

No. 67019-I

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

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

Appellant,

v.

CITY OF BELLINGHAM, a Washington municipal corporation,

Respondent.

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REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. ARGUMENT	3
A. Bellingham’s Argument Is Contrary to the Capital Facilities Plan.....	3
B. The Central Issue on Appeal Is Purely Legal, Reviewed <i>De Novo</i>	8
C. The Hearing Examiner’s Application of the Law to the Facts Was Clearly Erroneous.....	10
D. The GMA and the Takings Clause Prohibit Duplicate Fees for the Same Impact	13
III. CONCLUSION.....	16

TABLE OF AUTHORITIES

Pages

Washington Cases

Benchmark Land Co. v. City of Battle Ground,
103 Wn. App. 721, 14 P.3d 172 (2000)..... 5

Bennett v. Hardy,
113 Wn.2d 912, 784 P.2d 1258 (1990)..... 10

Clallam Cnty. v. Dry Creek Coal.,
161 Wn. App. 366, 255 P.3d 709 (2011)..... 2, 9

Fed. Way v. Town & Country Real Estate, LLC,
161 Wn. App. 17, 252 P.3d 382 (2011)..... 10

Isla Verde Int’l Holdings, Inc. v. City of Camas,
146 Wn.2d 740, 49 P.3d 867 (2002)..... 11, 14, 15

Isla Verde Int’l Holdings, Inc. v. City of Camas,
99 Wn. App. 127, 990 P.2d 429 (1999)..... 14, 15

Kittitas Cnty. v. E. Wash. Growth Mgmt. Hearings Bd.,
172 Wn.2d 114, 256 P.3d 1193 (2011)..... 3, 9

Olympia v. Drebeck,
156 Wn.2d 289, 126 P.3d 802 (2006)..... 14

Whatcom Cnty. Fire Dist. No. 21 v. Whatcom Cnty.,
171 Wn.2d 421, 256 P.3d 295 (2011)..... 11, 12, 13

Federal & Out-Of-State Cases

City of Monterey v. Del Monte Dunes at Monterey, Ltd.,
526 U.S. 687, 119 S. Ct. 1624 (1999)..... 5

Dolan v. City of Tigard,
512 U.S. 374, 114 S. Ct. 2309 (1994)..... 5, 15

<i>Lambert v. City & Cnty. of S.F.</i> , 529 U.S. 1045, 120 S. Ct. 1549 (2000).....	5
<i>Nollan v. California Coastal Commission</i> , 483 U.S. 825, 107 S. Ct. 3141 (1987).....	5, 15
<i>Reynolds v. Inland Wetlands Comm'n</i> , No. 309721, 1996 Conn. Super. LEXIS 1532 (Conn. Super. Ct. June 10, 1996).....	15
<i>St. Johns River Water Mgmt. Dist. v. Koontz</i> , 5 So.3d 8 (Fla. Dist. Ct. App. 2009)	5, 15
<i>William J. Jones Ins. Trust v. City of Fort Smith</i> , 731 F. Supp. 912 (W.D. Ark. 1990).....	15

Municipal Codes

BMC 19.04.050.....	2, 9
BMC 19.04.140.....	8

Statutes

RCW 36.70A.070.....	2, 9
RCW 36.70A.070(3).....	8
RCW 36.70C.....	11
RCW 36.70C.130(1).....	11
RCW 36.70C.130(1)(b)	1, 9
RCW 36.70C.130(1)(c).....	9
RCW 36.70C.130(1)(d)	10
RCW 82.02.050(1)(c)	14
RCW 82.02.060(1)(c)	14

RCW 82.02.060(3).....1, 2, 8, 9

Other Authorities

www.cob.org/services/neighborhoods/community-planning/comprehensive-plan.aspx..... 4

I. INTRODUCTION

The central issue before the Court is whether the Growth Management Act (“GMA”) allows the City of Bellingham to impose on Belleau Woods a park impact fee without giving credit for the open space easement, which Bellingham had exacted from Belleau Woods free of charge and which it plans to integrate into the city park system as an “open space corridor.” CP 30. The only answer consistent with the taking clause and the GMA, which prohibits local governments from imposing on developers duplicate fees for the same impact, is no.

