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

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ORIGINAL

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I. INTRODUCTION

Davidson Serles & Associates and TR Continental Plaza appeal the superior court's dismissal of their actions on summary judgment for lack of subject matter jurisdiction. By actions brought under Article IV, Section 6 of the State Constitution and for declaratory and injunctive relief, Davidson and Continental have challenged a series of ordinances enacted by the Kirkland City Council to amend land use, environmental and design review standards for an area within the Kirkland Central Business District (CBD) adjacent to their properties. Those ordinances included the adoption of entirely new land use districts under the comprehensive plan and zoning code, the creation of a planned action area exempt from further review under the State Environmental Policy Act (SEPA), Chapter 43.21C RCW, and the establishment of special design review guidelines, all applicable to property under a single ownership.

Because these measures represented a gross departure from prior planning and gave special treatment to a single set of property owners (the respondents Touchstone), Davidson and Continental challenged the plan and zoning amendments in this action as spot zoning. They also challenged the planned action ordinance and special design review guidelines for violation of SEPA, for failure of the City to prepare a legally adequate

environmental impact statement (EIS). The superior court entirely dismissed the actions by Davidson and Continental on respondents' motions for summary judgment. The court's dismissal of their actions amounts to clear error.

The superior court's dismissal of appellants' spot zoning claim amounted to an abuse of discretion because the court did so without respondents having ever moved, requested or argued for dismissal of those claims. As a result, appellants were deprived of the opportunity to demonstrate the basis for the court's subject matter jurisdiction over those claims.

The superior court's dismissal of appellants' challenges to the planned action ordinance and the EIS also amounts to error. The court dismissed appellants' SEPA claims upon its reasoning that SEPA requires that any challenge to an EIS be linked to a challenge to a governmental action and upon finding that the challenges to the EIS were unrelated to any governmental action. However, appellants' challenge to the EIS was in fact linked to an appeal of a specific governmental action, namely appellants' challenge to the planned action ordinance.

The court's dismissal of claims to invalidate all governmental actions taken in violation of SEPA was in error as well. In a parallel action, Davidson and Continental had appealed the plan and zoning amendments to the GMHB, alleging that the amendments

had been adopted in violation of the Growth Management Act (GMA) and SEPA. In order to apply longstanding judicial precedent that actions taken in violation of SEPA be invalidated, appellants also challenged in superior court the validity of the plan and zoning amendments under SEPA. The superior court dismissed those claims as well, apparently on the belief that appellants' sole remedy lay before the GMHB. In this ruling, the court erred as well. Under Article IV, section 6 of the constitution and SEPA, the superior court retains subject matter jurisdiction to review and invalidate governmental action enacted in violation of SEPA. Nothing within the GMA or the creation of the GMHB has removed, or could remove, that authority from the court. The superior court's dismissal of appellant claims to invalidate plan and zoning amendments taken in violation of SEPA was in error.

And finally, the superior court erred in dismissing appellants' SEPA challenges to the design review guidelines, wrongly believing that those claims lay before the GMHB. Because appellants' challenges to the design review guidelines were brought under SEPA and not GMA, jurisdiction properly lay before the superior court.

The superior court's dismissal of this action should be reversed and Davidson and Continentals' actions reinstated and remanded to the superior court.

II. ASSIGNMENTS OF ERROR

A. Appellants Davidson Serles and Continental Plaza assign error to the Findings, Conclusions and Order Granting Summary Judgment of Dismissal of June 4, 2009.[1]

B. Davidson and Continental assign error to the Order Denying Motion for Reconsideration of July 27, 2009.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Davidson and Continental challenged as spot zoning the City of Kirkland's adoption of a plan designation and a zoning district applicable to the property of a single landowner, the Touchstone Corporation. Within their motions to dismiss appellants' complaints, the respondents advanced no claim, argument or authority for dismissal of appellants' spot zoning claims. Nonetheless, the court dismissed appellants' spot zoning claims anyway. Did the trial court abuse its discretion by summarily dismissing spot zoning claims without ever affording appellants the opportunity to brief or argue the basis for their claims?

B. The State Environmental Policy Act at RCW 43.21C.075(6)(c) provides that judicial review under SEPA shall be

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[1]Even though the trial court purported to enter "findings" and "conclusions" within its summary judgment order, error is not separately assigned to those findings and conclusions since findings entered on summary judgment are "superfluous" and the appellate court conducts the same review as that conducted by the superior court anyway. *Gates v. Port of Kalama*, 152 Wn. App. 82, 87, 215 P.3d 983 (2009)

of the governmental action together with its accompanying environmental determinations. At RCW 43.21C.031, SEPA authorizes the adoption by local government of a planned action ordinance, but such an ordinance must be supported by a legally adequate Environmental Impact Statement (EIS). *Id.* Through Ordinance 4175, the City of Kirkland adopted a planned action ordinance and determined to be adequate an EIS prepared in support of that ordinance. Within this action Davidson and Continental have challenged the planned action ordinance together with the City's accompanying EIS. The superior court dismissed appellants' challenge as a freestanding, "orphan" appeal of an environmental determination unconnected to any governmental action. Where appellants have challenged both the planned action ordinance and the EIS enacted in support of that ordinance did the court err in dismissing their action as an "orphan" SEPA appeal?

C. In parallel proceedings before the superior court and the Growth Management Hearings Board (GMHB), Davidson and Continental have challenged the validity of the City of Kirkland's amendments to its comprehensive plan and zoning code for lack of support by a legally adequate EIS. The superior court ruled that jurisdiction over the claim lay before the GMHB. The GMHB ruled the EIS to be inadequate, but did not find the actions taken in reliance upon the inadequate EIS to be invalid. Even where the

underlying actions are appealable to the GMHB does the superior court retain the authority to invalidate governmental action taken upon an inadequate EIS?

D. Davidson and Continental also have challenged the validity of the design review guidelines for lack of compliance with SEPA. Under RCW 36.70A.280(1)(a) the GMHB only has jurisdiction over those plan and development regulations alleged not to be in compliance with GMA, or with SEPA as it relates legislation adopted under GMA. The special design guidelines adopted for the Touchstone site were not adopted under any provisions of GMA. Nonetheless, the superior court dismissed appellants' challenges to the design guidelines on grounds that exclusive jurisdiction lay before the GMHB. Where the GMHB lacked jurisdiction over appellants' challenges to the design guidelines, were their challenges to the design guidelines in superior court wrongfully dismissed?

IV. STATEMENT OF THE CASE

A. Actions by the City of Kirkland

Davidson and Continental own separate, adjacent properties in downtown Kirkland within the CBD 5 zoning district. CP417. Consistent with the maximum, five story zoning in effect at the time, an office building was constructed on the Continental site in 1990

and on the Davidson site in 1995. *Id.* The developers of these properties made investments in those buildings in reliance upon the five story height limitation of the CBD 5. The five story limitation also applied to other properties within the CBD 5 zoning, including those directly to the west and downslope of the Davidson and Continental sites, thus preserving to the Davidson and Continental properties views of the downtown, Lake Washington and areas beyond. CP 421.

On an 11.5 acre site directly to the west of the Davidson and Continental properties, the respondent Touchstone Corporation in 2007 proposed a major redevelopment, including 1.2 million square feet of office space, 592,700 square feet of retail and other commercial space and 3,500 parking spaces.[2] In order to accommodate Touchstone's proposal, the City was required to amend its comprehensive plan and zoning code to increase building heights from a range of three to five stories to a maximum of eight stories, to reduce building setbacks from street frontages to increase allowable lot coverage and to reduce parking requirements. CP 419. To further accommodate Touchstone's proposal, the City also proposed the adoption of a planned action

[2] The locations of the Touchstone, Davidson and Continental properties are shown in the site plan at CP 427, a copy of which is set forth at Appendix A to this brief.

ordinance[3] and a set of design review guidelines that would apply uniquely to the Touchstone development. In support of the planned action ordinance and related planning and zoning amendments, the City in April 2008 prepared a Draft EIS. CP 431-434. However, the Draft EIS considered no alternatives to these proposals, other than development under the existing comprehensive plan and zoning, which was treated as a "no action" alternative. CP 431 – 434 (Draft EIS, pp 2-20 to 2-23). The Draft EIS also covered plan and zoning amendments on two other sites within the central business district. CP 431.

After the Kirkland Planning Commission held hearings on the City's proposed comprehensive plan amendments, zoning code amendments and planned action ordinance, the City in October 2008 prepared its Final EIS for the proposals, which was entitled the "Final Environmental Impact Statement: Downtown Area Planned Action Ordinance." CP 437 *et seq.* The FEIS set forth for the first time an alternative not presented in the Draft EIS. This alternative, denominated the "FEIS Review Alternative", provided for certain increased building setbacks, but for the 11.5 acre Touchstone site it still provided for 1,792,700 square feet of mixed

[3] A planned action ordinance is a local enactment authorized under RCW 43.21C.031(2) of SEPA, which allows a city or county to define particular intensities of uses within a particular area to be exempt from later SEPA review. However, the exemption from later SEPA review rests upon an adequate EIS for the planned action having first been prepared.

use development, maximum building heights of 8 stories across the site and a reduction of on-site parking requirements by approximately 30%. CP 469-474 (FEIS at 2-24 – 2-29). Because it had been presented for the first time within the Final EIS, that alternative was not subject to review or comment within the Draft EIS.

In December 2008, the Kirkland City Council adopted four ordinances to allow for the redevelopment of the Touchstone site: Ordinance 4170 amended the City of Kirkland's comprehensive plan to create a new Design District 5A for Touchstone's development; Ordinance 4171 amended the zoning code to create a new CBD5A zoning district on the same site; Ordinance 4172 amended the city's design review guidelines to adopt design standards particularly applicable to the Touchstone development; and Ordinance 4175 adopted a planned action ordinance that establishes thresholds and mitigations for Touchstone's intended developments. These ordinances are set forth at CP 189-266 and 286-308.

Within this action, Davidson and Continental challenge each of the four ordinances for failure to be supported by an adequate EIS. They further challenge the plan amendment and the zoning amendment as unlawful spot zoning. CP 7 - 8 (Davidson complaint) and CP 159 - 60 (Continental complaint). In a parallel action,

Davidson and Continental also appealed the plan and zoning amendments to the GMHB. CP 418. SEPA challenges to the plan and zoning amendments were brought before the superior court and the GMHB in order that those actions would be subject to the full administrative and judicial remedial authority for actions taken in violation of SEPA.

B. The Superior Court Dismisses Appellants' Complaints.

On motions brought by Touchstone and the City of Kirkland, the superior court dismissed the complaints by Davidson and Continental for lack of subject matter jurisdiction. CP 577 *et seq.* Although Touchstone and the City never moved or argued for dismissal of appellants' spot zoning claims, CP 8 and 160, the court dismissed them anyway. CP 584. Even when appellants in a motion for reconsideration called to the court's attention its dismissal of claims never briefed or argued in respondents' motions, CP 587, the court adhered to its prior ruling and denied reconsideration. CP 649. From these rulings Davidson and Continental appealed. CP 652 and 656.

C. The GMHB Finds the EIS Inadequate.

In the meanwhile, the GMHB on October 5, 2009 rendered its Final Decision and Order in the parallel challenge to the plan and zoning amendments (Ordinances 4170 and 4171). Among

other rulings, the Hearings Board found the EIS to be inadequate for failure to consider alternatives and accordingly found Ordinances 4170 and 4171 to have been adopted without compliance with SEPA. However, the Board allowed those ordinances to stand as validly enacted. See Final Decision and Order at 16 and 20 rendered in *Davidson Serles, et al. v. City of Kirkland,* CPSGMHB No. 09-3-0007c (October 5, 2009). For ease of reference, a copy of this decision is set forth at Appendix B to this brief.

Davidson and Continental have appealed the Board's denial of invalidity to the superior court within the action of *Davidson Serles, et al. v. CPSGMHB,* King County Cause No. 09-2- 43060-8 SEA and have applied to the Board to certify the appeal for direct review to this court. In a separate action, *City of Kirkland v. CPSGMHB,* King County Cause No. 09-2-43855-2 SEA, the City of Kirkland and Touchstone have sought review of the Board's finding of EIS inadequacy, as well as an issue related to transportation planning.

V. STANDARD OF REVIEW

The issues presented in this appeal are reviewable *de novo.* The respondents moved for dismissal under CR 12(b)(1) and 12(b)(6) on grounds that the court lacked subject matter jurisdiction

over appellants' claims. CP 166. The motions relied on submissions outside of the pleadings and were brought by summary judgment.

Whether dismissal was appropriate presents a question of law that the court reviews *de novo. State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n.,* 140 Wn.2d 615, 629, 999 P.2d 602 (2000). "Under CR 12(b)(6), dismissal is appropriate only when it appears 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). A motion to dismiss for failure to state a claim should be granted "sparingly and with care, and only in the unusual case in which the plaintiff's allegations show on the face of the complaint an insuperable bar to relief." *Id.* (internal quotations and citations omitted).

Under the summary judgment standard, the court reviews the issues *de novo* as well, by engaging in the same inquiry as the trial court and considering the facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Wilson v. Steinbach,* 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). In the end, summary judgment may be upheld only if no genuine issues of material fact exist and the moving party is entitled to

judgment as a matter of law. *Anderson v. State Farm Mut. Ins. Co.,* 101 Wn.App. 323, 329, 2 P.3d 1029 (2000).

Davidson and Continental demonstrate below that their claims were properly brought and the superior court erred as a matter of law in dismissing their actions.

VI. ARGUMENT

A. The Trial Court Abused Its Discretion By Summarily Dismissing Appellants' Spot Zoning Claims Without Ever Affording Them the Opportunity to Brief or Argue the Basis for Their Claims.

By enacting Ordinances 4170, 4171, 4172 and 4175 the City of Kirkland adopted a set of legislation uniquely applicable to a single, 11.5 acre parcel of land under a single ownership. For this single parcel of land, the City created a new comprehensive plan land use designation (Design District 5A), a new zoning category (CBD 5A), a planned action area, to avoid later SEPA environmental review, and a separate set of design guidelines. These changes granted the landowner, Touchstone, rights to construct approximately 1 million square feet more office and commercial space than was previously allowed and at heights greater than other buildings within the Kirkland Central Business District. Moreover, while allowing this intensity of development, the amendments reduced parking requirements by 30% below

standard code requirements. CP 432, 433 and 423.

