later enacted. The burden of proof to show that such a waiver was intended was on Skeers pursuant to BMC 19.04.070 C.<sup>31</sup> Likewise, Skeers had no evidence to support its contention that the cross reference to BMC 19.04 that took the place of the code provision requiring the Former Fees in the BMC's subdivision code was intended to meld the Former Fees and PIFs into being the same thing and thereby allow Skeers to claim that the 1999 waiver of the Former Fees amounted to a later waiver of PIFs in 2006.

Because the Court's ruling rested primarily on finding that the BMC 18.44 cross reference<sup>32</sup> to the PIF Ordinance unambiguously

---

<sup>30</sup> Transcript of Recorded Hearing pgs. 31-32, CP, pgs. 839-840.

<sup>31</sup> See Exhibit C.

<sup>32</sup> The BMC 18.44 cross reference referred to throughout reads as follows:

In each subdivision hereafter approved, appropriate provisions shall be made for parks, playgrounds, open space and other public areas.

amounted to a waiver of PIFs as applied to the Development, the City will first address rules of statutory construction, then the Doctrine of Waiver and its application to the issues presented. Thereafter, the City will show why a preliminary plat is not a contract, and why even if the Plat is given such status, there was no breach. Lastly, the City will address issues relative to the A6b Exemption itself and why the Hearing Examiner's ruling should be reinstated.

**1. If a "[s]tatute is susceptible to more than one reasonable interpretation, it is to be construed as ambiguous."<sup>33</sup>**

When the Bellingham City Council enacted the PIF Ordinance, it certainly did not intend to include any ambiguous provisions, nor did it intend to create an ambiguity when it cross referenced the provision of the subdivision code where the Former Fees were eliminated and referenced the PIF Ordinance at BMC 19.04.

While certainty in the law is of great importance,<sup>34</sup> ambiguities nonetheless occur. The Bellingham City Council was no doubt certain of its intent with both these actions. With the A6b Exemption, it intended to

---

Provision of such areas shall be made in accordance with the City's Park Impact Fee Ordinance, BMC 19.04.

<sup>33</sup> Wingert v. Yellow Freight Systems, Inc., 146 Wn.2d 841, 852, 50 P.3d 256 (2002); "Municipal ordinances, such as the ordinances at issue here, are local statutes that are to be construed according to the rules of statutory construction." Ford Motor Co. v. City of Seattle, Executive Services Department, 160 Wn.2d 32, 41, 156 P.3d 185, 189 (2007).

<sup>34</sup> Mill & Logging Supply Co. v. West Tenino Lumber Co., 44 Wn.2d 102, 108-109, 265 P.2d 807, 811 (1954).

avoid duplicative fees being charged to a developer who had already fully mitigated its park impacts.<sup>35</sup> With the elimination of the Former Fees, the Council was again attempting to avoid anything that could be perceived as a duplicative charge and allowing for PIFs to take the place of the Former Fees. The Former Fees were not intended to subsume PIFs that had not yet been enacted. Despite the City Council's efforts, it would appear that both with the A6b Exemption and perhaps also with the BMC 18.44 cross reference, the Council created ambiguities. These ambiguities arise, however, only if none of the proffered interpretations is manifestly unreasonable.<sup>36</sup>

In light of the City's evidence of original intent that appears from the plain language of the PIF Ordinance, and the additional support that comes from reading A6b in conjunction with the other provisions of the PIF Ordinance (to be discussed more below), it is impossible to simply dismiss the City's interpretation as manifestly unreasonable. Skeers interprets both A6b and the 18.44 cross reference through the eyes of a developer who seeks the benefit of vested status and the avoidance of additional costs. The City interprets A6b not only through the lens of its original intent, but also through the intent of the Impact Fee Statute and the PIF Ordinance, the surrounding context in the PIF Ordinance, and the

---

<sup>35</sup> Belleau Woods II, LLC v. City of Bellingham, 150 Wn. App. 228 (2009) review denied 2009 Wash. LEXIS 1135 (Dec. 2, 2009)

<sup>36</sup> State v. McGee, 122 Wn.2d 783, 787, 864 P.2d 912 (1993).

controlling precedents in the Pavlina, New Castle and Belleau Woods cases. Neither interpretation is necessarily unreasonable. That being the case, it was the Court's duty to construe both A6b and the 18.44 cross reference in accordance with the rules of statutory construction.<sup>37</sup> Instead the Court found both unambiguous in contravention of the City's evidence of intent and the reasonableness of the City's interpretation and erred as a result.

**2. When a Statute or Ordinance is Ambiguous, it Must be Construed so as to Effectuate the Legislative Intent.<sup>38</sup>**

As has been stated thus far, the legislative intent of impact fees is abundantly clear both at the state and local level. A court's "[p]rimary goal in statutory interpretation is to ascertain and give effect to the intent of the Legislature."<sup>39</sup>

Beginning with RCW 82.02.050, it is clear that the intent of impact fees is to "[r]equire, by ordinance, that new growth and development pay a proportionate share of the cost of new facilities needed to serve new growth and development." The Bellingham City Council adopted this rationale in its specific statement of intent in the PIF Ordinance at BMC 19.04.030 B. which states: " The purpose of this ordinance is to assure that

---

<sup>37</sup> Wingert, 146 Wn.2d at 852.

<sup>38</sup> Id. citing Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996).

<sup>39</sup> Nat'l Elec. Contractors Ass'n v. Riveland, 138 Wn.2d 9, 19, 978 P.2d 481 (1999).

new development bears a proportionate share of the cost of capital expenditures necessary to provide parks, recreation, and open space improvements in Bellingham." The City Council also prescribed the parameters by which the PIF Ordinance must be construed and interpreted in BMC 19.04.040 which reads: "The provisions of this ordinance shall be liberally construed and interpreted so as to effectively *carry out its purpose* in the interest of the public health, safety, and welfare." [emphasis added] Its purpose was not to protect developers with pre-existing preliminary plats from paying PIFs with a blanket exemption, but rather to have them pay their appointed share of the cost of the growth they precipitate.

In considering the 18.44 cross reference, that purpose and intent has to flow both directions. The Council intended for developers to pay for their impacts, but at the same time did not intend for any fees to appear duplicative, even where those fees were calculated, imposed and used differently than PIFs. As a result, it did away with the Former Fees opting for PIFs to be the only charge related to subdivisions/new development. Surely the Court of Appeals can see how countenancing Skeers' reading of this cross reference thwarts the Council's intent to have developers pay the cost of the impacts they create in what otherwise amounts to an unintentional waiver.

In the case of the A6b Exemption, logic<sup>40</sup> requires an analysis of the value of the prior mitigation against the legislatively determined impact represented by the fee assessed in the PIF Ordinance. If the value of the prior mitigation equals (or exceeds<sup>41</sup>) the impact fee, the City will, of course, not require an arbitrary payment of a duplicative fee. No evidence supports Skeers' preferred interpretation of the A6b exemption, and to say that the plain language grants an exemption, regardless of the value of the mitigation, is contrary to the City's evidence from the hearing and subverts the intent and purpose of both the Impact Fee Statute and the PIF Ordinance.

Likewise, allowing Skeers' interpretation of the 18.44 cross reference to exempt the Development from PIFs by construing the cross reference into an unambiguous waiver, reflexively reaching back to the 1999 Plat and then forward to the 2006 PIF Ordinance, is neither logical nor is it in keeping with the purpose and intent of the PIF Ordinance and the Impact Fee Statute. As will be shown below, allowing for such a waiver also goes against well settled principles of Washington law as to what can constitute such a waiver, and is contrary to the holdings of Pavlina, New Castle and Belleau Woods.

---

<sup>40</sup> As well as this Court's holding in Belleau Woods.

<sup>41</sup> In the case of excess value, BMC 19.04.140 F. allows for the possibility that such excess could be transferred to another development.

**3. Two Additional Rules of Statutory Construction Require Reinstatement of the Hearing Examiner's Decision.**

(a) First Rule—Harmonize the Whole. The Court of Appeals has stated previously that "We construe each part or section of a statute in connection with every other part to harmonize the statute as a whole." State v. Keller, 98 Wn. App. 381, 383-384, 990 P.2d 423, 425 (1999).<sup>42</sup> That is exactly what the Hearing Examiner did in construing A6b not only in light of the intent and purpose language set forth above, but also in looking at the language that immediately proceeds and follows A6b in the PIF Ordinance.

All five prior exemptions listed in BMC 19.04.130 leading up to A6b as it was originally enacted are for development activities that unequivocally create no new impacts on parks facilities such as rebuilding a destroyed dwelling or conversion of an apartment complex to condominiums where no new units are created. Skeers' one hundred seventy two (172) unit residential subdivision most certainly creates new impacts on parks facilities. That impact has to be compared against the value of the dedications made within the Development in order to determine if those impacts have indeed been mitigated.<sup>43</sup> In perfect fairness, Skeers should be exempt from paying PIFs if its prior mitigation

---

<sup>42</sup> See also State v. Roggenkamp, 153 Wn.2d 614, 623, 106 P.3d 196, 200 (2005) and Belleau Woods 150 Wn. App. 208 P.3d 5; 2009 Wash. App. LEXIS 1246 (2009). Belleau Woods dealt with these exact same issues and should be controlling on the outcome.

<sup>43</sup> See Belleau Woods 150 Wn. App. at headnotes 9-12.

efforts have, in fact, sufficiently mitigated the impacts of the Development at the time of construction, and that is essentially what the Hearing Examiner ruled should happen after a proper valuation. Conversely, to exempt Skeers without determining whether "[p]ark impacts have been mitigated,"<sup>44</sup> would run counter to the Council's intent and this Court's ruling in Belleau Woods. Division One made the proper analysis of the A6b Exemption and the Bellingham City Council's subsequent actions in the Belleau Woods and that ruling should control here over any issues of ambiguity, construal and intent regarding the A6b Exemption.

(b) Second Rule—Deference to the Enforcing Authority. The final rule of statutory construction that comes into play in this case coincides with the LUPA requirement of deference. The LUPA statute<sup>45</sup> specifically states that in determining whether a "[l]and use decision is an erroneous interpretation of the law," due deference must be given to "[t]he construction of a law by a local jurisdiction with expertise."<sup>46</sup> Even in non-LUPA contexts, the Washington Supreme Court has applied and followed the below rule:

[w]hen construing an ordinance, a "reviewing court gives considerable deference to the construction of" the challenged ordinance "by those officials charged with its enforcement." Ford

---

44 The pertinent language from A6b as it was enacted.

45 RCW 36.70C.130(1)(b).

46 *Id.* See also Habitat Watch v. Skagit County, 155 Wn.2d 397, 412, 120 P.3d 56, 63 - 64 (2005).

Motor Co. v. City of Seattle, Executive Services Department, 160 Wn.2d at 42, *citing* Gen. Motors Corp. v. City of Seattle, 107 Wn. App. 42, 57, 25 P.3d 1022 (2001).

In the present case, the Parks and Recreation Director is the person charged with enforcing the imposition and payment of PIFs.<sup>47</sup> His testimony before the Hearing Examiner supports the credit / exemption dichotomy asserted by the City,<sup>48</sup> and with no evidence to the contrary from Skeers, the Hearing Examiner had to uphold the City's interpretation.

The rules of statutory construction clearly entail following the ruling set forth by the Hearing Examiner, both as regards the application of the A6b Exemption and the 18.44 cross reference in order to uphold the City Council's intent.<sup>49</sup>

#### **4. Application of the Doctrine of Waiver Prevents a Finding that the City Waived PIFs Years Before They were Enacted.**

As mentioned above, when the provisions of the Plat were concluded neither the applicant, Skeers' predecessor in interest, nor the City made any provision for the waiver of the Former Fees to act as a

---

<sup>47</sup> See BMC 19.04.070 C., Ex. A, pgs. 7~8.

<sup>48</sup> See Transcript of Recorded Hearing at pgs. 181-190, CP, pgs. 660-669.

<sup>49</sup> It should be pointed out here that, although Skeers argued that PIFs had been waived due to the waiver of the Former Fees at the hearing, the avenue to arriving there through the 18.44 cross reference really was only argued for the first time on appeal. As a result, the record has little to say about this issue.

waiver of PIFs should they be later enacted.<sup>50</sup> The City and Mr. Kvame were dealing with the Former Fees only.

"The doctrine of waiver ordinarily applies to all rights or privileges to which a person is legally entitled." Bowman v. Webster, 44 Wn.2d 667, 669, 269 P.2d 960, (1954).<sup>51</sup> Beginning in March of 2006, the City became entitled to charge PIFs on new development. In Bowman the Washington Supreme Court set forth the rule for determining whether a party has waived a legal right, such as the right to collect PIFs, as follows:

A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. It may result from an express agreement or be inferred from circumstances indicating an intent to waive. It is a voluntary act which implies a choice, by the party, to dispense with something of value or to forego some advantage. The right, advantage, or benefit must exist at the time of the alleged waiver. The one against whom waiver is claimed must have actual or constructive knowledge of the existence of the right. He must intend to relinquish such right, advantage, or benefit; and his actions must be inconsistent with any other intention than to waive them. Id.

Under this test, Skeers could not meet its burden at the hearing and prove that the City intended to waive the right to collect PIFs for the

---

<sup>50</sup> See Testimony of Butch Kvame at p. 31-32 of the Hearing Transcript, CP pgs. 839-840.

<sup>51</sup> The Bowman case is prolifically cited in subsequent Washington cases as a seminal case on the doctrine of waiver.