Bellingham’s response brief says little about the central issue. Instead, it tries to avoid it (and *de novo* review) by urging the Court to affirm “because there is substantial evidence in the record to support the . . . Hearing Examiner decision.” Brief of Respondent City of Bellingham (“Response Brief”), at 8. Because the issue of the City’s compliance with the GMA and its own ordinances is legal, the substantial evidence test does not apply. RCW 36.70C.130(1)(b). This issue is not new as the City claims. Response Brief, at 8-9. The record shows that both parties briefed it below. CP 217 (City’s brief describing Belleau Woods’ position as “argu[ing] that RCW 82.02.060(3) requires the he [sic] be given credit for the entire conservation easement”).

The City's sole argument on the merits is that it does not need to give Belleau Woods credit because the Capital Facilities Plan "identified" the trail to be built through the open space it acquired by easement, but not the open space itself. But the "identification" requirement does not mean that the City can avoid giving credit by refusing to recognize contributions to the park system it insists on and receives. The GMA and the City ordinances require the City to identify *all* open space that it has already integrated, or plans to integrate, into the park system and *mandate* credit for such open space when charging the park impact fee. RCW 82.02.060(3); RCW 36.70A.070; BMC 19.04.050¹; *see Clallam Cnty. v. Dry Creek Coal.*, 161 Wn. App. 366, 385, 255 P.3d 709 (2011) ("The 2002 legislature . . . stat[ed], 'Park and recreation facilities *shall be included* in the capital facilities plan element.'" (emphasis added; citation omitted)).

The 2008 Parks, Recreation and Open Space Plan, Chapter 7 of the Amended Comprehensive Plan ("Park Plan") shows the Belleau Woods open space on the map of Recommended Park Facilities as part of the "open space corridor." CP 30. Therefore, at a minimum, the City was

¹ The City can hardly claim to be surprised on appeal by Belleau Woods' discussion of its own ordinance, BMC 19.04.050, which the City itself relied on below. CP 54-55.

required to “identify” the Belleau Woods open space as a proposed facility and issue credit. *Kittitas Cnty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 168, 256 P.3d 1193 (2011) (“[The GMA] uses the phrase ‘shall . . .’ regarding the requirements . . . , which . . . [are] not optional.” (citation omitted)).

In any event, the Capital Facilities Plan “identifies” the Belleau Woods open space sufficiently to trigger the credit requirement. It provides that “parks and trails are integrated into the City’s open space system,” and shows that the City plans to build a trail through the Belleau Woods open space to complete the integration. CP 226-27; *see* Appendix A. No more is required. Having chosen to integrate the Belleau Woods open space into the park system, Bellingham cannot avoid the credit requirement. The Hearing Examiner’s contrary decision was erroneous and should be reversed.

II. ARGUMENT

A. **Bellingham’s Argument Is Contrary to the Capital Facilities Plan**

Chapter 5 of Bellingham’s 2006 Comprehensive Plan contains its Capital Facilities Plan (“CFP” or the “Plan”). The Plan sets key priorities, referred to as “capital facilities visions” or “CFVs,” for Bellingham’s park system. The first of the Plan’s two park priorities goes to the heart of Belleau Woods’ appeal. It proves that in adopting the Plan, the City

intended to *integrate* neighborhood trails with the public open space around them. The City's entire argument *isolates* the Belleau Woods trail from the public open space around it and is inconsistent with the Plan, which states:

CFV 9. Developed parks and trails are integrated into the city's open space system. Acquisition and development of park sites that adequately serve both existing and newly developing neighborhoods are accomplished in part through developer contributions.

