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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

No. 58433-2-I

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

King County Superior Court No. 06-2-16675-2 KNT, **Consolidated**
and King County Superior Court No. 06-2-16933-6 SEA

MASTER BUILDERS ASSOCIATION OF KING AND SNOHOMISH COUNTIES,
and BUILDING INDUSTRY ASSOCIATION OF WASHINGTON,

Petitioners/Appellant,

vs.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD;
WASHINGTON STATE DEPARTMENT OF ECOLOGY; WASHINGTON STATE
DEPARTMENT OF COMMUNITY TRADE AND ECONOMIC DEVELOPMENT;
LIVABLE COMMUNITIES COALITION; CITY OF KENT, WASHINGTON
ASSOCIATION OF REALTORS; and CITIZENS ALLIANCE FOR PROPERTY
RIGHTS,

Defendants/Respondents.

CITY OF KENT,

Petitioner,

vs.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD;
WASHINGTON STATE DEPARTMENT OF ECOLOGY; WASHINGTON STATE
DEPARTMENT OF COMMUNITY TRADE AND ECONOMIC DEVELOPMENT;
LIVABLE COMMUNITIES COALITION; MASTER BUILDERS ASSOCIATION
OF KING AND SNOHOMISH COUNTIES and BUILDING INDUSTRY
ASSOCIATION OF WASHINGTON, WASHINGTON ASSOCIATION OF
REALTORS; and CITIZENS ALLIANCE FOR PROPERTY RIGHTS,

Respondents.

**OPENING BRIEF OF MASTER BUILDERS ASSOCIATION OF
KING AND SNOHOMISH COUNTIES AND BUILDING INDUSTRY
ASSOCIATION OF WASHINGTON**

ORIGINAL

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NATURE OF THE CASE

This action is the latest battleground in an ongoing struggle between state agencies (primarily the Department of Ecology and the Growth Management Hearings Boards) and local governments (cities and counties) over control of local planning decisions made under the Growth Management Act, RCW ch. 36.70A.

This is a direct appeal to the Court of Appeals from a decision issued by the Central Puget Sound Growth Management Hearings Board (“the Growth Board”). The Growth Board decision at issue determined, at the behest of the Departments of Ecology (“DOE”) and Community, Trade and Economic Development (“DCTED”) that portions of an ordinance known as the Critical Areas Ordinance (the “CAO”), adopted by the City of Kent, fail to comply with the requirements of the Growth Management Act. DOE and DCTED claimed that Kent’s CAO was defective because the City refused to adopt a wetland rating system which had been recently invented by DOE and because the City adopted wetland buffers which were different than those advocated by DOE. It is important to note that the City, when it adopted its CAO, did adopt alternative provisions which, from the City’s point of view, provided superior overall protection for wetlands in the City than would have been

provided by adopting the DOE rating system and DOE recommended buffer widths.

Although the State Supreme Court¹, the Courts of Appeal² and the Legislature³ have repeatedly advised the Growth Management Boards and other state agencies that they are required to defer to policy decisions made by local governments in the implementation of the Growth Management Act, the Board refuses to abide by this limitation on its authority and continues to reject local ordinances in favor of state agency recommendations and preferences.

In this case, the Growth Board ruled that Kent's CAO provisions related to the wetland rating system and wetland buffers failed to comply with requirement of the Growth Management Act and remanded the matter to the City with instructions to adopt a new wetland rating system and larger buffers as requested by DOE.⁴ This decision was based in large part on the Board's decision that the City had the burden of proving that

¹ See, e.g., *The Quadrant Corporation v. Washington Growth Management Board*, 154 Wn. 2d 224, 232-233, 110 P.3d 1132 (2005) in which the Court discussed the reluctance of the Growth Boards to defer to local jurisdictions and noted that the Legislature had specifically amended the Act to require greater deference to local decision making bodies.

² See, e.g., *Preserve Our Island, et al. v. Shoreline Hearings Board, et al.*, 133 Wn.App. 503, 516, 137 P.2d 31 (2006) in which the Court explains at length that the Growth Management Act, unlike the Shoreline Management Act, requires that the Growth Boards defer to local decisions.

³ See, e.g. RCW 36.70A.3201

⁴ The Board also found a provision in the CAO exempting certain accidentally created wetlands from the CAO was inconsistent with the Growth Management Act. No party has challenged this aspect of the Board's decision.

its current regulations were consistent with the Growth Management Act, despite the fact that RCW 36.70A.320(2) places the burden of proof on the appealing parties, DOE and DCTED, not the City, and the assertion that it was not necessary for DOE and DCTED to prove either that the City's existing wetland regulations caused any harm or risk to wetlands or that the new DOE rating system and bigger buffers would produce any improvement in wetland protection.