Development before they were even enacted, either through anything express in the Plat, or by unequivocal conduct that implies such an intention. The fact that a waiver has to be of a presently existing right alone negates any waiver as a result of the Plat. Simply put, there is no "express agreement" to waive PIFs in the plat. The City had no "known right" to collect PIFs in 1999 since PIFs did not exist. And again, nothing in the City's actions has been consistent with a waiver of PIFs either before or after their enactment.

Skeers has appeared to argue below that the City should have had the foresight to account for the possibility of PIFs being enacted in the future and expressly reserved that right or otherwise the right should be deemed waived. That said, any such imputed duties do not withstand a correct application of the law regarding the Doctrine of Waiver. The Court of Appeals has summed this issue up nicely by saying "[w]aiver is essentially a matter of intention. Negligence, oversight or thoughtlessness does not create it."<sup>52</sup> The intention to waive or relinquish a right must be proved by the party claiming that the right was waived<sup>53</sup> and the Hearing Examiner correctly ruled that Petitioner failed to carry this burden.<sup>54</sup>

---

<sup>52</sup> Dombrosky v. Farmers Ins. Co. of Washington, 84 Wn. App. 245, 255, 928 P.2d 1127 (1996) *citing* Reynolds Metals Co. v. Electric Smith Constr. & Equip. Co., 4 Wn. App. 695, 700, 483 P.2d 880 (1971).

<sup>53</sup> Id.

<sup>54</sup> CP, pgs. 1264-1265.

Skeers' claim of waiver, which became the sole basis for the Court's ruling below, rested entirely on the assumption that the Former Fees are interchangeable with PIFs, but the evidence on record is clear that they are not.<sup>55</sup> The best Skeers' witnesses could testify to was that they *assumed* the Former Fees were equivalent with PIFs.<sup>56</sup> That does not change the fact that they were part of the subdivision code and were based on entirely different statutory authority.<sup>57</sup> They were calculated differently and were focused locally. And finally, their use was limited to acquisition and they were non-refundable. PIFs are different on all points. The differences are more than just semantics as Skeers' witness, Chris Spens seemed to intimate.<sup>58</sup>

Lastly, the City would submit that a plain language analysis of the 18.44 cross reference also does not support the Court's ruling below. BMC 18.44.010 was amended contemporaneously with the enactment of the PIF Ordinance. All the amended section contains is an acknowledgment of the requirement set forth in RCW 58.17.110 to provide for parks and an acknowledgment that the City intends to do that, starting in March of 2006, through PIFs. There is no mention of a retroactive waiver. There is no statement of retroactive application of any

---

<sup>55</sup> See, e.g. Testimony of Kathy Bell, Transcript of Recorded Hearing, pg. 177-178, CP, pgs. 656-657.

<sup>56</sup> CP pgs. 839-840.

<sup>57</sup> RCW 58.17.110 as opposed to RCW 82.02.050-090.

<sup>58</sup> Transcript of Recorded Hearing, pg. 118, CP, pg. 926.

kind. There is no express statement in BMC 18.44.010 upon which Skeers can rely for its claimed waiver. There is also no conduct by the City that amounts to an inference of such waiver either.

**5. Pavlina, New Castle and Belleau Woods Directly Control the Outcome of this Case.**

(a) The Controlling Precedents.

The Pavlina, New Castle and Belleau Woods cases are of vital importance to the issues of this appeal because they dealt with the exact same core issue:

Can impact fees be imposed on developments that were approved prior to the enactment of the impact fee ordinance if the development has not yet applied for permits?

In all three cases, the answer was "yes."<sup>59</sup>

Impact fees "[m]ust be calculated when the growth is to occur, at the time of the building permits; otherwise cities would be underfunded to pay for the indirect costs of new growth." New Castle Investments, 98 Wn. App. at 237. This holding is in perfect conformance with the intent and purpose of impact fees as stated in both the Impact Fee Statute and the PIF Ordinance—that "[n]ew growth and development pay a proportionate

---

<sup>59</sup> With the Belleau Woods case, not only was it the same issue, but also the same jurisdiction and same subsection of Bellingham's PIF Ordinance in question. The same as here, Belleau Woods argued that the City's imposition of PIFs had breached or impaired its Planned Contract. The Court of Appeals found no merit to that argument and upheld the City's intent and purpose in enacting the PIF Ordinance.

share of the cost of new facilities needed to serve new growth and development." RCW 82.02.050(1)(b).

The New Castle court acknowledged that the time between initial approval of a development and the issuance of a permit application may be "many years,"<sup>60</sup> which was certainly the case here with a gap of approximately seven years. As a result, it would be both unfair and unwise to impose impact fees prior to permitting—*unfair* because until such time as permitting takes place the developer is not actually engaging in any development activity that creates new demand on facilities, and *unwise* because, as already stated, charging too early could leave cities substantially underfunded to accommodate the new growth. This requirement only serves to further highlight one of the differences between PIFs and the Former Fees, which were charged at the time a subdivision was approved and possibly well in advance of permitting. The City's decision to do away with the Former Fees in order to avoid any appearance of charging duplicative fees in violation of the Impact Fee Statute should not be used as a tool to deprive the City of any PIFs owing on the Development and thereby convey a special benefit on the developer.

---

<sup>60</sup> Id. Some development are abandoned altogether.

(b) Impact Fees have no Backward Reach.

Under both the common law and as codified at RCW 58.17.033, the vested rights doctrine is designed "[t]o provide a measure of certainty to developers and to protect their expectations against fluctuating land use policy," but that principle of protection only applies to measures that are, in fact, development regulations. New Castle Investments, 98 Wn. App. at 237 at 231. The present case is very similar to Lincoln Shiloh Assocs. v. Mukilteo Water Dist., 45 Wn. App. 123, 724 P.2d 1083, 742 P.2d 177, *review denied*, 107 Wn.2d 1014 (1986) (*vesting does not protect against an increase in fees incident to development*), a case upon which the New Castle court heavily relied. There the plaintiff builder, Lincoln, sought to have the vested rights doctrine applied to freeze its utility connection charges at \$6,400. The court reasoned that even though Lincoln had created its own expectation that the fee would not, or should not rise as applied to Lincoln, it had no vested right to the connection fee remaining at \$6,400. Lincoln, 45 Wn. App. at 128.

The Pavlina and New Castle cases expounded upon reasoning found in Lincoln Shiloh Assocs. In both cases, the court determined that impact fees do not change the developer's intended use of the land, nor do they change any condition, approval or restriction that was not already present in the approved plans. They simply add to the cost of the development in question and the cost of the development is not the kind of

expectation the vested rights doctrine was designed to protect. New Castle, 98 Wn. App. at 232~233, Pavlina, 122 Wn. App. at 528~529. Both cases concluded that, because impact fees do not affect physical aspects of a development, they are not land use control ordinances/ regulations, and cannot be considered an additional condition of approval. Id. Division One followed this reasoning in Belleau Woods.

These three case have made it abundantly clear that the imposition of impact fees on a development is not a new condition added to an existing approval, whether that approval was by preliminary plat, as in Pavlina and New Castle, as well as the present case, or by other approval mechanism such as the Planned Contract in Belleau Woods. Where the Former Fees were actually part of the subdivision process, impact fees are not.

(c) Is a Preliminary Plat a Contract?

Before the Superior Court, both parties acknowledged that there was no case authority for the proposition that a preliminary is a contract,<sup>61</sup> which led to the Court's statement recounted above in Section D. where it said, "I don't know what else to call it other than a contract." Preliminary plats are not, however, contracts.

RCW 58.17.020(4) defines what a preliminary plat is with the following:

---

<sup>61</sup> RP, pg. 66.

(4) "Preliminary plat" is a neat and approximate drawing of a proposed subdivision showing the general layout of streets and alleys, lots, blocks, and other elements of a subdivision consistent with the requirements of this chapter. The preliminary plat shall be the basis for the approval or disapproval of the general layout of a subdivision.

RCW 58.17.033 and 58.17.070, grant cities the authority to approve preliminary plats within their jurisdiction according to local ordinance. A city's role in the preliminary plat approval process may be, at times, highly participatory and seem very much like the negotiation of a contract, but that role is a sovereign act, in a regulatory capacity, not a contractual role. RCW 58.17.070, makes this fact all the clearer, placing a city's role with preliminary plats in the category of "quasi-judicial or administrative actions." Preliminary plats are not contracts; they are quasi-judicial actions that can be appealed as such.

(d) If PIFs are not a New Condition on the Plat, can there be a Breach of Contract as a Result of their Imposition, Even Assuming the Plat to be a Contract Under the Present Facts?<sup>62</sup>

The answer to this question is "no" for a number of reasons. First, as has already been shown above, neither the City nor Skeers' predecessor in interest contemplated the payment or exemption from payment of PIFs

---

<sup>62</sup> All references to contracts, agreements or bargains from this point forward are made assuming the Plat to be a contract for the sake of argument only. The City still maintains that a preliminary plat is not a contract.

as part of the Plat approval process. Simply put, PIFs were not in the minds of the parties, and therefore, those minds could not meet and agree upon that inchoate, future issue.

Second, there is no breach of any presumed agreement because Skeers still gets the full benefit of the “bargain” struck under the Plat. Skeers (and its predecessor) did not bargain for the waiver of PIFs. PIFs were not part of the factual bargain struck, nor are they part of any imputed legal bargain, as shown above, because impact fees are not a condition on the approval of a plat, nor are they a development regulation that affects the terms and conditions of a plat approval.<sup>63</sup> The Former Fees are still waived, and in addition thereto, Skeers will still get credit for that waiver, as well as any additional credit valued in accordance with the PIF Ordinance. Skeers is getting full credit for all dedications or system improvements and that credit is going much farther than just covering the \$60 per lot value of the Former Fees.

An enforceable contract requires offer, acceptance, and consideration. Yakima County Fire Protection Dist. No. 12 (West Valley) v. City of Yakima, 122 Wn.2d 371, 388-89, 858 P.2d 245 (1993). Holding the City to a bargain to which it did not agree, namely the waiver of PIFs, lacks all three elements of a contract. There was no offer and acceptance

---

<sup>63</sup> Unless expressly made a part as with impact fees that were in existence in 1999.

or meeting of the minds—at least insofar as a waiver of PIFs is concerned—and such a waiver, if added after the fact, is not supported by any consideration.<sup>64</sup> The City is still honoring its “obligation” to allow Skeers to construct the Development in accordance with the approved Plat and is giving it the value of its dedications and improvements. The “parties” had no agreement regarding the waiver of PIFs. Imputing such a requirement on the City would require additional consideration from Skeers. Such consideration does not exist.<sup>65</sup> Skeers has not undertaken any new obligation to the City that would offset the City's foregoing the collection of PIFs.<sup>66</sup>

Requiring Skeers to pay any PIFs that exceed its earned credit with its permits does not alter conditions attached to the Development or any physical aspect thereof. It is nothing different than any other developer has to do.

---

<sup>64</sup> Under the pre-existing duty rule, an agreement to do that which one is already legally obligated to do is not valid consideration. 25 Wash. Practice § 2:24, at 68.

<sup>65</sup> Consideration is absent "if one party is to perform some additional obligation while the other party is simply to perform that which he promised in the original contract." Rosellini v. Banchemo, 83 Wn.2d 268, 273, 517 P.2d 955 (1974). *See also Harris v. Morgensen*, 31 Wn.2d 228, 240-241, 196 P.2d 317, 324 (1948) (*Generally, the promise of a person to carry out a subsisting contract is no consideration as he is doing no more than he was already obliged to do.*)

<sup>66</sup> Such an absence of consideration also raises illegal gifting of public funds issues for the City. Article XIII, §§5 and 7 of the Washington Constitution prohibit the gifting of public funds. The absence of consideration is one of the factors looked to in determining whether an unconstitutional gifting has occurred. City of Tacoma v. Taxpayers of City, 108 Wn.2d 679, 702, 743 P.2d 793 (1987).

Finally, the Pavlina, New Castle and Belleau Woods decisions have made it clear that there is no relation, whether contractual or otherwise, between the approval mechanism (e.g. preliminary plat, planned contract, etc.) and the imposition of impact fees. Because impact fees do not affect the intended use or physical aspects of a development, they are not land use control ordinances. New Castle, 98 Wn. App. at 237, Pavlina, 122 Wn. App. at 528~529. Because they are not land use control ordinances, "[t]hey cannot be viewed as an additional condition of approval." Id. In other words, PIFs are not part of the Plat approval, and therefore, they do not affect the Skeers' presumed contract whether as an added condition, or as a breach of the existing "bargain."

(e) Determining Credit Ends the Inquiry.

Just as Belleau Woods did in its case before this Court, Skeers has denied any valuation or full mitigation requirement under the A6b Exemption. The Belleau Woods case put this contention to rest when it "[c]oncluded [that] the city intended that a developer is entitled to a full exemption only if the previous contribution of land or money was equivalent to the park impact fees assessed under chapter 19.04 BMC." 150 Wn. App. at 243.