2006 Bellingham Comprehensive Plan, Chapter 5, Capital Facilities Element, Part 14: Capital Facility Visions & Goals, Capital Facility Visions (CFV) for Bellingham, Appendix A, available at www.cob.org/services/neighborhoods/community-planning/comprehensive-plan.aspx – last visited on August 27, 2011.²

In 2004, the City obtained the easement over the Belleau Woods' open space through the type of "developer contribution" the Plan promotes, free of charge. CP 19 ("**Said easement was granted without monetary exchange between the Grantor and Grantee.**") (emphasis in original). Because the City conditioned Belleau Woods' proposed development on obtaining the easement, Belleau Woods had no choice but

² The Hearing Examiner considered the entire 2006 Comprehensive Plan as part of her decision. CP 261.

to convey the easement. This process is called an “exaction.” *Benchmark Land Co. v. City of Battle Ground*, 103 Wn. App. 721, 727, 14 P.3d 172 (2000) (“exactions” are “decisions conditioning approval of development on the dedication of property” (internal quotation marks and citation omitted)); *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702, 119 S. Ct. 1624 (1999) (defining “exaction” to be the “dedication of property to public use”); *St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So.3d 8, 9 (Fla. Dist. Ct. App. 2009) (“[A]n ‘exaction’ is a condition sought by a governmental entity in exchange for its authorization to allow some use of land that the government has otherwise restricted.”).³ As a result of the exaction, the City’s only expense in integrating the Belleau Woods open space into the park system is limited to the cost of building the trail. CP 227.

The City drafted the terms of the exaction and the description of the property interest it received. It did so twice: in 2004, when Belleau

³ In *Koontz*, a Florida court struck down the attempted exaction of a conservation easement over wetlands as an unconstitutional taking. *Koontz*, 5 So.2d at 10-11. The *Koontz* court relied on *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994), the two key Supreme Court cases that set constitutional limits on the leveraging of police power by local governments to obtain interest in land from private owners. *See also Lambert v. City & Cnty. of S.F.*, 529 U.S. 1045, 1047-48, 120 S. Ct. 1549 (2000) (“The object of the Court’s holding in *Nollan* and *Dolan* was to protect against the State’s cloaking within the permit process ‘an out-and-out plan of extortion.’” (Scalia, J., dissenting from decisions denying certiorari; quoting *Nollan*, 483 U.S. at 837)).

Woods originally conveyed the easement, and in 2008, after the dispute about park fees arose. Both documents and property maps drawn by the City affirmatively designated the entire easement as open to public access. CP 204-07, 18-21. Nothing in either the 2004 or the 2008 recorded easements and nothing on the maps that accompanied them limited public access to the area of the future trail or indicated where the trail would be located. *Id.*

In 2008, before deciding on the trail's specific location, the City identified the entire Belleau Woods easement as a "recommended facility" in its Recommended Facilities Plan for Open Space, and included it in the map of Recommended Park Facilities. CP 30. The Park Plan text that accompanies the map states:

Open space areas generally preserve, restore, and may provide access to wetlands, woodlands . . . and other sensitive or unique ecological features. New open space areas should link to existing open spaces to create . . . greenways, and open space networks. These linked areas will visually define and separate developed areas in accordance with the objectives of the Washington State Growth Management Act (GMA).

Open space may also include trails . . . to increase public awareness and appreciation for significant and visually interesting ecological features.

CP 29. According to Park Plan guidelines, open space should be preserved “through acquisition of easements, development rights and other non-fee simple arrangements” that provide for “public access.” CP 29.

This was precisely the intent of the Belleau Woods easement, in the words of the City’s own drafters:

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

CP 19.

In sum, the City insisted on, and obtained, the easement over part of Belleau Woods’ property without using public funds, by exacting it as a condition of the Belleau Woods development. Once it obtained the easement, the City identified it in the Park Plan as a Recommended Open Space Facility and plans to build a trail through this open space in a location not yet determined. CP 30, 227. By taking these actions, Bellingham acted consistently with its Plan, which promotes the “vision”

of integrating trails into publicly accessible open space acquired through developer contributions. None of these facts are in dispute in this appeal.

B. The Central Issue on Appeal Is Purely Legal, Reviewed *De Novo*

The question before the Court is purely legal: Did the Hearing Examiner err by failing to construe BMC 19.04.140 consistently with the GMA? Under the Hearing Examiner’s interpretation, park fee credit is due only when the City exacts a land contribution from a developer and immediately “dedicates” it to public use in the Plan. If, as here, the City exacts a developer contribution first and puts it to public use later, it can escape giving credit. CP 293 (Conclusion of Law 2) (stating that “BMC 19.04.140 provides that a credit for facilities *dedicated* pursuant to the Capital Facilities Plan *may be considered* for a credit” (emphases added)).