ASSIGNMENTS OF ERROR AND ISSUES RELATED THERETO

1. The Growth Board failed to presume that the City's CAO was valid, as required by RCW 36.70A.320(1).
2. The Growth Board failed to defer to the judgment of the City of Kent, as required by RCW 36.70A.3201.
3. The Growth Board failed to properly require that the state agencies bear the burden of proving that the City's CAO was clearly erroneous.
4. The Growth Board improperly applied the requirement for inclusion of "best available science" in the adoption of Kent's CAO by misinterpreting this Court's holdings in *HEAL v. Seattle*⁵ and *WEAN v. Island County*.⁶

⁵ *Honesty in Environmental Analysis and Legislation v. Seattle*, 96 Wn.App. 522, 979 P.2d 864 (1999).

5. The Growth Board erred by finding that the wetland rating system adopted by the City of Kent does not comply with the requirement of the Growth Management Act.
6. The Growth Board erroneously concluded that Kent's wetland buffers were outside the range of "best available science."
7. Assuming that Kent's wetland buffers were outside the range of "best available science," the Growth Board erroneously concluded that Kent failed to justify such a departure.
8. The Growth Board's decision to require more stringent land use controls on private property in the absence of any evidence that there is a need for such regulations violates the substantive due process requirements of the Fourth Amendment to the United States Constitution.

FACTUAL BACKGROUND

The City of Kent's Brief accurately summarizes the factual and procedural history of the adoption of Kent's Critical Areas Ordinance, Ordinance No. 3746, and that history will not be repeated in this Brief. The key points for the Court to bear in mind during its review are as follows:

⁶ *Whidbey Environmental Action Network v. Island County*, 122 Wn.App. 156, 93 P.3d 885 (2004).

- The Growth Board concedes that Kent developed its ordinance in an extended process that included substantial public involvement and the use of qualified professional consultants.
- The City, during the adoption process for its CAO, formed a Wetland Focus Group, comprised of a variety of stakeholders, including representatives of DOE, DCTED, the development industry, environmental organizations, and Kent City staff. That Group met on a number of occasions for several months and extensively discussed the issues which are the focus of this case. Specifically, the Group discussed the pros and cons of adopting DOE's new wetland rating system and the pros and cons of various methods of wetland protection, including but not limited to, DOE's recommendations regarding best available science and buffer widths and alternatives to those recommendations.
- The Focus Group's recommended changes were incorporated into Ordinance No. 3746 even though, at the last minute, DOE decided to disavow the Focus Group's recommendations and demand additional concessions.
- DOE's own summary of best available science regarding wetlands concedes that there is no scientific evidence that the new DOE wetland rating system will do anything to improve wetland protection. Kent used a wetland rating system that had been adopted and has been in use by Kent and many other jurisdictions in Washington for years. DOE advocated a new system which DOE recently invented. While DOE

and DCTED claimed they believed the new system was superior, they offered no evidence to support this claim other than “it is newer and considers more variables, so it must be better.”

- DOE’s own summary of best available science regarding wetlands indicates that wetland buffer widths are only one of many tools available to protect wetland functions and values. The DOE summary of wetland science also demonstrated that there is no clear “best width” for buffers. Nevertheless, the Growth Board concluded that wider buffers are required in preference to all other methods of wetland protection and that no credit should be given to the City for adopting and implementing other regulatory tools to achieve the same wetland protection goals.

ARGUMENT

A. The Growth Board Decision Fails to Comply with GMA Requirements Regarding Presumption of Validity, Burden of Proof, Standard of Review and Deference to Local Jurisdictions.

There are a number of very basic legal standards which the Growth Board was supposed to apply to its review of Kent’s CAO:

- A City’s development regulations are presumed valid upon adoption. RCW 36.70A.320(1). The Growth Board was required to presume that Kent’s CAO was valid.

- The burden of proof is on the party filing an appeal to the Growth Board. RCW 36.70A.320(2). In this case, the burden of proof was on DOE and DCTED to prove that Kent’s CAO did not comply with the Growth Management Act.
- The standard of proof which DOE and DCTED were required to meet was the “clearly erroneous” standard. RCW 36.70A.320(3).
- The Growth Board is **required** to defer to the policy decisions of local jurisdictions. The Legislature was adamant about this when it adopted RCW 36.70A.3201 in reaction to earlier Growth Board rulings which failed to provide such deference:

[T]he legislature intends that the boards apply a **more deferential standard of review** to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. In recognition of the **broad range of discretion that may be exercised by counties and cities** consistent with the requirements of this chapter, the **legislature intends for the boards to grant deference to counties and cities in how they plan for growth**, consistent with the requirements and goals of this chapter. **Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances.** The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, **the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county’s or city’s future rests with that community.**

The Growth Board, in its decision regarding the Kent CAO, gave lip service to each of the legislative requirements regarding presumptions

of validity, burden of proof, standard of review, and deference to local jurisdictions by reciting them at the beginning of its opinion and then proceeded to totally ignore them in the balance of its analysis.