This Court's reinstatement of the Bellingham Hearing Examiner's ruling in Belleau Woods should lead to the same conclusion here. The Hearing Examiner ruled that the Development was not exempt from PIFs,

nor had the City waived the same, but that Skeers should get credit for a broader range of dedications/improvements than the City's Parks Department originally was inclined to grant. The City did not appeal that last finding at the Superior Court nor does it challenge it now. Certainly, Skeers has a significant credit against PIFs coming, one that may even rise to an exemption. However, just as the Hearing Examiner ruled, Skeers must follow the procedures set out in the PIF Ordinance in making that valuation.<sup>67</sup>

#### **G. CONCLUSION.**

Skeers' position here is no different than developers Belleau Woods II, LLC, New Castle Investments partnership and Dennis Pavlina. All had development approvals that predated the enactment and imposition of an impact fee. In none of those cases, just as here, was there an agreement to waive later enacted impact fees. This Court has already ruled on the effect of the A6b Exemption in the Belleau Woods case based on the language of the A6b Exemption when read in light of the

---

<sup>67</sup> The sticking point here is that BMC 19.04.140 A. requires valuations to be performed by "private appraisers acceptable to the City." Skeers had an appraisal of its dedications performed as this process began to unfold, but never bothered to inquire whether its appraiser was acceptable to the City, instead choosing to argue after the fact that its appraiser should have been acceptable. The City found flaws in Skeers' appraiser's valuation and testified to the same through Matthew Burke at the Hearing, a licensed appraiser who was on the Parks Department's staff at the time. This after the fact dickering over numbers is exactly what the City intended to avoid by requiring agreement over the private appraiser in advance.

surrounding provisions of the PIF Ordinance and later legislative action. There is no exemption without qualifying valuation.

Belleau Woods also argued that the City had waived its right to collect PIFs through language similar to that which Skeers relies on here regarding the treatment of fees other than actual PIFs. The Doctrine of Waiver precludes such an argument when there is no express or implied waiver at a time when the right alleged to have been waived was not even in existence.

Lastly, Belleau Woods too argued that its development approval mechanism, a Planned Contract, had been breached or impaired by the later imposition of PIFs. That argument did not prevail for Belleau Woods, nor should the Superior Court's ruling to that effect be allowed to stand here. A preliminary plat is not a contract; it is a quasi-judicial approval mechanism. The Plat simply cannot rise to being a valid and binding contract on the matter of PIFs because they were not part of the subject matter of the Plat.

Therefore, the City of Bellingham hereby respectfully requests both that the Hearing Examiner's decision be reinstated by the Court of Appeals in the LUPA action, and that the Superior Court's grant of summary judgment on the issue of the existence of a contract and that contract's breach be reversed.

Respectfully submitted this 27<sup>th</sup> day of February, 2010.

CITY OF BELLINGHAM

A handwritten signature in black ink, appearing to read "Jeff M. Capell", written over a horizontal line.

Jeff M. Capell, WSBA #25207  
Counsel for City of Bellingham

EXHIBIT A—The Plat

RESOLUTION NO. 1999-50

**RESOLUTION ACCEPTING PRELIMINARY PLAT OF BIRCH STREET**

**WHEREAS**, pursuant to Chapter 18.16 of the Bellingham Municipal Code, the Pennbrook Company, proponents (developer) for the Birch Street subdivision, comprising 79 acres and located generally south of Birch St., Portal Drive, Bonanza Way, and Scenic Avenue, Bellingham, has made application for approval of a preliminary plat containing 172 single family detached lots; and

**WHEREAS**, pursuant to Section 18.16.035, a neighborhood meeting was held on November 4, 1998 at 7:00pm at Kulshan Middle School; and

**WHEREAS**, pursuant to Section 18.16.070 of the Bellingham Municipal Code, the applicant met with the City's Technical Review Committee, and thereafter said Committee formulated certain conditions for consideration by the Planning Commission and City Council; and

**WHEREAS**, an Environmental Checklist and Environmental Assessment has been prepared and considered by the Responsible Official and a Determination of Non-significance was published on April 2<sup>nd</sup>, 1999; and

**WHEREAS**, the Planning and Development Commission held a public hearing on April 22<sup>nd</sup>, 1999 which was continued on May 6<sup>th</sup>, May 20<sup>th</sup>, and concluded on June 3<sup>rd</sup>, 1999 and made recommendation to Council that the Preliminary Plat, known as Birch Street be accepted; subject to certain restrictions; and

0030.RES (1)



City of Bellingham  
CITY ATTORNEY  
210 Lotto Street  
Bellingham, Washington 98225  
Telephone (360) 676-6903

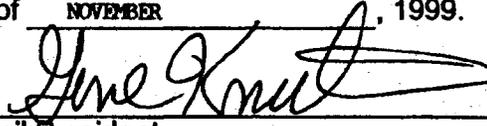
**WHEREAS**, the Bellingham City Council held a public meeting on June 28<sup>th</sup>, 1999 which was continued to July 26<sup>th</sup>, August 23<sup>rd</sup>, and September 29<sup>th</sup>, 1999 concerning the above Preliminary Plat; and

**WHEREAS**, the City Council has modified the Planning Commission recommendation based on the record established at the public hearing and revised the findings and conclusions, attached as Exhibit "D". The Council therefor finds that the conditions of Preliminary Plat approval will make adequate provision for the public health, safety and general welfare,

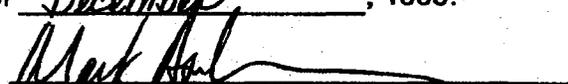
**NOW THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF BELLINGHAM:**

That said plat, known as Birch Street Preliminary Plat, has been presented for acceptance, approval, and filing, be and hereby is as conditioned herein, accepted, approved, and ordered filed, subject to the submission of a plat design which conforms to the restrictions listed in Exhibit "A", attached hereto, and made a part hereof by reference as though set forth fully herein. The property included in this plat is described legally as the east ½ of the northeast ¼ of Section 33, Township 38 North, Range 3 East, less a one-acre exception adjacent to Portal Drive.

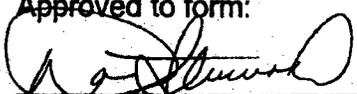
**PASSED** by the Council this 15th day of NOVEMBER, 1999.

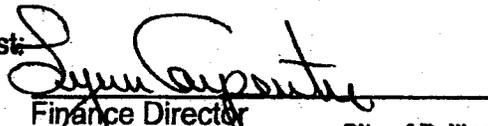
  
\_\_\_\_\_  
Council President

**APPROVED** by me this 16th day of December, 1999.

  
\_\_\_\_\_  
Mayor

Approved to form:

  
\_\_\_\_\_  
Office of the City Attorney

Attest:   
\_\_\_\_\_  
Finance Director

City of Bellingham  
CITY ATTORNEY  
210 Lotto Street  
Bellingham, Washington 98225  
Telephone (360) 676-6903

## **EXHIBIT "A" PRELIMINARY PLAT CONDITIONS:**

### **Birch Street Single Family Cluster Preliminary Plat**

#### **General:**

1. The plat design has been modified from the attached Exhibit "B" to incorporate the design requirements contained within Exhibit "A", "Preliminary Plat Conditions". The revised plat design is now included herein as Exhibit "C". The TRC may consider additional minor design revisions that will simplify survey, minimize environmental impacts or otherwise improve the overall function prior to final plat approval.
2. The revised plat design shall incorporate the following requirements: The average lot size shall be not less than 10,000 sq.ft. The minimum net buildable area shall be not less than 7000 sq. ft. The minimum lot width measured between lot lines at the standard cluster 15' front and rear-building setbacks [B.M.C.18.32.040 (5)] shall be not less than 70 ft.
3. No clearing, except for surveying, or grading may occur within proposed rights of way, utility corridors, stormwater, trail or open space tracts until final approval of construction plans is issued for each street, utility, stormwater facility or trail section or phase. No clearing shall be permitted within any open space tract without written approval of the Planning and Community Development (Planning) and Parks and Recreation (Parks) departments. No clearing or grading shall be permitted on individual lots until approval of all abutting public facility plans is issued and a Clearing Management Plan is reviewed and approved by both the Planning and Public Works departments in accordance with B.M.C. Chapter 16.60, 16.70 and 15.42. A Clearing Management Plan shall attempt to retain existing native vegetation on individual lots where feasible. Emphasis shall be on retention of native vegetation along backs of lots and within side yard setbacks.
4. Construction management: The developer shall present a construction access, staging area and traffic management plan that will minimize offsite impacts to area residents, public and private property, facilities and environmental impact. Special consideration shall be directed to providing safe construction vehicle access at the intersection of Lakeway Drive and Birch Street. The traffic management plan shall address this issue in detail. It is the developer's responsibility to ensure that all public streets and drainage ways remain free of mud and debris, that private driveways are not blocked and that safe travel is

**City of Bellingham**  
**CITY ATTORNEY**  
210 Lotto Street  
Bellingham, Washington 98225  
Telephone (360) 676-6903

maintained within all neighborhood access streets. No heavy equipment work, truck traffic, chainsaw use or other activity that generates nuisance noise, dust or vibration shall occur between the hours of 7:00pm to 7:00am seven days a week. The plan must be approved by Public Works.

**Access:**

- 1) Primary vehicle access to the plat shall be provided via Birch Street from Lakeway Drive. The developer shall signalize the intersection of Birch Street and Lakeway Drive in accordance with Public Works Department requirements. Improvements shall include a 36' wide curb to curb throat, with a curb radius approved by both Public Works and Planning departments on Birch Street south of Lakeway. Any right of way acquisition, utility relocation, replacement of privacy screening, driveway revisions and parking for adjacent corner-only residents shall be the responsibility of the developer. A design emphasis shall be placed on reducing loss of privacy, screening, parking and private property vehicle access impacts to the abutting properties and corner-only residents on the south side. The developer shall prepare a diagram for City Council review prior to approval of the final design. The developer shall not be required to make any street improvements, other than those that are necessary to accommodate the signal installation including support pole, arms, detector loops and protective curbing, on the north side of Lakeway Drive.
- 2) Birch Street from Lakeway Drive to the entrance of the plat shall be improved to 28' of pavement width with vertical curb, gutter and storm drains on both sides of the street. A 5' concrete sidewalk shall be placed on the east side only. Birch Street shall transition in width at its intersection with Lakeway Drive from a 36' wide throat to a 28' wide pavement section with sufficient room and taper for a turn lane, but not striped as such. Both signalization at Lakeway and Birch Street improvements shall be completed prior to final approval of the first phase of the plat.
- 3) A secondary emergency-only access shall be constructed at the end of Portal Drive prior to the final approval of the first phase of the plat. The Fire, Public Works and Planning departments shall review and approve all design, signage and operational elements of the emergency-only access prior to construction.
- 4) Satisfactory secondary and/or emergency access approved by the City Council is required prior to final approval of more than 100 lots. Birch Street shall be constructed as a  $\frac{3}{4}$  standard 28' street south of the entrance to the plat and across the last abutting lot, and then as a minimum standard street south to Whatcom Street, prior to final approval of more than 100 lots. Provision for connection to Cedar Hills West is required. Cedar Hills West, Portal Drive or

City of Bellingham  
CITY ATTORNEY  
210 Lotto Street  
Bellingham, Washington 98225  
Telephone (360) 676-6903

another adequate street facility may be considered secondary and/or emergency access, based on traffic conditions at the time and satisfactory performance of the Portal Drive emergency access as determined by the Fire Department. A 60' right of way shall be provided to allow the future connection of the plat to the vacant 8.35-acre property, adjacent to the northeast corner of the plat. A right of way "wedge" shall also be provided for the extension of Scenic Avenue to the 8.35-acre parcel.

- 5) Street ends presently shown at the southern end of the plat shall be connected generally along the power line easement for the purpose of providing internal circulation and emergency access from multiple directions. Street rights of way and street designs shall also provide for future connection to the adjacent 40-acre parcel to the south. At least one 28' wide street with sidewalk shall be made available to the south. The Fire, Public Works and Planning departments, shall approve right of way location and street design.

**Streets:**

- 1) All internal street rights of way shall be 50' wide. Any cul de sac shall have a minimum 50' radius right of way.
- 2) All internal through streets and the connection to Cedar Hills West shall be constructed as 28' wide pavement, with curb, gutter and storm drain both sides and sidewalk one side only, except as provided in #3 above (emergency access) and at stream crossings. Stream crossings (4 total) shall be located as approved by the Public Works, Fire and Planning departments and constructed as 22' wide pavement, with curb, gutter and storm drain both sides and sidewalk one side only. Any cul de sac less than 600' long may be constructed as 24' wide pavement, with a 44' paved cul de sac radius, with curb, gutter and storm drain both sides and sidewalk one side only.
- 3) Any temporary dead-end or street section created as a result of an approved phasing plan may be required to provide an adequate turn around as determined by the Fire Department.
- 4) The Whatcom Transit Authority (WTA) shall review the revised plat design and associated street improvements. WTA shall recommend and approve any proposed or required transit stop locations and facilities that might further the use and efficiency of public transportation.
- 5) Street trees (average of two per lot) shall be installed according to an approved street tree plan upon completion of residential construction of each abutting lot or reasonably thereafter in accordance with the plan.

**City of Bellingham**  
CITY ATTORNEY  
210 Lotto Street  
Bellingham, Washington 98225  
Telephone (360) 676-6903

- 6) Street names shall be those as approved by Emergency Services and 911 dispatch.
- 7) Unless otherwise expressly stated herein, all street design and construction shall meet the adopted standards and practices of the City of Bellingham as administered by the Public Works Department.

