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NO. 64072-1
(CONSOLIDATED WITH
NO. 65171-9)

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

DAVIDSON SERLES & ASSOCIATES, a Washington general partnership,
Appellant,

v.

CITY OF KIRKLAND, a municipal corporation and
TOUCHSTONE, a Washington Corporation, et al.,

Respondents,

and

TR CONTINENTAL PLAZA CORP., a Delaware Corporation,
Intervenor Appellant

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REPLY BRIEF OF APPELLANTS
DAVIDSON SERLES & ASSOCIATES AND TR CONTINENTAL PLAZA

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ORIGINAL

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I. INTRODUCTION

The superior court abused its discretion and acted in manner contrary to law in dismissing appellant Davidson Serles and Continental Plaza's claims of spot zoning and their challenges to the City of Kirkland's planned action ordinance, plan and zoning amendments and design review guidelines enacted for the Touchstone property. For the reasons given below and within appellants' opening brief, the court should remand the spot zoning claims for trial and invalidate the planned action ordinance, plan and zoning amendments and design review guidelines for having been adopted in violation of the State Environmental Policy Act.

II. ARGUMENT

A. **The Trial Court Abused Its Discretion by Dismissing Appellants' Claims of Spot Zoning Because They Were Never Part of Respondents' Motion for Summary Judgment.**

In seeking dismissal of claims for lack of subject matter jurisdiction a moving party must show "*beyond doubt* that the claimant can prove no set of facts, consistent with the complaint, which would justify recovery." *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007)(emphasis supplied). The superior court abused its discretion in dismissing

Davidson and Continental's claims of spot zoning because it did so without respondents ever having moved for dismissal of those claims and because the record before the court, compiled without the benefit of discovery or briefing on the merits of the issue, does not show that plaintiffs would be incapable of proving their spot zoning claims.¹

Touchstone and the City at 11-14 respond that: their motion on summary judgment covered appellants' spot zoning claims; appellants' brief argued the issue; appellants' Article IV, Section 6 spot zoning claims were barred by the availability of other remedies; and zoning in compliance with a comprehensive plan cannot as a matter of law amount to spot zoning. None of these arguments are well founded.

First, respondents effectively concede that their motion never requested dismissal of appellants' claims of spot zoning, but they defend instead that dismissal of spot zoning claims was included because their motion² asked for dismissal of all of

¹ See Davidson and Continental's Opening Brief at 13-17.

² Although the Motion for Summary Judgment was brought by Touchstone, the City of Kirkland filed a joinder in the motion, CP 369, thus the plural is used.

appellants' claims.³ However, a general request for dismissal of all claims does not satisfy a moving party's burden under CR 12 and 56 of proving the absence of any set of facts to justify relief and the entitlement of dismissal of particular claims as a matter of law.⁴ If such a sweeping request for dismissal of all claims were sufficient under CR 12 and 56, the burdens would be entirely reversed and a one-sentence, blanket assertion of lack of jurisdiction would immediately shift the burden to plaintiff to essentially establish by law and by evidence a *prima facie* case, which of course is not consistent with either federal or state rules of civil procedure.

Second, Davidson and Continental's repeated efforts to alert the superior court that respondents were not entitled to summary judgment on an issue not included within their motion does not

³ Respondents' assertion that its motion for summary judgment included spot zoning claims apparently rests upon the following three sentences within its motion for summary judgment:

"The Court has no subject matter jurisdiction over the claims presented in this lawsuit. CP 166;

"The Court is respectfully requested to dismiss this lawsuit." CP 167; and

"Defendants are entitled to a summary judgment of dismissal." CP 179.

⁴ *White v. Kent Medical Center, Inc.*, 61 Wn. App. 163, 168-169, 810 P.2d 4 (1991)(a moving party has the responsibility of presenting in its motion each issue upon which it seeks summary judgment).

allow respondents to now claim that their summary judgment included claims of spot zoning and that appellants were granted full opportunity to establish the basis for those claims. In their Opposition to Motion for Summary Judgment at 23-24, CP 397-98, Davidson and Continental point out that their complaints raise claims of spot zoning, that respondents' motion does not address those claims, and that those claims would remain regardless of how the court might rule on the claims that were covered by respondents' motion.⁵ In their motion for reconsideration and in their reply in support of reconsideration Davidson and Continental similarly show that the court improperly granted dismissal of claims never included within respondents' motion.⁶ Of course, a response

⁵ On this point Davidson and Continental's Opposition to Motion for Summary Judgment states:

Without arguing the point here, plaintiffs challenge the adopted amendments as spot zoning because they carve out a single parcel under a single ownership and grant it special privileges not accorded to any other properties in the City. Even if the court were to agree that exclusive jurisdiction to review the comprehensive plan, zoning and design review amendments lay before the GMHB, plaintiffs' spot zoning would remain in this action.