With regard to the issue of wetland rating systems, the Growth Board held that DOE and DCTED did not need to prove either that Kent's current regulations were inadequate⁷ or that the DOE wetland rating system would improve wetland protection,⁸ and that Kent failed to include information in the record proving that its wetland rating system adequately protected wetlands.⁹ The Board's decision that the state agencies did not need to prove that Kent's ordinances failed to protect wetlands and that Kent was required to prove that they did protect wetlands improperly places the burden of proof on Kent to defend its ordinance instead of placing the burden of proof on DOE and DCTED as required by RCW 36.70A.320(2). Moreover, the Board totally ignored the fact that DOE's own summary of best available wetland science conceded that there was no evidence that any particular wetland rating system provided superior wetland protection.

⁷ Board decision, CP Vol. 5, Tab 59, p. 16 (The Clerk's Papers filed by the Growth Board are indexed by Volume, Tab number and Page number, and in some cases by Attachment number. This protocol is used throughout this brief.)

⁸ Board decision, CP Vol. 5, Tab 59, p. 39

⁹ Board decision, CP Vol. 5, Tab 59, p. 33

DOE's *Wetlands in Washington State* Report,¹⁰ the summary of best available wetland science compiled by DOE, makes the following comment about rating systems for wetlands:

Although many different rating-type tools have been developed, **the literature search for this document did not uncover any analyses of the effectiveness of the rating systems at protecting the wetland resource.** It is **assumed** that better protection for wetlands is provided with improved understanding of wetland functions and values. [Emphasis added]

In other words, DOE and DCTED asked the Growth Board to assume that the new DOE rating system is better science than Kent's rating system even though DOE's survey of the literature indicates that this assumption has never been tested or verified by anyone. This assumption, which the Growth Board embraced in the admitted absence of any evidence submitted by DOE, should have demonstrated to the Growth Board that DOE and DCTED failed to meet their burden of proof. However, by shifting the burden of proof to the City to include information in its record proving its ordinance complied with the Growth Management Act, the Board ignored its obligation to defer to the City's judgment and ignored DOE's own admission that there was no evidence that the new DOE wetland rating system was either needed or would provide better environmental protection than the Kent rating system. Only on this basis was the Growth Board able to conclude that Kent's wetland rating system

¹⁰ *Wetlands in Washington State*, CP Vol. 2, Tab 28, Ex. 8, Attachment 2, p. 5-14

did not comply with the Growth Management Act. The Growth Board's decision violated the burden of proof, the requirements for a presumption of validity and deference to the City, and the standard of review.

The Growth Board also ignored the rules about burden of proof, deference, presumption of validity and burden of proof when considering the issues related to the width of wetland buffers. In its decision,¹¹ the Board adopted by reference an argument by DOE and DCTED that the state agencies did not have to prove that their preferred rating system and buffer widths would make any difference "on the ground." In other words, DOE and DCTED argued, and the Board adopted, the premise that the state agencies could force Kent to adopt more stringent regulations without a scintilla of evidence that Kent's existing regulations created a problem or that newer, stricter regulations would make any difference in the real world. This decision clearly violates the requirements that the Growth Board presume the City's CAO is valid and defer to the City's judgment on such issues.

As noted previously, the City of Kent adopted a series of other protective measures designed to protect the functions and values of wetlands, in lieu of the bigger buffers urged by DOE and DCTED. These programs included stormwater regulations, floodplain and stream

¹¹ CP Vol. 5, Tab 59, p. 39

protection measures, a requirement for restoration of existing degraded wetland buffers, and a program to acquire and enhance the major wetlands in the City, all of which, in the overall scheme of things, the City believed would provide better overall wetland protection than bigger buffers.