**Utilities:**

- 1) A public water and sewer system shall be designed, approved and constructed which meets the adopted standards and practices of the City of Bellingham as administered by the Public Works and Fire departments. Said system shall be designed as an integral part of any regional or sub regional plan that is deemed appropriate for the service area as defined by geographical features and/or limited by existing infrastructure. The water and sewer plan shall provide for the orderly extension of services to adjacent property and anticipate build-out scenarios based on existing zoning. Any placement of utilities within any open space tract shall be reviewed and approved by the Planning and Parks departments.
- 2) A stormwater plan shall be reviewed and approved by the Public Works and Planning departments that meets the requirements of B.M.C. 15.42. In addition, no stormwater facilities shall be located closer than 50' from any existing property line abutting the north end of the plat, except for necessary connections or discharges within existing street rights of way. The intent of this requirement is to retain all existing safe and stable native vegetation within the 50' setback to provide a buffer for abutting residences. This provision does not preclude the construction of necessary pedestrian connections (trails) within the 50' buffer.
- 3) The Stormwater plan in #2 above must include a landscape plan sufficient to reasonably blend the detention facilities into the surrounding open space tracts. Any significant visual voids in the adjacent buffer should be filled with new conifer tree plantings sufficient to provide a visual screen from adjacent properties and minimize unauthorized entry into the facilities. Every reasonable effort should be made to avoid creation of detention facilities with steep sides that would require fencing for public safety. Side slopes of 3:1 are preferable. The desired outcome should be stormwater facilities that are safe, functional and visually compatible with natural open space. Any opportunity to provide static storage that would promote wetland conditions is encouraged. The final landscape plan must be reviewed and approved by the Public Works, Planning and Parks departments.

**City of Bellingham**  
CITY ATTORNEY  
210 Lotto Street  
Bellingham, Washington 98225  
Telephone (360) 676-6903

- 4) All other private utilities and services shall be provided in accordance with the standards and practices of the private utility vendors. Any placement of private utilities within any public right of way or easement shall be subject to review and approval of the Public Works Department in accordance with existing franchise agreements.

**Emergency Response and Fire Protection:**

All emergency access and fire protection requirements shall be reviewed and approved by the Fire Department prior to issuance of any related development approvals or permits.

**Parks and Open Space:**

- 1) All open space shall be dedicated to the City of Bellingham as generally shown on the attached Exhibit "C" including the following. A 20' wide public access and conservation easement shall be provided to the east of, and parallel to, the westernmost ridge-line. The easement shall begin at the highest point located at the southern property line, then northward to a point on the ridge centerline where the existing ridge trail turns eastward and intersects the proposed main right of way entering the plat. The intent of this easement is to retain the existing trail and public use opportunity. The final alignment should provide separation between the trail and the edge of the access/conservation easement, thus including some adjacent native vegetation and retaining some route flexibility. The northernmost terminus may be modified by the TRC to achieve a smooth transition and connection of the trail and sidewalk systems. The proposed easement may overlay platted lots without reducing the calculated lot size for averaging or minimum lot size purposes. A non-motorized public access and utility easement shall also be provided, in addition to public right of way, within the boundary of the PSE power line easement, allowing an east-west corridor across the entire southern boundary of the plat. A uniform fencing strategy to separate all open space and conservation/access easements from abutting lots shall be applied along the entire length of each open space tract and conservation/access easement. The strategy must be approved by the Parks Department and follow crime prevention through environmental design (CPTED) guidelines for public safety.
- 2) A public multi-use trail system and parking facilities shall be constructed by the developer to provide at least one through route from the northern end of the plat to the southern end of the plat. The trail system shall provide connection to the existing ends of Birch Street, Portal Drive, Bonanza Way and Scenic Avenue. The trail system shall be constructed to Parks Department standards. The proposed route shall be reviewed and approved by the Parks and Planning

City of Bellingham  
CITY ATTORNEY  
210 Lotto Street  
Bellingham, Washington 98225  
Telephone (360) 676-6903

departments. If the trail is combined all or in part with any utility corridor, the Public Works Department shall also review and approve the route. All trail sections must be completed within each phase of the plat prior to final plat approval of each phase.

- 3) A minimum of 15% of the gross area calculated for cluster platting (B.M.C.18.32.040) shall be dedicated to the city with each phase of final plat. Any area required for the construction and maintenance of necessary utilities shall not be counted as credit toward meeting the open space requirement.
- 4) The Planning and Parks departments must approve any open space revision.
- 5) All open space tracts and conservation/access easements shall be made free of any land clearing debris, fill, garbage or hazard (trees) as inspected and determined by the Parks Department prior to dedication and acceptance by the city. All open space tracts shall be marked as required by the Parks Department prior to final plat approval of any phase. The Parks Department shall provide markers.
- 6) A note shall be placed on the face of the plat stating "Absolutely no dumping, clearing, or storage of material is permitted within this public open space tract".

**Wetlands and Streams:**

- 1) The west fork of Hannah Creek shall have a 100' average buffer setback on both sides, except for the extension of the Portal Drive emergency access as depicted on Exhibit "C". The east fork of Hannah Creek shall have an 80' average buffer setback on both sides also as depicted on Exhibit "C". The Planning Department shall approve the final buffer setbacks.
- 2) A wetland/stream permit consistent with B.M.C. Chapter 16.50 shall be required prior to any disturbance to or within 50' of the onsite regulated streams or to or within 100' of any onsite regulated wetlands. The purpose of this permit shall be to condition the stream crossings and their post construction ground restoration, manage utilities in close proximity to wetlands and streams and to provide for adequate wetland buffer management. The small wetland within the southwestern portion of the site will be retained, but buffers will be reduced to 10' where they abut lots. Replanting and restoration of existing logging road impacts within the wetland and stream corridors will be required.

**Impact Fees:**

1. The applicant, or its successor in interest, shall provide mitigation for school

City of Bellingham  
CITY ATTORNEY  
210 Lotto Street  
Bellingham, Washington 98225  
Telephone (360) 676-6903

impacts at the building permit stage. The amount shall be determined by the Bellingham School District and be based on the school impact fee ordinance in effect at the time. Fees shall be paid to the Bellingham School District prior to building permit issuance.

2. Traffic impact fees shall be paid in accordance with the traffic impact fee ordinance in effect at the time of building permit issuance.
3. Park fees as specified in Section 18.44.000 of the Subdivision Ordinance shall be waived in exchange for dedication of all open space tracts to the City of Bellingham.
4. Stormwater fees shall be paid in accordance with the Stormwater Ordinance in effect at the time.

**Setbacks and Parking:**

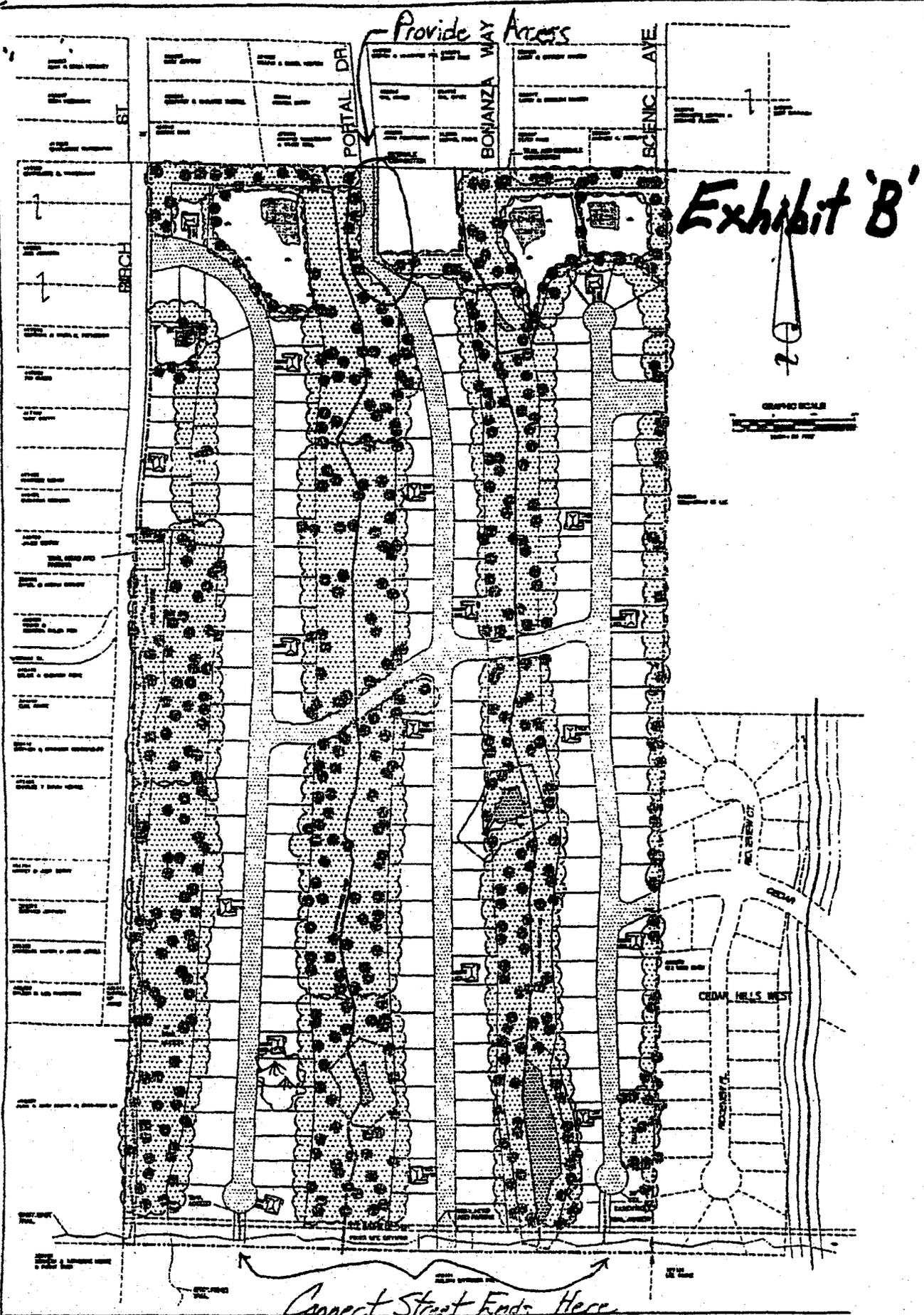
Shall be as specified for single family development within the Land Use Code.

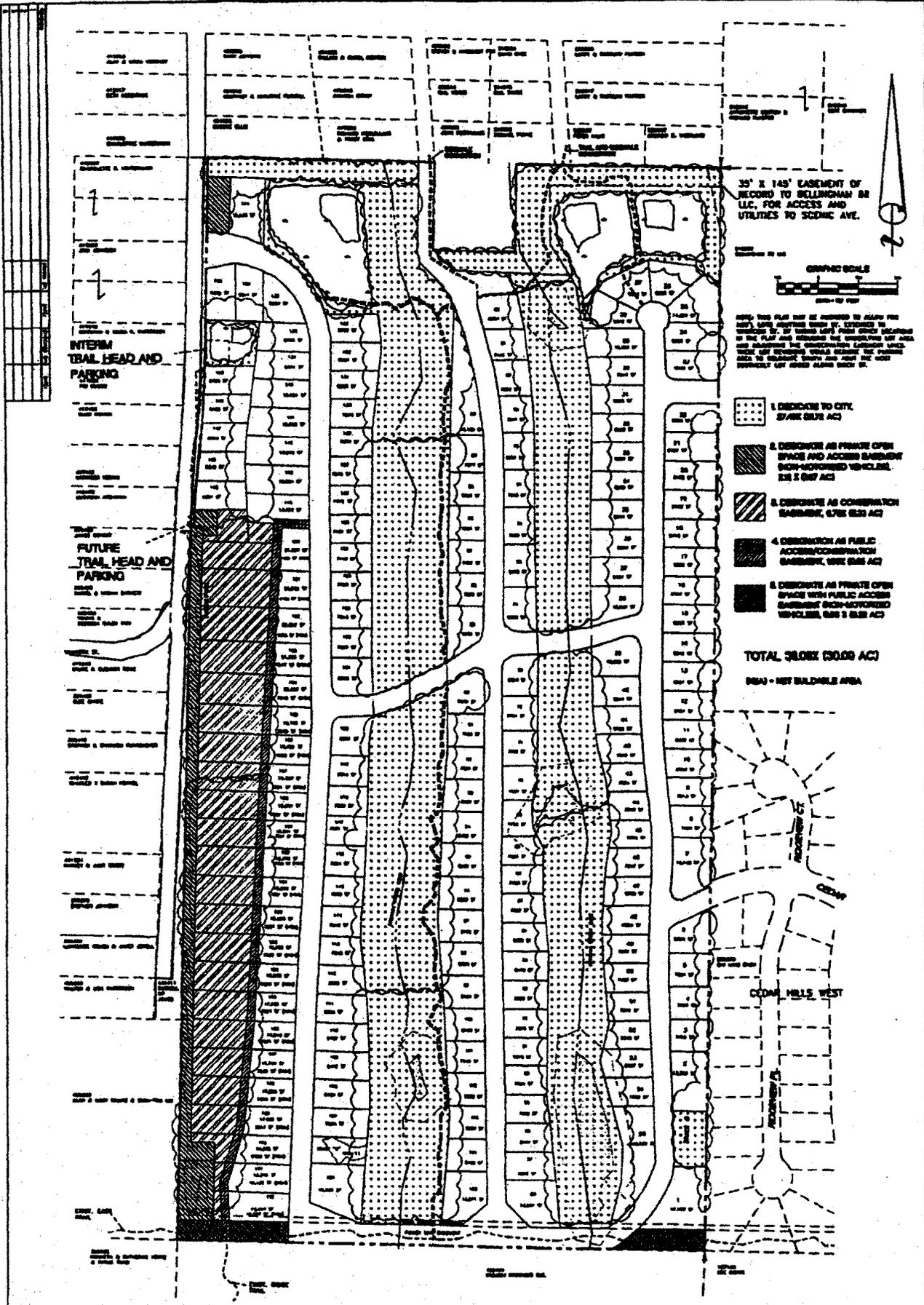
**Phasing:**

Phasing may be reviewed, conditioned and approved by the TRC.