For singling out the Touchstone site for special treatment, Davidson and Continental challenged the new plan and zoning designations as spot zoning. Davidson and Continental brought their spot zoning claims alleging such actions to be arbitrary and capricious.[4]

Spot zoning occurs when a particular parcel of land is singled out for special treatment:

> Spot zoning has come to mean arbitrary and unreasonable zoning action by which a smaller area is singled out of a larger area or district and specially zoned for a use classification totally different from and inconsistent with the classification of surrounding land, and not in accordance with the comprehensive plan. Spot zoning is a zoning 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 715, 743, 453 P.2d 832 (1975).

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[4] At paragraph 4.4 of their respective complaints, Davidson and Continental challenge the planning and zoning classifications constituting unlawful spot zoning:

> 4.4 By failing to consider any other objectives or alternatives for the Planned Action A other than those proposed by an individual owner, Touchstone, by singling out that separate ownership from the larger CBD and creating for that ownership special planning and zoning classifications (namely, Design District 5A and CBD 5A) whose requirements, including those for building height, intensity and parking, are totally different from and inconsistent with the requirements for surrounding lands, and by abruptly changing long-established provisions for pedestrian access, parking and view protection to serve one particular landowner, <u>the City Council has acted arbitrarily and unreasonably by bestowing special favors upon an individual property owner, by failing to act in the interest of the public at large and by engaging in spot zoning</u>. (Emphasis supplied.). CP 8 and 160.

Under long-established caselaw – not provisions under GMA or through GMHB decisions – spot zoning is *per se* unlawful and invalid. *Smith* at 744 ("...it is universally held that a spot zoning . . . is invalid . . ."). Davidson and Continental challenged the adopted amendments as spot zoning because they carved out a single parcel under a single ownership and granted it special privileges not accorded to any other properties in the City.

However, the trial court dismissed appellants' spot zoning claims even though those claims were never part of respondents' motion for summary judgment. The court's summary dismissal of appellants' spot zoning claims amounts to an abuse of discretion because it denies appellants' their rights to seek review of arbitrary and capricious action without ever affording them the opportunity to address, brief or argue the issue.

It is undisputed that respondents' motions for summary judgment did not address, argue or move for dismissal of appellants' spot zoning claims. See CP 165 and 517 (Touchstone's motion and reply for summary judgment). Only at oral argument in a brief reply to Davidson and Continental's arguments did Touchstone even speak to plaintiffs' spot zoning claims. CP 629. Whatever the merits of its belated arguments, Touchstone could not at that stage bootstrap into its summary judgment motion relief that the motion never sought. As the court has clearly held:

> It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment. Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond. It is for this reason that, in the analogous area of appellate review, the rule is well settled that the court will not consider issues raised for the first time in a reply brief.

White v. Kent Medical Center, Inc., 61 Wn. App. 163, 168-169, 810 P.2d 4 (1991)(citations omitted). The court in *White* reversed a superior court ruling on summary judgment that had been granted in part upon arguments first raised in rebuttal papers. Raising the argument during the summary judgment hearing puts Touchstone in no better position. As the court has also held, "[a]bsent a change in applicable law, [the court] will not consider an issue raised for the first time during oral argument." *State v. Kirwin,* 137 Wn. App. 387, 394-395, 153 P.3d 883 (2007).

Even though the superior court's summary dismissal of spot zoning claims prevented the issue from ever being addressed, jurisdiction over appellants' spot zoning claims clearly lay before the superior court.

Under Article IV, section 6 "the superior court has inherent power . . . to review administrative decisions for illegal or manifestly arbitrary acts." *Saldin Securities, Inc. v. Snohomish County*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998). While the exercise of review under Article IV, section 6 lies in the discretion of the court, the

refusal to exercise review must be supported by tenable reasons. *Id.* at 846, fn. 5, citing to *Bridle Trails Community Club v. City of Bellevue*, 45 Wn.App. 248, 252, 724 P.2d 1110 (1986).

But the superior court dismissed appellants' claims of arbitrary and capricious conduct for no reason at all; no reasons for dismissal were advanced by respondents and no reasons given by the court's orders. Even giving the superior court the benefit of the doubt, that it had internally rationalized dismissal of appellants' spot zoning claims on grounds that an appeal to the GMHB already provided them an adequate remedy, its action still would not be well-founded. Because review under Article IV, section 6 is constitutionally based, the court's power may not be abrogated by statute. *Clark County Public Utility Dist. No. 1 v. Wilkinson*, 139 Wn.2d 840, 846, 991 P.2d 1161 (2000)("The Legislature may not intrude by statute on this constitutional power."). Even if it formed the basis for the court's decision, the availability of an appeal right to the GMHB could not defeat appellants' ability to bring claims in superior court for arbitrary and capricious conduct.

The court's dismissal of appellants' spot zoning claims amounts to an abuse of discretion and should be reversed and remanded for trial.

B. Appellants' Challenges to the Planned Action Ordinance and the EIS Are Ripe for Review.

Davidson and Continental challenged the planned action ordinance adopted for the Touchstone site on grounds that the City failed to prepare an adequate EIS, an essential requirement for the enactment of a planned action ordinance.[5] A planned action ordinance is a local enactment authorized under RCW 43.21C.031(2) of SEPA, which effectively allows a city or county to define particular intensities of uses within a particular area to be exempt from later SEPA review. However, the exemption from later SEPA review rests upon an adequate EIS for the planned action having first been prepared. Section RCW 43.21C.031(2) provides:

> (2)(a) For purposes of this section, a planned action means one or more types of project action that:
>
> (i) Are designated planned actions by an ordinance or resolution adopted by a county, city, or town planning under RCW 36.70A.040;
>
> (ii) Have had the significant impacts adequately addressed in an environmental impact statement prepared in conjunction with (A) a comprehensive plan or subarea plan adopted under chapter 36.70A

[5] Since no statutory right of appeal of a planned action ordinance otherwise exists, Davidson and Continental have challenged the planned action ordinance (as well as the special design review guidelines), through claims for declaratory and injunctive relief. Section RCW 7.24.020 of the Uniform Declaratory Judgments Act grants the court the authority to review the construction and validity of municipal ordinances. Section RCW 7.40.020 allows the court to grant injunctive relief to prevent the continuation of some act in violation of a plaintiff's rights, such as in this case the continued validity of ordinances enacted in violation of SEPA.

> RCW, or (B) a fully contained community, a master planned resort, a master planned development, or a phased project;
>
> (iii) Are subsequent or implementing projects for the proposals listed in (a)(ii) of this subsection;
>
> (iv) Are located within an urban growth area, as defined in RCW 36.70A.030;
>
> (v) Are not essential public facilities, as defined in RCW 36.70A.200; and
>
> (vi) Are consistent with a comprehensive plan adopted under chapter 36.70A RCW.
>
> (b) A county, city, or town shall limit planned actions to certain types of development or to specific geographical areas that are less extensive than the jurisdictional boundaries of the county, city, or town and may limit a planned action to a time period identified in the environmental impact statement or the ordinance or resolution adopted under this subsection.

(Emphasis supplied.)

In its motion for summary judgment of dismissal, Touchstone claimed that Davidson and Continentals' challenge to the adequacy of the EIS was premature on the asserted grounds that it raised an "orphan" SEPA claim, unrelated to any "governmental action" citing to RCW 43.21C.075.[6] CP 174 – 177,

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[6] The following two provisions within RCW 43.21C.075 require that judicial review of SEPA determinations be linked to the review of their underlying governmental actions:

> (1) Because a major purpose of this chapter is to combine environmental considerations with public decisions, any appeal brought under this chapter shall be linked to a specific governmental action. The State Environmental Policy Act provides a basis for challenging whether

The superior court agreed, dismissing appellants' challenges to the planned action ordinance for lack of jurisdiction. CP 582 - 84.

While SEPA's "linkage" requirement provides that an appeal of the adequacy of an EIS be linked to a "governmental action," RCW 43.21C.075(6)(c), the superior court erred in concluding that appellants' challenge to the EIS had not been linked to an underlying governmental action. In fact, both the EIS and appellants' challenge to the EIS were linked to a governmental action, namely the City of Kirkland's adoption of its planned action ordinance (Ordinance 4175). These actions are properly challenged together because the planned action ordinance is a governmental action, that action requires the support of an adequate EIS and the EIS was alleged to be, and has subsequently been found by the GMHB to be, legally inadequate.

The superior court's finding at CP 583 that the City's action adopting its planned action ordinance is not a "governmental action," and that it would not trigger an opportunity to challenge the adequacy of the EIS, is incorrect for at least four reasons.

First, the planned action ordinance is not just a "purely

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governmental action is in compliance with the substantive and procedural provisions of this chapter. The State Environmental Policy Act is not intended to create a cause of action unrelated to a specific governmental action [and].

(6)(c) Judicial review under this chapter shall without exception be of the governmental action together with its accompanying environmental determinations.

procedural SEPA ordinance", as characterized by Touchstone.[7] The planned action ordinance establishes substantive criteria and procedures defining and determining whether future projects qualify as "planned actions." CP 287 (Ordinance 4175, p.1, Section 1.C; pp. 2-6, Section 3). The planned action ordinance further establishes substantive conditions that each qualifying planned action project must meet before approval. CP 287 (Ordinance 4175, p.1, Section 1.E; pp. 2-6, Section 3). The planned action ordinance establishes, as a matter of statutory right, that qualifying projects do not need to undergo further review under SEPA, including either a "threshold determination" or EIS. RCW 43.21C.031(1); WAC 197-11-172(2) and CP 287 (Ordinance 4175, p.1, Section 1.B; pp. 7, Section F). Finally, the planned action ordinance finds, as a matter of law, that "future projects that are consistent with the Planned Action will protect the environment, benefit the public and enhance economic development." CP 287 (Ordinance 4175, p.1, Section 2.G). In short, Ordinance 4175 establishes substantive rights and substantive duties. It is not

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[7] The phrase "purely procedural SEPA ordinance" is a phrase coined by Touchstone and is not based on SEPA. CP 176. While RCW 43.21C.075(8) does define "action" to exclude pure "procedural determinations under this chapter" the act of adopting a "Planned Action Ordinance" is not a procedural determination – such as determining whether a particular project is "categorically exempt," WAC 197-11-305, or determining whether an EIS is required under the "threshold determination", WAC 197-11-310 to -330, or indeed whether a project is exempt from SEPA review because it meets the definition of a "project

merely a procedural ordinance. Ordinance 4175 is a substantive agency action meeting the definition of "action" in RCW 43.21C.075(8).

Second, the challenged EIS, was adopted specifically in support of the City of Kirkland's review and preparation of its planned action ordinance. Indeed, the very title of the EIS is "Final Environmental Impact Statement: Downtown Area Planned Action Ordinance." CP 436, Cover Sheet to EIS. The "Fact Sheet" within EIS identifies the "Proposed Action" as involving two related actions, one of which is described as "A City of Kirkland (City)-sponsored proposal to adopt an ordinance establishing these three areas as a Planned Action for the purpose of [SEPA]." CP 440 (EIS at pp. ii., and 1-2). Thus, the specific "governmental action" that the EIS was prepared for was the adoption of the planned action ordinance. There is no basis to assert that adoption of that planned action ordinance is not a "specific governmental action" that provides a link for the present appeal of the adequacy of the EIS prepared for that action. RCW 43.21C.075.

Third, appellants' challenge to the planned action ordinance and the EIS was ripe when brought, because the Department of Ecology's SEPA regulations compelled appellants to bring their challenge to the adequacy of the EIS at the time and not await the

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action" under a previously adopted "planned action ordinance."

approval of individual planned actions or project permits. In relevant part, WAC 197-11-680(4)(d) provides:

> (d) The notice of action procedures of RCW 43.21C.080 may still be used. If this procedure is used, then the time limits for judicial appeal specified in RCW 43.21C.080 shall apply, unless there is a time limit established by statute or ordinance for appealing the underlying governmental action. If so, the time limit for appeal of SEPA issues shall be the time limit in the statute or ordinance for the underlying governmental action. If the proposal requires more than one governmental decision that will be supported by the same SEPA documents, then RCW 43.21C.080 still only allows one judicial appeal of procedural compliance with SEPA, which must be commenced within the applicable time to appeal the first governmental decision.

(Emphasis supplied.) It cannot be disputed that the City prepared the EIS to support adoption of its planned action ordinance. It is also beyond dispute that between the adoption of the planned action ordinance and the issuance of construction permits the planned action ordinance is the "first governmental decision" since it must necessarily precede the issuance of development permits. Contrary to the superior court's order at 7, CP 583, The above regulation requires that any challenge to the EIS be brought at the enactment of the enabling ordinances, not later, at the time of the issuance of development permits.

And fourth, to bar appellants' challenge to the planned action ordinance now and to delay any challenge until some planned action project has been approved, as held by the superior

court, CP 583, would not foster orderly review under SEPA. Under such a scenario, appellants would be required to wait until *after* an applicant such as Touchstone had applied for a specific planned project under the planned action ordinance, and *after* the City had gone through its lengthy design review and project review and approved the project, before they could bring a challenge to the adequacy of the EIS prepared for the original planned action ordinance. Of course, this would mean that if appellants were successful in challenging the eventual project permits on grounds of EIS inadequacy, all of the actions taken by Touchstone and the City in reliance upon its planned action ordinance would be for naught. This would eliminate entirely the certainty that the legislature intended in creating the planned action ordinance procedure in the first place. RCW 43.21C.031.

Although not a basis for the court's ruling, respondents may attempt to defend dismissal of the challenge to the planned action ordinance on the alternative ground that appeal to the GMHB has provided Davidson and Continental an adequate administrative remedy, since the GMHB has partially granted appellants their requested relief by ruling the EIS to be inadequate. However, should it be advanced, such a defense would not be well founded for at least two reasons: first, the GMHB lacks the authority to review planned actions; and second, the grant of authority to the

GMHB would not remove the authority from the courts to grant remedial relief under SEPA. The first point is addressed directly below; the second point is addressed under the next Argument heading.

The Board's authority is limited to that which it has been delegated. *Skagit Surveyors and Engineers, LLC, v. Friends of Skagit County*, 135 Wn.2d 542, 558, 958 P.2d 962 (1998). With respect to SEPA, the GMHB only has the authority to determine if the jurisdiction planning under the GMA "is not in compliance with the requirements of ... [SEPA] as it relates to plans, development regulations or amendments..." RCW 36.70A.280(1)(a).[8] A planned action ordinance is authorized by SEPA, and is not a type of plan or regulation adopted under GMA. Accordingly, as the Central Board held in *Kent CARES v. City of Kent,* CPSGMHB No.