It is important to understand the context in which the City made its decision to adopt alternatives to bigger buffers: Almost all of the City of Kent is already developed and there is very little property on which new development will be proposed in the foreseeable future. The bigger buffers supported by DOE and DCTED apply only to new development and an occasional project which significantly redevelops an existing developed site in the City.¹² As a result, the bigger buffer rules propounded by DOE and DCTED would apply to and benefit only a small portion of the City's wetlands. The City recognized that in an existing urbanized environment, there is much more to be gained by protecting and enhancing all wetlands and wetland buffers on a city-wide basis instead of regulating the few remaining undeveloped properties which are adjacent to wetlands. As a result, the City opted for a series of programs which would emphasize restoration and protection of wetland areas adjacent to existing

¹² It is also important to bear in mind that the City already has wetland buffer requirements that have been in place for years. This is not a debate over whether to require buffers at all, but a debate over whether the buffers for new development should be 25 to 100 feet wide (the existing City requirements) or 50 to 125 or more feet wide as advocated by DOE.

development, while continuing to impose wetland buffer requirements for new development. This solution, besides applying to a far larger number of wetlands, also avoided the inevitable claims of unfairness that would ensue where one property has already been developed under current buffer requirements and an adjoining owner is told that they must provide a larger buffer even though the properties and their impacts on the wetland are identical.

The Growth Board, instead of presuming those alternative measures valid and deferring to the decision of the local government, as required by RCW 36.70A.320(1) and .3201, simply declared that the City had failed to prove that these alternative programs were effective. Once again, by improperly transferring the burden of proof to the City, the Growth Board justified its refusal to defer to the City's policy decisions.

B. The Growth Board Ruling that the Wetland Rating System Adopted by Kent Violates the Requirements of GMA is Error.

1. The Growth Management Act does not Require Adoption of a Wetland Rating System.

RCW 36.70A.040(3)(b) and .170(1)(d) require Kent to "designate critical areas." **The GMA does not require that any kind of rating system for wetlands be adopted by a local jurisdiction, let alone the new rating system invented and advocated by DOE.** Nevertheless,

DOE and DCTED argued and the Growth Board ruled that because the Kent rating system does not consider as many variables as the 2004 DOE rating system, that the Kent system violates the Growth Management Act. The Growth Board's decision that Kent is required to not only adopt a rating system but also use a system advocated by DOE is in error and should be reversed.

2. The Growth Management Act does not Require Adoption of Any Specific Wetland Rating System.

Even assuming that the Growth Management Act requires adoption of a wetland rating system, it does not impose any particular requirement for a particular wetland rating system. On the contrary, it is up to local decision makers to decide whether to use such a system, and if such a system is used, to select a system that balances the need for reasonable accuracy, the public and private cost of preparing and reviewing wetland designations, the complexity of their local permit processes, and a host of other issues. The Growth Management goals identified in RCW 36.70A.020, which include protection of environmental values, protection of property rights and fair and timely processing of permit applications, must be considered and balanced by the local governments implementing GMA. *WEAN v. Island County*, 122 Wn.App. 156, 173, 93 P.3d 885 (2004).

The City of Kent concluded that it was appropriate to retain its existing rating system based on concerns that the more complex case-by-case analysis that will be required by the new DOE rating system would result in increased subjectivity and complexity for both City staff, applicants and the general public. Although the Growth Board chose to ignore this, it is noteworthy that DOE's summary of best available science raises the same concerns:¹³

The case-by case, variable width approach is probably the most consistent with what a review of scientific literature reveals about buffer effectiveness.... **However, this approach is time-consuming, costly to implement and provides less predictable outcome.** It requires either that the applicant hire a consultant to conduct the necessary analysis, or that the government agency staff conduct the analysis. In either case, the local government staff must have appropriate training and expertise to conduct or review the report produced. In addition, this approach requires a considerable effort when the formula and methodology for site-evaluation is developed. This approach may also not provide any predictability for applicants. They have no idea how large a buffer may be required until considerable time and money are invested in the analysis. **Using a case-by-case, variable width approach can also result in attempts to manipulate the site-specific data, lead to frequent haggling with applicants, and create the perception that buffer widths are determined in an arbitrary and capricious manner.** [Emphasis added]

The Growth Board refused to defer to the City's policy decision to retain its existing rating system and instead created a new requirement for wetland rating systems which does not exist in the Growth Management Act. Once again, the Growth Board failed to provide the deference to

¹³ CP Vol.2, Tab 28, Ex. 8, Attachment 3, pp 8-38 to 8-39

local policy decisions required by the GMA and imposed its own vision of public policy on the local government.

3. The Growth Board Improperly Shifted the Burden of Proof to the City Regarding the Selection of a Wetland Rating System.

As noted above, the Growth Board improperly ruled that the City of Kent had the burden of proving that its wetland rating system was in compliance with the Growth Management Act. The Board also held that the state agencies did not need to prove that adopting the DOE rating system would actually result in any substantive change in wetland protection in Kent. Instead, the Board simply decided that because DOE's rating system purportedly considers more variables for some wetland functions, it must produce better results. Based on the fact that the new DOE rating system is "more detailed," the Growth Board assumed that it constitutes better science than Kent's rating system. However, the Growth Board did not and could not point to any evidence in the record indicating that adoption of the DOE system or any other alternative system would result in better wetland protection.