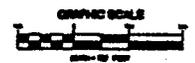
**City of Bellingham**  
CITY ATTORNEY  
210 Lott Street  
Bellingham, Washington 98225  
Telephone (360) 676-6903

# Exhibit 'B'





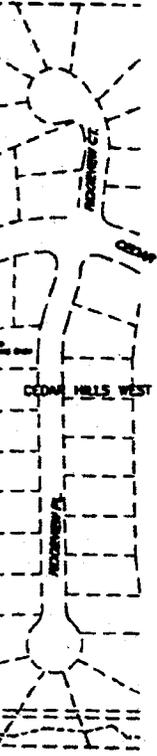
35' X 145' EASEMENT OF RECORD TO BELLINGHAM BR L.L.C. FOR ACCESS AND UTILITIES TO SCenic AVE.



THIS PLAN MAY BE REFERRED TO AS THE BIRCH STREET PLAT AND THE LOTS THEREIN AS LOTS OF SAID PLAT AND THE ENTIRE PLAT AS THE BIRCH STREET PLAT. THE CITY ENGINEER HAS REVIEWED THE PLAT AND APPROVES THE SURVEY AND THE LOTS THEREIN AND THE EASEMENT THEREON. THE CITY ENGINEER'S OFFICE IS AT THE CORNER OF 1ST AND 2ND STS. BELLINGHAM, WASH.

- 1. DESIGNATE TO CITY (27.46 AC)
- 2. DESIGNATE AS PRIVATE OPEN SPACE AND ACCESS BARRIERS (NON-REGISTERED VEHICLES) (2.12 AC)
- 3. DESIGNATE AS CONSERVATION BARRIERS (7.78 AC)
- 4. DESIGNATE AS PUBLIC ACCESS/CONSERVATION BARRIERS (10.02 AC)
- 5. DESIGNATE AS PRIVATE OPEN SPACE WITH PUBLIC ACCESS BARRIERS (NON-REGISTERED VEHICLES) (2.62 AC)

TOTAL 38.00 AC  
 (38.00 - NET BUILDABLE AREA)



NO. OF PAGES	1	DATE	NOVEMBER 15, 1909 7:00 PM	SCALE	1" = 100'
PAGE NO.	1	CITY COUNCIL RESOLUTION	EXHIBIT 'C'	DATE	11-15-09
BIRCH STREET PLAT			CITY ENGINEER'S OFFICE		

**EXHIBIT "D"**  
**BELLINGHAM CITY COUNCIL FINDINGS OF FACT AND CONCLUSIONS**  
**FOR THE PRELIMINARY PLAT OF BIRCH STREET**  
**NOVEMBER 15, 1999**

**The City Council hereby adopts the June 3, 1999 Planning Commission Findings of Fact and Conclusions for the Birch Street Preliminary Plat except as modified by the following statements:**

Birch Street will be the primary access to the site. The volume of traffic generated by the plat and the current traffic conditions on Lakeway Drive will require that the intersection of Lakeway Drive and Birch Street be signalized.

Birch Street will need to be widened to 28' of pavement with a sidewalk on one side to provide for adequate traffic capacity and public safety.

A secondary street access will be necessary to provide adequate emergency response. The connection of streets with adjacent properties is necessary for adequate emergency access and vehicle circulation.

The maximum number of lots that could be created as a conventional non-cluster subdivision, subject to all provisions of the Subdivision Ordinance, is 120 lots based on Alternative 1 as described in the Environmental Assessment for the Birch Street subdivision.

Due to the site topography and environmental features, which include a series of parallel ridges and stream corridors, reduced right of way widths and street standards are necessary to provide sufficient building area in-between the streams and ridges.

The east and west forks of Hannah Creek provide hydrologic and ecological support to Whatcom Creek, a salmon bearing stream. Tributaries to Whatcom Creek are important to the viability of salmon habitat. Stream buffers of 80' and 100' respectively will be necessary to preserve the ecological integrity of the east and west forks of Hannah Creek and help support the ecological restoration of Whatcom Creek.

A clustered site plan can improve the overall efficiency of public infrastructure and natural resource preservation. When combined with variances from conventional development standards, a cluster will result in the most desirable plat design with the greatest public benefit.

A clustered plat design will yield a greater number of building lots than a conventional subdivision. This is desirable for the purpose of efficient in-fill.

An average lot size of 10,000 sq. ft. is exactly half of the minimum lot size required for a conventional subdivision in this neighborhood. Much of the immediate neighborhood is characterized by large lots of 10,000 to 30,000 sq. ft. and contain significant mature native vegetation. An average lot size of 10,000 sq. ft. will be efficient, without compromising neighborhood character, and still allow building site plan flexibility with significant retention of native vegetation.

A minimum lot size of 7000 sq. ft. will allow design flexibility and space efficiency for irregular shaped areas of the plat, such as at ends of cul de sacs or in narrow corridors.

A minimum lot width of 70' will retain the linear spacing of homes in keeping with the design, streetscape and character of the neighborhood. This minimum width will also help retain mature native vegetation by providing building site flexibility.

The record demonstrates that the ridge trail on top of the westernmost ridge has been used informally by the public for decades and has provided an access corridor through the site for recreation purposes. The ridge trail should be retained as a neighborhood feature and amenity.

## EXHIBIT B—Impact Fee Statute

### 82.02.050

#### Impact fees — Intent — Limitations.

(1) It is the intent of the legislature:

- (a) To ensure that adequate facilities are available to serve new growth and development;
- (b) To promote orderly growth and development by establishing standards by which counties, cities, and towns may require, by ordinance, that new growth and development pay a proportionate share of the cost of new facilities needed to serve new growth and development; and
- (c) To ensure that impact fees are imposed through established procedures and criteria so that specific developments do not pay arbitrary fees or duplicative fees for the same impact.

(2) Counties, cities, and towns that are required or choose to plan under RCW 36.70A.040 are authorized to impose impact fees on development activity as part of the financing for public facilities, provided that the financing for system improvements to serve new development must provide for a balance between impact fees and other sources of public funds and cannot rely solely on impact fees.

(3) The impact fees:

- (a) Shall only be imposed for system improvements that are reasonably related to the new development;
- (b) Shall not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development; and
- (c) Shall be used for system improvements that will reasonably benefit the new development.

(4) Impact fees may be collected and spent only for the public facilities defined in RCW 82.02.090 which are addressed by a capital facilities plan element of a comprehensive land use plan adopted pursuant to the provisions of RCW 36.70A.070 or the provisions for comprehensive plan adoption contained in chapter 36.70, 35.63, or 35A.63 RCW. After the date a county, city, or town is required to adopt its development regulations under chapter 36.70A RCW, continued authorization to collect and expend impact fees shall be contingent on the county, city, or town adopting or revising a comprehensive plan in compliance with RCW 36.70A.070, and on the capital facilities plan identifying:

- (a) Deficiencies in public facilities serving existing development and the means by which existing deficiencies will be eliminated within a reasonable period of time;
- (b) Additional demands placed on existing public facilities by new development; and
- (c) Additional public facility improvements required to serve new development.

If the capital facilities plan of the county, city, or town is complete other than for the inclusion of those elements which are the responsibility of a special district, the county, city, or town may impose impact fees to address those public facility needs for which the county, city, or town is responsible.

[1994 c 257 § 24; 1993 sp.s. c 6 § 6; 1990 1st ex.s. c 17 § 43.]

#### Notes:

**Severability -- 1994 c 257:** See note following RCW 36.70A.270.

**Effective date -- 1993 sp.s. c 6:** See note following RCW 36.70A.040.

**Severability -- Part, section headings not law -- 1990 1st ex.s. c 17: See RCW 36.70A.900 and 36.70A.901.**

SEPA: RCW 43.21C.065.

## **82.02.060**

### **Impact fees — Local ordinances — Required provisions.**

The local ordinance by which impact fees are imposed:

(1) Shall include a schedule of impact fees which shall be adopted for each type of development activity that is subject to impact fees, specifying the amount of the impact fee to be imposed for each type of system improvement. The schedule shall be based upon a formula or other method of calculating such impact fees. In determining proportionate share, the formula or other method of calculating impact fees shall incorporate, among other things, the following:

(a) The cost of public facilities necessitated by new development;

(b) An adjustment to the cost of the public facilities for past or future payments made or reasonably anticipated to be made by new development to pay for particular system improvements in the form of user fees, debt service payments, taxes, or other payments earmarked for or proratable to the particular system improvement;

(c) The availability of other means of funding public facility improvements;

(d) The cost of existing public facilities improvements; and

(e) The methods by which public facilities improvements were financed;

(2) May provide an exemption for low-income housing, and other development activities with broad public purposes, from these impact fees, provided that the impact fees for such development activity shall be paid from public funds other than impact fee accounts;

(3) Shall 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;

(4) Shall allow the county, city, or town imposing the impact fees to adjust the standard impact fee at the time the fee is imposed to consider unusual circumstances in specific cases to ensure that impact fees are imposed fairly;

(5) Shall include a provision for calculating the amount of the fee to be imposed on a particular development that permits consideration of studies and data submitted by the developer to adjust the amount of the fee;

(6) Shall establish one or more reasonable service areas within which it shall calculate and impose impact fees for various land use categories per unit of development;

(7) May provide for the imposition of an impact fee for system improvement costs previously incurred by a county, city, or town to the extent that new growth and development will be served by the previously constructed improvements provided such fee shall not be imposed to make up for any system improvement deficiencies.

[1990 1st ex.s. c 17 § 44.]

**Notes:**

**Severability -- Part, section headings not law -- 1990 1st ex.s. c 17: See RCW 36.70A.900 and 36.70A.901.**

## **82.02.070**

### **Impact fees — Retained in special accounts — Limitations on use — Administrative appeals.**

(1) Impact fee receipts shall be earmarked specifically and retained in special interest-bearing accounts. Separate accounts shall be established for each type of public facility for which impact fees are collected. All interest shall be retained in the account and expended for the purpose or purposes for which the impact fees were imposed. Annually, each county, city, or town imposing impact fees shall provide a report on each impact fee account showing the source and amount of all moneys collected, earned, or received and system improvements that were financed in whole or in part by impact fees.

(2) Impact fees for system improvements shall be expended only in conformance with the capital facilities plan element of the comprehensive plan.

(3)(a) Except as provided otherwise by (b) of this subsection, impact fees shall be expended or encumbered for a permissible use within six years of receipt, unless there exists an extraordinary and compelling reason for fees to be held longer than six years. Such extraordinary or compelling reasons shall be identified in written findings by the governing body of the county, city, or town.

(b) School impact fees must be expended or encumbered for a permissible use within ten years of receipt, unless there exists an extraordinary and compelling reason for fees to be held longer than ten years. Such extraordinary or compelling reasons shall be identified in written findings by the governing body of the county, city, or town.

(4) Impact fees may be paid under protest in order to obtain a permit or other approval of development activity.

(5) Each county, city, or town that imposes impact fees shall provide for an administrative appeals process for the appeal of an impact fee; the process may follow the appeal process for the underlying development approval or the county, city, or town may establish a separate appeals process. The impact fee may be modified upon a determination that it is proper to do so based on principles of fairness. The county, city, or town may provide for the resolution of disputes regarding impact fees by arbitration.

[2009 c 263 § 1; 1990 1st ex.s. c 17 § 46.]

#### **Notes:**

**Severability -- Part, section headings not law -- 1990 1st ex.s. c 17: See RCW 36.70A.900 and 36.70A.901.**

## **82.02.080**

### **Impact fees — Refunds.**

(1) The current owner of property on which an impact fee has been paid may receive a refund of such fees if the county, city, or town fails to expend or encumber the impact fees within six years of when the fees were paid or other such period of time established pursuant to RCW 82.02.070(3) on public facilities intended to benefit the development activity for which the impact fees were paid. In determining whether impact fees have been encumbered, impact fees shall be considered encumbered on a first in, first out basis. The county, city, or town shall notify potential claimants by first-class mail deposited with the United States postal service at the last known address of claimants.

The request for a refund must be submitted to the county, city, or town governing body in writing within one year of the date the right to claim the refund arises or the date that notice is given, whichever is later. Any impact fees that are not expended within these time limitations, and for which no application for a refund has been made within this

one-year period, shall be retained and expended on the indicated capital facilities. Refunds of impact fees under this subsection shall include interest earned on the impact fees.

(2) When a county, city, or town seeks to terminate any or all impact fee requirements, all unexpended or unencumbered funds, including interest earned, shall be refunded pursuant to this section. Upon the finding that any or all fee requirements are to be terminated, the county, city, or town shall place notice of such termination and the availability of refunds in a newspaper of general circulation at least two times and shall notify all potential claimants by first-class mail to the last known address of claimants. All funds available for refund shall be retained for a period of one year. At the end of one year, any remaining funds shall be retained by the local government, but must be expended for the indicated public facilities. This notice requirement shall not apply if there are no unexpended or unencumbered balances within an account or accounts being terminated.

(3) A developer may request and shall receive a refund, including interest earned on the impact fees, when the developer does not proceed with the development activity and no impact has resulted.

[1990 1st ex.s. c 17 § 47.]