⁶ The Motion by Davidson Serles and Continental Plaza for Reconsideration at 8, CP 594 states:

In brief, plaintiffs challenge the adopted amendments as spot zoning because they carve out a single parcel under a single ownership and grant it special privileges not accorded to any other properties in the City. Even if the court were to stand by its

to the procedural issue of the court's error in dismissing claims never part of respondents' motion is not the same as a response on the legal and factual basis for the spot zoning claim, which appellants were never afforded the opportunity to develop since it was never a part of respondents' motion.

Third, the availability of an appeal of plan and zoning amendments to the Growth Management Hearings Board does not bar claims of spot zoning under Article IV, Section 6 of the State Constitution. By reference to the State Administrative Procedures Act at RCW 34.05.570(3), respondents at 13 advance the contradictory argument that even though the GMHB lacks authority over constitutional issues such as spot zoning, its decision could nonetheless be challenged on that basis. It is difficult to understand how a GMHB decision could be challenged on an issue that would lie beyond its jurisdiction to address. Davidson and

dismissal of the challenge to the Planned Action Ordinance, plaintiffs' spot zoning should remain in this action because those claims were never a part of respondents' motion.

And the Reply by Davidson Serles and Continental Plaza in Support of Reconsideration at 5, CP 637 argued:

Whatever the merits of its arguments, Touchstone cannot at this stage bootstrap back into its summary judgment motion a request for dismissal of plaintiffs' spot zoning claims.

Continental's spot zoning claims are brought under the superior court's inherent power to review governmental action under Article IV, Section 6 of the State Constitution.⁷ The GMHBs lack jurisdiction over constitutional issues and in particular over spot zoning challenges.⁸ The claim of spot zoning lies against the city or county rendering the zoning decision. *See e.g., Smith v. Skagit County*, 75 Wn.2d 715, 743, 453 P.2d 832 (1975). Since the GMHB only has jurisdiction to review compliance with the GMA (and with SEPA, as it relates to GMA actions) and since the GMA is silent on spot zoning, a GMHB decision could not possibly be challenged for spot zoning, particularly where the GMHB itself has no authority to zone or rezone land. *Skagit Surveyors and Engineers LLC v. Friends of Skagit County*, 135 Wn.2d 542, 568, 958 P.2d 962 (1998) (GMHB lacks authority to affect the validity of pre-GMA zoning).

⁷ See Opening Brief at 16-17.

⁸ *Hood Canal Env'tl. Council v. Kitsap County*, CPSCMHB No. 06-3-0012c Final Decision and Order (August 23, 2006) (The GMHBs lack jurisdiction over constitutional issues) and *Point Roberts Registered Voters Association v. Whatcom County*, WWGMHB No. 00-2-0052, Final Decision and Order at 4 (April 6, 2001) ("... the Act clearly does not allow a GMHB jurisdiction over 'spot zoning' challenges.")

Fourth, the City's concurrent enactment of special comprehensive plan and zoning districts for a single landowner, Touchstone, does not defeat Davidson and Continental's spot zoning claims. Respondents' assertion at 14 that "a zoning decision that is in compliance with the comprehensive plan is by operation of law *not* a spot zone"⁹ is neither supported by the cited authority (*Smith v. Skagit County, supra,*) nor a legally correct statement of law. As respondents at 14 point out, zoning that is inconsistent with the applicable comprehensive plan may be determined to be spot zoning. But the converse does not hold true, that a zoning amendment in conformance with a comprehensive plan can never amount to spot zoning. In fact, the state's first two spot zoning cases involved combined comprehensive plan and zoning amendments. Washington's seminal spot zoning case, *Smith v. Skagit County*, involved review of not just a rezone but of changes in both "the comprehensive zoning plan and interim zoning ordinance and maps[.]" 75 Wn.2d at 717. The court's second spot zoning case, *Chrobuck v. Snohomish County*, 78 Wn.2d 858, 859, 480 P.2d 489 (1971) also reviewed and set aside as spot zoning

⁹ Emphasis in original.

combined comprehensive plan and zoning amendments, to change an area from a rural residential to a heavy industrial classification.

