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DIVISION II

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STATE OF WASHINGTON
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IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION II

KITSAP ALLIANCE OF PROPERTY OWNERS,
WILLIAM PALMER, and RON ROSS,

Petitioners/Appellants,

v.

CENTRAL PUGET SOUND GROWTH
MANAGEMENT HEARINGS BOARD, et al.,

Respondents/Appellees.

On Appeal from the Superior Court of the
State of Washington for Kitsap County

APPELLANTS' REPLY TO HOOD CANAL PETITIONERS

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Petitioners Kitsap Alliance of Property Owners, William Palmer and Ron Ross (collectively “KAPO”) respectfully submit this reply to the Hood Canal Petitioners’¹ improper response brief. This appeal arises from two separate Growth Management Act (GMA) appeals that were administratively consolidated by the Growth Board. The law provides two methods for a petitioner to address issues raised in a petition other than his or her own: intervention or amicus participation. Hood Canal failed to take advantage of either method; instead, it has unilaterally decided to address issues that were raised solely by KAPO’s petition. Hood Canal lacks standing to participate in KAPO’s appeal and its response brief should be disregarded.

On the one limited issue on which it has standing to participate (the size of marine shoreline buffers), Hood Canal has changed the position it took before the Growth Board. Below, Hood Canal argued that Kitsap County’s shoreline buffers failed to comply with the GMA’s “best available science” (BAS) requirement. On appeal, however, Hood Canal shifts its position and party alignment 180 degrees, now arguing that the size of the County’s marine shoreline buffers was supported by BAS. Hood Canal

¹ Hood Canal Environmental Council, People for Puget Sound, West Sound Conservation Council, Kitsap Citizens for Responsible Planning, Futurewise, Judith Krigsman, Irwin Krigsman, and Jim Trainer (collectively Hood Canal).

cannot take clearly inconsistent positions on the same evidence and law in this case.

ARGUMENT

I

THE HOOD CANAL PETITIONERS LACK STANDING TO PARTICIPATE AS RESPONDENTS TO KAPO'S PETITION

In its opening brief, KAPO set out the distinct issues raised in separate petitions that were filed by the Hood Canal and KAPO Petitioners challenging Kitsap County's critical areas update. *See* KAPO's Opening Br. at 9-12. The Growth Board administratively consolidated these two petitions, but did not grant either petitioner the right to participate in the issues raised in the other's petition. AR V1, Tab 7; *see also* AR V2, Tab 30 at 5 (Prehearing Order, limiting each petitioner's participation to the issues identified in the order). The Hood Canal Petitioners never moved to intervene in any of the issues raised in KAPO's petition, and never filed any briefs in the administrative proceedings addressing KAPO's issues. *See* AR V7, Tab 55 at 10 ("[T]here are no intervenors in the KAPO issues."). Hood Canal lacks standing to participate in the appeal of issues raised solely by KAPO.

And yet, the vast majority of Hood Canal’s 48-page “response” brief addresses issues that were raised solely in KAPO’s petition for review. The only exceptions are argument section A (setting forth the standard of review in a GMA petition) and section E (addressing the size of the County’s marine shoreline buffers). *See* Hood Canal Resp. Br. Hood Canal lacks standing to participate in the issues addressed in sections B, C, D, F, and G of its response brief. This Court should disregard Hood Canal’s improper submission of briefing of issues on which it lacks standing. RAP 10.7.

A. Hood Canal’s Standing on Administrative Appeal Is Limited by Its Role as Petitioner and by the Issues Raised in Its Petition for Review

On appeal, Hood Canal has abandoned its status as a petitioner challenging Kitsap County’s marine shoreline buffers, has unilaterally re-designated itself a “respondent,” and has filed a brief addressing all aspects of KAPO’s petition. Hood Canal’s standing on appeal, however, is limited by the claims that it brought to the growth board; it cannot change its party status and alignment without justification. *See City of Sequim v. Malkasian*, 157 Wn.2d 251, 270 (2006) (the alignment of parties is closely connected to justiciability and standing). Hood Canal cannot demonstrate the statutory requirements to establish standing to participate in the issues raised solely in KAPO’s appeal. Under the GMA, standing is limited to persons “who [have]

