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**BEFORE THE HEARING EXAMINER FOR THE CITY OF BELLEVUE**

In the Matter of the Appeal of a	)	
Transportation Impact Fee	)	<b>AAD 16-23</b>
	)	<b>(15-115339 BB)</b>
<b>EVERGREEN POINT</b>	)	
<b>DEVELOPMENT, LLC,</b>	)	
	)	<b>FINDINGS OF FACT,</b>
Appellant,	)	<b>CONCLUSIONS OF LAW</b>
	)	<b>AND ORDER</b>
v.	)	
	)	
<b>CITY OF BELLEVUE,</b>	)	
	)	
Respondent.	)	

**PROCEDURE**

On June 28, 2016, Evergreen Point Development LLC (Evergreen) filed an appeal of the City of Bellevue’s refusal to credit three dedications against a transportation impact fee imposed by the City.

Pursuant to a process established at a Prehearing Conference held July 29, 2016, the parties filed opposing dispositive motions. These were heard on September 27, 2016. Thereafter, the Hearing Examiner issued an Order denying the motions. The Examiner ruled that he has no jurisdiction over constitutional issues. After putting such issues aside, he determined that his powers in this case are limited to whether omission of the NE 2<sup>nd</sup> Street project (TFP 190) from the impact fee project list at the time the subject fee was imposed was appropriate. He said there is a fact question as to whether the exclusion of the project from the list was arbitrary or predicated on a rational basis.

After several months for discovery, the hearing on this question was held on March 24, 2017, and April 11, 2017. Scott Missall and Joshua Lane, Attorney at Law, represented Appellant Evergreen Point Development, LLC. Chad Barnes, Assistant City Attorney, represented Respondent City of Bellevue.

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1 **FINDINGS OF FACT**

2 1. On February 11, 2016, the City of Bellevue approved a proposal by Evergreen Point  
3 Development, LLC to construct an eight-story residential building with street frontage on NE 2<sup>nd</sup>  
4 Street in downtown Bellevue. In connection with the approval the City required dedications of  
5 right-of-way and a pedestrian easement.

6 2. On June 13, 2016, the City imposed a transportation impact fee for the project of  
7 \$288,455.28. The City did not provide any credit for the value of the required dedications  
8 against the transportation impact fee.

9 3. Bellevue’s transportation impact fee ordinance is set forth in Chapter 22.16 BCC.  
10 BCC 22.16.087 provides that a developer shall be given a credit against the transportation impact  
11 fee for the fair market value of dedications if they relate to system improvements “identified in  
12 the impact fee project list” and required as a condition of approving the development activity.

13 4. On June 28, 2016, Evergreen appealed the City’s failure to grant such a credit. No  
14 system improvements relating to NE 2<sup>nd</sup> Street were identified in the impact fee project list at the  
15 time the project sought approval.

16 5. The building proposed by Evergreen is a “development” as that term is defined in the  
17 Transportation Impact Fee Program chapter of the City Code. Chapter 22.16 BCC. Under BCC  
18 22.18.070 any development (except for identified exemptions not applicable here) in the City is  
19 required to pay a transportation impact fee. Impact fees are to be paid at the time of issuance of a  
20 building permit.

21 6. There is a project for the improvement of NE 2<sup>nd</sup> Street which is identified in  
22 Bellevue’s planning and program documents as TFP 190. When built, the project will widen the  
23 roadway from three lanes to five lanes.

24 7. The City’s Transportation Facilities Plan contains a 12-year list of transportation  
25 improvements in the City considered together with projected revenue in the City. The plan is  
26 updated regularly, usually every two years.

27 8. The impact fee project list is a subset of the larger list of projects contained in the  
28 Transportation Facilities Plan. Under BCC 22.16.050(B)

29 The impact fee project list consists of the transportation improvements  
30 in the transportation facilities plan needed to provide capacity on the city  
of Bellevue roadways, where the capacity needs are reasonably related

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1 in part or in whole to new development. The impact fee project list  
2 is adopted by the city council when it adopts the transportation facilities  
3 plan.