Even where plan and zoning amendments are concurrently enacted, as occurred in the present case, spot zoning issues may arise where the plan and zoning amendments are enacted “for private gain designed to favor or benefit a particular individual or group and not the welfare of the community as a whole.” *Smith v. Skagit County*, 75 Wn.2d at 743. Whether amendments constitute spot zoning presents a question of mixed fact and law. The superior court’s summary dismissal deprived appellants of the opportunity to present evidence and argument on the merits of their spot zoning claims. The superior court’s dismissal of those claims should be reversed and those claims should be reinstated and remanded for discovery and trial.

B. The Court Has Jurisdiction to Review the Planned Action Ordinance.

Davidson and Continental demonstrated within their Opening Brief at 18-26 why the planned action ordinance was ripe for review when this action was commenced. However, Touchstone and the City at 15-19 argue that the ordinance is not ripe for review on asserted grounds that it is “purely procedural” and has no

substantive effect, that the ordinance itself is a form of SEPA compliance and that its review would only be appropriate upon later issuance of development approvals. Respondents' arguments are based upon a mischaracterization of the effect of the planned action ordinance and a conflation of the concepts of SEPA determination and SEPA action.

First, respondents' characterizations of the effect of Ordinance 4175 are incorrect. Respondents assert that Ordinance 4175 "is an ordinance setting forth environmental considerations relevant to possible future implementing actions." But it does much more. Ordinance 4175 sets objective, numerical thresholds for development, prescribes mitigations applicable to development at those thresholds and exempts any developments meeting those thresholds and mitigation requirements from any further SEPA review. CP 289-93.

Development thresholds are established under Section 3D, of Ordinance 4175, which in part provides:

D. Planned Action Thresholds. The following thresholds shall be used to determine if a site-specific development proposed within the Planned Action area is contemplated by the Planned Action and has had its environmental impacts evaluated in the Planned Action EIS. ...

* * *

(2) *Land Use Review Threshold.*

(a) The Planned Action designation applies to future development proposals that are comparable or within the ranges established by Planned Action FEIS Review Alternative, as shown below:

Land Use	Area A (Parkplace)	Area C (Altom) [omitted]
Office	1,200,000 sq.ft.	[]
Residential	<i>Not Analyzed</i>	[]
Retail/Commercial	592,700 sq.ft. ³	[]
Total	1,792,700 sq.ft.	[]

* * *

(3) *Building Heights, Bulk, and Scale.* Building heights, bulk, and scale shall not exceed the maximums reviewed in the Planned Action EIS.

Section 3D(4)(d) establishes traffic and parking mitigation for developments meeting the above thresholds.

(d) *Transportation Improvements.*

(i) *Intersection Improvements.* The Planned Action will require off-site transportation improvements identified in Exhibit B to mitigate significant impacts. ...

(ii) *Transportation Management Program.* The owners or operators of development projects within Areas A and C shall prepare and implement Transportation Management Programs (TMP).... The TMP for Area A shall include the TMP elements identified in the transportation mitigation measures in the Planned Action EIS, attached as Exhibit C to this ordinance. ...

And Section 3F(1) provides that developments meeting the development thresholds and containing the listed mitigation would be freed of further SEPA review:

(1) Upon designation by the City's Planning and Community Development Director that the project qualifies as a Planned Action pursuant to this Ordinance and WAC 197-11-172, the project shall not require a SEPA threshold determination, preparation of an EIS, or be subject to further review under SEPA.

While Ordinance 4175 itself does not authorize actual land development (which would be authorized through subsequent building permits), it accepts and insulates from later SEPA review a stated level of development.