participated orally or in writing before the county or city regarding the matter on which review is being requested” RCW 36.70A.280(2)(b); *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 137 Wn. App. 781, 791 (2007);² *Wells v. W. Wash. Growth Mgmt. Hearings Bd.*, 100 Wn. App. 657, 672-73 (2000) (the prospective petitioner’s participation must have been reasonably related to the issue as presented to the Board). Unlike KAPO, the Hood Canal petitioners never participated in the SMA and RCW 82.02.020 issues while the critical areas update was pending before the County. *Compare* AR V1, Tab 2 at 13 *with* AR V1, Tab 3 at 4-5. The Hood Canal Petitioners limited their participation to arguing for larger buffers. *See, e.g.*, AR V6, Tab 38, Index 307; AR V6, Tab 38, Index 322; AR V8, Tab 72, Index 1405; AR V8, Tab 72, Index 1436; AR V8, Tab 72, Index 1537. Having filed its own petition to the administrative action below, Hood Canal lacks standing to participate in KAPO’s petition.

Moreover, each party to an administrative appeal is limited to the issues raised in his or her respective petition (or raised in a timely motion to intervene).³ *Washington Utils. & Transp. Comm’n v. Federal Energy*

² Reversed in part and affirmed in part on different grounds by *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329 (2008).

³ In the context of a growth board appeal, a party seeking to participate in issues raised by a another party’s petition must file a timely motion to
(continued...)

Regulatory Comm'n, 26 F.3d 935, 941-42 (9th Cir. 1994). A petitioner who seeks review of one issue cannot then argue for review of others. *See King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161, 179-80 (1999) (citing *Washington Utils.*, 26 F.3d at 941-42). Thus, a party's continuing standing to participate on administrative appeal is evaluated by considering the relief that the party sought before the board:

[O]nce a person has standing before the board, it would seem that whether he or she is aggrieved should be measured according to his or her role as a party—in other words, by comparing the relief that he or she sought from the board, to the relief that he or she obtained from the board. . . .

. . . [W]e think the GMA grants standing before the board to certain classes of petitioners, and standing [on appeal] to any petitioner with standing before the board, *provided that the petitioner failed to receive from the board the relief that he or she sought.*

Project for Informed Citizens v. Columbia County, 92 Wn. App. 290, 296-97 (1998) (emphasis added).

Here, there is the complete disconnect between the relief that Hood Canal sought below and its position on appeal. Before the growth board, the Hood Canal Petitioners argued: “Kitsap County again fails to comply with

³ (...continued)
intervene. WAC 242-02-270; *King County v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161, 179-80 (1999) (A timely motion to intervene must be filed before the statutory deadline for filing petitions for judicial review of administrative decisions.).

the requirements of the GMA, and this Board's FDO, by adopting 50 foot urban shoreline buffers, and a scarecrow [. . .] shoreline buffer of 100 feet" See AR V8 Tab 78 at 3. In its prayer for relief, the Hood Canal Petitioners requested conclusions that the "County is still in non-compliance with regard to all shoreline issues. Petitioners urge this Board to find continuing non-compliance and remand the shoreline buffers to the County for further action." See AR V8 Tab 78 at 8. Hood Canal cannot ignore its earlier pleadings and simply "switch sides" in this appeal. This Court should disregard Hood Canal's brief as having been submitted without standing.

II

HOOD CANAL AGREES THAT *FUTUREWISE* REQUIRES REVERSAL OF THE COUNTY'S MARINE SHORELINE BUFFERS

Even if this Court were to consider Hood Canal's input on the issue of GMA/SMA interplay after ESHB 1933, Hood Canal merely restates the obvious: *Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242 (2008), requires reversal of the County's marine shoreline buffers and a remand to comply with the substantive and procedural requirements of the SMA. Hood Canal Resp. Br. at 11. If, however, the pending motion for reconsideration in *Futurewise* is granted, then Hood Canal concludes that the Court will have to consider the decision as amended. Hood Canal Resp. Br.

at 11-12; 41-42. This is essentially the same position KAPO argues.⁴ See KAPO Opening Br. at 12-24.