**Notes:**

**Severability -- Part, section headings not law -- 1990 1st ex.s. c 17: See RCW 36.70A.900 and 36.70A.901.**

---

## **82.02.090**

### **Impact fees — Definitions.**

Unless the context clearly requires otherwise, the following definitions shall apply in RCW 82.02.050 through 82.02.090:

(1) "Development activity" means any construction or expansion of a building, structure, or use, any change in use of a building or structure, or any changes in the use of land, that creates additional demand and need for public facilities. "Development activity" does not include buildings or structures constructed by a regional transit authority.

(2) "Development approval" means any written authorization from a county, city, or town which authorizes the commencement of development activity.

(3) "Impact fee" means a payment of money imposed upon development as a condition of development approval to pay for public facilities needed to serve new growth and development, and that is reasonably related to the new development that creates additional demand and need for public facilities, that is a proportionate share of the cost of the public facilities, and that is used for facilities that reasonably benefit the new development. "Impact fee" does not include a reasonable permit or application fee.

(4) "Owner" means the owner of record of real property, although when real property is being purchased under a real estate contract, the purchaser shall be considered the owner of the real property if the contract is recorded.

(5) "Proportionate share" means that portion of the cost of public facility improvements that are reasonably related to the service demands and needs of new development.

(6) "Project improvements" mean site improvements and facilities that are planned and designed to provide service for a particular development project and that are necessary for the use and convenience of the occupants or users of the project, and are not system improvements. No improvement or facility included in a capital facilities plan approved by the governing body of the county, city, or town shall be considered a project improvement.

(7) "Public facilities" means the following capital facilities owned or operated by government entities: (a) Public streets and roads; (b) publicly owned parks, open space, and recreation facilities; (c) school facilities; and (d) fire protection facilities in jurisdictions that are not part of a fire district.

(8) "Service area" means a geographic area defined by a county, city, town, or intergovernmental agreement in

which a defined set of public facilities provide service to development within the area. Service areas shall be designated on the basis of sound planning or engineering principles.

(9) "System improvements" mean public facilities that are included in the capital facilities plan and are designed to provide service to service areas within the community at large, in contrast to project improvements.

[2008 c 42 § 1; 1990 1st ex.s. c 17 § 48.]

Notes:

**Severability -- Part, section headings not law -- 1990 1st ex.s. c 17: See RCW 36.70A.900 and 36.70A.901.**

## **82.02.100**

### **Impact fees — Exception, mitigation fees paid under chapter 43.21C RCW.**

A person required to pay a fee pursuant to RCW 43.21C.060 for system improvements shall not be required to pay an impact fee under RCW 82.02.050 through 82.02.090 for those same system improvements.

[1992 c 219 § 2.]

## **82.02.110**

### **Impact fees — Extending use of school impact fees.**

Criteria must be developed by the office of the superintendent of public instruction for extending the use of school impact fees from six to ten years and this extension must require an evaluation for each respective school board of the appropriateness of the extension.

[2009 c 263 § 2.]

EXHIBIT C—Park Impact Fee Ordinance  
ORDINANCE NO. \_\_\_\_\_

**AN ORDINANCE OF THE CITY OF BELLINGHAM, WASHINGTON RELATING TO IMPACT FEES ON LAND USE DEVELOPMENT ADDING A NEW TITLE 19 AND NEW CHAPTER 19.04 TO THE BELLINGHAM MUNICIPAL CODE IMPOSING A PARK IMPACT FEE ON RESIDENTIAL DEVELOPMENT IN ORDER TO PROVIDE NEW PARKS AND RELATED FACILITIES NECESSITATED BY SUCH NEW DEVELOPMENT.**

**WHEREAS**, in order to meet development requirements, maintain park standards and continue to promote and protect the public health, safety, and welfare in the face of a growing population, the City of Bellingham must expand its park system;

**WHEREAS**, the Washington State Legislature authorized local jurisdictions to adopt impact fees through the enactment of the Washington State Growth Management Act, and such fees are intended to be a means of implementing Goal 12 in Section 2 of the GMA (RCW 36.70A.020) that reads: "...Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.";

**WHEREAS**, the imposition of impact fees is one of the preferred methods of ensuring that new development bears a proportionate share of the cost of capital facilities necessary to accommodate new growth;

**WHEREAS**, each type of land development described in Section 19.04.050, 6) hereof will create demand for the acquisition or expansion of parks and the construction of recreational facilities and other park improvements; and

**WHEREAS**, the fees established in Section 19.04.050, 14) are derived from, based upon, and do not exceed the costs of providing additional park and park improvements necessitated by the new land developments for which the fees are levied.

**NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF BELLINGHAM DOES ORDAIN AS FOLLOWS:**

**Section 1. Park Impact Fees.** A new Title 19 and new chapter 19.04 are hereby added to the Bellingham Municipal Code to read as follows:

**TITLE 19 – IMPACT FEES**

**Chapter 19.04  
Park Impact Fees**

**Sections:**

- Section 19.04.010: Findings and authority
- Section 19.04.020: Short title, authority, and applicability
- Section 19.04.030: Intents and purposes

City of Bellingham  
City Attorney  
210 Lottie Street  
Bellingham, Washington 98225  
360-676-6903

Section 19.04.040: Rules of construction  
Section 19.04.050: Definitions  
Section 19.04.060: Imposition of park impact fee  
Section 19.04.070: Computation of the amount of the fee  
Section 19.04.080: Payment of fee  
Section 19.04.090: Park impact fee districts  
Section 19.04.100: Park impact fee special revenue funds established  
Section 19.04.110: Use of funds  
Section 19.04.120: Refund of fees paid  
Section 19.04.130: Exemptions  
Section 19.04.140: Credits  
Section 19.04.150: Review  
Section 19.04.160: Penalty provision  
Section 19.04.170: Severability  
Section 19.04.180: Effective date

**19.04.010: Findings and Authority.**

The Bellingham City Council hereby finds and declares that:

A. In order to meet development requirements, maintain park standards and continue to promote and protect the public health, safety, and welfare in the face of a growing population, the City of Bellingham must expand its park and open space system.

B. The imposition of impact fees is a preferred method of ensuring that (1) adequate parks and recreational facilities are available to serve new growth and development, and (2) such new growth and development should be required to pay a proportionate share of the costs of new facilities necessary to serve such increased growth.

C. Each type of land development described in this chapter will create demand for the acquisition or expansion of parks and the construction of recreational facilities and other park improvements.

D. The fees established in section 19.04.070 are derived from, based upon, and do not exceed the costs of providing additional park and park improvements necessitated by the new land developments for which the fees are levied.

E. This chapter is adopted pursuant to the authority granted to the City under the Growth Management Act (RCW 36.70A) and RCW 82.02 as a means of mitigating residential development's impacts upon the parks and recreational facilities in the City.

**19.04.020: Applicability.**

A. This ordinance shall apply to all new residential development applied for after the effective date of this ordinance.

City of Bellingham  
City Attorney  
210 Lottie Street  
Bellingham, Washington 98225  
360-676-6903

**19.04.030: Intent and Purpose.**

A. This ordinance is intended to assist in the implementation of the capital facilities plan element of the Bellingham Comprehensive Plan, and to help achieve the goals of the Bellingham Comprehensive Park, Recreation & Open Space Plan element therein.

B. The purpose of this ordinance is to regulate the use and development of land so as to assure that new development bears a proportionate share of the cost of capital expenditures necessary to provide parks, recreation, and open space improvements in Bellingham.

**19.04.040: Construction and Interpretation**

The provisions of this ordinance shall be liberally construed and interpreted so as to effectively carry out its purpose in the interest of the public health, safety, and welfare.

**19.04.050: Definitions**

**1) Capital improvement** – includes, without limitation, park planning, land acquisition, site improvements, buildings, and equipment but excludes maintenance, operation, repair, alteration, or replacement.

**2) Capital Facilities Plan ("CFP")** – a six 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 six year projection period. As defined in the GMA, the CFP will include:

- a) forecast of future needs for park facilities and open space;
- b) identification of additional demands placed on existing public facilities by new development;
- c) long-range construction and capital improvement projects of the City;
- d) parks under construction or expansion;
- e) proposed locations and capacities of expanded or new park facilities;
- f) inventory of existing park facilities;
- g) at least a six year financing component, updated as necessary to maintain at least a six-year forecast period, for financing needed for park facilities within projected funding levels, and identifying sources of financing for such purposes, including bond issues authorized by the voters; and
- h) identification of deficiencies in park facilities and the means by which existing deficiencies will be eliminated within a reasonable period of time.

**3) City** - the City of Bellingham, Washington.

**4) Bellingham Comprehensive Park, Recreation & Open Space Plan** - the planning document that includes a park and recreation inventory, facility demand, policy and guidance on developing citywide and local park and recreation facilities.

**5) Developer** - any person or entity who owns or holds purchase options or other development control over real property for which development activity is proposed.

City of Bellingham  
City Attorney  
210 Lottie Street  
Bellingham, Washington 98225  
360-676-6903

**6) Development activity** - any construction or expansion of a residential building, structure, or use, any change in use of a building or structure, or any change in the use of land, that creates additional demand for park and recreational facilities (GMA, Section 48, RCW 82.02.090).

**7) Development approval** - any written authorization from a county, city or other municipal jurisdiction that authorizes the commencement of development activity.

**8) Encumbered** - impact fees identified by the City as being committed as part of the funding for a park facility for which the publicly funded share has been assured or building permits sought or construction contracts executed.

**9) Environments and facilities - citywide** - should:

- a) have significant physical qualities,
- b) have historical, cultural or social values,
- c) not be duplicated elsewhere in the city,
- d) be of citywide interest,
- e) protect environmentally sensitive areas, and
- f) be accessible to residents of the city by trails, park features or local roads.

Citywide facilities may:

- a) have high population participation rates,
- b) have high user volumes,
- c) benefit residents of a number of neighborhoods including adjacent jurisdictions,
- d) involve joint ventures,
- e) represent the ultimate competition level play facility,
- f) have no or low user fee recapture opportunities,
- g) have unique location requirements that require citywide coordination, and
- h) be activities for which there are no other logical or available sponsors.

**10) Environments and facilities - local:**

- a) should have significant character,
- b) should have local historical or social values, but
- c) may be duplicated elsewhere within the city, though not elsewhere within the local area, and
- d) should be of local rather than citywide interest.

Local facilities:

- a) have significant but not high user participations,
- b) are oriented to local user preferences,
- c) are limited in appeal,
- d) are developed to minimum levels of playing skill or competition,
- e) have no or low fee recapture potentials,
- f) are not subject to special siting considerations, and
- g) may have a number of other public and private sponsors.

**11) Growth impact requirement** - caused by population increases created by new developments determined by:

City of Bellingham  
City Attorney  
210 Lottie Street  
Bellingham, Washington 98225  
360-676-6903

- a) **calculating** - the inventory of existing park and recreational lands and facilities [optionally including funded projects listed within the current capital facilities plan (CFP)],
- b) **dividing** - by the existing population in order to determine the existing level-of-service (ELOS),
- c) **multiplying** - by the population estimated to be created by the development project (per person or housing unit),
- d) **multiplying** - by the estimated land and facility acquisition and development cost or value for each kind of land and facility unit, in order
- e) **to determine** - the composite level-of-service (LOS) value or cost required per person (or housing unit) by the composite development project in order to sustain the existing level-of-service (ELOS).

The growth impact requirement will differentiate the proportional impact (cost or value) required to sustain citywide facilities and local facilities.

**12) Growth impact fee assessment** - a payment of money imposed upon development as a condition of development approval to pay for public facilities needed to serve new growth and development:

- a) where such public facilities are reasonably related to the new development that creates additional demand for public facilities,
- b) where such fees are a proportionate share of the cost of the public facilities, and
- c) where such fees are used for facilities that reasonably benefit the new development.

Park impact fees will be a proportionate amount (less than 100 percent) of the land acquisition and facility development value or cost required to sustain the existing level-of-service (ELOS) as a result of new development.

The assessment fee proportion of the actual impact (as set forth in item 6 above) will be determined on an annual basis by the Council. The Council will review and consider projected park and recreation facility requirements, funding capabilities and trends, citizen preferences concerning park improvement financing, and other issues when determining the proportionate amount to be charged new developments.

The growth impact fee assessment will include a proportionate amount:

- a) for citywide facilities** - that may be distributed for the creation of a citywide system of park and recreation facilities on a citywide basis; and
- b) local facilities** - that may be used or invested by Bellingham for the creation of local facilities servicing the residents of Bellingham neighborhoods.

City of Bellingham  
 City Attorney  
 210 Lottie Street  
 Bellingham, Washington 98225  
 360-676-6903

Park growth impact fees do not include reasonable permit or application fees or charges.

**13) Growth impact fee - schedule** - the table of impact fees to be charged per unit of development as computed by the formula adopted under this ordinance, and indicating the standard fee amount per dwelling unit type to be paid as a condition of development within the city as attached hereto as Attachment A.

**14) Improvements - project** - site improvements and facilities planned and designed to provide service for a particular development project. Project improvements are necessary for the use and convenience of the occupants or users of the project, and are not system improvements. Project improvement examples include, without limitation, the construction of water and sewer lines or interior roads that serve only the structures and occupants located within the development.

No improvement or facility in a capital facilities plan (CFP) approved by the City Council shall be considered a project improvement. The developer normally pays project improvements as a condition of development approval. Project improvements are not financed with public funds nor included within the City's capital facilities plan and development impact fees.