Judicial review of SEPA compliance for similar types of land use actions has long been recognized. For example, the setting of development thresholds (through limitations on use and intensity) and the adoption of mitigation for traffic and parking (through impact fee ordinances and schedules) occurs through the adoption of other forms of land use regulations that require SEPA review and most often preparation of an EIS, WAC 197-11-158 (providing for integrated GMA and SEPA review), even though those development regulations do not themselves authorize the actual

development of land.¹⁰ Likewise here, even though Ordinance 4175 does not specifically authorize land development, which would occur through the approval of building permits, it does establish standards and limits applicable to those later development approvals.

Second, respondents' arguments that Davidson and Continental's challenge to the planned action ordinance is an "orphan" SEPA claim unlinked to any underlying governmental action rests upon an improper conflation of the two concepts of SEPA procedural determination and substantive agency action. SEPA distinguishes between these two types of decisions.

SEPA procedural determinations consist of: a threshold determination of whether or not an EIS is required; a determination of EIS adequacy; and a determination of whether a project should be mitigated or denied under SEPA mitigation authority. See RCW

¹⁰ See e.g., *Byers v. Board of Clallam County Com'rs*, 84 Wn.2d 796, 801-802, 529 P.2d 823 (1974)(The adoption of interim zoning constitutes a proposal for legislation requiring analysis through an environmental impact statement.) and *Ullock v. City of Bremerton*, 17 Wn. App. 573, 581, 565 P.2d 1179 (1977)(Even though a nonproject zoning action has no immediate or measurable environmental consequences, an environmental impact statement must consider impacts of maximum potential development that would be allowed.)

43.21C.075(3)(a) and (b).¹¹ These procedural determinations are distinguished from the underlying decisions or “actions” for which SEPA determinations are rendered. In SEPA parlance, an “action” is the underlying, substantive governmental decision on which a SEPA “determination” is rendered. RCW 43.21C.076(8)¹²

While it is true that SEPA requires linkage, respondents’ “orphan appeal” argument does not apply because this appeal involves both a challenge to a substantive agency action and a SEPA procedural determination. Ordinance 4175 is a “substantive agency action” under SEPA because it sets development thresholds and establishes mitigations. For these standards and mitigations the City has prepared and found to be adequate an environmental impact statement. Ordinance 4175 Sec. 2D (finding of EIS adequacy). CP 288. Thus the City has rendered a SEPA determination (finding of EIS adequacy) to support its underlying action in establishing development thresholds and mitigations through the planned action ordinance. Davidson and Continental’s challenge to Ordinance 4175 is not an “orphan appeal” because

¹¹ See the SEPA regulations at WAC 197-11-734, 736 and 766, defining terms of “determination of non-significance”, determination of significance” and “Mitigated DNS”.

¹² The term “action” is further defined within the SEPA regulations at WAC 197-11-704.

appellants challenge both the City's substantive action and its SEPA determination.

Third, to accept respondents' argument at 19, that the planned action ordinance is a form of SEPA determination and no right of review presently exists, would effectively prevent any judicial review of the SEPA determination rendered for the planned action ordinance. As cited above, Section 3F(1) of Ordinance 4175 completely eliminates SEPA review for permits and approvals falling within the thresholds established by the planned action ordinance. Further, for qualifying planned actions there would be no SEPA determination or SEPA notice, unless notice were otherwise required by the underlying permit (which typically is not the case for a building permit). Thus even if one learned of the issuance of a building permit, which, without notice, may not occur until well after the limitation period has run,¹³ there would be no SEPA determination subject to appeal. As a result, acceptance of respondents' position would effectively foreclose any right to judicial review of the EIS adopted for the planned action ordinance. This may be respondents' intended outcome, but nothing within the

¹³ See e.g., *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, ___P.3d ___, 2009 WL 4043370 (2009) (appeals barred for lack of timely challenge to permit and SEPA determination, even though plaintiffs lacked notice of their issuance)

planned action provision of SEPA, RCW 43.21C.031(2) suggests that the legislature intended such a result.

C. Exclusive Jurisdiction to Invalidate Agency Action for Noncompliance with SEPA Does Not Lie Before the GMHB.

In its Opening Brief at 26-32, Davidson and Continental show that the GMA grants limited appellate review authority to the GMHB and that the State Constitution under Article IV, Section 6 grants original jurisdiction to the superior court review of administrative decisions for unlawful and arbitrary action. Touchstone and the City respond by misstating appellants' arguments, by relying upon inapplicable caselaw and then by suggesting, without citation to authority, that the Court of Appeals is not the proper forum for review of this issue. Respondents obfuscate.