The Growth Board's ruling states that Kent failed to "include" best available science when it made a decision to retain its existing wetland rating system. This ruling mischaracterizes the requirement in RCW 36.70A.172 for "including" best available science.

As this Court has ruled, the requirement in RCW 36.70A.172 that local government “include the best available science” means that the best available science must be “considered” by local jurisdictions and that the local jurisdiction may, but are not required to, adopt standards that are consistent with that science.¹⁴ In *WEAN*, this Court held:

The County is correct when it asserts that, under the GMA, it is required to balance the various goals of GMA set forth in RCW 36.70A.020. It is also true that when balancing those goals in the process of adopting a plan or development regulation **under GMA, a local jurisdiction must consider BAS regarding protection of critical areas. This does not mean that the local government is required to adopt regulations that are consistent with BAS because such a rule would interfere with the local agency’s ability to consider the other goals of GMA and adopt an appropriate balance between all the GMA goals.** However, if a local government elects to adopt a critical area requirement that is outside the range that BAS alone would support, the local agency must provide findings explaining the reasons for its departure from BAS and identifying the other goals of GMA which it is implementing by making such a choice. [Emphasis added]

The City of Kent clearly considered the option of adopting DOE’s rating system.¹⁵ The City Council discussed the pros and cons of the differences between the two rating systems and made a series of findings explaining its decision to retain the existing rating system. Since the City

¹⁴ *WEAN v. Island County*, 122 Wn. App. 156, 173, 93 P.3d 885 (2004)

¹⁵ Kent Ordinance No. 3746, CP Vol. 1, Tab 2, Attachment A, pp. 12-14,

of Kent clearly considered adoption of the DOE rating system, the remaining questions are:

(1) Is the Kent rating system “outside the range that best available science alone would support?”

As explained previously, DOE and DCTED failed to meet their burden of proving that the Kent rating system is outside the range of choices presented by best available science. Obviously, since DOE’s own summary of best available science concedes that there is no scientific evidence that there is any real world difference between the various wetland rating systems, it is impossible to say that any particular rating system is “outside the range of best available science.” The Growth Board’s declaration that the Kent rating system is outside the range of best available science is pure conjecture.

(2) Even assuming the Kent wetland rating system is outside the range of best available science, did the City of Kent provide findings explaining its reasons for adopting a departure from best available science?

Although the Appellants in this case believe the Kent rating system is consistent with best available science, even if it is not, the City of Kent did adopt defensible findings of fact supporting its determination that it was appropriate to depart from best available science.

The City of Kent exercised reasonable caution in the adoption of its CAO and made alternative findings, first indicating that it was the City's determination, based on a review of the available science, that its rating system was within the range of best available science,¹⁶ but also included findings which stated that if it was later determined that the Kent rating system was outside the range of best available science, the City had reasoned bases for departing from best available science. Specifically, the City Council concluded that although the Kent rating system does not consider all of the same variables as the DOE system, it considers most of the same factors, is scientifically based, ranks wetlands from higher to lower function and value and meets the requirements of WAC 365-190-180.¹⁷

The Kent Ordinance also explained the rationale for the City's decision to retain the existing rating system even if it constituted a departure from best available science.¹⁸ First, the City was concerned that the additional complexity of the DOE rating system would lead to higher

¹⁶ The Growth Board admitted that this finding was supported by the City's professional wetland consultant, Adolphson and Associates, CP Vol. 5, Tab 59, p. 33. Ironically, the Growth Board, in an effort to justify ignoring this evidence, criticized the City for relying on the opinion of its consultant, Board decision, CP Vol. 5, Tab 59, p. 33, fn. 27, but then assumed that the opinions of DOE's comparable consultants was entitled to considerable deference. Board decision, CP Vol. 5, Tab 59, p. 38. The Board simply selected the opinions of the consultants which support its vision of appropriate policy decisions and ignored all contrary evidence.

¹⁷ Finding O, Ordinance No. 3746, CP Vol. 1, Tab 2, Attachment A, pp. 12-13

¹⁸ Findings P and, Q Ordinance No. 3746, CP Vol. 1, Tab 2, Attachment A, p. 13

complexity and greater subjectivity between evaluators, a fact which DOE's own summary of best available science concedes.

The City also found that although DOE's rating system may be appropriate on a statewide basis given the range of wetland types and sizes that exist statewide, it may not be necessary to have such an elaborate system to evaluate wetlands in an urban environment that was essentially largely already developed. While the DOE and DCTED disputed this by arguing that there is a range of wetland types in Kent, they presented no evidence to the Growth Board that the range of wetlands in the City is as broad as the range that exists statewide.