**15) Improvements - system** - public facilities designed to serve areas within the community at large, in contrast to project improvements designed to service occupants of a particular development project or site. System improvement examples include, without limitation, collector or arterial roads, schools, and parks.

Systems improvements are financed with public funds in accordance with the City's capital facilities plan (CFP). An impact fee may be imposed for a system improvement only if the improvement is included within Bellingham's capital facilities plan (CFP).

**16) Level-of-service - existing/proposed (ELOS/PLOS)** - the ratio of park and recreation land and facility units (acres, fields, square feet, etc.) to the number of persons in the population (expressed in units per 1,000 persons).

The existing level-of-service (ELOS) includes all park and recreation land and facility units that have been improved to the present time and funded for improvement within the current (existing) time period specified in the capital facilities program (CFP).

The proposed level-of-service (PLOS) includes park and recreational land and facility units that are intended to be added to the current inventory over Bellingham's Comprehensive Park, Recreation & Open Space Plan's time period (20 years) to improve upon existing standards.

Growth impact fees are to be imposed on new developments in order to finance the development of additional facilities necessary to maintain the existing level-of-service (ELOS) as a result of the additional population requirements created by new development.

Existing and proposed level-of-service (ELOS/PLOS) requirements will be estimated:

**a) for citywide facilities** - for the creation of a citywide system of park and recreation facilities on a citywide basis, and

City of Bellingham  
City Attorney  
210 Lottie Street  
Bellingham, Washington 98225  
360-676-6903

**b) local facilities** - for the creation of local facilities servicing the residents of Bellingham neighborhoods.

**17) Owner** - the owner of record of real property, although when real property is being purchased under a real estate contract, the purchaser shall be considered the owner of the real property if the contract is recorded.

**18) Previously incurred system improvements** - system projects that were accomplished that will serve new growth and development. Impact fees can be imposed on an adjacent development to recover a proportionate share of the money Bellingham spent or previously incurred to provide for the future demand that the adjacent development now requires.

**19) Prior system deficiencies** - improvements that are necessary to expand the existing system to meet current level-of-service (LOS) requirements. Impact fees may not be used for prior system deficiencies or for improvements that do not benefit or serve new growth.

**20) Private recreational facility** - any recreational facility that is not owned by or dedicated to any public or governmental entity.

**21) Proportionate share** - that portion of the cost of public facility improvements that are reasonably related to the service demands and needs of new development.

**22) Public facility** - the following capital facilities owned or operated by government entities:

- a) public streets and roads,
- b) publicly owned parks, open space, and recreation facilities,
- c) school facilities, and
- d) fire protection facilities in jurisdictions that are not part of a fire district.

**23) Service areas – citywide/local park and recreational** - a geographic area in which a defined set of public facilities provide service to the population within the area. Park and recreational lands, facilities, and services will be provided under a tiered approach that includes:

- a) a citywide system that will be organized on a citywide basis; and
- b) a local system that may be organized on a neighborhood basis.

**19.04.060: Imposition of Park Impact Fee**

A. Any person or entity who, after the effective date of this ordinance seeks to develop land within Bellingham by applying for a building permit for a residential building or permit for residential mobile home installation is hereby required to pay a park impact fee in the manner and amount set forth in this ordinance.

B. No new residential building permit or new permit for residential mobile home installation for any activity requiring payment of an impact fee pursuant to section 19.04.070 of this

City of Bellingham  
City Attorney  
210 Lottie Street  
Bellingham, Washington 98225  
360-676-6903

ordinance shall be issued unless and until the park impact fee hereby required has been paid.

C. No extension of a residential building permit or permit for residential mobile home installation issued prior to the effective date of this ordinance for any activity requiring payment of an impact fee pursuant to section 19.04.070 of this ordinance shall be granted unless and until the park impact fee hereby required has been paid.

**19.04.070: Computation of the Park Impact Fee Amount**

**A. Schedule** - the citywide and local park impact fee value per person shall be determined in accordance with section 19.04.050: Definition items 5, 6 and 7 as set forth therein and documented in Attachment A to this ordinance.

1) If a building permit is requested for mixed uses, then the fee shall be determined using the above referenced schedule by apportioning the number of units committed to uses specified on the schedule.

2) If the type of development activity that a residential building permit is applied for is not specified on the above fee schedule, the Planning Director (or designee) shall use the fee applicable to the most comparable type of land use on the above fee schedule. The Planning Director shall be guided in the selection of a comparable type by the Bellingham Comprehensive Plan, supporting documents of the Bellingham Comprehensive Park, Recreation & Open Space Plan, and Title 20 (Land Use Development) of the Bellingham Municipal Code. If the Planning Director determines that there is not a comparable type of land use on the above fee schedule then the Planning Director shall determine the appropriately discounted fee by considering demographic or other documentation that is available from state, local, and regional authorities.

3) In the case of change of use, redevelopment, or expansion or modification of an existing use that requires the issuance of a building permit or permit for mobile home installation, the impact fee shall be based upon the net positive increase in the impact fee for the new use as compared to the previous use. The Planning Director shall be guided in this determination by the source and agencies listed above.

**B. Calculation** – Fees shall be calculated in accordance with the Attachment A Schedule unless:

1) The developer submits to the Planning Director and Director of Parks and Recreation (the "Parks Director") studies and data in accordance with RCW 82.02.060 (5) that support a claim for adjustment in the amount of the fee. The studies and data submitted shall clearly show the basis upon which the independent fee calculation was made.

2) The Parks Director shall consider the documentation submitted by the developer but is not required to accept such documentation as he/she shall reasonably deem to be inaccurate or not reliable and may, in the alternative, require the developer to submit additional or different documentation for consideration

3) If the Parks Director accepts the studies and data and deems an adjustment in the amount of the fee to be warranted, the Parks Director may adjust the fee to that appropriate to the particular development. The adjustment may include a credit against the fee otherwise payable for public recreational facilities constructed or deed restricted or otherwise set aside for recreational purposes by the developer that serve the same purposes and functions as

City of Bellingham  
City Attorney  
210 Lottie Street  
Bellingham, Washington 98225  
360-676-6903

specific designations set forth for public parks in the Bellingham Comprehensive Park, Recreation & Open Space Plan Element.

4) In cases where the developer requests an adjustment in the amount of the fee to be imposed, the costs of such calculation shall be borne by the developer.

### **C. Appeals**

1) Determinations made by the Planning Director or Parks Director pursuant to this section may be appealed to the Hearings Examiner under the provisions of Chapter BMC 2.56 by filing a written request for a hearing with the Parks Director within ten (10) days of the given official's determination.

2) At the hearing, the appellant shall have the burden of proof, which shall be met by a preponderance of the evidence. The impact fee may be modified upon a determination that it is proper to do so based on the application of the criteria contained in BMC §§19.04.070, 130 and 140. Appeals shall be limited to application of the impact fee provisions to the specific development activity and the provisions of this ordinance shall be presumed valid.

3) Impact fees may be paid under protest in order to obtain a permit or other approval of development activity.

### **19.04.080: Payment of Fee**

A. Impact fees shall be imposed upon development activity in the City, based upon the schedule set forth in this ordinance, and shall be collected by the City from any applicant where such development activity requires issuance of a residential building permit or a mobile home permit and the fee for the lot or unit has not been previously paid.

B. Arrangement may be made for later payment of the impact fee with the approval of the City only if the City determines that it will be unable to use or will not need the payment until a later time, provided that sufficient security, as defined by the City, is provided to assure payment. Security shall be made to and held by the City, which will be responsible for tracking and documenting the security interest.

### **19.04.090: Park Impact Fee Service Areas**

**A. Citywide service area** - a single park impact fee service area will be created for citywide park and recreational facilities to include the entire city.

**B. Local service areas** - local park and recreation facilities will be located in neighborhood service areas which may be oriented around neighborhood parks, elementary and middle schools, and similar sites.

### **19.04.100: Park Impact Fee Special Revenue Fund Established**

A. All funds collected shall be promptly transferred for deposit in a park impact fee interest-bearing special revenue fund to be held in separate account as determined by this section of this ordinance and used solely for the purposes specified herein.

City of Bellingham  
City Attorney  
210 Lottie Street  
Bellingham, Washington 98225  
360-676-6903

B. Funds withdrawn from this account must be used in accordance with the provisions of section 19.04.110 of this ordinance.

**19.04.110: Use of funds**

A. Funds collected from park impact fees shall be used solely for the purpose of acquiring and/or making capital improvements to citywide or local parks under the jurisdiction of Bellingham, and shall not be used for maintenance or operations.

B. Funds shall be used exclusively for acquisitions, expansions, or capital improvements within the citywide or local park impact fee service areas. Funds shall be expended in the order in which they were collected.

C. In the event that bonds or similar debt instruments are issued for advanced provision of capital facilities for which park impact fees may be expended, impact fees may be used to pay debt service on such bonds or similar debt instruments to the extent that the facilities provided are of the type described in Paragraphs A or B above.

D. Impact fees for system improvements shall be expended by the City only in conformance with the Capital Facilities Plan (CFP).

E. Impact fees shall be expended or encumbered by the City for a permissible use within six (6) years of receipt by the City, unless there exists an extraordinary or compelling reason for fees to be held longer than six (6) years. The City Council shall identify the City's extraordinary and compelling reasons for the fees to be held longer than six (6) years in the Council's own written findings.

F. At least once each fiscal period the Parks Director shall present to the Council a proposed capital facility plan (CFP) for parks, assigning funds, including any accrued interest from the park impact fee special revenue fund to specific park improvement projects and related expenses. Monies, including any accrued interest not assigned in any fiscal period shall be retained in the park impact fee special revenue fund until the next fiscal period, except as provided by the refund provisions of this ordinance.

G. Funds may be used to provide refunds as described in section 19.04.120.

H. Bellingham shall be entitled to retain not more than 2 percent of the funds collected as compensation for the expense of collecting the fee and administering this ordinance.

**19.04.120: Refunds of Fees Paid**

A. If a residential building permit or permit for residential mobile home installation expires without commencement of construction, then the developer shall be entitled to a refund, with interest, of the impact fee paid as a condition for its issuance except that the City shall retain a percentage of the fee (as set forth in section 19.04.110 H, above) to offset a portion of the costs of collection and refund. The developer must submit an application for such a refund to the Planning Director within thirty (30) days of the expiration of the permit.

City of Bellingham  
City Attorney  
210 Lottie Street  
Bellingham, Washington 98225  
360-676-6903

B. Any funds not expended or encumbered by the end of the calendar quarter immediately following six (6) years from the date the park impact fee was paid shall, upon application by the current landowner, be returned to such landowner with interest at the interest rate accrued in the special revenue fund account, provided that the landowner submits an application for a refund to the City of Bellingham within one (1) year of the expiration of the six (6) year period.

C. Any impact fees that are not expended or encumbered by the City in conformance with the Capital Facilities Plan (CFP) within these time limitations, and for which no application for a refund has been made within this one (1) year period, shall be retained and expended consistent with the provisions of this section.

D. Interest due upon the refund of impact fees required by this section shall be calculated according to the average rate received by the City on invested funds throughout the period during which the fees were retained.

**19.04.130: Exemptions**

A. The following development activities shall be exempted from payment of impact fees:

**1. Reconstruction, remodeling or construction** - of the following facilities, subject to the recording of a covenant or recorded declaration of restrictions precluding use of the property for other than the exempt purpose; provided, that if the property is used for a nonexempt purpose, then the park impact fees then in effect shall be paid:

a) Shelters or dwelling units for temporary placement which provide housing to persons on a temporary basis of not more than four (4) weeks.

b) Construction or remodeling of transitional housing facilities or dwelling units that provide housing to persons on a temporary basis of not more than twenty-four (24) months, in connection with job training, self-sufficiency training and human services counseling - the purpose of which is to help persons make the transition from homelessness to placement in permanent housing.

**2. Rebuilding or replacement** - of a legally established dwelling unit(s) destroyed or damaged by fire, flood, explosion, act of God or other accident or catastrophe provided that such rebuilding takes place within a period of one (1) year after destruction with a new building or structure of the same size and use.

**3. Alteration or expansion:**

a) of an existing building where no additional residential units are created and where the use is not changed, and/or

b) the construction of accessory buildings or structures.

**4. Mobile home where:**

a) The installation of a replacement mobile home on a lot or other such site when a park impact fee for such mobile home site has previously been paid pursuant to this ordinance or where a mobile home legally existed on such site on or prior to the effective date of this ordinance.

City of Bellingham  
City Attorney  
210 Lottie Street  
Bellingham, Washington 98225  
360-676-6903

b) The construction of any nonresidential building or structure or the installation of a nonresidential mobile home.

Any claim or exemption must be made no later than the time of application for a building permit or permit for mobile home installation. Any claim not so made shall be deemed waived.

**5. Condominium projects** - in which existing dwelling units are converted into condominium ownership where no new dwelling units are created.

**6. Previous mitigation where:**

a) The development activity is exempt from the payment of an impact fee pursuant to RCW 82.02.100, due to mitigation of the same system improvement under the State Environmental Policy Act (SEPA) and such improvement is included within the capital facilities plan (CFP).

b) 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, unless the terms of the agreement provide otherwise; provided that the agreement predates the effective date of fee imposition as provided herein.

**B.** The following development activities may be exempted from payment of impact fees:

**Low income housing projects** – Upon application by the owner, the City Council may exempt a low income housing development, as defined by the current City of Bellingham Consolidated Plan (or successor thereto), from all or part of the required fees upon such conditions as the City Council deems appropriate. The determination to grant or deny an exemption shall be in the sole discretion of the City Council after consideration of the public benefit of the development, the hardship to the development of the fees, the impacts of the development, the availability of public funding to pay the development's fees and any other factors deemed relevant by the City Council. If an exemption is granted, the fees attributable to the development shall be paid from public funds other than Park Impact Fee accounts.