First, respondents begin by incorrectly claiming that appellants concede that the GMHBs hold exclusive jurisdiction over GMA and SEPA claims, and further, that appellants maintain that the GMHB lacks authority to invalidate agency action for noncompliance with SEPA. To the contrary, Davidson and Continental do not concede that exclusive jurisdiction lies before the GMHB over their GMA and SEPA claims, since their superior

court action and their appeal in this case are premised upon the GMHB not holding exclusive jurisdiction. Further, Davidson and Continental recognize in their Opening Brief at 29-30 that the GMHB has the authority to invalidate local governmental action for noncompliance with GMA and/or SEPA, but that that authority is limited by RCW 36.70A.302(1)(b). As appellants go on to establish, the GMA's delegation of review authority to the GMHB does not abrogate the court's review authority under Article IV, Sec. 6. Accordingly, the court retains its constitutional authority to apply longstanding judicial precedent and invalidate government action taken in violation of statute.

Second, Touchstone and the City rely upon inapplicable authority. For their assertion that "the GMHB has exclusive jurisdiction over [appellants'] GMA and SEPA challenges" respondents cite to *Coffey v. City of Walla Walla*, 145 Wn. App. 435, 437, 187 P.3d 272 (2008), a decision that does not support their position. In *Coffey*, residents within the City of Walla Walla filed a land use petition in superior court to challenge the city's amendment of its comprehensive plan. The superior court dismissed the land use petition. The Court of Appeals affirmed, on grounds that RCW 36.70A.280 granted the GMHB jurisdiction over

petitions alleging a local jurisdiction not to be acting in compliance with the GMA. The court concluded that “[t]he superior court lacked subject matter jurisdiction to consider the claim since the GMHB had exclusive authority to do so.” 145 Wn. App. at 441. But the court went on to recognize circumstances under which both the GMHB and the superior court would each have jurisdiction over actions that may have been taken together, such as where an applicant seeks both a comprehensive plan and a rezone in the same proceeding. *Id.* at 442. Although Davidson and Continental do not contend that appeal remedies of the comprehensive plan amendment (creation of Design District 5A for Touchstone’s property) and the zoning amendment (creation of the new CBD 5A zoning district for Touchstone) should have been filed in separate tribunals, they do maintain that the board and the court have overlapping jurisdiction in issuing remedial relief under SEPA, See Opening Br. at 30-32. Of course, the court in *Coffey* does not address superior court jurisdiction under Article IV, Sec. 6 of the State Constitution and it does not hold that jurisdiction over all planning and zoning enactments exclusively lies before the GMHB.

The only other decision cited by respondents on this issue, *Kucera v. Department of Transportation*, 140 Wn.2d 200, 995 P.2d

63 (2000), also is off point. Touchstone and the City cite to *Kucera* for the proposition that an injunction is not *automatically* granted for governmental action taken without SEPA review. That may be so, but it has no bearing on this case. At issue in *Kucera* was a preliminary injunction granted by the superior court against passenger ferry operations authorized without SEPA review. Consistent with well-established judicial precedent governing the issuance of preliminary injunctions, the court correctly held that the superior court had erred in granting preliminary injunctive relief without first balancing the equities and considering the availability of alternative remedies at law. By contrast, the challenge by Davidson and Continental to the continued validity of the planning and zoning amendments rendered in violation of SEPA does not ask for the exercise of either equitable relief or for preliminary injunctive relief, but simply the exercise of the court's inherent power under Article IV, Sec. 6 to review administrative decisions for illegal action. See *Saldin Securities, Inc. v. Snohomish County*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998). The *Kucera* court at 140 Wn.2d 219-220 was careful to distinguish its limitations upon the exercise of preliminary injunctive relief from the well-established body of caselaw invalidating governmental action for

noncompliance with SEPA.¹⁴ Thus, the holding in *Kucera* reaffirms longstanding judicial precedent invalidating agency action taken in violation of SEPA.