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[8] RCW 36.70A.280(1) provides:

> (1) A growth management hearings board shall hear and determine only those petitions alleging either:
>
> (a) That, except as provided otherwise by this subsection, a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW. Nothing in this subsection authorizes a board to hear petitions alleging noncompliance with RCW 36.70A.5801; or
>
> (b) That the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted.

02-3-0015 Order on Motions at 6 (November 27, 2002), the GMHB lacks subject matter jurisdiction to review a planned action ordinance. Davidson and Continental's challenges to the planned action ordinance could not have been brought before the GMHB. Further, as demonstrated in the following argument, the superior court retains the authority to grant relief under SEPA.

C. The Superior Court Retains the Authority to Invalidate Action Taken upon an Inadequate EIS.

As noted above, Davidson and Continental have challenged the plan and zoning amendments under Article IV, section 6 of the state constitution and have challenged the adequacy of the EIS, the planned action ordinance and the design review guidelines by actions for declaratory and injunctive relief. These causes of action place in the superior court the authority to grant appellants relief for violations of SEPA. By dismissal of their actions, the superior court has unlawfully prevented appellants from obtaining the relief to which they are entitled.

Under Article IV, Section 6 of the state constitution, the Uniform Declaratory Judgments Act, Chapter 7.24 and SEPA, the court has broad authority to set aside agency action for violation of SEPA. Under Article IV, Section 6, "[t]he superior court has inherent power to review administrative decisions for illegal or

manifestly arbitrary acts."[9] *Saldin Securities,* 134 Wn.2d at 292. This review authority extends to the enforcement of agency decisionmaking authority. *Pierce County Sheriff v. Civil Service Com'n of Pierce County*, 98 Wn.2d 690, 695, 658 P.2d 648, 650 - 651 (1983)("An agency's violation of the rules which govern its exercise of discretion is certainly contrary to law and, just as the right to be free from arbitrary and capricious action, the right to have the agency abide by the rules to which it is subject is also fundamental.") As the Hearings Board has now found, the Kirkland City Council acted in violation of state law by taking action on an EIS that fails to meet the requirements of SEPA.

Under the Declaratory Judgment Act, the court has the power to determine "any question of construction or validity arising under [an] . . . ordinance . . . and obtain a declaration of rights, status, or other legal relations thereunder."[10] Because appellants

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[9] Art. IV, Section 6 provides in relevant part:

> The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court[.]

[10] RCW 7.24.020 provides:

> A person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

challenge the enactment of the planned action ordinance, and not its administration, such as specific project approvals issued through its application, declaratory relief is available and appropriate. *City of Federal Way v. King County,* 62 Wn.App. 530, 534-535, 815 P.2d 790, 793 (1991)("A declaratory judgment is used to determine questions of construction or validity of a statute or ordinance. ... It is the proper form of action to determine the facial validity of an enactment, as distinguished from its application or administration.").

And under SEPA itself, our courts have uniformly set aside agency action rendered in violation of the statute's requirements, including action taken on an inadequate EIS. For example, in *Weyerhaeuser v. Pierce County,* 124 Wn.2d 26, 47, 873 P.2d 498 (1994), the court found to be legally inadequate an environmental impact statement. As a result, the court also reversed the decisions rendered in reliance upon the inadequate EIS. In *Barrie v. Kitsap County*, 93 Wn. 2d 843, 861, 613 P.2d 1148 (1980), the court declared invalid a rezone ordinance based upon an EIS found to be inadequate. *See also*, *Klickitat County Citizens v. Klickitat County*, 122, Wn.2d 619, 632, 860 P.2d 390 (1993) ("If the decision to build a regional landfill was not based on an adequate EIS, then the County must revisit that planning process .."); *State*

v. Grays Harbor County, 122 Wn.2d 244, 256, fn 12, 857 P.2d 1039 (1993)("agency action which does not comply with SEPA is unlawful and outside the agency's authority").

These holdings follow earlier decisions that have invalidated agency action for lack of compliance with SEPA. *See Eastlake Community Council v. Roanoke Assocs., Inc.,* 82 Wn. 2d 475, 487, 513 P.2d 36 (1973) (failure to file an EIS prior to renewal of a building permit rendered the permit void); *Lassila v. City of Wenatchee,* 89 Wn. 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 Wn. 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, *Dioxin/Organochlorine Ctr. v. Pollution Control Hr'gs Bd.,* 131 Wn. 2d 345, 932 P.2d 158 (1997).

However, the authority of the GMHB, including its authority to invalidate agency action is more limited, and allows the outcome that has occurred in these proceedings in which action found to be taken in violation of SEPA is nonetheless allowed to stand. This result follows from the constraints placed on the invalidity authority of the Boards.

The GMA at RCW 36.70A.280(1)(a) grants the GMHB the authority to review GMA plans and development regulations for noncompliance with SEPA. But under GMA, a finding of noncompliance does not necessarily affect the validity of the actions taken. RCW 36.70A.300(4) provides that "[u]nless the board makes a determination of invalidity as provided in RCW 36.70A.302, a finding of noncompliance and an order of remand shall not affect the validity of comprehensive plans and development regulations" that may have been found to be noncompliant with GMA or SEPA.[11] Under RCW 36.70A.302(1)(b),[12] the GMHB may only enter an order of invalidity

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[11] RCW 36.70A.300(4) provides:

> (4) Unless the board makes a determination of invalidity as provided in RCW 36.70A.302, a finding of noncompliance and an order of remand shall not affect the validity of comprehensive plans and development regulations during the period of remand.

[12] RCW 36.70A.302(1) and (2) provide:

> (1) A board may determine that part or all of a comprehensive plan or development regulations are invalid if the board:
>
> (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
>
> (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
>
> (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.
>
> (2) A determination of invalidity is prospective in effect and does

if it determines that the continued validity of a noncompliant action would substantially interfere with the goals of the GMA. And if the Board enters an order of invalidity, its effect is only prospective. RCW 36.70A.302(2)

As noted earlier, the GMHB in the *Davidson Serles* decision found the plan and zoning amendments to have been taken in violation of SEPA. However, the Board declined to invalidate those actions, finding that the continued validity of the plan and zoning amendments would not substantially interfere with the goals of the GMA. Final Decision and Order at 21. Davidson and Continental have appealed the Board's refusal to issue invalidity and have petitioned for direct review of that decision before the Court of Appeals.

But quite apart from the outcome in the GMHB proceeding, the superior court in this proceeding still retains the authority under Article IV, Section 6 of the state constitution to review and invalidate governmental action found to be illegal. Nothing within the GMA has removed, or lawfully could remove, that authority from the court. That proposition was squarely established by the court in

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not extinguish rights that vested under state or local law before receipt of the board's order by the city or county. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the county or city or to related construction permits for that project.

Saldin Securities, Inc. v. Snohomish County, 134 Wn. 2d 288, 294, 949 P.2d 370 (1998). In *Saldin,* plaintiffs had challenged a determination of significance rendered by Snohomish County, requiring the preparation of an EIS for a proposed subdivision. That appeal was initially dismissed by the Court of Appeals, on grounds that SEPA precluded a challenge to a SEPA determination in the absence of a challenge to the final decision on the underlying governmental action, citing to RCW 43.21C.075(6)(c). But the Supreme Court disagreed and ruled that neither SEPA, nor any other statutory provision, could remove from the court its inherent right under Article IV, section 6 of the Washington State Constitution to review administrative decisions for illegal or arbitrary action. 134 Wn. 2d at 292. Similarly here, even though the GMA has granted to the GMHB the authority to review agency action for noncompliance with SEPA, that delegation of authority has not curtailed or limited the judicial authority to invalidate action for noncompliance with SEPA.

Appellants have timely invoked the court's original jurisdiction to review and invalidate the City's ordinances for violation of SEPA. Nothing within the creation of the GMHB has removed that authority. The trial court's dismissal of appellants' SEPA claims and their claims for relief of invalidity was wrongful.

D. The Superior Court Wrongly Dismissed Appellants' Challenges to the Design Review Guidelines.

The fourth piece of the legislative package enacted for Touchstone was a special set of design review guidelines that would govern its eventual development. CP 233 *et seq.* (Ordinance 4172). Davidson and Continental challenged this ordinance for violation of SEPA, on account of its lack of support by an adequate EIS. CP 7-8 (Davidson complaint) and CP 158 – 59 (Continental complaint). Appellants brought their challenges to the design guidelines in superior court because those guidelines were not adopted to implement any requirement under GMA and therefore lay beyond the jurisdiction of the GMHB. Without identifying any requirements within GMA, respondents simply asserted that the design guidelines were development regulations adopted under GMA and that exclusive jurisdiction for their review lay before the GMHB. CP 173 - 74. The superior court accepted this assertion and dismissed appellants' challenges to the design guidelines. CP 579 and 582.

The superior court erred because the adoption of design guidelines is not an enactment under GMA. As demonstrated above under Argument B, the GMHB does not have jurisdiction over just any plan or development regulation, only those alleged not to be in compliance with GMA, or with SEPA as it relates

legislation adopted under GMA. RCW 36.70A.280(1)(a), *supra* at fn 9. Even when a local government professes to conduct its planning and zoning under the GMA, the GMHB does not have jurisdiction over all of its enactments. In construing the scope of the Hearing Board's jurisdiction under RCW 36.70A.280, the court in *Wenatchee Sportsmen Ass'n v. Chelan County,* 141 Wn. 2d 169, 178, 4 P.3d 123 (2000) squarely held:

> From the language of these GMA provisions [RCW 36.70A.280 and .290], we conclude that unless a petition alleges that a comprehensive plan or a development regulation or amendments to either are not in compliance with the requirements of the GMA, a GMHB does not have jurisdiction to hear the petition.

Appellants' complaints alleged the design review guidelines to have been adopted in violation of SEPA, not GMA. They did not allege the design review guidelines to have been adopted in violation of GMA, since no provisions of GMA applied.

At RCW 36.70A.020, the GMA sets forth 13 goals to guide the development of comprehensive plans and development regulations. At RCW 36.70A.070, the GMA sets forth a number of mandatory elements for adoption through comprehensive plans and development regulations. And at RCW 36.70A.080, the GMA identifies several optional elements for inclusion in plans and development regulations. However, neither the goals nor the identified elements for plans and development regulations contain

any provisions for the adoption of design guidelines.

Since the GMHB is limited to the review of actions adopted under GMA and since the design guidelines were not adopted under any specific provisions of GMA, the GMHB lacked the authority to review the design guidelines. An appeal of the design guidelines to the Board would have served no purpose, since the GMA lacks any legal standards under which they could be reviewed. Because a challenge to the design guidelines did not properly lie before the GMHB, appellants could not have brought to the GMHB their SEPA challenge to the design guidelines either. RCW 36.70A.280(1)(a). Since the Hearings Board lacked the authority to grant any relief on SEPA appellants' challenge to the design guidelines, appellants were under no obligation to first bring their challenge to the design guidelines to the Hearings Board. *Estate of Friedman v. Pierce County,* 112 Wn. 2d 68, 74, 768 P.2d 462 (1989) ("...exhaustion is excused if resort to administrative procedures would be futile.").

The superior court's dismissal of appellants' challenges to the design review guidelines was in error.

VII. CONCLUSION

For the above reasons, the superior court's dismissal of appellants' claims of spot zoning, their challenges to the planned action ordinance and design review guidelines and their claims

seeking invalidation of all ordinances for violation of SEPA were wrongfully dismissed and should be reinstated.

RESPECTFULLY SUBMITTED this 21st day of December 2009.