But the GMA is to the contrary. It provides that the local government “[s]hall provide a credit” for the value of “any dedication of land . . . to facilities that are *identified* in the capital facilities plan and that are required by the county, city, or town as a condition of approving the development activity.” RCW 82.02.060(3) (emphases added). The GMA also provides that “[p]ark and recreation facilities *shall be included* in the capital facilities plan element” of a comprehensive plan. RCW 36.70A.070(3) (emphasis added). Under the GMA, the local government

cannot escape giving park fee credit by exacting a land contribution but delaying to identify the exaction as part of the park system. *See Clallam Cnty.*, 161 Wn. App. at 385 (“The 2002 legislature added a sentence at the end of the capital facilities plan element subsection, stating, ‘Park and recreation facilities *shall be included* in the capital facilities plan element.’” (emphasis added; citation omitted)); *see also Kittitas Cnty.*, 182 Wn.2d at 168 (“[t]he GMA distinguishes between when a County ‘shall provide for’ and ‘may provide for’ something. For example, the statute uses the phrase ‘shall provide for’ regarding the requirements for public participation in local planning, which surely is not optional.” (citation omitted)).

Bellingham now concedes that the GMA “require[s] the CFP to identify *proposed locations of expanded or new park facilities.*” Response Brief, at 14 (citing RCW 82.02.060(3); RCW 36.70A.070; BMC 19.04.050). But it seeks to avoid this GMA requirement by obfuscating the proper standard of review. While citing (correctly) to RCW 36.70C.130(1)(b), which provides for *de novo* review of legal issues, the City actually discusses (without citation) a more deferential standard of review under RCW 36.70C.130(1)(c). *See* Response Brief, at 14 (arguing that the Hearing Examiner’s decision should be affirmed because it is supported by “substantial evidence that the City never intended to include

the entire conservation easement in the parks system and that it was not identified in the capital facilities plan”).

The substantial evidence test does not apply. Belleau Woods does not challenge the Hearing Examiner’s findings of fact, which are reviewed under the substantial evidence test. Instead, Belleau Woods argues, as it did at every stage of the proceedings below (*see* CP 179-81, 55, 217-18, 72-73), that the denial of credit for the entire easement is contrary to the GMA, pursuant to which the Bellingham Park Impact Fee was adopted. This issue is not new and is properly before the Court. *See Bennett v. Hardy*, 113 Wn.2d 912, 917-18, 784 P.2d 1258 (1990) (additional authority related to the general theory presented below is properly considered on appeal). It does not involve weighing evidence of the City’s alleged intent, nor warrants any deference to the Hearing Examiner’s conclusions on appeal. *Fed. Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 38, 252 P.3d 382 (2011) (hearing examiner’s conclusions regarding state law are not entitled to any deference).

C. The Hearing Examiner’s Application of the Law to the Facts Was Clearly Erroneous

Belleau Woods also challenged the Hearing Examiner’s decision as a “clearly erroneous application of the law to the facts.” RCW

36.70C.130(1)(d). “An application of law to the facts is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Whatcom Cnty. Fire Dist. No. 21 v. Whatcom Cnty.*, 171 Wn.2d 421, 427, 256 P.3d 295 (2011) (internal quotation marks and citation omitted). Although Belleau Woods has the burden of demonstrating that one of the LUPA standards in RCW 36.70C.130(1) is met, Bellingham has to carry its own *independent* burden of showing compliance with the GMA. *Isla Verde Int’l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 755-56, 49 P.3d 867 (2002) (recognizing the countervailing burdens of proof).⁴

The City cites to CP 101, 105, 115, and 116 as the totality of the evidence in the record that supports its alleged compliance with the GMA. *See* Response Brief, at 14. At CP 101, Paul Leuthold denied that the Parks Department considered the Belleau Woods’ conservation easement to be a park. At CP 105, Mr. Leuthold insisted that his department “need[s] to be the public entity that makes the decision on what is or what is not a park.”

⁴ Bellingham simply ignores *Isla Verde* and continues to incorrectly insist that the burden of proof is on Belleau Woods alone. *See* Response Brief, at 12-13 (“[B]ecause this matter is an appeal of a land use decision under the Land Use Petition Act (RCW 36.70C) . . . the burden of proof falls to the party seeking relief from the land use decision.”).