4 9. TFP 190 was included on the impact fee project list prior to 2013. Versions of the list  
5 from 2013 onward omit this project.

6 10. The key to inclusion of a transportation project in the impact fee project list is  
7 whether the needed capacity is “reasonably related” to new development.

8 11. In the Transportation Facilities Plan for 2013-2024 the funding allocation for the  
9 TFP 190 is described as a “place holder.” This means that funds for the construction of the  
10 project are not available. The same status is accorded the project in the 2016-2027  
11 Transportation Facilities Plan.

12 12. The availability of funding is a critical factor in the make-up of the impact fee project  
13 list. In the City’s view, a project not slated for funding within the 12-year plan horizon to is not  
14 “reasonably related” to new development. TFP 190 now falls into that category.

15 13. Overall funding availability declined in the time period at issue. In the  
16 Transportation Impact Fee Program for 2009, 34 projects sharing a total cost of \$381.5 million  
17 were listed. TFP 190 then was given a funding allocation of \$42 million dollars. In the  
18 Transportation Impact Fee Program for 2013, 18 projects sharing a total of \$203.4 million were  
19 listed. TFP 190 was then dropped from the list and has not been put back on it.

20 14. The priority given to projects affects how those projects participate in available  
21 funding. TFP 190 over the years was lowered in priority among projects competing for funds.  
22 This lowering in rank was the product of a complicated process involving evaluation of a broad  
23 range of mobility factors given different weights.

24 15. The process includes evaluation criteria established (and sometimes changed) by the  
25 Transportation Commission, an advisory body that ultimately makes recommendations to the  
26 City Council. The Council ultimately approves (or rejects) what it receives from the  
27 Commission.

28 16. The testimony at the hearing demonstrated that it is not possible to objectify the  
29 project ranking process completely. Information is gathered and then filtered through a number  
30 of evaluative efforts that inevitably involve some subjectivity. There is a scoring system but this

1 is only one facet of the process. The end result is a sort of consensus that is the product of the  
2 application of myriad judgments.

3 17. In sum, it appears that TFP 190's removal from the impact fee project list was the  
4 result of a combination of funding availability and ranking decline. In competition with other  
5 needed capacity improvements, it used up too much of the money available. The removal was a  
6 product of informed judgment, shown to have emerged from a highly rational process, not from  
7 unreasoning behavior.

8 18. During the course of the TFP 190's ongoing evaluation, there existed a Washington  
9 State Department of Transportation proposal for an I-405 Interchange to connect with NE 2<sup>nd</sup>  
10 Street with the freeway. Although there is nothing in the testimony to show that these two  
11 projects were officially discussed in relation to one another, it is the City's understanding that  
12 WSDOT has backed away from its interchange plan.

13 19. The record does not show that the City considered splitting TFP 190 into several  
14 smaller projects which would make individual phases more affordable.

15 20. Any conclusions herein which may be deemed a finding is hereby adopted as such.

### 16 CONCLUSIONS OF LAW

17 1. The Hearing Examiner has jurisdiction over this appeal. BCC 22.16.095, LUC  
18 20.35.250(E).

19 2. The Examiner has no authority to determine whether the creation of the impact fee  
20 project list violates the underlying State statute, RCW 82.02.050 and RCW 82.02.060. That is a  
21 type of constitutional question.

22 3. The activities surrounding the listing and delisting of projects on the impact fee  
23 project list is administrative not legislative action. Nonetheless, the process must have a rational  
24 basis. It cannot be willful and unreasoning in disregard of the facts and circumstances.

25 4. Ranking of projects and inclusion of projects on the impact fee project list are clearly  
26 acts of discretion involving subjective judgments. There may be reasonable differences of  
27 opinion over the particulars. However, the record discloses that the City engaged in a  
28 sophisticated and thoughtful process which aimed at making rational choices regarding what  
29 projects to list and where to list them.  
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