Respondents at 22 close their response on this issue by asserting that the Court of Appeals is not a proper forum for the presentation of this issue. Even though this assertion lacks any citation to authority,¹⁵ it raises the question: if not here, then what would be the proper forum to address the interconnected legal

¹⁴ In the following passage the *Kucera* court at 219-20 cites to the same cases relied upon by appellants in their Opening Brief at 28-29:

Eastlake Community Council v. Roanoke Assocs., Inc., 82 Wash.2d 475, 487, 513 P.2d 36, 76 A.L.R.3d 360 (1973) (failure to file an EIS prior to renewal of a building permit rendered the permit void); *Sisley v. San Juan County*, 89 Wash.2d 78, 87, 569 P.2d 712 (1977) (reversing DNS issued for construction of a marina and remanding for preparation of an EIS); *Lassila v. City of Wenatchee*, 89 Wash.2d 804, 816-17, 576 P.2d 54 (1978) (vacating amendment of city's comprehensive plan which contained environmental assessment but not an EIS); *Noel v. Cole*, 98 Wash.2d 375, 655 P.2d 245 (1982) (failure to prepare EIS prior to entering contract permitting logging on public land rendered contract ultra vires), *superseded by statute on other grounds by Dioxin/Organochlorine Ctr. v. Pollution Control Hr'gs Bd.*, 131 Wash.2d 345, 932 P.2d 158 (1997).

¹⁵ *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (no consideration given to arguments presented without authority).

issues presented in appellants' two pending appeals?¹⁶ While these issues are interrelated, they come to the court through different causes of action, in this appeal through an original action brought under Article IV, Sec. 6 of the State Constitution and in the GMHB appeal through the state Administrative Procedures Act, Ch. 34.05 RCW.¹⁷ This court is the appropriate forum to resolve these issues.

D. The Superior Court Erred in Dismissing Appellants' Challenges to the Design Review Guidelines.

Davidson and Continental also challenge the special design review guidelines adopted for the Touchstone project on grounds that they, too had been enacted in violation of SEPA. Even though GMA contains no goals, standards or other criteria requiring, or guiding the content of, design review guidelines, the court nonetheless dismissed the challenge to the design review

¹⁶ The two appeals present the following interconnected issue: whether the GMHB in exercising its invalidity authority can lawfully disregard longstanding judicial precedent invalidating agency action taken in violation of SEPA, and if so, whether Article IV, Sec. 6 of the State Constitution grants the superior court the authority to review and invalidate governmental action for SEPA violations.

¹⁷ As of the date of this writing, motions for discretionary review and consolidation with the instant appeal are pending in the matter of *Davidson Serles et al. v. Central Puget Sound Growth Management Hearings Board, et al.* Cause No. 76751-2-I.

guidelines on grounds that jurisdiction over this issue lay exclusively before the GMHB. CP 582. In response, the City and Touchstone argue that the design guidelines are development regulations adopted under GMA and that the GMHB has authority to review appellants' challenge to the design guidelines, even though they are challenged for noncompliance with SEPA and not for noncompliance with GMA (since no GMA standards apply). The law does not support respondents' contentions.

First, even though the design guidelines may be a form of development regulation, they do not thereby become subject to the jurisdiction of the GMHB. Appellants do not state or "concede" as respondents assert at 23, that "if the design guideline ordinance constitutes a 'development regulation' under GMA, then the GMHB has exclusive jurisdiction to determine its lawfulness." Rather, as the decision in *Wenatchee Sportsmen Ass'n. v. Chelan County*, 141 Wn.2d 169, 178, 4 P.3d 123 (2000) makes clear, the GMHB only has jurisdiction to hear a petition that alleges that the adoption or amendment of a plan or development regulation is not in compliance with the GMA.

While the term “development regulations” is broadly defined at RCW 36.70A.030(7)¹⁸ not all development regulations falling within that broad definition are adopted to meet the requirements of the GMA. For example, the definition of development regulations includes subdivision ordinances, but such measures are adopted under the Subdivision Act, Ch. 58.17 RCW, not GMA. Also, building codes place controls on development and land use activities, but they are not adopted to meet requirements of GMA and are not reviewable by the GMHB. The same is true of the design review guidelines. The GMA neither requires, nor contains criteria applicable to, the adoption of design guidelines. Accordingly, Ordinance 4172 makes no recitation to the GMA as authority for the adoption of the design guidelines. CP 233-34.