**19.04.140: Credits** - Park land and/or park capital improvements may be offered by the developer as total or partial payment of the required impact fee. Development activity for which park impacts were intended to be mitigated pursuant to a condition of plat or PUD approval, dedications of land or construction of, or improvement to park facilities that pre-date this ordinance, unless the condition of the plat or PUD approval provides otherwise, may also be considered for credit hereunder; provided that any such mitigation measure was made pursuant to the capital facilities plan (CFP). Any new offer must specifically request or provide for a park impact fee credit. If the Parks Director accepts such an offer, whether the acceptance is before or after the effective date of this ordinance, the credit shall be determined and provided in the following manner:

City of Bellingham  
City Attorney  
210 Lottie Street  
Bellingham, Washington 98225  
360-676-6903

A. Credit for the dedication of land shall be valued at fair market value established by private appraisers acceptable to the City. Credit for the dedication of park land shall be provided when the property has been conveyed at no charge to, and accepted by the City.

B. Applicants for credit for construction of park improvements shall submit acceptable engineering drawings and specifications, and construction cost estimates to the Parks Director. The Parks Director shall determine credit for construction based upon either these cost estimates or upon alternative engineering criteria and construction cost estimates if the Parks Director determines that such estimates submitted by applicants are either unreliable or inaccurate. The Parks Director shall provide applicants with a letter or certificate setting forth the dollar amount of the credit, the reason for the credit, and the legal description of the project or development to which the credit may be applied. Applicants must sign and date a duplicate copy of such letter or certificate indicating their agreement to the terms of the letter or certificate and return such signed document to the Parks Director before credit will be given. The failure of an applicant to sign, date, and return such document within sixty (60) days shall nullify the credit.

C. Except as provided in subsection D. below, credit against impact fees otherwise due will not be provided until:

- 1) The construction is completed and accepted by the Parks Director; and
- 2) A suitable maintenance and warranty bond is received and approved by the Parks Director, when applicable.

D. Credit may be provided before completion of specified park improvements if adequate assurances are given by the applicant that the standards set out in subsection C. above will be met and if the developer posts security as provided below for the costs of such construction. Security in the form of a performance bond, irrevocable letter of credit, or escrow agreement shall be posted with and approved by the Parks Director in an amount determined by the Parks Director. If the park construction project will not be constructed within one (1) year of the acceptance of the offer by the Parks Director, the amount of the security shall be increased by ten percent (10%) compounded for each year of the life of the security. The security shall be reviewed and approved by the Parks Director prior to acceptance of the security. If the park construction project is not to be completed within five (5) years of the date of the developer's offer, the City Council must approve the park construction project and its scheduled completion date prior to the acceptance of the offer by the Parks Director.

E. Any claim for credit must be made no later than the time of application for a building permit or permit for mobile home installation. Any claim not so made shall be deemed waived.

F. Credits shall not be transferable from one project or development to another without the approval of the City Council and may only be transferred to a different development upon a finding by the Council that the dedication for which the credit was given benefits the different impact fee service area.

G. Determinations made by the Parks Director pursuant to this section may be appealed to the Hearing Examiner by filing a written request with the Parks Director within ten (10) days

City of Bellingham  
City Attorney  
210 Lottie Street  
Bellingham, Washington 98225  
360-676-6903

of the Parks Director's determination. Hearing proceedings shall conform with section 19.04.070, C., 2).

**19.04.150: Review**

The fee schedule referenced in 19.04.070, A. shall be reviewed by City Council at least once each fiscal year. The review shall occur in conjunction with any update of the capital facilities plan (CFP) element of the City's Comprehensive Plan; provided that failure to conduct this review shall not invalidate the fee schedule previously adopted. Any revisions to the fee schedule may be made by resolution passed by a majority of the City Council.

**19.04.160: Penalty provision**

A violation of this ordinance shall be prosecuted in the same manner as misdemeanors are prosecuted and upon conviction the violator shall be punishable in accordance with BMC 1.28.010; however, in addition to or in lieu of any criminal prosecution the City shall have the power to sue in civil court to enforce the provisions of this ordinance.

**19.04.170: Severability**

If any section, phrase, sentence, clause or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and such holding shall not affect the validity of the remaining portions hereof.

**19.04.180: Effective date**

This ordinance, being an exercise of a power specifically delegated to the City legislative body, is not subject to referendum, shall be effective fifteen (15) days after passage and publication of the ordinance or a summary thereof consisting of the title.

**PASSED** by the Council this \_\_\_\_\_ day of \_\_\_\_\_, 20106.

\_\_\_\_\_  
Council President

**APPROVED** by me this \_\_\_\_\_ day of \_\_\_\_\_, 20106.

City of Bellingham  
City Attorney  
210 Lottie Street  
Bellingham, Washington 98225  
360-676-6903

\_\_\_\_\_  
Mayor

**ATTEST:** \_\_\_\_\_  
Finance Director

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Office of the City Attorney

City of Bellingham  
City Attorney  
210 Lottie Street  
Bellingham, Washington 98225  
360-676-6903

# EXHIBIT D -- Superior Court Case Summary



Courts Home | Search Case Records

Home | Summary Data & Reports | Resources & Links | Get Help



## Superior Court Case Summary

Court: Whatcom Co Superior  
Case Number: 08-2-00112-8

Sub	Docket Date	Docket Code	Docket Description	Misc Info
	01-18-2008	\$FFR	Filing Fee Received	200.00
1	01-18-2008	PT	Land Use Petition & Complaint For Breach Of Contract Declaratory Judgment & Other Relief	
2	01-18-2008	MT	Petitioners Motion For Initial Hearing Setting Schedules	
3	01-18-2008	PROR	Proposed Order On Initial Lupa Hearing	
4	01-18-2008	NTMTDK ACTION	Note For Motion Docket Initial Hearing On Lupa Appeal	02-22-2008C1
5	01-23-2008	MT	Mot For Change Of Judge Pursuant To Cr 40(f)	
6	01-23-2008	AFPRJ	Affidavit Of Prejudice/mura	
7	01-24-2008	ORCJ	Order On Resps Mot For Change Of Judge Pursuant To Cr 40(f)	
		JDG0002	Judge Steven J. Mura, Dept 2	
8	01-30-2008	AFSR	Affidavit/dclr/cert Of Service	
9	02-01-2008	SM	Summons	
10	02-07-2008	AFSR	Affidavit/dclr/cert Of Service	
11	02-15-2008	MT	Ex Parte Motion For Entry Of Transfer Of Case Affidavit Of Prejudice And	
12	02-15-2008	ORTR	Order Transferring Case On	

### About Dockets

You are viewing the case docket or case summary. Each Court level uses different terminology for this information, but for all court levels, it is a list of activities or documents related to the case. District and municipal court dockets tend to include many case details, while superior court dockets limit themselves to official documents and orders related to the case.

If you are viewing a district municipal, or appellate court docket, you may be able to see future court appearances or calendar dates if there are any. Since superior courts generally calendar their caseloads on local systems, this search tool cannot display superior court calendaring information.

### Contact Information

Whatcom Co Superior  
311 Grand Ave, Ste 301  
Bellingham, WA 98225-4048  
Map & Directions  
360-676-6777(Phone)  
360-676-6693(Fax)  
Visit Website

### Disclaimer

This information is provided for use as reference material and is not the official court record. The official court record is maintained by the court of record. Copies of case file documents are not available at this website and will need to be ordered from the court of record.

The Administrative Office of the Courts, the Washington State Courts, and the Washington State County Clerks :

1) Do not warrant that the information is accurate or complete;

2) Do not guarantee that information is in its most current form;

3) Make no representations regarding the identity of any person whose name appears on these pages; and

		JDG0003	Affidavit Of Prejudice Judge Charles R. Snyder, Dept. 3	
13	02-15-2008	AFPRJ	Affidavit Of Prejudice	
14	02-15-2008	AFSR	Declaration Of Service	
15	02-22-2008	MTHRG JDG0001	Motion Hearing Judge Ira Uhrig, Dept 1	
	02-22-2008	CTRN CTR0001	Court Reporter Notes Court Reporter Laura Porter	
16	02-22-2008	OR JDG0001	Order On Initial Lupa Hearing Judge Ira Uhrig, Dept 1	
17	03-14-2008	CRT	Certification Of The Record	
18	03-25-2008	TS	Transcript Of Recorded Hearing Wednesday 11-14- 2007	
19	03-25-2008	TS	Transcript Of Recorded Hearing Thursday 11-15- 2007	
20	03-25-2008	TS	Transcript Of Recorded Hearing Friday 11-16-2007	
21	03-26-2008	AFSR	Affidavit/dclr/cert Of Service	
22	04-04-2008	CRT	Supplemental Certification Of The Record (sent To Court Of Appeals)	
23	04-24-2008	ORCNT	Stipulation And Order Continuing Hearing On The Merits	06-05- 2008
		COM0007	Commissioner Alfred L. Heydrich	
24	04-25-2008	AFSR	Declaration Of Service	
25	05-08-2008	AFSR	Affidavit/dclr/cert Of Service	
26	05-08-2008	MTSMJG	Motion For Partial Summary Judgment	
27	05-08-2008	BR	Petitioners Opening Lupa Brief	
28	05-08-2008	DCLR	Declaration Of Peter R Dworkin In Support Of Pltfs Motion For Partial Summary Judgment	

4) Do not assume any liability resulting from the release or use of the information.

Please consult official case records from the **court of record** to verify all provided information.

29	05-08-2008	MM	Memorandum In Support Of Motion For Partial Summary Judgment	
30	05-08-2008	NTMTDK ACTION	Note For Motion Docket Motion For Summary Judgment	06-05-2008C1
31	05-27-2008	MM	Citys Response Memorandum To Lupa Appeal	
32	05-27-2008	RSP	Response To Petitioners Motion For Partial Summary Judgment	
33	06-02-2008	AFSR	Affidavit/dclr/cert Of Service	
34	06-02-2008	RPY	Petitioners/pltfs Reply To Defts/respondents Summary Judgment & Lupa Response Briefs	
35	06-05-2008	SMJHRG JDG0001	Summary Judgment Hearing Judge Ira Uhrig, Dept 1	
	06-05-2008	CTRN CTR0001	Court Reporter Notes Court Reporter Laura Porter	
36	08-05-2008	AFSR	Dclr Of Service	
37	08-05-2008	PROR	Proposed Findings Of Fact Conclusions Of Law & Order On Land Use Petition (lupa)	
38	08-05-2008	PROR	Proposed Order Granting Pltfs Motion For Partial Summary Judgment	
39	08-05-2008	NTMTDK ACTION	Note For Motion Docket Entry Of Order On Partial Summary Judgment	08-15-2008C1
40	08-05-2008	NTMTDK ACTION	Note For Motion Docket Entry Of Findings Of Fact & Conslusions Of Law & Order	08-15-2008C1
41	08-14-2008	AFSR	Dclr Of Service	

42	08-14-2008	NTMTDK ACTION	Note For Motion Docket Conclusions Of Law & Order	08-22- 2008C1
		ACTION	Entry Of Findings Of Fact &	
43	08-14-2008	NTMTDK ACTION	Re Note For Motion Docket Summary Judgment	08-22- 2008C1
		ACTION	Entry Of Order On Partial	
44	08-15-2008	HSTKPA	Cancelled: Plaintiff/pros Requested	
45	08-22-2008	MTHRG JDG0001	Motion Hearing Judge Ira Uhrig, Dept 1	
	08-22-2008	CTRN CTR0001	Court Reporter Notes Court Reporter Laura Porter	
46	08-22-2008	OR  JDG0001	Findings Of Fact Conclusions Petition  Judge Ira Uhrig, Dept 1	
			Of Law & Order On Land Use	
47	08-22-2008	OR JDG0001	Order Granting Pltfs Motion For Judge Ira Uhrig, Dept 1	
			Partial Summary Judgment	
48	08-26-2008	AFSR	Dclr Of Service	
49	08-26-2008	MT	Motion For Entry Of Judgment	
50	08-26-2008	PROR	Proposed Judgment On Lupa Appeal	
51	08-26-2008	NTMTDK ACTION	Note For Motion Docket Entry Of Judgment	09-12- 2008C1
52	09-12-2008	HSTKPA	Cancelled: Plaintiff/pros Requested	
53	09-19-2008	NACA	Notice Of Appeal To Court Of Appeal Division I / (\$250.00 Paid)	
54	09-19-2008	DCLRM	Declaration Of Mailing Notice Of Appeal	
55	10-14-2008	LTR	Letter From Court Of Appeals To Counsel - Coa#	

			62379-6-i
56	10-20-2008	DSGCKP	Designation Of Clerk's Papers And Exhibits
57	10-21-2008	INX	Index To Clerk's Papers
58	10-27-2008	RCP	Receipt From Court Of Appeals (7 Vols Cp)
	11-26-2008	VRPRC	Verbatim Report Of Proceedings (6/5/08 Hearing)
59	12-15-2008	RCP	Receipt From Court Of Appeals (1 Vol Vr)

[Courts](#) | [Organizations](#) | [News](#) | [Opinions](#) | [Rules](#) | [Forms](#) | [Directory](#) | [Library](#)  
[Back to Top](#) | [Privacy and Disclaimer Notices](#)