While DOE is understandably proprietary about the wetland rating system it invented and while DOE and DCTED clearly want a decision that gives them the authority to impose their version of wetlands rules on local jurisdictions, there is nothing that mandates or even allows such a result. On the contrary, the position advocated by DOE and DCTED and adopted by the Growth Board is clearly inconsistent with the broad deference mandated by RCW 36.70A.3201.

The Growth Board has ignored the Legislature's admonition that deference is to be paid to local planning in recognition of the burdens that local governments face when they are required to comply not only with the environmental protection objectives but also with the other goals and

policies of GMA, as well as deal with the fiscal and regulatory burdens which local governments must deal with on a daily basis. The Growth Board's decision finding that the City of Kent's wetland rating system violates the Growth Management Act should be reversed.

C. The Growth Board Decision That Kent's Wetland Buffers Violate the Growth Management Act is Error.

The second major issue presented to the Growth Board by the DOE/DCTED appeal was a challenge to the wetland buffers adopted by Kent. Again, DOE and DCTED essentially took a "do it our way or else" approach, arguing that anything other than compliance with DOE's recommendations for wetland protection is an unjustified departure from best available science. The Board accepted these claims and found Kent's buffer requirements to be outside the range of best available science and that there was no justification for such departure. The Board's decision was error for several reasons.

It is very important to appreciate exactly what DOE and DCTED argued and what the Growth Board decided on this issue because there is an enormous gap in the logic of their analysis. In essence, the state agencies argued and the Board ruled that:

- Best available science, as summarized in the DOE publication, *Wetlands in Washington State*, indicates that wetland buffers provide

environmental benefits in the form of stormwater protection (both water quality and flood control), as well as habitat for wildlife.

Importantly, no one disagrees with this basic general premise.

- The recommendations for wetland buffer widths recommended by DOE also constitute best available science. The Board's acceptance of this premise, as discussed below, is seriously flawed.
- Any departure from the DOE recommendations must be justified by the local government because it is outside the range of best available science.

The logical flaw in this analysis, which the Growth Board ignores, is the fact that while everyone agrees with the general principle that buffers provide protection for wetland functions, there is absolutely nothing in the "science" defining the appropriate level of protection for wetlands or the size of buffer required to achieve any particular level of protection.

As DOE's *Wetlands in Washington State* admits:

By far the issue of greatest interest with respect to buffers is the question of how wide a buffer needs to be in order to be effective in protecting a wetland (or other aquatic resource). While the literature is unanimous that buffers provide important functions that protect wetlands and provide essential habitat for many species, there is wide-ranging discussion about how much buffer is necessary to be effective in providing a particular level of function.¹⁹

¹⁹ CP Vol. 52 Tab 28, Attachment 2, p. 5-26

The bottom line, which is discussed in detail below, is (1) there is no accepted standard for what constitutes a level of protection that is sufficient to protect a wetland's functions and values, and (2) even assuming that one established some sort of objective standard for determining a required level of protection, there is no accepted science that indicates that a buffer of any given width will provide that level of protection. Given this lack of scientific information, the Growth Board is **required** to defer to the policy choices adopted by local jurisdictions, assuming that the local jurisdiction considered the available scientific information during its deliberations and provided some reasonable level of protection for wetlands.²⁰

The following example illustrates these points vividly:

One of the known functions of wetland buffers is that they filter sediments from stormwater before it reaches the actual wetland. DOE's report on best available science summarizes the studies which have been conducted on the amount of sediment control provided by buffers of various widths.

²⁰ Obviously, a party could challenge a local jurisdiction's wetland buffers and attempt to prove that the buffers adopted by the agency would damage wetlands. The Growth Board would then be faced with the question of whether the appellant had met its burden of proving that such damage would violate the Growth Management Act. In this case, however, DOE and DCTED made no attempt to introduce evidence that Kent's existing wetland buffers had caused any damage to wetland resources despite the fact that the buffer requirements had been in effect for years and there was ample opportunity to prove that the existing buffer rules had resulted in environmental damage. In the complete absence of such evidence, the Growth Board simply ignored the burden of proof obligation imposed by RCW 36.70A.320(2) and required Kent to prove a negative - that its existing buffers had not caused damage to wetlands.

Not surprisingly, the studies show very generally that as buffers become wider, the percentage of sediment removed increases.²¹

However, the studies do not indicate how much buffer is required to achieve any particular level of sediment removal. In general, the DOE report shows that buffers as small as 6.6 feet remove 60% of all sediment and that buffers of less than 100 feet removed 80%+ of the sediments.²²

However, none of the studies indicates how much sediment must be removed by the buffer to adequately protect a wetland. Is 50% removal sufficient or is 75% removal required?²³ No one even pretends to claim to know the answer to this question. Nevertheless, local lawmakers are required to decide “how wide a buffer is wide enough” to provide some degree of sediment control.