III

JUDICIAL ESTOPPEL PRECLUDES HOOD CANAL FROM ASSERTING CLEARLY INCONSISTENT POSITIONS OF THE COUNTY'S BAS RECORD

The doctrine of judicial estoppel precludes Hood Canal from asserting one factual position before the Growth Board, then later seeking an advantage by taking a clearly inconsistent factual position with this Court. See *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 224-25 (2005); *Risetto v. Plumbers & Steamfitters, Local 343*, 94 F.2d 597, 604 (9th Cir. 1996) (judicial estoppel applies to administrative proceedings). “The purpose of this doctrine is to preserve respect for judicial proceedings and to avoid inconsistency, duplicity, and waste of time.” *Miller v.*

⁴ Any modification of the *Futurewise* decision would have to be harmonized with existing case law interpreting the amendments in ESHB 1933 as a mandate requiring local government to use the procedures set forth in the Shoreline Management Act, rather than the GMA, when regulating shorelines. See *Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242 (2008); *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 699 (2007) (“the SMA is the exclusive source of shoreline development regulation”); *Biggers v. City of Bainbridge Island*, 124 Wn. App. 858, 866-67 (2004); *Citizens Protecting Critical Areas v. Jefferson County*, WWGMHB No. 08-2-0029c at 16-17 (Final Decision and Order, Nov. 19, 2008) (“critical areas with the shoreline are regulated by the SMA”); *Evergreen Islands v. City of Anacortes*, WWGMHB No. 05-2-0016 at 31 (Final Decision and Order, Dec. 27, 2005).

Campbell, 164 Wn.2d 529, 540 (2008) (quotations and citations omitted); *Haslett v. Planck*, 140 Wn. App. 660, 665 (2007) (“judicial estoppel prevents a litigant from playing fast and loose with the courts”) (citations omitted).

In order to secure standing to participate as a petitioner before the Growth Board, Hood Canal argued that Kitsap County’s BAS record *did not* support the size of its shoreline buffers. *See, e.g.*, AR V1, Tab 3 at 4; AR V6, Tab 38 at 9-21.⁵ Even after the County expanded its marine buffers to 50/100 feet, Hood Canal continued to argue that the larger buffers failed to comply with the GMA’s BAS requirement. *See* AR V8, Tab78 at 3-8; AR V8, Tab 82 at 8-14.⁶ On appeal, however, Hood Canal has argued that the *exact same evidence* supports the opposite conclusion. *Compare* Hood Canal Resp. Br. at 29-39 to AR V1, Tab 3; AR V8, Tab78; AR V8, Tab 82. For example, compare the following inconsistent assertions from Hood Canal:

⁵ *See also* AR V6, Tab 38, Index 307 (Comment letter from West Sound Conservation Council, Futurewise, Washington Environmental Council and People for Puget Sound, arguing that BAS required a uniform minimum 150-foot marine buffer); AR V6, Tab 38, Index 322 (same).

⁶ *See also* AR V8, Tab 72, Index 1405 (Kitsap Citizens For Responsible Planning comment letter, arguing that BAS required a uniform minimum 150-foot marine buffer); AR V8, Tab 72, Index 1436 (Futurewise comment letter, same); AR V8, Tab 72, Index 1537 (People For Puget Sound comment letter, same).

Proceedings Before the Growth Board	Response Brief to the Court of Appeals
<p>“The County has failed to substantively consider the best available science when determining marine shoreline buffer widths for urban shorelines and has failed to provide adequate justification for its actions.” AR V8, Tab78 at 4.</p>	<p>“Marine shoreline buffers of widths eventually adopted by Kitsap County are called for by the best available science in the record . . .” Hood Canal Resp. Br. at 29.</p>
<p>“[A] 50-foot buffer is no more compliant with the requirement to include best available science in order to protect the functions and values of these critical areas than was a 35-foot buffer.” AR V8, Tab78 at 5.</p>	<p>“The adopted marine shoreline buffers are supported by the record Kitsap County had before it.” Hood Canal Resp. Br. at 30.</p>
<p>“[T]he scientific evidence contained in the record contradicts the County’s decision to set urban marine buffers at 50 feet.” AR V8, Tab78 at 4.</p>	<p>“The BAS also supports the protection of critical habitat functions by imposing a minimum buffer width of either 50 feet or 100 feet, depending on the type of area.” Hood Canal Resp. Br. at 39.</p>
<p>“The County’s justification for setting a 100-foot buffer and a 50-foot buffer . . . is absolutely backwards in regards to the science.” AR V8, Tab 83 at 13-14.</p>	<p>“The Board’s finding that the County rightly crafted a buffer system with reference to the science in the record is consistent with the requirements of the GMA.” Hood Canal Resp. Br. at 39.</p>