¹⁸ The GMA at RCW 36.70A.030(7) defines “development regulations” as follows:

(7) “Development regulations” or “regulation” means the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto. A development regulation does not include a decision to approve a project permit application, as defined in RCW 36.70B.020, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city.

Respondents' statement at 23-24 that "Ordinance 4172 was in fact adopted pursuant to the City's GMA authority" is based upon bootstrapping. In support of this assertion, respondents cite to the declaration of Kirkland's Planning Director, Eric Shields (prepared by Touchstone's counsel), in which Mr. Shields states that "the Plan and Guidelines constitute development regulations administered by the City of Kirkland and its Design Review Board." CP 163. Of course, Mr. Shields' statement doesn't make the design guidelines an enactment under GMA. That determination is governed by the GMA itself, which contains no provision, guidance or requirement for the adoption of design guidelines.

Respondents next assert that even though Davidson and Continental challenge the design guidelines for lack of compliance with SEPA and not GMA (again, because no GMA requirements pertain), appellants were nonetheless obliged to bring the challenge to the GMHB on the asserted grounds that "[e]ither or both [a GMA claim or a SEPA claim] suffice to afford exclusive jurisdiction to the GMHB . . ." The law does not support this position either. The Board has authority to review SEPA compliance only "as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040... ." RCW 36.70A.280(1)(a). The Board does not

have jurisdiction to consider SEPA claims involving just any development regulations, only those that have been adopted under RCW 36.70A.040, which do not include design guidelines.

Consistent with this construction of GMHB authority, the Central Puget Sound Board correctly ruled in *Hayes v. Kitsap County*, No. 95-3-0081c, Order Granting Motion to Dismiss at 7 (April 23, 1995), that it “does not have independent SEPA jurisdiction where it lacks subject matter jurisdiction over the underlying action.” Here, the board lacks jurisdiction over appellants’ SEPA challenge to the design guidelines because it lacks jurisdiction over the substance of the design guidelines.

III. CONCLUSION

For the reasons stated above and within their Opening Brief, appellants’ claims of spot zoning should be reinstated. Because the GMHB has ruled the EIS prepared for the actions to be inadequate,

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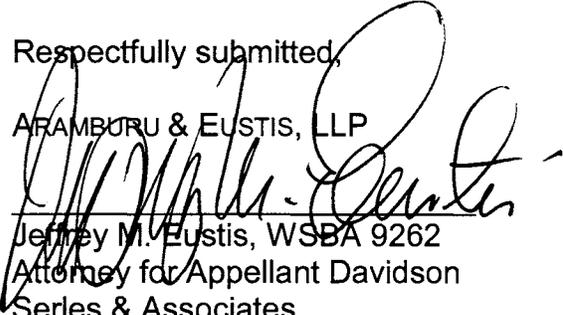
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appellants further ask the court to invalidate the planned action ordinance, the plan and zoning amendments and the design review guidelines.

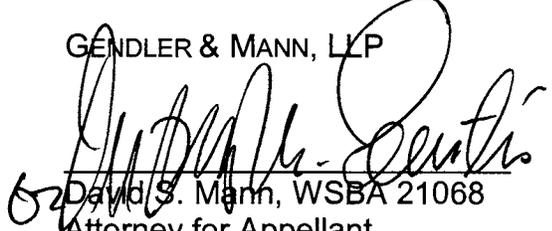
DATED this 2nd day of February 2010.

Respectfully submitted,

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per authorization

NO. 64072-1
(CONSOLIDATED WITH
NO. 65171-9)

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

DAVIDSON SERLES & ASSOCIATES, a Washington general
partnership,

Appellant,

v.

CITY OF KIRKLAND, a municipal corporation and
TOUCHSTONE, a Washington Corporation, et al,

Respondents,

and

TR CONTINENTAL PLAZA CORP., a Delaware Corporation,

Intervenor Appellant

DECLARATION OF SERVICE
FOR REPLY BRIEF OF APPELLANTS
DAVIDSON AND TR CONTINENTAL

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DECLARATION OF SERVICE

I am an employee in the law offices of Aramburu & Eustis, LLP, over eighteen years of age and competent to be a witness herein. On February 22, 2010, an original and copy of the Opening Brief of Appellants was filed at the Court of Appeals and copies were served by first class mail on counsel of record, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED: February 22, 2010



Carol Cohoe

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STATE OF WASHINGTON
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