To make things even more problematic for local decision makers, wetland buffers are not the only tool used by local governments to reduce the impacts of sediment on local water bodies. Cities and counties in Washington, including Kent, as well as DOE, routinely require that developers and builders install and maintain extensive erosion and sedimentation control systems as part of their stormwater control

²¹ *Wetlands in Washington State*, CP Vol. 2, Tab 28, Exhibit 8, Attachment 2, p. 5-32

²² *Wetlands in Washington State*, CP Vol. 2, Tab 28, Exhibit 8, Attachment 2, p. 5-31

²³ One presumes that even the DOE and DCTED will concede that 100% removal of sediments is not necessary since sediments are transported into wetlands and streams naturally and no one is claiming that buffers are required to out-perform Mother Nature.

regulation programs. In addition, the City has constructed and maintains a municipal stormwater control system which intercepts and treats stormwater to remove sediments before runoff is discharged to water bodies. Thus, the ultimate question is: If a local government like Kent has existing stormwater management programs which reduce sediments from development projects and from existing neighborhoods, how much more protection in the form of wetland buffers is required to achieve the same objective? No one has a purely scientific answer to this question.

The problems described in the preceding paragraphs become even more difficult when one recognizes that DOE's own *Wetlands in Washington State* report admits that there is a significant issue of "diminishing returns" as wetland buffers increase in size. One major study cited by DOE reports 60% sediment removal in a buffer of only 6.6 feet, but also notes that the buffer needs to be increased 1250 % to 82 feet to obtain just a 33% improvement in sediment removal (to a removal rate of 80%). Another study cited in the DOE report shows a 90% sediment removal rate with a buffer of 100 feet, but also reports that the buffer needs to be doubled in size to 200 feet in order to obtain an increase of only 5%.²⁴ In other words, while "bigger is better" at some very general level when discussing buffer width, the additional benefit of "bigger" becomes

²⁴ CP Vol. 2, Tab 28, Exhibit 8, Attachment 2, pp. 5-30 to 5-32

less and less as the width of the buffer is increased. As a result, in the real world, the local lawmaker is required to answer the following question:

If a buffer of 50 feet provides a significant sediment removal benefit, and the City also has active stormwater management programs for controlling sedimentation and erosion, how much additional benefit will occur from requiring wider buffers?

The foregoing example is based on just one of the functions and values provided by wetlands – sediment removal. However, the same principles apply to other functions and values provided by wetlands. For example, it is acknowledged by the scientific community that wetland buffers provide habitat for various wildlife species. But that simple fact begs the question. The more precise issues, which the City of Kent and every other local government planning under GMA must resolve, are as follows:

1. What species should the City protect? RCW

36.70A.030(5) defines critical areas to include “fish and wildlife conservation areas,” but does not impose any more specific requirements on which species must be considered for protection by local officials.

RCW 36.70A.172 provides a very general requirement that “counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.” Beyond

that, the GMA leaves decisions about which species are to be protected to local officials.

2. How much protection must be provided to species that use wetlands as habitat? The Growth Management Act provides no guidance on this issue at all, leaving all decisions to local lawmakers. That means that cities and counties must decide not only what species to protect, but how much protection is sufficient. Unfortunately, the available scientific information is nearly useless when attempting to answer this question.

The DOE *Wetlands in Washington* report concedes this point:

In regard to wildlife, most of the scientific research is not directly focused on the effectiveness of buffers for maintaining individuals or populations of species that use wetlands. Some of the research simply documents use of upland habitats adjacent to wetlands by wildlife to meet their life-history needs. For example, a substantial body of research identifies the distances that amphibians may be found away from a wetland edge. However, the implications to amphibian populations of providing buffers that are smaller than those identified ranges are not well documented.²⁵

The DOE best available science report also concedes:

There is no simple, general answer for what constitutes an effective buffer width for wildlife considerations. The width of the buffer is dependent upon the species in question and its life-history needs, whether the goal is to maintain connectivity of habitats across a landscape, or whether one is simply trying to screen wildlife from human interactions.²⁶

²⁵ CP Vol. 2, Tab 28, Exhibit 8, Attachment 2, pp. 5-38 to 5-39

²⁶ CP Vol. 2, Tab 28, Exhibit 8, Attachment 2, pp. 5-49

In other words, there is no science based answer that defines the appropriate width of wetland buffers for protection of wildlife habitat and there is no scientifically based “range of best available science”. As in the case with the issue of sediment removal, local lawmakers are confronted with the issue of trying to decide how much protection is sufficient.