Application of judicial estoppel is appropriate here because: (1) Hood Canal asserted a position on the BAS that is “clearly inconsistent” with its position before the Growth Board; (2) acceptance of the inconsistent position

would indicate that either this Court or the Growth Board has been misled; and (3) the Growth Board's acceptance of Hood Canal's position below was necessary to establish participation standing under the GMA. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-39 (2007). Hood Canal has not provided an explanation for its inconsistent assertions of fact and law, therefore, this Court should disregard its argument on the adequacy of the best available science.⁷

IV

HOOD CANAL'S ARGUMENTS ON RCW 82.02.020 ARE BASED ON INAPPLICABLE CASES AND INCORRECT ASSUMPTIONS

Hood Canal's input on KAPO's RCW 82.02.020 argument demonstrates its lack of familiarity with this issue. Hood Canal first claims that application of the nexus and proportionality requirements of RCW 82.02.020 has been limited by the U.S. Supreme Court's dicta regarding what constitutes an exaction in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702-03 (1999). Hood Canal Resp. Br. at 42-43. Hood Canal fails, however, to acknowledge that our Courts have repeatedly rejected

⁷ Even if this Court were to consider Hood Canal's argument, it merely repeats the same analysis and errors that Kistap County made in its separate response brief. In the interest of judicial economy, KAPO incorporates its reply to the County's BAS discussion by reference. *See* KAPO Reply to Kitsap County.

this argument. *See, e.g., Honesty in Env'tl. Analysis & Legislation (HEAL) v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 534 (1999) (rejected supposed limitation as non-binding dicta); *Benchmark Land Co. v. City of Battle Ground*, 103 Wn. App. 721, 723-28 (2000) (rejected because Supreme Court has in fact extended exactions beyond the definition in *Del Monte Dunes*); *affirmed on other grounds*, 146 Wn.2d 685 (2002); *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 757-58 (2002); *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 99 Wn. App. 127, 138 (2000); *see also City of Olympia v. Drebeck*, 156 Wn.2d 289, 301-02 (2006) (*Del Monte Dunes*' limitation on rough proportionality did not apply to direct mitigation fees subject to RCW 82.02.020). Hood Canal provides no reason for this Court to revisit this well-settled issue.

Moreover, Hood Canal's "*Isla Verde*" argument is based on incorrect factual assumptions, and should be rejected. In *Isla Verde*, a city had imposed a mandatory open space condition for approval of the proposed development. This condition did not require the property owner to dedicate the open space; instead, the city required that the property owner create a homeowner's association to maintain the set aside property. *Isla Verde*, 146 Wn.2d at 757 n.13. The city and its amicus support argued that the set aside condition could not constitute an exaction as that term had been defined by

Del Monte Dunes because it did not require the property owner to transfer title to the open space area. See *Isla Verde*, 146 Wn.2d at 757; *Isla Verde*, 99 Wn. App. at 138.⁸ In a decision that drew the support of all nine Justices, our Supreme Court rejected this argument, concluding that a condition requiring a “dedication or reservation of open space” constituted an in kind indirect tax, fee, or charge on new development subject to RCW 82.02.020. See *Isla Verde*, 146 Wn.2d at 758-59 (citing *Trimen Dev. Co. v. King County*, 124 Wn.2d 261 (1994)) (emphasis added).