His statement implies that the Parks Department had nothing to do with the Recommended Park Facilities map in the Park Plan. The map, CP 30, *does* list the entire Belleau Woods easement as part of the expanded park open space corridor. At CP 115 and 116, when Leslie Bryson testified that the Belleau Woods conservation easement is “not in the recommended capital facilities portion of the plan which is in Chapter 9,” she failed to answer the question asked of her, which was whether the Belleau Woods conservation easement “was . . . included in the Bellingham Parks Recreation and Open Space Plan.” The answer to that question is, of course, yes. CP 30.

Even if credited, these self-serving statements fall far short of showing that the Belleau Woods open space was not part of the park system. The statements are at odds with the CFP, which “serves as a guide or blueprint to be used when making land use decisions.” *Whatcom Cnty. Fire Dist.*, 171 Wn.2d at 427 (internal quotation marks and citations omitted). The CFP plainly provides that “trails are integrated into the city’s open space system,” *see supra* Section II(A), and identifies the Belleau Woods trail as a capital facility that remains to be built to complete the integration with the *existing* open space that the City obtained by exaction in 2004. CP 227.

Mr. Leuthold's and Ms. Bryson's statements also fly in the face of the Park Plan, Chapter 7 of the Comprehensive Plan. Even if the Parks Department was not the agency that exacted the Belleau Woods conservation easement in 2004, the City never disputed below that the Parks Department was involved in putting it on the map of Recommended Park Facilities in 2008. On appeal, once again, the City does not challenge the 2008 Recommended Park Facilities map or argue that the map does not include the Belleau Woods open space. Response Brief, at 13. Mr. Leuthold's and Ms. Bryson's testimony about the alleged lack of involvement by the Parks Department in 2004 does nothing to undermine the "definite and firm" showing, *see Whatcom Cnty. Fire Dist.*, 171 Wn.2d at 427, that the City considered the Belleau Woods open space to be part of the park system since 2008, if not earlier. CP 30. It therefore was not free to deny Belleau Woods park impact fee credit under the GMA.

D. The GMA and the Takings Clause Prohibit Duplicate Fees for the Same Impact

The City simply cannot deny that since at least 2008 it has planned to incorporate the Belleau Woods open space into the park system. Therefore, the City must "identify" it either as part of the existing park inventory or as a proposed new facility. These GMA requirements "ensure that . . . specific developments do not pay arbitrary fees or

duplicative fees for the same impact.” RCW 82.02.050(1)(c); see *Olympia v. Drebeck*, 156 Wn.2d 289, 126 P.3d 802 (2006) (“[T]he legislature intended . . . to protect ‘specific developments’ from impact fees that . . . ‘duplicat[ed]’ the amount paid for the ‘same impact.’”); *Isla Verde*, 146 Wn.2d at 754 n.9 (“RCW 82.02.060(1)(c) states the Legislature’s intent that impact fees are imposed through established procedures and criteria so that a development does not pay arbitrary or duplicative fees for the same impact.”).

In *Isla Verde*, the Washington Supreme Court invalidated the Camas ordinance requiring developers, in addition to paying park impact fees, to set aside 30 percent of their properties as open space. By applying the ordinance, Camas planned to “add about four acres to the City’s open space network.” *Id.* at 748; see also *Isla Verde Int’l Holdings, Inc. v. City of Camas*, 99 Wn. App. 127, 130 n.1, 990 P.2d 429 (1999). The Washington Supreme Court held that the open space condition was a “tax, fee or charge” on development prohibited by the GMA. It also held that the city failed to carry its burden of showing that the GMA exception permitting “voluntary agreements . . . that allow a payment *in lieu of* a dedication of land” applied. *Isla Verde*, 146 Wn.2d at 758-759 (emphasis

added).⁵ The italicized phrase demonstrates that the GMA may allow cities to impose park fees *or* require developers to dedicate land that is put to public use, but it never permits both.