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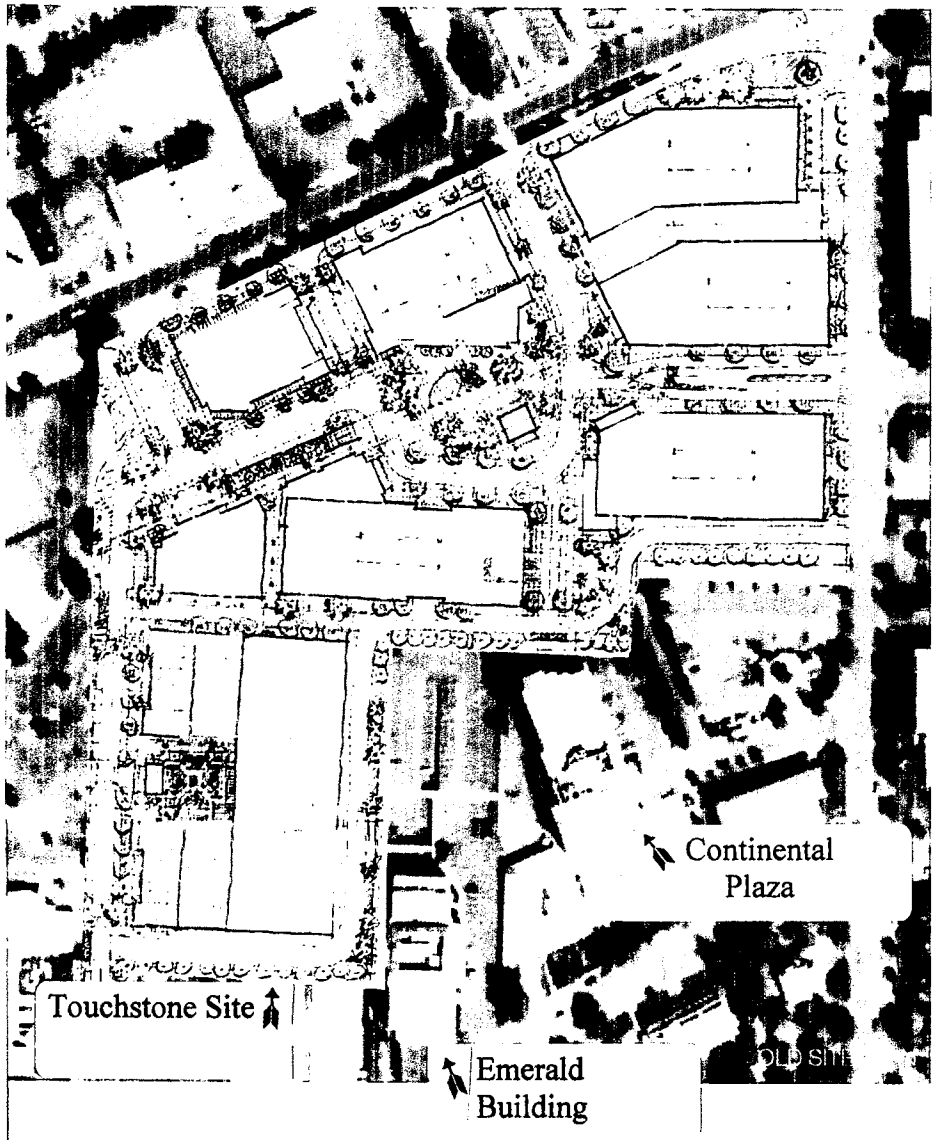
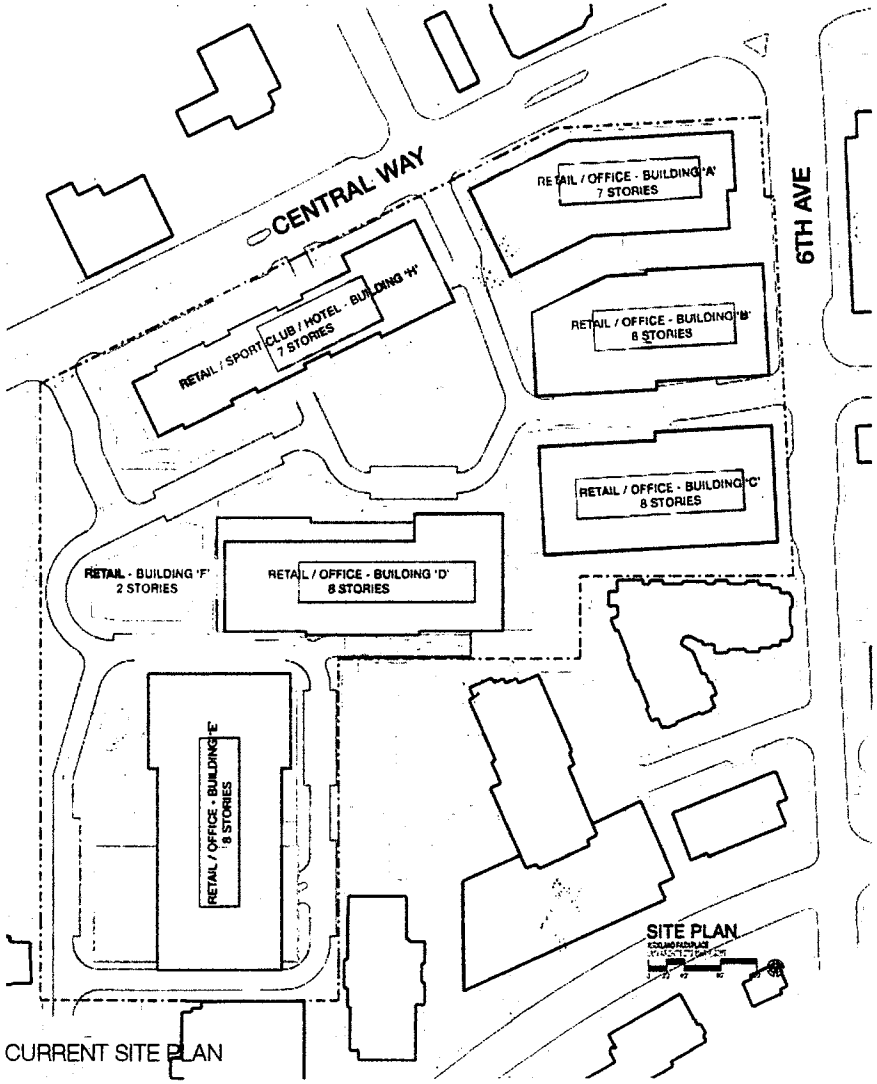
Attorneys for TR Continental Plaza Corp.

Appendix A

SITE PLANS





CURRENT SITE PLAN

Appendix B

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CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

DAVIDSON SERLES, et al.,	)	**Case No. 09-3-0007c**
Petitioner,	)	***(Davidson Serles)***
v.	)	
CITY OF KIRKLAND,	)	**FINAL DECISION AND ORDER**
Respondent, and	)	
TOUCHSTONE CORPORATION,	)	
Intervenor.	)	

SYNOPSIS

*The City of Kirkland enacted Ordinance Nos. 4170 and 4171 as part of a package of legislation amending the City's comprehensive plan and zoning to allow three downtown projects. Two property owners adjacent to the largest of these projects challenged the City's compliance with the Growth Management Act (**GMA**) and the State Environmental Policy Act (**SEPA**).*

The Board dismissed Petitioners' allegations of inconsistency with King County's County-wide Planning Policies and with the City's six-year capital facilities funding plan. However, the Board found the City's action non-compliant with provisions of the GMA related to the capital facilities element (RCW 36.70A.070(3)(b),(c)) and the transportation element (RCW 36.70A.070(6)(a)(iv)) of the City's Comprehensive Plan.

The City processed the three private proposals as a non-project legislative action. Relying on the Court's holding in Citizens' Alliance to Protect our Wetlands v. City of Auburn,[1] the Board determined that the City's environmental review was required to consider alternatives in addition to the proposal and the no-action alternative. In dismissing the remainder of Petitioners' SEPA issues, the Board ruled:

[1] 126 Wn.2d 356, 894 P2d 1300 (1995).

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- *Petitioners' issue concerning public objectives for the proposal was not based on a SEPA requirement;*
- *Short-term construction impacts were adequately addressed through Kirkland's existing regulations;*
- *Petitioners failed to carry their burden on the adequacy of EIS consideration of indirect impacts; and*
- *Conflicts in expert opinion as to trip generation rates and parking impacts were within the City's authority to resolve.*

The Board denied Petitioners' request for a determination of invalidity and remanded the Ordinances to the City for compliance. [Keywords: Countywide Planning Policies, Transportation Element- Financing Plan, SEPA.]

I. PROCEDURAL HISTORY[2]

On February 20, 2009, the Central Puget Sound Growth Management Hearings Board (the **Board**) received two Petitions for Review: Case No. 09-3-0006 was filed by Davidson Serles and Associates, and Case No. 09-3-0007 was filed by T.C. Continental Plaza Corporation. The petitions were consolidated as Consolidated Case No. 09-3-0007c.[3]

Davidson Serles and Continental Plaza (collectively, **Petitioners**) challenge the City of Kirkland's (**Respondent** or **City**) adoption of Ordinance Nos. 4170 and 4171 amending the City's Comprehensive Plan and development regulations with respect to three downtown properties, the largest of which is an 11.5 acre parcel of land owned by Touchstone Corporation [**Touchstone** or **Intervenor**] which intervened in this matter.

Motions

The Board requested special briefing on questions of SEPA jurisdiction, SEPA standing, and the availability of invalidity as a remedy for SEPA noncompliance. A hearing on motions was held by teleconference. On June 10, 2009, the Board issued its Order on Motions, finding that the Board has jurisdiction over the SEPA issues raised and granting Petitioners' motion to supplement the record.

Hearing on the Merits

Each of the parties timely filed briefing on the merits as follows:

- Hearing Memorandum by Davidson Serles and Continental Plaza [**Petitioners' PHB**]
- City's Prehearing Brief [**City Response**]
- Touchstone Response to Petitioner' Hearing Memorandum [**Touchstone Response**]
- Reply Memorandum by Davidson Serles and Continental Plaza [**Petitioners' Reply**]

[2] The complete chronology of procedures in this matter is attached as Appendix A.

[3] In a proceeding in King County Superior Court under Cause No. 09-2-02204-6 SEA, petitioners challenged Ordinances 4170 and 4171 and related ordinances on other grounds.

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The Board conducted the Hearing on the Merits on August 10, 2009, from 10:45 a.m. to 1:00 p.m. Board Members David O. Earling and Margaret A. Pageler and Staff Attorney Julie Ainsworth-Taylor were present. Jeffrey M. Eustis represented Petitioner Davidson Serles and David S. Mann represented Petitioner T.C. Continental Plaza. Robin Jenkinson represented Respondent City of Kirkland. Richard Hill appeared for Intervenor Touchstone Corporation, assisted by Jessica Clawson. Also in attendance were A.P. Hurd of Touchstone Corporation, Jennifer Barnes of ICF Jones & Stokes, Angela Malstrom of McCullough Hill, City Planning Director Eric Shields, Deputy Planning Director Paul Stewart, Public Works David Godfrey, and transportation engineer Thang Nguyen.

At the hearing each of the parties, without objection, provided the Board with illustrative exhibits which were admitted as "HOM exhibits" and are listed in full in Appendix B below. The hearing on the merits afforded the Board an opportunity to ask questions clarifying important facts in the case and providing better understanding of the legal arguments of the parties.

Court reporting services were provided by Barbara Hayden of Byers & Anderson, Inc. The Board ordered a transcript of the hearing, which was received on August 18, 2009, and is referenced herein as **HOM.** At the hearing, Board member Earling requested that the City provide the Board with a listing of staff memoranda and power points provided to the City Council after July 1, 2008. The City subsequently filed a set of documents received by the Board on August 27, 2009.[4]

II. STANDARD AND SCOPE OF REVIEW

GMA Standard of Review

The Growth Management Boards are tasked by the legislature with determining compliance with the GMA:

> The Board is empowered to determine whether [city] decisions comply with GMA requirements, to remand noncompliant ordinances to [the city], and even to invalidate part or all of a comprehensive plan or development regulation until it is brought into compliance.

Lewis County v. Western Washington Growth Management Hearings Board, 157 Wn.2d 488 at 498, fn. 7, 139 P.3d 1096 (2006).

The GMA creates a high threshold for challengers. A jurisdiction's GMA enactment is presumed valid upon adoption. RCW 36.70A.320(1). "The burden is on the petitioner to demonstrate that [the challenged action] is not in compliance with the requirements of [the GMA]." RCW 36.70A.320(2).

In *Swinomish Indian Tribal Community, et al. v Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007), the Supreme Court summarized the Board's standard of review:

[4] Exhibits 357, 367, 381, 408, 415, 550, 569, 585, 664, 669, 672, 689.

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> The Board is charged with determining compliance with the GMA and, when necessary, invalidating noncomplying comprehensive plans and development regulations. The Board "shall find compliance unless it determines that the action by the state agency, county or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." RCW 36.70A.320(3). An action is "clearly erroneous" if the Board is "left with the firm and definite conviction that a mistake has been committed." "Comprehensive plans and development regulations [under the GMA] are presumed valid upon adoption." RCW 36.70A.320(1). Although RCW 36.70A.3201 requires the Board to give deference to a [jurisdiction], the [jurisdiction's] actions must be consistent with the goals and requirements of the GMA.

161 Wn.2d at 423-24 (internal case citations omitted).

As to the degree of deference to be granted under the clearly erroneous standard, the *Swinomish* Court stated:

> The amount [of deference] is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the [jurisdiction's] actions a "critical review" and is a "more intense standard of review" than the arbitrary and capricious standard.

Id. at 435, fn. 8 (internal citations omitted).

SEPA Standard of Review

Whether an environmental impact statement is adequate is subject to *de novo* review and is a question of law. *Citizens v. Klickitat County,* 122 Wn.2d 619, 626, 866 P.2d 1256 (1993). The adequacy of an EIS is tested under the 'rule of reason,' which requires a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the agency's decision. *Id.* The reviewing body does not rule on the wisdom of the proposed development but rather on "whether the FEIS gave the city council sufficient information to make a reasoned decision." *Citizens' Alliance v. City of Auburn* ***(Citizens' Alliance)***, 126 Wn. 2d 356, 362, 894 P.2d 1300 (1995).

> In any action involving an attack on the adequacy of [an EIS] the decision of the governmental agency shall be accorded substantial weight.

RCW 43.21C.090. See, *City of Burien v. City of SeaTac, et al.*, CPSGMHB Case No. 98-3-0010, Final Decision and Order (Aug. 10, 1998), at 9.

Scope of Review

The scope of the Board's review is limited to determining whether a jurisdiction has achieved compliance with the GMA or SEPA only with respect to those issues presented in a timely petition for review. RCW 36.70A.290(1).

III. BOARD JURISDICTION AND PREFATORY NOTE

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BOARD JURISDICTION

The Board finds that the Petitions for Review were timely filed, pursuant to RCW 36.70A.290(2). The Board finds that Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2). The Board finds that it has jurisdiction over the subject matter of the petitions pursuant to RCW 36.70A.280(1).[5]

PREFATORY NOTE

On December 16, 2008, the Kirkland City Council took action to enable applications for three private developments to proceed in downtown Kirkland. Rather than conduct three site-specific plan amendments and rezones, the City opted to review the proposed amendments together as a legislative process. The City undertook a package of six ordinances.[6] The two challenged here are Ordinance 4170, amending the City's Comprehensive Plan to implement changes to the downtown subarea plan, land use map, and transportation element, and Ordinance 4171, amending the City's Zoning Code to implement a new "Central Business District 5A Zone" for the Touchstone property.[7]

The challenged Ordinances allow Touchstone to re-develop Parkplace, a mixed-use project on an 11.5 acre tract in the Kirkland downtown area abutting the properties of the two petitioners. The Touchstone parcel today consists of 7 buildings separated by surface parking; one building is at 6 stories and the rest are 1-2 stories. DEIS at 3.1-1. The current development contains 95,300 square feet of office space and 143,150 square feet of retail. Previous zoning for the property allowed build-out to approximately 800,000 square feet of commercial space at building heights of three to five stories.

The challenged Ordinances increase building heights to eight stories, reduce building setbacks along street frontages, increase allowable lot coverage, and provide for reductions in parking requirements below the requirement of the parking code. The Ordinances allow as much as 1.2 million square feet of office and 592,700 square feet of retail and other commercial space (i.e., hotel, movie theater, athletic club, restaurants, supermarket) in the Parkplace development.

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[5] See Order on Motions, June 10, 2009.

[6] The complete package of ordinances:

- Ordinance 4170 Amending the Comprehensive Plan to implement changes to the downtown section of the Moss Bay Neighborhood Plan and the transportation element
- Ordinance 4171 Amending the City's zoning code to implement new CBD5A Zone [Touchstone property]
- Ordinance 4172 Adopting development master plan and design guidelines for Parkplace [Touchstone proposal]
- Ordinance 4173 Amending the Comprehensive Plan to implement changes to Planned Area 5 of Moss Bay Neighborhood [Orni and Altom properties]
- Ordinance 4174 Amending the zoning code, design guidelines and use zone [Orni and Altom properties]
- Ordinance 4175 Planned Action Ordinance under SEPA for development of Touchstone and Orni proposals

[7] The challenged ordinances also involve two other proposals referred to as the Orni and Altom proposals. Petitioners do not challenge the Orni and Altom portions of the Ordinances. HOM at 31-32.