Hood Canal next claims that our Supreme Court limited the application of the nexus and proportionality requirements of RCW 82.02.020 in *City of Olympia v. Drebeck*, 156 Wn.2d 289. Hood Canal Resp. Br. at 43. That could not be further from the truth. The very page cited by Hood Canal states that its decision was limited to general GMA impact fees imposed under RCW 82.02.050-.090, not a condition on development imposed under RCW 82.20.020. *Drebeck*, 156 Wn.2d at 301-02 (criticizing the dissent for “[i]gnoring the distinction between impact fees under RCW 82.02.050-.090

⁸ See also *Isla Verde* Suppl. Brief, No. 69475-3, 2000 WL 34539748, at 7-12 (Wash. Nov. 6, 2000); Supplemental Brief of Amicus Curiae The Washington State Association of Municipal Attorneys, No. 69475-3, 2000 WL 34539750 (Wash. Nov. 6, 2000); see also Pacific Legal Foundation Amicus Brief, 69475-3, 2000 WL 34539749 (Wash. Nov. 6, 2000) (responding to *Del Monte Dunes* argument).

and land dedications under RCW 82.02.020”). Hood Canal’s argument is wrong and must be rejected.

Lastly, Hood Canal repeats Kitsap County’s argument that a Growth Board determination that the ordinance complied with the BAS requirement is somehow determinative of nexus and rough proportionality. Again, Hood Canal is wrong. Whether a record satisfies the GMA’s legislative requirements is a qualitatively different question than whether the ordinance violated the nexus and proportionality requirements of RCW 82.02.020.⁹ *See, e.g., Isla Verde*, 146 Wn.2d at 761 (“We reject the City’s argument that it satisfies its burden under RCW 82.02.020 merely through a legislative determination ‘of the need for subdivisions to provide for open space set asides . . . as a measure that will mitigate a consequence of subdivision development.’” (citation omitted)); *Citizens’ Alliance for Property Rights v.*

⁹ The growth boards are quasi judicial administrative agencies with limited review authority under their enabling statute. RCW 36.70A.250-.280; *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d at 358-59. The boards lack authority to decide claims alleging a violation of property rights, including a violation of RCW 82.02. *See, e.g., Open Frame LLC v. City of Tukwila*, CPSGMHB No. 06-3-0028, 2006 WL 3694092, at *7 (Nov. 17, 2006) (“for the Board to review any of the City’s actions . . . would amount to the Board’s review of actions under RCW 82.02, for which [the Board] has no jurisdiction”); *Hood Canal Env’tl. Council v. Kitsap County*, CPSGMHB No. 06-3-0012c, 2006 WL 2644138, at *35 (Aug. 28, 2006) (Property rights claims brought under statutory or constitutional protections “must be decided in the Courts, not by this Board.” (citation omitted)).

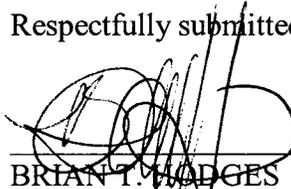
Sims, 145 Wn. App. 649, 668-69, 670 (2008) (“Notwithstanding the County’s extensive [scientific] record, [the challenged ordinance] fails to satisfy the proportionality requirement”); *Dolan v. City of Tigard*, 512 U.S. 374, 380, 389 (1994) (“The question for us is whether these findings are constitutionally sufficient to justify the conditions imposed by the city on petitioner’s building permit.”).

CONCLUSION

For the foregoing reasons, KAPO respectfully requests that this Court rule that Hood Canal lacks standing to participate in KAPO’s appeal, and judicial estoppel precludes Hood Canal from taking inconsistent positions on the facts of this case. KAPO respectfully requests that this Court disregard Hood Canal’s response brief and, for the reasons set forth in its appeal, reverse the Board’s Final Decision and Order and Compliance Order and conclude that the County’s attempt to regulate all shorelines of the state as critical areas is invalid.

DATED: February 12, 2009.

Respectfully submitted,



BRIAN T. HODGES
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Attorney for Petitioners/Appellants

DECLARATION OF SERVICE BY MAIL

I, Brian T. Hodges, declare as follows:

I am a resident of the State of Washington, residing or employed in Bellevue, Washington. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 10940 NE 33rd Place, Suite 210, Bellevue, Washington 98004. On February 13, 2009, true copies of APPELLANTS' REPLY TO HOOD CANAL PETITIONERS were placed in envelopes addressed to:

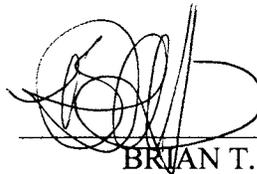
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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Bellevue, Washington.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 13th day of February, 2009, at Bellevue, Washington.



BRIAN T. HODGES