The Hearing Examiner failed to follow the GMA by allowing the City to charge Belleau Woods duplicative park fees. First, the City exacted an easement over half of Belleau Woods' property "without monetary exchange" and made explicit plans to incorporate that property into the park system's open space corridor. CP 30. This addition to the park system cost the City nothing. The City then charged Belleau Woods a full park impact fee without giving credit for the free addition to the park system that it owes to the exaction. This duplicate park impact fee burden violates the GMA and should be reversed.

⁵ In *Isla Verde*, 99 Wn. App. 127, the Washington Court of Appeals held that the open space condition was an exaction that violated the takings clause of the United States Constitution under the *Nollan /Dolan* tests. *Id.* at 138-39 ("[T]he set-aside ordinance requires Isla Verde to dedicate a significant portion of its property for a public benefit, wildlife preservation, thus limiting Isla Verde's right to improve that property. . . . Such a governmental interference with a fundamental property right is a form of exaction.").

The Washington Supreme Court affirmed by concluding that the open space condition violated the GMA but did not reach the takings issue. *Isla Verde*, 146 Wn.2d at 764-65. Other courts, however, have continued to analyze similar challenges under the takings clause. *See Koontz*, 5 So.3d at 10-11 (conservation easement); *Reynolds v. Inland Wetlands Comm'n*, No. 309721, 1996 Conn. Super. LEXIS 1532 (Conn. Super. Ct. June 10, 1996) (wetlands conservation easement); *William J. Jones Ins. Trust v. City of Fort Smith*, 731 F. Supp. 912 (W.D. Ark. 1990) (right-of-way easement).

III. CONCLUSION

For the reasons stated, the Hearing Examiner's decision should be reversed.

DATED: September 29, 2011.

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APPENDIX

Appendix A	2006 Bellingham Comprehensive Plan, Chapter 5: Capital Facilities Element Part 14: Capital Facility Visions and Goals, excerpt (CF-94/95 – highlighted text)
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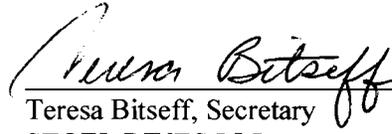
CERTIFICATE OF SERVICE

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

Counsel for Parties:

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

Executed September 29, 2011, at Seattle, WA.



Teresa Bitseff, Secretary
STOEL RIVES LLP

Comments

Vision statements changed from (CFG) to (CFV)

PART 14: CAPITAL FACILITY VISIONS & GOALS

CAPITAL FACILITY VISIONS (CFV) FOR BELLINGHAM

CFV-1 The community is enriched by support of a thriving downtown arts center, a fully restored and maintained Mt. Baker Theater, an expanded museum and library serving contemporary needs and a full range of cultural events.

CFV-2 Bellingham's commitment to trained professionals in both police and fire departments contributes to an ongoing sense of security and safety in the community.

CFV-3 The community supports the highest possible educational quality for our children, including a curriculum that fosters innovative ways of learning and preparation for life in the 21st century.

CFV-4 The City and school district obtain a significant contribution from the private sector for new residential development to augment the school district's financial resources and meet new enrollment demands.

CFV-5 Neighborhood schools in developed areas are retained and new schools are located consistent with the City's commitment to infill and compact growth.

CFV-6 Bellingham's water quality is improved through the pursuit of goals expressed in the Joint Lake Whatcom Watershed Agreement with the county and Water District #10 and through continued efforts to control stormwater quantity and quality.

CFV-7 Residents benefit from access to quality health and child care through programs supported by public and private resources and keyed to households' economic resources.

CFV-8 Parking improvements downtown emphasize support for downtown redevelopment, are pedestrian friendly, flexible, and adaptive to changing regional transportation technologies and patterns. Improvements may include satellite parking with shuttles in and around downtown, pedestrian corridors and parking structures that include or could be converted to other uses.

CFV-9 Developed parks and trails are integrated into the city's open space system. Acquisition and development of park, sites that adequately serve both existing and newly developing neighborhoods are accomplished in part through developer contributions.

CFV-10 Design and location of parks and recreation facilities recognize the demand for indoor as well as outdoor activities and the need for facilities that serve teenagers as well as younger children, including a possible indoor swimming pool. Parks are safe and well maintained, and where appropriate, include lighting for evening recreation. Playgrounds and parks are available in all neighborhoods.