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Ordinance 4175, the Planned Action Ordinance, provides the required SEPA mitigations to be implemented in the Parkplace redevelopment. Ordinance 4175 is not challenged by these Petitioners, but its provisions are relevant to the ensuing analysis.

With this Final Decision and Order, the Board first considers the Petitioners' various challenges arising from the internal and external consistency requirements of the GMA. Then the Board takes up the SEPA issues raised by Petitioners, and finally, the Petitioners' request for a determination of invalidity.

IV. LEGAL ISSUES AND DISCUSSION

LEGAL ISSUES 1 and 2

Consistency with Transportation Plan and Capital Facilities Plan

The Prehearing Order states Legal Issues 1 and 2 as follows:

1. *Do Ordinance Nos. 4170 and 4171 fail to guided by goals 1 and 12 (RCW 36.70A.020(1) and (12)), and fail to comply with the requirements of RCW 36.70A.070(preamble), and .070(6) by amending the City of Kirkland (City) Comprehensive Plan and Zoning Code to create new planning and zoning districts that would allow an intensity of development that would not be adequately served by transportation and other public facilities?*

2. *Do Ordinance Nos. 4170 and 4171 fail to guided by goal 12 (RCW 36.70A.020(12)), and fail to comply with the requirements of RCW 36.70A.070(preamble), .070(3) and .070(6) by amending the City's Comprehensive Plan and Zoning Code to create new planning and zoning districts that require transportation and other capital improvements for which financing plans meeting the requirements of RCW 36.70A.070(3) and .070(6) do not exist?*

Applicable Law

The GMA requires consistency among plan elements. The preamble to RCW 36.70A.070 states:

> The plan shall be an internally consistent document and all elements shall be consistent with the future land use map.

In setting forth the requirements for the capital facilities plan element, the same section of the GMA, at RCW 36.70A.070(3), requires

> A capital facilities plan element consisting of:
> (a) an inventory of existing capital facilities owned by public entities, showing the locations and capacities of the capital facilities;
> (b) a forecast of the future needs for such capital facilities;
> (c) the proposed locations and capacities of expanded or new capital facilities;

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> (d) at least a six-year plan that will finance such capital facilities within projects funding capacities and clearly identifies sources of public money for such purposes; and
> (e) a requirement to reassess the land use element if probable funding falls short of meeting existing needs and to ensure that the land use element capital facilities plan element and financing plan within the capital facilities plan element are coordinated and consistent....

The transportation plan element is laid out in RCW 36.70A.070(6). Again, the transportation element "implements and is consistent with the land use element." *Id.* Specific sub-elements of the transportation plan include (iii) facilities and services needs and (iv) finance.

> (iii) Facilities and services needs, including:
> ...
> (E) Forecasts of traffic for at least ten years based on the adopted land use plan to provide information on the location, timing and capacity needs of future growth;
> (F) Identification of ... local system needs to meet current and future demands...
>
> (iv) Financing, including:
> ...
> (B) A multiyear financing plan based on the needs identified in the comprehensive plan, the appropriate parts of which shall serve as the basis for the six-year [TIP] required by RCW 35.77.010 for cities ....

Discussion and Analysis

Petitioners contend that the new design district and zoning created by Ordinance Nos. 4170 and 4171 will allow a 7.5 fold increase in office and retail area which will generate more vehicle traffic than can be accommodated by the existing road network at the adopted level of service standards. Petitioners' PHB, at 13. Petitioners point to 18 intersection capacity improvements identified in the FEIS at 3-16 and 3-17, estimated to cost more than $13 million, and adopted as necessary mitigations for the Touchstone proposal. *Id.* at 15. The Planned Action Ordinance – Ordinance No. 4175 – sets out these improvements in Appendix B. Only one of the required improvements – restriping at the intersection of 85th St. NE and 114th Ave. NE, at a cost of $166,400 – is included as funded in Kirkland's current 6-year Capital Facilities Plan (**CFP**). FEIS at 3-21. Petitioners argue that the Ordinances are noncompliant with the GMA requirements for consistent land use, capital facilities, and transportation plans, because the 18 transportation improvements necessary for the Touchstone proposal are not fully listed and funded in the City's capital and transportation plans.

In response, the City and Touchstone assert:

- The Petitioners have conflated the City's concurrency analysis (the basis for GMA consistency) and its traffic impact analysis (the basis for developer impact fee assessment under RCW 82.02).

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- The TIP (Transportation Improvement Plan) and CFP are only required to provide funding plans for a six-year period (here, 2008-2014). The 17 improvements other than the 85th/114th restriping are not projected to be needed until after 2014.
- Touchstone will be paying in excess of $9 million in transportation impact fees which will cover more than half the cost of the indicated improvements. Touchstone Response, at 16, citing City staff memos, Ex. 585 and 672.

In reply, Petitioners assert that eight of the 18 necessary projects are not even listed in the City's Capital Facilities Plan and so would not be eligible to be funded through developer impact fees. Petitioners' Reply, at 2. Further, Petitioners point out that the assertions as to the developer paying, as mitigation, for all or a major portion of the costs is unsupported by the record. *Id.* at 4-5.

The Board asks whether Kirkland's amendments to its comprehensive plan and zoning, adopted in the challenged Ordinances and requiring $13 million of transportation improvements over ten years in order to mitigate specific identified traffic impacts, are consistent with Kirkland's capital facilities plan and the transportation element of its plan, which do not contain or fund all of these improvements.

Under the Growth Management Act, both the capital facilities element and the transportation element require a forecast of needs and identification of needed future facilities. The capital facilities element calls for a 6-year funding plan, while the transportation element requires a multi-year financing plan that is based on a 10-year traffic forecast and facility needs identification. The Board recognizes the tension in the law between the required 10-year transportation facilities plan and the specific 6-year funding plans for the CFP and TIP.

Looking first at the statutory requirements for the capital facilities element, the Board agrees with Petitioners that consistency requires the City to amend its CFP to include all the "future needs for capital facilities" called out in the comprehensive plan and zoning amendments just enacted – i.e., all 18 identified improvements. RCW 36.70A.070(3)(b and c). All 18 identified improvements must be included in the City's capital facilities plan. However, the Board finds no requirement in the capital facilities element for the City to identify funding for capital projects beyond the six-year window. RCW 36.70A.070(3)(d).

Looking next at the statutory language concerning the transportation element, the Board reads, first, a requirement that the transportation element of a plan shall include "forecasts of traffic for at least ten years based on the adopted land use plan" and "identification of local needs" to meet future growth. RCW 36.70A.070(6)(a)(iii). In preparing the FEIS for Ordinances 4170 and 4171, and in identifying the specific improvements needed to meet transportation concurrency and mitigate traffic impacts, Kirkland has met this requirement.

Then the Board reads that the transportation element shall include "a multiyear financing plan *based on the needs identified in the comprehensive plan.*" RCW 36.70A.070(6)(a)(iv). This is the first time the Board has had squarely before it the question of how the requirement for a ten-year transportation plan identifying facilities and services needs must interface with the requirement (in the same section of the statute) for a "multi-year financing plan." It seems apparent that the multi-year financing plan required by .070(6)(a)(iv) is not the same as the 6-year TIP. The multi-year financing plan encompasses the 10-year needs analysis set forth in the Facilities and Services Needs sub-element (.070(6)(a)(iii)), and "the appropriate parts … serve as the basis for the 6-year [TIP]."

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Here, the Planned Action Ordinance requires that all 18 traffic improvements be constructed to meet transportation concurrency and/or traffic impacts analysis.[8] Ord. 4175, Ex. B. The Planned Action Ordinance is effective for ten years, until December 31, 2018. Ord. 4175, ¶ 7. The City and Touchstone assert that the developer will be assessed impact fees for a substantial portion of the improvement costs, but there is no document in the record requiring a particular level of payment. In short, there is nothing in the transportation amendments adopted by Ordinance Nos. 4170 and 4171 that amounts to "a multiyear financing plan based on the needs identified in the comprehensive plan" which arise from "forecasts of traffic for at least ten years" and "identification of local system needs." RCW 36.70A.070(6).[9] The Board is left with a firm and definite conviction that a mistake has been made.

In sum, the Board finds and concludes that Ordinances 4170 and 4171 **fail to meet the consistency requirement** of RCW 36.70A.070 (preamble), .070(3), and .070(6) because of failure to amend the capital facilities plan to include all necessary capital improvements and because of the lack of a "multi-year financing plan based on the [10-year transportation] needs identified in the comprehensive plan."

The Petitioners pose two additional objections that are readily disposed of. First, Legal Issues 1 and 2 allege noncompliance with GMA Goal 12, Public Facilities and Services. The GMA concurrency requirements are linked to GMA Planning Goal 12. Petitioners did not argue this point in their briefing or at the hearing, and the Board finds no basis for a finding of non-compliance with Goal 12 or the GMA concurrency requirements.

Second, the Petitioners argue that the City's plans lack a provision for re-assessing land use if funding for needed improvements falls short. The Board finds that there is a provision for land use reassessment in Kirkland's 2004 Comprehensive Plan, Capital Facilities Element, at XIII-10, Policy CF-5.2, which satisfies this GMA requirement.

Conclusion

The Board concludes that the City's adoption of Ordinance 4170 and 4171 was **clearly erroneous** and **failed to comply** with RCW 36.70A.070 (preamble), .070(3), and RCW 36.70A.070(6). However, the Board concludes that Petitioners **have not carried their burden** of demonstrating failure to provide for reassessment of the land use element if funding falls short. The Board **remands** the Ordinances to the City to take legislative action to comply with the GMA as set forth in this order.

LEGAL ISSUE 3
Consistency with County-wide Planning Policies

The Prehearing Order states Legal Issue 3 as follows:

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[8] The Board understands the difference between Kirkland's transportation concurrency regulations (Title 25) and traffic impact fees (Title 27), but is not persuaded that the distinction is relevant to the RCW 36.70A.070(6)(a)(iii) and (iv) analysis.

[9] A multi-year financing plan is not necessarily a single document. As the City and Touchstone suggest, it might consist of the 6-year TIP and one or more developer agreements covering the transportation improvements identified in connection with these amendments.

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Does Ordinance No. 4170 fail to comply with the consistency requirements of RCW 36.70A.100 and .210 by amending the Kirkland Comprehensive Plan to create a new planning district that would allow intensity of development inconsistent with the County-wide Planning Policies, specifically CPPs FW 12(a) and LU 25a-25d, for King County?

Applicable Law

RCW 36.70A.100 requires that city planning "shall be coordinated with and consistent with" the comprehensive plans of the county and adjacent cities.

RCW 36.70A.210(3)(a) requires that county-wide planning policies must include policies to implement the urban growth allocated pursuant to RCW 36.70A.110.

RCW 36.70A.110(2), in turn, establishes the application of population projections within each GMA county:

> Based upon the growth management population projections made for the county by the office of financial management, the county and each city within the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period.

It is well-settled that a local comprehensive plan must be consistent with GMA-compliant county-wide planning policies. *Children's Defense Fund v. City of Bellevue I*, CPSGMHB Case No. 95-3-0011, Order Partially Granting Bellevue's Dispositive Motion (May 17, 1995), at 12; *Strahm v. City of Everett*, CPSGMHB 05-3-0042, Final Decision and Order (Sep. 15, 2006), at 30.

Discussion and Analysis

In Legal Issue 3, Petitioners contend that Kirkland's expansion of zoned capacity for commercial development is inconsistent with the allocation of employment in the King County County-wide Planning Policies (**CPPs**) and with the CPP goal of jobs/housing balance.

The relevant facts are not disputed by the parties:

- The Countywide Planning Policies allocate Kirkland an employment growth target of 8,800 jobs by 2022.
- Kirkland's zoned development capacity for employment growth under the 2004 comprehensive plan was 12,606, exceeding the CPP 2022 target by 3,806.
- Ordinance 4170 allows for employment growth of 16,291, exceeding the CPP 2022 target by 7,491.

Petitioners argue that the intensity of development allowed by Ordinance 4170 is inconsistent with the Countywide Planning Policies in violation of the GMA. The Board is not persuaded.

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First, the GMA requirements for population and employment allocations in cities and urban growth areas are specifically directed to ensuring *sufficient capacity* to accommodate growth.

- RCW 36.70A.110(2) provides that urban growth areas "shall include areas and densities *sufficient to permit the urban growth* that is projected to occur."
- The review and evaluation process of RCW 36.70A.215[10] requires a comparison of targets with actual growth patterns for the purpose of determining "whether a county and its cities are *achieving urban densities* within urban growth areas."
- Periodic review must be undertaken to ensure that adoption and amendments to county and city plans and development regulations "*provide sufficient capacity* of land suitable for development within their jurisdictions to accommodate their allocated ... employment growth." RCW 36.70A.115.

The Board reads these provisions together as indicating that the population and employment targets allocated to cities by countywide planning policies are intended to require each city to zone areas and densities sufficient to accommodate that growth; in other words, the targets create a *floor* for zoned capacity, not a ceiling.

Petitioners have cited no GMA language suggesting that population and employment growth allocations in urban areas create a cap on local planning. Nor have they cited any case law to support their contention.

Second, Petitioners have pointed to no language in King County's CPPs that indicates the County's population or employment targets are intended to impose caps or limits on zoned development capacities for cities.

CPP LU-25a provides:

> Each jurisdiction shall plan for and accommodate the household and employment targets established pursuant to LU-25c and LU-25d. This obligation includes:
>
> a. Ensuring adequate zoned capacity; and
> b. Planning for and delivering water, sewer, transportation and other infrastructure ... and
> c. Accommodating increases in household and employment targets as annexations occur.
>
> The targets will be used to plan for and accommodate growth within each jurisdiction. The targets do not obligate a jurisdiction to guarantee that a given number of housing units will be built or jobs added during the planning period.

Again, the CPP emphasis is on ensuring zoned capacity and infrastructure to accommodate projected growth. There is no suggestion that King County's CPP targets are intended to limit growth or establish a maximum capacity level.

Third, the objective of "jobs/housing balance" in the King County CPPs must be read in context. The CPPs allocate growth to broad subareas. Kirkland and the Eastside cities[11] are

[10] The review of .215 is not required for all counties, but is applicable to King County and its cities.

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in the East subarea. Jobs/housing balance is one of seven listed criteria for allocating growth targets within subareas.

CPP FW-12 provides:

> All jurisdictions within King County share the responsibility to accommodate the 20-year population projection and job forecast. The population projection shall be assigned to the four subareas of King County (Sea-Shore, East, South and the Rural Cities) proportionate with the share of projected employment growth. Anticipated growth shall be allocated pursuant to the following objectives:
>
> a. To ensure efficient use of land within the UGA by directing growth to the Urban Centers and Activity Centers;
> b. To limit development in Rural Areas;
> c. To protect designated resource lands;
> d. To ensure efficient use of infrastructure;
> e. To improve the jobs/housing balance on a subarea basis;
> f. To promote a land use pattern that can be served by public transportation and other alternatives to the single occupancy vehicle; and
> g. To provide sufficient opportunities for growth within the jurisdiction.

The Board notes that the additional employment growth made possible by Ordinance 4170 meets a number of the FW 12 objectives: it directs growth to an Activity Center,[12] makes efficient use of infrastructure, is well-served by public transportation and promotes other alternatives to the single occupant vehicle.

As to jobs/housing balance, FW12 calls for improving jobs/housing balance "on a subarea basis." Petitioners have provided the number of additional jobs and housing units for the City of Kirkland, but have not demonstrated that Kirkland's comprehensive plan amendment creates or contributes to an imbalance in the East subarea. Their argument that more jobs in Kirkland will exacerbate pressure for housing development in rural and resource lands, thus thwarting GMA Goals 1 and 2, is not supported by any facts in the record. The Board finds and concludes that Petitioners **have not carried their burden** on this issue.

Conclusion

The Board finds and concludes that Petitioners have **failed to carry their burden** of demonstrating that Ordinance 4170 is inconsistent with King County Countywide Planning Policies FW 12(a) and LU-25 or fails to comply with the consistency requirements of RCW 36.70A.100 and .210.

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[11] Bellevue, Redmond, Issaquah, Mercer Island, Sammamish, Kirkland, Kenmore, Bothell, Woodinville, Newcastle, Hunts Point, Medina, Yarrow Point, Clyde Hill.

[12] The CPPs identify the central business district of Kirkland as an activity center. See Section III Land Use Pattern, Part E Activity Centers. Kirkland's Comprehensive Plan designates its downtown area as a regional Activity Area. LU 5-3.

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LEGAL ISSUE 4 – SEPA Compliance

Legal Issue 4 challenges Ordinances 4170 and 4171 as non-compliant with SEPA because of the following deficiencies in the EIS:[13]

A. Failure to identify the objectives of the proposal
B. Failure to consider alternatives
C. Failure to consider the proposal's short-term impacts
D. Failure to consider indirect impacts
E. Failure to adequately consider traffic and parking impacts

A. Failure to identify the objectives of the proposal

The SEPA rules distinguish between "project actions" and "nonproject actions." Project actions include permit decisions on a site specific project. WAC 197-11-704(2)(a). Nonproject actions are "decisions on policies, plans or programs [such as] the adoption or amendment of comprehensive land use plans or zoning ordinances." WAC 197-11-704(2)(b). The City here acknowledges that Ordinances 4170 and 4171 were adopted as "nonproject actions." See, e.g., HOM, at 46.[14]

Petitioners contend that the City's EIS was deficient because it failed to state the public objectives of the proposed comprehensive plan amendment. Petitioners' PHB, at 24-26. Instead, the EIS recites the project-specific objectives of proponents Touchstone, Orni, and Altom. DEIS at 2.5.[15] In addition, Petitioners state that the City's objectives are only indicated in connection with the Planned Action Ordinance, which by definition aims to provide certainty in the permitting process. *Id.*[16]

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[13]The Prehearing Order states Legal Issue 4 as follows: *Were Ordinance Nos. 4170 and 4171 adopted through non-compliance with SEPA where the EIS prepared in support of those actions fails to fully meet the requirements of Chapter 43.21C RCW including the failure to identify, consider and evaluate: the overriding planning objectives to be served by the planned actions; a full range of alternatives to the proposed action; the impacts of full build-out under the proposed amendments; the total direct and indirect effects of more than doubling the area of office and commercial space within Planned Action Area A; impacts upon surrounding uses caused by the construction of the proposed office and commercial space; parking congestion and spillover impacts caused by a reduction of parking based upon a methodology that underestimates parking demand; and traffic impacts based upon the application of inconsistent and improper methodologies and mode splits?*

[14] The plan changes here were not confined to the properties involved in the three private amendment requests. For example, the City also rezoned a parcel adjacent to Altom's (FEIS at 2-4, 2-9), and realigned a view corridor.

[15] Touchstone's project-specific objectives:

> **Area A, Touchstone Corporation (Parkplace).** The applicant's objective for this amendment request is to redevelop Parkplace to create an employment, shopping and entertainment center that is pedestrian-friendly, is oriented toward Peter Kirk Park, ties the Downtown and eastern cores of the City, and allows for modification of parking and other requirements to create a new urban mixed-use center at this location. The office portions of the center will include large floor plate dimensions that meet high technology needs.

DEIS, at 2.5.

[16] The objective of the Planned Action Ordinance is project certainty:

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Upon review of the record, the Board discerns a number of public objectives referenced in the City's review. These include, for example:

- Provide destination retail and community-serving retail in the downtown
- Catalyze downtown redevelopment
- Provide safe and fun places for teens
- More "third place" opportunities for gathering and entertainment
- Economic boost for downtown business
- Generation of retail sales tax
- Green building design and open space
- Creating a north-south street across the super-block

See, e.g., Ex. 569, Planning Commission Recommendation to City Council, Nov. 20, 2008.

The Board can readily surmise that an EIS process that began with a clear statement of the chosen public objectives for review of the private proposals might have generated alternative ways of meeting the City's goals with less negative environmental impact. See, WAC 197-11-440(5)(b).

However, Petitioners have cited no authority on this issue other than the SEPA guidelines. As the Board reads the relevant SEPA provisions, they are *permissive*, not mandatory. WAC 197-11-060(3) provides:

> (ii) A proposal by a lead agency or applicant **may** be put forward as an objective, as several alternative means of accomplishing a goal, or as a particular or preferred course of action.
> (iii) Proposals **should** be described in ways that encourage considering and comparing alternatives. Agencies **are encouraged to** describe public and nonproject proposals in terms of objectives rather than preferred solutions.

In the SEPA definitions, "'may' is optional and permissive and does not impose a requirement." WAC 197-11-700(3)(b). Petitioners' argument is appealing, but they have not identified a legal requirement that the City's EIS be based on a statement of public objectives.

The Board therefore finds and concludes that Petitioners have **not carried their burden** of proving Legal Issue 4A.

B. Failure to consider alternatives

Petitioners argue that the EIS is deficient in that only the "no action" alternative and the applicants' proposals were evaluated. Petitioners cite numerous cases indicating the

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> The City's objective for the Planned Action designation ... is to provide for a streamlined SEPA review process for future area-specific development proposals and to provide greater certainty to potential developers, City decision-makers, and the public regarding the future development pattern and likely impacts of the Planned Action area.

Ex. 442, FEIS at 5-11.

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centrality of alternatives analysis in SEPA review. Petitioners' PHB at 26-31. They assert that for non-project actions, alternatives may not be limited to just the proposed action or only the properties owned by the applicants. *Id.*[17]

Here the City of Kirkland analyzed only the "no-action" alternative, which projected build-out on the three parcels under the existing zoning, and the "proposed action," i.e., the proponents' proposals for each of the three sites. The Planning Commission ultimately developed a third alternative for the Touchstone site (the FEIS Review Alternative), but this did not change the height, square footage, parking discounts, or other key elements of the proposal.[18]

As Petitioners have pointed out, in the FEIS at issue here, no offsite alternatives were reviewed, and no intermediate schemes were assessed.

Having reviewed the cases relied on by the parties, the Board finds *Citizens' Alliance to Protect our Wetlands v. City of Auburn, et al* ***(Citizens' Alliance)***, 126 Wn.2d 356, 894 P2d 1300 (1995) to be most on point. The Citizens' Alliance challenged the EIS developed by the City of Auburn for a thoroughbred horseracing track development. Auburn undertook the environmental review to support amendments to the zoning code to allow commercial recreation, including animal racetracks, in the M-2 zone as a conditional use. The city identified three potential sites within Auburn and included one of them as an alternative throughout the EIS.

The Supreme Court held that the racetrack project itself "qualifies for the private project exemption" from review of offsite alternatives. However, "because there is also a nonproject action [code amendment] involved in this case, Auburn is obliged to review offsite alternatives." 126 Wn.2d at 365.

While underscoring the difference between rezones and text amendments, the Court explained:

> Normally, under the private project exception, private projects which do not require rezones will not compel lead agencies to examine offsite alternatives....[N]onproject actions pose separate obligations under SEPA which a lead agency must satisfy. The environmental significance of the nonproject action creates the obligation to examine alternatives to the nonproject action....In practice, Auburn had to look at reasonable, feasible offsite alternatives to the building of a racetrack on lands zoned heavy industrial.

Id. at 366.

This Board's recent ruling in *North Everett Neighbors Alliance v. City of Everett (NENA)*, CPSGMHB Case No. 08-3-0005, Final Decision and Order (May 18, 2009), at 32-25, is distinguishable. There the Board rejected petitioners' request for greater review of offsite

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[17] Citing *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 42, 873 P.2d 498 (1994), *Barrie v. Kitsap County*, 93 Wn.2d 843, 857, 613 P.2d 1148 (1980).

[18] The FEIS Review Alternative requires a minimum of 300,000 square feet of retail uses and steps back the heights of buildings on certain parts of the property.

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alternatives in the EIS for the expansion of Providence Hospital. The Board found that alternative sites had previously been evaluated in a 2005 SEPA analysis. The Board determined that reliance on this previous consideration of offsite alternatives is specifically authorized by WAC 197-11-620 and WAC 197-11-235(6)(ii). In the present case, however, the City has pointed to no previous consideration of off-site alternatives for the kind of high-intensity mixed-use development at issue here.

In the present case, therefore, in accord with the *Citizens' Alliance* holding, Kirkland cannot limit its review to onsite alternatives. By looking beyond Touchstone's proposal for its own property, could the City realize the same objectives[19] at lower environmental cost? See, WAC 197-11-440(5)(b).

Petitioners suggest that there may be other commercially zoned areas of Kirkland that could be studied. Petitioners' PHB, at 31, Ex. 114. They also ask for a range of alternatives of less height and intensity on the same site. Petitioners' Reply, at 11-12. It seems reasonable to the Board that an alternative that included the *whole* of the superblock between 3rd and 6th might achieve both Touchstone's goals and the public's objectives with less negative impact on the environment and better synergies for the vibrant mixed-use destination the City envisions.[20] However, the Board does not dictate the specific alternatives to be reviewed.

The Board finds that Kirkland's FEIS for Ordinance 4170 and 4171 is insufficient for failure to assess reasonable alternatives to the Touchstone proposal,[21] including offsite alternatives to the nonproject action. The Board **remands** Ordinances 4170 and 4171 to the City of Kirkland to take the action necessary to fully comply with SEPA.

C. *Failure to consider the proposal's short term impacts*

WAC 197-11-060(4) requires the consideration of both short and long-term impacts of a proposal.

The Petitioners assert that the DEIS for the Touchstone proposal failed to properly address the short-term impacts of construction of the project. Petitioners' PHB, citing Comment Letter 23 at 10, in FEIS. The Final EIS at 4-19, 4-20 and 4-28 acknowledges that construction will disrupt traffic and lists generic measures that may be included in the building permits, but it does not thoroughly analyze the likely impacts, according to the Petitioners. Petitioners contend that, in light of adoption of a Planned Action Ordinance, no further environmental review is available, so long as the development falls within the adopted threshold (1,792,700 square feet for the Touchstone project). Petitioners' PHB at

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[19] On remand, the City "may" and "is encouraged to" articulate its public objectives. WAC 197-11-060(3)(ii) and (iii).

[20] Touchstone's ParkPlace property takes up the northeast corner and midsection of a superblock that includes Peter Kirk Park on the west. The Petitioners and others own properties in the south and east portions of the superblock. Environmental review limited to Touchstone's onsite proposal has the effect of isolating the other properties and perhaps intensifying environmental negative impacts. An alternative which considered all of CBD Area 5 might address the city's objectives differently, for example, assessing pedestrian linkages differently, finding additional "third place" or "green infrastructure" opportunities, proposing coordinated parking mitigation strategies, ensuring coordinated traffic ingress and egress management, and enhancing future redevelopment potential for the southeast properties.

[21] As indicated above, the Orni and Altom proposals are not before us.

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32. They conclude that impacts of "noise, vibration, dust, debris and disruption of adjacent uses" are simply ignored. *Id.*

The City asserts that construction noise impacts were addressed in the Scoping checklist, citing Ex. 442, FEIS at 5-14. The City states that visual impacts of construction are referenced under "aesthetics," with the comment that viewers "may not be accustomed to seeing construction activities and equipment" and may be moderately sensitive. Ex. 92, DEIS at 3.3-17. Construction impacts on vehicular and pedestrian traffic are acknowledged as being "particularly disruptive." Ex. 442, FEIS as 4-19.[22] The City references the conditions it may impose as part of the project permit process to address construction traffic management. City Response, at 13.

The Board first notes that build-out to the prior zoning allowance (the no-action alternative) would involve a protracted and disruptive period of construction on the Touchstone site. It is not readily apparent that construction of the additional square-footage or building heights under the new proposal would have significant additive negative impacts.

Second, the Board finds that, as part of the permit process, the City will apply its existing ordinances to mitigate construction impacts, as SEPA allows. See RCW 43.21C.240. These ordinances govern noise, heavy equipment, sedimentation, and the like.[23] Further, the FEIS specifically provides that consideration of construction mitigation at time of permit application may include such measures as designated parking for construction workers, limitations on truck movements and materials delivery, traffic flaggers, temporary sidewalks, and adjustment of traffic signal phasing. FEIS at 4-28.

The Board is not persuaded that the impacts of construction need further analysis in the SEPA process in order to ensure appropriate application of the City's existing ordinances. The Board concludes that, with respect to short-term impacts, "the FEIS gave the city council sufficient information to make a reasoned decision." *Citizens' Alliance*, 126 Wn.2d at 362. Petitioners **have not carried their burden** with respect to Legal Issue 4C.

D. Failure to consider the proposal's long-term impacts

Under WAC 197-11-060(4)(d) environmental review must consider both direct and indirect effects of a proposal. Indirect impacts "include those effects resulting from growth caused by a proposal, as well as the likelihood that the present proposal will serve as a precedent for future actions." *Id.*

---

[22] In addition, the Board notes that the DEIS addresses greenhouse gas emissions from construction activities (DEIS Appendix D) and police and fire response times based on construction activities (DEIS 3.15-13, 3.15-14).

[23] Kirkland construction impacts ordinances:

- Chapter 115.25 KZC. Development Activities, Movement of Heavy Equipment
- Chapter 115.35 KZC Erosion and Sedimentation
- Chapter 115.75 KZC Land Surface Modification
- Chapter 115.95 Noise
- 115.140 KZC Temporary Construction Trailers
- Title 21 Kirkland Municipal Code, Building and Construction

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The Petitioners assert that the EIS glosses over the land use impacts of the proposal. First, the City's analysis considers only commercial development already constructed or in the permitting pipeline, rather than full build-out of the whole downtown area under existing zoning. Thus, Petitioners allege, consistency between planned land uses and the capital facilities necessary to serve them is never fully assessed. Petitioners' PHB at 34. Further, the impacts of housing the additional 3,600 employees are ignored, according to Petitioners.

The City and Touchstone respond that the indirect impacts suggested by Petitioners are "merely speculative." Touchstone Response, at 23-24; City Response, at 13-14. The City points to the DEIS discussion of the land use compatibility of the Proposed Action and the No Action alternative in the study area.

The Board concurs that determining how an increase in zoned density in one location might affect development patterns in adjacent areas may involve some "speculation." Generally, however, the GMA refers to this exercise as "comprehensive planning," and requires that it be thoughtfully undertaken based on the best data, experience, and professional planning expertise available. The urban planning profession and planners in the greater Puget Sound metropolitan area in particular have developed ample data on the residential demand associated with commercial development and on the zoned capacity needed to accommodate various levels of residential demand, as well as on commute trip variables.

Here the Board notes that the DEIS assesses the land use compatibility of the Proposed Action and the No Action alternative on a study area which extends for just a few small blocks around the subject properties. Ex. 92, DEIS at 3.1-1. The DEIS lists as "significant unavoidable adverse impacts" the greater intensity of land use, concentration of employment, and potential for land use incompatibility. DEIS at 3.1-22. The DEIS projects an "overall redevelopment in the study area [that] will continue to increase office, retail and multifamily portions of the mix of uses found in Downtown and its perimeter area." DEIS at 3.1-18. "Single family residential uses are expected to decrease in the land use pattern study area as single-family structures located in multifamily and commercial zones redevelop." *Id.*

In brief, the DEIS projects the indirect land use effects of the proposal to include

- Commercial redevelopment of the adjacent blocks at greater intensity (within existing zoned capacity), and
- Redevelopment of single-family property in the study area to commercial or multifamily.

The DEIS looks at a narrow "study area" and provides no quantification of the likely housing pressures caused by an added 3,600 job concentration. However, under the "rule of reason," the City is not required to provide a detailed analysis of the full cascade of land-use impacts from its action. The Petitioners have put no housing-demand formula into the record. They propose, without any supporting data, that intense job growth in downtown Kirkland will result in residential sprawl in rural areas. The Board therefore concludes that Petitioners **have not carried their burden** of demonstrating a failure to consider the indirect impacts of the Ordinances.

E. <u>Failure to adequately consider traffic and parking impacts</u>

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Petitioners challenge the traffic and parking analysis relied on in the FEIS to support the greatly-reduced parking requirements for the Touchstone project. According to Petitioners, the EIS is faulty because it "includes just one data set – the ITE model." Petitioners' PHB, at 17. The Institute for Transportation Engineers (ITE) trip generation model at issue here is derived from empirical data from mixed-use projects elsewhere in the country; Petitioners' expert asserts that these counts already reflect mode splits and that reducing them again with additional mode split projections for the Touchstone project is unjustified. FEIS, pdf at 254, Bernstein letter, May 16, 2008. Further, Petitioners present actual mode split and parking demand data from office buildings within the City of Kirkland; these numbers differ significantly from the assumptions in the EIS. Petitioners' PHB at 18, FEIS, pdf at p. 251.

The City responds that the EIS traffic and parking analysis took into consideration the mode split (primarily carpooling) already embedded in the ITE trip rates; the analysis then projected an increased mode split based on adjacency of the Kirkland Transit Center and implementation of Transportation Demand Management. FEIS at 5-10 (Comment 1). The City asserts it used current local commute trip reduction (CTR) data to help determine SOV rates. The City notes that employers within the Touchstone development will be required to adopt CTR programs and meet CTR goals. City Response, at 15-16. Finally, the City states that it reasonably anticipates the required parking demand management program (controlled access, paid parking, and ongoing monitoring and mitigation of off-site parking impacts) will further reduce trip generation. *Id.* citing FEIS at 5-15 (Comment 18).

The Washington Courts have determined that resolving competing expert opinions is a task for lead agency, not the reviewing body:

> When an agency is presented with conflicting expert opinion on an issue, it is the agency's job and not the job of the reviewing appellate body, to resolve those differences.

City of Des Moines v. Puget Sound Regional Council, 108 Wn.App. 836, 852, 988 P.2d 27 (1999).

The Board finds that the City had before it both the ITE trip rates, as modified by the City's expert IFC Jones & Stokes, and the Bernstein critique submitted by Petitioners in comment on the DEIS. The City was within its authority to choose to rely on IFC Jones & Stokes and to incorporate this analysis into the FEIS. The Board concludes that, with respect to parking and traffic impacts, "the FEIS gave the city council sufficient information to make a reasoned decision." *Citizens' Alliance*, 126 Wn.2d at 362. The Board concludes that the Petitioners **have not carried their burden** with respect to Legal Issue 4E.

VI. INVALIDITY

The Board has previously held that a request for invalidity is a prayer for relief and, as such, does not need to be framed in the PFR as a legal issue. *See King County v. Snohomish County*, CPSGMHB Case No. 03-3-0011, Final Decision and Order (Oct. 13, 2003), at 18. Here, Petitioners' Legal Issue No. 5 requests a determination of invalidity.

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Shall Ordinance No. 4170 and 4171 be invalidated where their continued effectiveness would substantially interfere with the fulfillment of the goals of the Growth Management Act, including, RCW 36.70A.020(1) and (12)?

Applicable Law

RCW 36.70A.302, the GMA's invalidity provision, provides in part:

> (1) A board may determine that part or all of a comprehensive plan or development regulation are invalid if the board:
>
> (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
>
> (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter ....

Discussion and Analysis

A determination of invalidity is based on a finding that continued validity of a City's action "would substantially interfere with the fulfillment" of a GMA Goal. Petitioners here cite to GMA Goals 1 (Urban growth) and 12 (Public facilities and services). The Board has previously concluded that Petitioners have not carried their burden in demonstrating that the challenged Ordinance will frustrate GMA goals to accommodate urban growth and prevent sprawl. See Legal Issue 3. The Board has also concluded that the Ordinances do not violate the concurrency required by Goal 12. See Legal Issues 1 and 2.

The Board also looks to Goal 10 which requires environmental protection. In this decision, the Board has found Kirkland's SEPA review inadequate in one respect and has therefore remanded the Ordinance to the City for further review. While the deficiency is serious, the Board is not persuaded that the GMA goal will be thwarted absent a ruling of invalidity. The Board remands the Ordinances to the City, establishes a compliance schedule, and declines to enter an order of invalidity.

Conclusion

The request for a determination of invalidity is **denied.**

V. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the GMA, prior Board Orders and case law, having considered the arguments of the parties, and having deliberated on the matter the Board ORDERS:

1. Petitioners have **failed to carry their burden** of demonstrating that the City's adoption of Ordinances 4170 and 4171 (a) did not comply with RCW 36.70A.100 and .210 or was inconsistent with County-wide Planning Policies; (b) was not guided by GMA Planning Goals 1 or 12; or (c) that environmental review was inadequate as alleged in Legal Issues 4A, 4C, 4D and 4E.

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2. Petitioners' request for a determination of invalidity is **denied.**

3. The City of Kirkland's adoption of Ordinance Nos. 4170 and 4171 was **clearly erroneous** in two respects:

   - The City did not comply with RCW 36.70A.070(preamble), .070(3)(b, c) and .070(6)(a)(iv) as set forth under Legal Issues 1 and 2.
   - The City's SEPA review is deficient as set forth in Legal Issue 4B.

4. Therefore the Board **remands** Ordinance Nos. 4170 and 4171 to the City of Kirkland with direction to the City to take legislative action to comply with the requirements of the GMA and SEPA as set forth in this Order.

5. The Board sets the following schedule for the City's compliance:

- The Board establishes **April 5, 2010,** as the deadline for the City of Kirkland to take appropriate legislative action.

- By no later than **April 19, 2010**, the City of Kirkland shall file with the Board an original and three copies of the legislative enactment described above, along with a statement of how the enactment complies with this Order **(Statement of Actions Taken to Comply - SATC)**. The City shall simultaneously serve a copy of the legislative enactment(s) and compliance statement, with attachments, on Petitioners and Intervenor. By this same date, the City shall also file a **"Compliance Index,"** listing the procedures (meetings, hearings etc.) occurring during the compliance period and materials (documents, reports, analysis, testimony, etc.) considered during the compliance period in taking the compliance action.

- By no later than **April 30, 2010,**[24] the Petitioners may file with the Board an original and three copies of Response to the City's SATC, simultaneously serving copies of the Response on the City and Intervenor.

- By no later than **May 7, 2010**, the City may file and serve a Reply to the Petitioners' Response.

- Pursuant to RCW 36.70A.330(1), the Board hereby schedules the Compliance Hearing in this matter for **10:00 a.m. May 13, 2010,** at a location to be announced. If the parties so stipulate, the Board will consider conducting the Compliance Hearing telephonically. If the City of Kirkland takes the required legislative action prior to the April 5, 2009, deadline set forth in this Order, the City may file a motion with the Board requesting an adjustment to this compliance schedule.

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[24] April 30, 2010, is also the deadline for a person to file a request to participate as a "participant" in the compliance proceeding. *See* RCW 36.70A.330(2). The Compliance Hearing is limited to determining whether the City's remand actions comply with the Legal Issues addressed and remanded in this FDO.

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So ORDERED this 5th day of October, 2009.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

David O. Earling
Board Member

Margaret A. Pageler
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.[25]

[25] Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

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APPENDIX A

Chronology of Procedures in CPSGMHB Consolidated Case No. 09-3-0007c

On February 20, 2009, the Central Puget Sound Growth Management Hearings Board (the **Board**) received two Petitions for Review: Case No. 09-3-0006 was filed by Davidson Serles and Associates, and Case No. 09-3-0007 was filed by T.C. Continental Plaza Corporation (collectively, **Petitioners**). The two matters were consolidated and assigned Consolidated Case No. 09-3-0007c, referred to as *Davidson Serles v. City of Kirkland*.[26]

Davidson Serles and Continental Plaza challenge the City of Kirkland's (**Respondent** or **City**) adoption of Ordinance Nos. 4170 and 4171 amending the City's Comprehensive Plan and development regulations with respect to an 11.5 acre parcel of land owned by Touchstone Corporation, which has intervened [**Touchstone** or **Intervenor**].[27] Petitioners are owners of two adjoining pieces of commercial property.

On February 24, 2009, the Board issued a "Notice of Hearing and Consolidation" in the above-captioned cases. The Order set a date for a prehearing conference and established a tentative schedule for the consolidated case.

On March 2, 2009, the Board received "Touchstone Motion to Intervene" (**Touchstone Motion**).

In their Petitions for Review, the two Petitioners assert that only the superior court, and not the Board, has authority to vacate a SEPA determination and to invalidate agency action retrospectively for violation of SEPA.[28] The City and Touchstone maintain that the Board has primary jurisdiction over SEPA challenges to the comprehensive plan and zoning code, but that Petitioners lack standing to bring a SEPA challenge. On March 17, 2009 the Presiding Officer sent a memo to the parties posing questions to be discussed at the PHC regarding jurisdiction and standing.

Prehearing Conference

On March 26, 2009, the Board conducted the prehearing conference at the Board's Offices in Seattle. Board member Edward G. McGuire, Presiding Officer in this matter, conducted the conference. Board Members David O. Earling and Margaret A. Pageler and Staff Attorney Julie Ainsworth-Taylor were also present. Jeffrey M. Eustis represented Petitioner Davidson Serles and David S. Mann represented Petitioner T.C. Continental. Richard Hill appeared for potential Intervenor Touchstone Corporation. Robin Jenkinson represented Respondent City of Kirkland. A.P. Hurd (Touchstone) also attended.

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[26] Edward G. McGuire served as the initial presiding officer in this matter. Upon Board member McGuire's retirement from state service on April 30, 2009, Board member Margaret A. Pageler became Presiding Officer.

[27] The challenged ordinances also involve two other proposals referred to as the Orni and Altom proposals. Petitioners do not challenge the Orni and Altom portions of the Ordinances. HOM, at 31-32.

[28] These two ordinances and related enactments were challenged by these Petitioners on other grounds in King County Superior Court under Cause No. 09-2-02204-6 SEA.

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The City of Kirkland presented the Board and the parties with copies of Kirkland's "Index of the Record," listing 690 items.

The first matter of business was consideration of the Touchstone Motion to Intervene. None of the parties objected to intervention and the Presiding Officer orally granted the motion.

The Board laid out a briefing schedule and date for a telephonic hearing to consider on motions the threshold legal issues of jurisdiction and standing. The Board then reviewed its procedures for the hearing, including the exhibits and supplemental exhibits; dispositive motions; the Legal Issues to be decided; and a final schedule of deadlines.

The Board further discussed with the parties the possibility of settling or mediating their dispute to eliminate or narrow the issues. The parties indicated that they were willing to pursue settlement negotiations and requested a 45-day settlement extension. At the close of the prehearing conference, the parties presented the Board with such a request signed by the parties.

The Board issued its Order on Intervention, Order Granting Settlement Extension, and Prehearing Order on March 30, 2009.

On May 14, 2009, the City of Kirkland filed an Amended Index to the Record and submitted its Core documents as follows:

- Kirkland Comprehensive Plan
- Final Environmental Impact Statement
- Capital Improvement Program 2009-2014

Motions

The following cross-motions, responses, and rebuttals were timely filed:

- Memorandum by Davidson Serles and Continental Plaza on SEPA Jurisdiction and SEPA Standing [**Petitioners' Opening**]
- City's Motion to Dismiss SEPA Claims [**City Motion – Dismiss**]
- Touchstone Motion to Dismiss SEPA Claims [**Touchstone Motion – Dismiss**]
- City's Response to Petitioners' Memorandum on SEPA Jurisdiction and SEPA Standing [**City Response**]
- Touchstone Response to Petitioners' Memorandum on SEPA Jurisdiction and SEPA Standing [**Touchstone Response**]
- Reply Memorandum by Davidson Serles and Continental Plaza in Opposition to Motions to Dismiss SEPA Claims [**Petitioners' Reply**]
- City's Reply to Petitioners' Response on SEPA Standing [**City Reply**]
- Touchstone Reply to Petitioners' Response on SEPA Standing [**Touchstone Reply**]
- Motion to Supplement the Record by Davidson Serles and Continental Plaza [**Petitioners' Motion – Supplement**]
- City's Opposition to Petitioners' Motion to Supplement Record [**City Opposition – Supplement**]

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- Reply by Davidson Serles and Continental Plaza in Support of Motion to Supplement the Record [**Petitioners' Reply – Supplement**]

The Board conducted a hearing on motions by teleconference on June 1, 2009, from 10:00-11:00 a.m. Board Members David O. Earling and Margaret A. Pageler and Staff Attorney Julie Ainsworth-Taylor were present. Jeffrey M. Eustis represented Petitioner Davidson Serles and David S. Mann represented Petitioner T.C. Continental. Robin Jenkinson represented Respondent City of Kirkland. Richard Hill appeared for Intervenor Touchstone Corporation, assisted by Jessica Clawson. A.P. Hurd of Touchstone also attended. The hearing provided the Board the opportunity to explore legal questions in the case.

On June 10, 2009, the Board issued its Order on Motions, finding that the Board has jurisdiction over the SEPA issues raised and granting Petitioners' motion to supplement the record.

Briefing and Hearing on the Merits

Each of the parties timely filed briefing on the merits as follows:

- Hearing Memorandum by Davidson Serles and Continental Plaza [**Petitioners' PHB**]
- City's Prehearing Brief [**City Response**]
- Touchstone Response to Petitioner' Hearing Memorandum [**Touchstone Response**]
- Reply Memorandum by Davidson Serles and Continental Plaza [**Petitioners' Reply**]

The Board conducted the Hearing on the Merits on August 10, 2009, from 10:45 a.m. to 1:00 p.m. Board Members David O. Earling and Margaret A. Pageler and Staff Attorney Julie Ainsworth-Taylor were present. Jeffrey M. Eustis represented Petitioner Davidson Serles and David S. Mann represented Petitioner T.C. Continental Plaza. Robin Jenkinson represented Respondent City of Kirkland. Richard Hill appeared for Intervenor Touchstone Corporation, assisted by Jessica Clawson. Also in attendance were A.P. Hurd of Touchstone Corporation, Jennifer Barnes of ICF Jones & Stokes, Angela Malstrom of McCullough Hill, City Planning Director Eric Shields, Deputy Planning Director Paul Stewart, Public Works David Godfrey, and transportation engineer Thang Nguyen.

Each of the parties, without objection, provided the Board with illustrative handouts at the hearing. The handouts were admitted as HOM Exhibits and are listed in Appendix B.

Court reporting services were provided by Barbara Hayden of Byers & Anderson, Inc. The Board ordered a transcript of the hearing, which was received on August 18, 2009, and is referenced herein as **HOM.** The hearing provided the Board the opportunity to explore legal questions in the case.

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At the hearing, Board member Earling requested that the City provide the Board with a listing of staff memoranda and power points provided to the City Council after July 1st. The City subsequently filed a set of documents received by the Board on August 27, 2009.[29]

[29] Exhibits 357, 367, 381, 408, 415, 550, 569, 585, 664, 669, 672, 689.

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APPENDIX B

Handouts at the Hearing on the Merits

Handouts provided by Petitioner Davidson Serles – **Admitted as HOM Exhibit 1**

A. Comprehensive Plan, p. IX-22 "Transportation Facility Plan"

B. Planned Action Ordinance Mitigation Measures, Ordinance 4175, Ex. B (annotated by Petitioners to show projects listed in the Capital Facilities Plan)

C. Excerpts from FEIS at 3-21 to 3-23; Excerpts from Ex. 672, at 2

D. Excerpts from Ordinance 4175, section 3d(4)(e) and City impact fee ordinance, KZC 27.04.030

E. RCW 82.02(2), (3), (4); citation to *Bothell v. Snohomish County*, CPSGMHB Case No. 07-3-0026c, Final Decision and Order (Sep. 17, 2007), at 21.

F. Citation to *Strahm v. City of Everett*, CPSGMHB Case No. 05-3-0042, Final Decision and Order (Sep. 15, 2006), at 30; Excerpt from King County Comprehensive Plan Policies; Petitioners' table of jobs and housing surplus capacity in the Kirkland Plan

G. RCW 36.70A.215

Handouts provided by Petitioner Continental Plaza – **Admitted as HOM Ex. 2**

A. WAC 197-11-060

B. Excerpts WAC 197-11-440(5)

C. Excerpts RCW 43.21C.240

Handouts provided by Intervenor Touchstone – **Admitted as HOM Exhibit 3**

A. RCW 36.70A.070(3) and (6) excerpts

B. DEIS tables: 2014 Concurrency Assessment, 2022 Concurrency Assessment, and 2014 Traffic Impact Analysis

C. DEIS Figure 3.4-2 and 3.4-2 (annotated by Intervenor)

D. Kirkland 2004 Comprehensive Plan Capital Facilities Plan excerpts

E. FEIS, Attachment 2 to Comment Letter 23

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CPSGMHB Case No. 09-3-0007c
Davidson Serles, et al v. City of Kirkland
DECLARATION OF SERVICE:

I certify that I mailed a copy of the **Final Decision and Order** to the persons and addresses listed hereon, postage prepaid, in a receptacle for United States mail at Seattle, Washington, on **October 5, 2009.**

Signed: Linda Bewstores

Pr. 206/625-9515 phone 206/682-1376 fax *Davidson Serles &Associates, Petitioner* *Eustis@aramburu-eustis.com* Jeffrey M. Eustis Aramburu & Eustis, LLP 720 Third Avenue, Suite 2112 Seattle, WA 98104	*Res. 425/587-3197 phone* Kathi Anderson, Kirkland City Clerk 123 Fifth Avenue Kirkland, WA 98033-6183
Pr. 206/621-8868 phone 206/621-0512 fax *TR Continental Plaza Corp., Petitioner* *Mann@Gendlermann.com* David S. Mann Gendler & Mann, LLP 1424 Fourth Avenue, Suite 1015 Seattle, WA 98101	*Res.425/587-3031 phone* *RJenkinson@ci.kirkland.wa.us* Dave Ramsey, Kirkland City Manager and/or Robin Jenkinson, Kirkland City Attorney 123 Fifth Avenue Kirkland, WA 98033-6183
Int. 206/812-3388 phone 206/812-3389 fax *Touchstone Corporation and Touchstone KPP Development LLC* *Rich@mhseattle.com;Jessica@mhseattle.com* Jessica M. Clawson McCullough Hill, P.S. 701 Fifth Avenue, Suite 7220 Seattle, WA 98104	

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JEFFREY M. EUSTIS
(em fwd CTC 11/3)

BEFORE THE CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

DAVIDSON SERLES & ASSOCIATES, and T.R. CONTINENTAL PLAZA CORP., Petitioners, v. CITY OF KIRKLAND, Respondent, and TOUCHSTONE CORPORATION and TOUCHSTONE KPP DEVELOPMENT, LLC, Intervenor.	Case No. 09-3-0007c *(Davidson Serles)* **ORDER ON MOTION FOR RECONSIDERATION**

THIS Matter comes before the Board upon the City and Touchstone's Motion for Reconsideration of the Board's October 5, 2009, Final Decision and Order.[1] Petitioners Davidson Serles and T.R. Continental Plaza oppose the Motion.[2]

DISCUSSION

A motion for reconsideration of a final decision of a Board is governed by WAC 242-02-832. WAC 242-02-832(2) provides that a motion for reconsideration must be based on at least one of the following grounds:

---

[1] City and Touchstone's Motion for Reconsideration, October 15, 2009, with 10 attachments.
[2] Petitioners' Response to Respondents' Motion for Reconsideration, October 22, 2009.

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(a) Errors of procedure or misinterpretation of fact or law, material to the party seeking reconsideration;
(b) Irregularity in the hearing before the board by which such party was prevented from having a fair hearing; or
(c) Clerical mistakes in the final decision and order.

The Respondents' Motion is based on the criteria in WAC 242-02-832 (a).[3] Respondents assert that the Board's determination of insufficiency of the FEIS for Ordinance 4170 and 4171 is based on errors of fact and law. *Id.* Respondents make two arguments.

- Failure to Apply "Private Rezone" Exemption

Although Respondents contend the Board's Final Decision and Order erred in its application of WAC 197-11-440(5) and the *Citizens' Alliance* precedent,[4] the Board finds that Respondents have raised no arguments or authorities that were not already thoroughly presented in the briefs and oral arguments of the parties. As the Board has stated before, a motion for reconsideration is not simply an opportunity to reargue a case.[5] The fact that the Board disagreed with a party's legal analysis does not provide a basis for reconsideration.[6]

Conclusion: The Board declines to reconsider its application of the law in this matter.

- Alternatives Reviewed in the 2004 EIS

Respondents contend that, when the 2004 SEPA documents are considered together with the 2008 FEIS, the City has reviewed a sufficient range of on- and off-site alternatives to the proposed action.[7] The Board recognizes that government agency decisions regarding EIS adequacy are to be accorded substantial weight.[8] Accordingly, the Board has carefully

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[3] City and Touchstone's Motion for Reconsideration, at 1.
[4] *Id.* at 2, 4-5.
[5] *Suquamish II v. Kitsap County*, CPSGMHB Case No. 07-3-0019c, Order on Reconsideration (Sep. 13, 2007), at 3.
[6] *Petso II v. City of Edmonds*, CPSGMHB Case No. 09-3-0005, Order on Reconsideration (Sep. 4, 2009), at 2.
[7] City and Touchstone's Motion for Reconsideration, at 3-7.
[8] RCW 43.21C.090.

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reviewed the referenced sections of the 2004 Comprehensive Plan EIS which the City asserts it reasonably relied upon when it limited its review of alternatives in the 2008 non-project review.

The Board notes that the 2004 EIS reviewed a plan with a maximum capacity for 53,128 jobs citywide, which would encompass the increase represented in the Touchstone proposal. [9] However, the 2004 EIS contemplated downtown commercial and office FARs in the range of 1.13 to 2.25,[10] not 3.25, as in the Touchstone proposal.[11] The 2004 EIS did not compare the environmental impacts of locating higher-intensity commercial/office capacity in the downtown core or elsewhere in the city – Totem Lake, Carillon Point, Lakeview or another commercial district. Nor can the Board find that either the 2004 EIS or the 2008 EIS looked at CBD5 as a whole as an alternative site for higher-intensity development. As Petitioners point out: "Had alternatives for siting of an additional million square feet of commercial and office space already been considered in the 2004 EIS, the City might have dispensed with preparation of another EIS."[12]

Conclusion: The City and Touchstone have failed to demonstrate that the Board erred in its determination that the SEPA analysis for Ordinance 4170 and 4171 was insufficient. Respondents have not shown "misinterpretation of fact or law, material to the party seeking reconsideration."

ORDER

Having reviewed the City and Touchstone's Motion for Reconsideration, the Petitioners' Response, the relevant provisions of the GMA and the Board's Rules of Practice and Procedure, in particular WAC 242-02-832(2), the Board finds that Respondents have failed

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[9] City and Touchstone's Motion for Reconsideration, Ex. 7, at 3-38.
[10] *Id.* fn. 1, and Ex. 1.
[11] Thus the question whether this higher density is appropriate or desirable in an Activity Center with freeway access and adjacent to a transit hub is not before the Board at this time.
[12] Petitioners' Response to Respondents' Motion for Reconsideration, at 6.

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to provide a basis that compels reconsideration of the October 5, 2009 Final Decision and Order. Therefore, for the reasons set forth above, the City and Touchstone's Motion for Reconsideration is hereby DENIED.

SO ORDERED this 3rd day of November, 2009.

David O. Earling, Board Member

Margaret A. Pageler, Board Member

Pursuant to RCW 36.70A.300 this is a final order of the Board.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

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CPSGMHB Case No. 09-3-0007c
Davidson Series, et al v. City of Kirkland
DECLARATION OF SERVICE:

I certify that I mailed a copy of the **Order on Motion for Reconsideration** to the persons and addresses listed hereon, postage prepaid, in a receptacle for United States mail at Seattle, Washington, on **November 3, 2009.**

Signed: Linda Kenstores

Pr. 206/625-9515 phone 206/682-1376 fax *Davidson Series &Associates, Petitioner* *Eustis@aramburu-eustis.com* Jeffrey M. Eustis Aramburu & Eustis, LLP 720 Third Avenue, Suite 2112 Seattle, WA 98104	*Res. 425/587-3197 phone* Kathi Anderson, Kirkland City Clerk 123 Fifth Avenue Kirkland, WA 98033-6183
Pr. 206/621-8868 phone 206/621-0512 fax *TR Continental Plaza Corp., Petitioner* *Mann@Gendlermann.com* David S. Mann Gendler & Mann, LLP 1424 Fourth Avenue, Suite 1015 Seattle, WA 98101	*Res.425/587-3031 phone* *RJenkinson@ci.kirkland.wa.us* Dave Ramsey, Kirkland City Manager and/or Robin Jenkinson, Kirkland City Attorney 123 Fifth Avenue Kirkland, WA 98033-6183
Int. 206/812-3388 phone 206/812-3389 fax *Touchstone Corporation and Touchstone KPP Development LLC* *Rich@mhseattle.com;Jessica@mhseattle.com* Jessica M. Clawson McCullough Hill, P.S. 701 Fifth Avenue, Suite 7220 Seattle, WA 98104	

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

FILED
STATE OF WASHINGTON
2009 DEC 22 PM 4:49

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

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ORIGINAL

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 December 22, 2009, an original and copy of the Opening Brief of Appellants was filed at the Court of Appeals and copies were served in the manner indicated below 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: December 22, 2009

Carol Cohoe

Carol Cohoe