Answering this question would require answers to the following:

- Is a buffer that allows wetland dependent species to survive, albeit in reduced numbers, sufficient to comply with GMA or is 100% protection of all individuals and all species all the time required?
- Should the City try to protect raccoons, starlings and crows, or should the City limit its concern to less commonplace species?
- Should the City protect only those species that cannot survive outside of a wetland or must the City also protect species that may use wetlands from time to time, but which also thrive in other terrain?
- To what extent are the answers to the preceding question affected by the fact that the area in question is part of the urban growth area, where jurisdictions are under a mandate to concentrate development in order to protect rural and resource areas?

Against this backdrop of questions which lack scientific answers, the Growth Board concluded that the City of Kent's decisions on buffer width do not "include best available science" because the buffers are outside the "range of best available science." In order to reach this conclusion, the Growth Board simply cites DOE's "guidance" on buffer widths and asserts that failure to comply with these "guidelines" constitutes a failure to "include best available science."

Notably, although the Growth Board claims that Kent's buffers are outside the range of best available science, the Growth Board totally fails to define what that range might be. Presumably, if the Board has been able to determine that Kent's buffers are outside the range of best available science, that also means the Board has determined what that range is. However, in reality, what the Board really decided was that if the City doesn't follow the DOE recommendations, the City is assumed to not be within the "range of best available science." This "analysis" is flawed for three major reasons:

- The DOE "guidance" on wetland buffer sizes concedes that there is no right answer to the question of buffer size and that there are many potential options, each with advantages and disadvantages. Kent has adopted buffers ranging from 25 to 100 feet in width, along with a host of other regulations and programs which also protect wetland functions

and values. As noted above, DOE's own summary of the scientific evidence shows that buffers as small as 6.6 feet provide significant wetland protection benefits. The Growth Board's decision that the Kent buffers are outside the range of best available science is merely a conclusory statement with no evidentiary support. Such an unsupported conclusion is not a basis for determining that Kent's buffers violate the Growth Management Act.

- Neither DOE nor DCTED even attempted to prove and the Growth Board did not decide what the range of best available science might be. Instead, the Board improperly shifted the burden of proof to Kent by holding that Kent had the burden to prove its buffers were "adequate."
 - By assuming that whatever DOE recommended is "best available science" and that anything else is outside the range of best available science, the Growth Board violated its statutory duty to defer to policy decisions made by local governments and continued its historic practice of overruling local decisions despite repeated warnings by the Courts and Legislature that state agencies are not allowed to impose their vision of the best way to implement the GMA on local governments.
1. The Growth Board Decision that Best Available Science Requires Wider Wetland Buffers is not Supported by the Board's Decision or by the Record.

The DOE guidance on wetland buffer size concedes that there is no “best available” scientific answer to the question of buffer width. Key points in that portion of the Report include the following statements:

- The case-by-case, variable width approach is probably the most consistent with what a review of scientific literature reveals about buffer effectiveness.... However, this approach is time-consuming, costly to implement and provides less predictable outcome. It requires either that the applicant hire a consultant to conduct the necessary analysis, or that the government agency staff conduct the analysis. In either case, the local government staff must have appropriate training and expertise to conduct or review the report produced. In addition, this approach requires a considerable effort when the formula and methodology for site-evaluation is developed. This approach may also not provide any predictability for applicants. They have no idea how large a buffer may be required until considerable time and money are invested in the analysis. Using a case-by-case, variable width approach can also result in attempts to manipulate the site-specific data, lead to frequent haggling with applicants, and create the perception that buffer widths are determined in an arbitrary and capricious manner.²⁷
- By contrast, a fixed-width approach provides predictability and is relatively inexpensive to administer. The downside of this “one size fits all” approach is that it results in some buffers being too small to adequately protect wetland functions and some buffers being larger than necessary to protect wetland functions. It is also difficult to determine an appropriate standard width, because no single-size buffer can be demonstrated to protect all wetland types adequately in all situations unless the standard width is very large.... [N]o local governments in Washington currently use a single, fixed width approach...

²⁷ As noted previously, these are the very points that the City of Kent cited as reasons not to adopt DOE’s wetland rating system, which is a case-by-case scoring system for designating wetland classes.

- There are several ways to modify an approach using standard, fixed widths to incorporate some of the factors that contribute to effectiveness of buffers. Some drawbacks of the fixed-width approach can be rectified by using a wetland rating system that divides wetlands into different categories based on specific characteristics. Then standards for buffer widths can be assigned to each category. This approach provides predictable widths, yet allows some tailoring of buffer widths to wetland functions....Most local governments in Washington currently designate wetland buffer widths based on the state wetland rating systems or a rating that is similar.... Other critical factors, such as characteristics of the buffer itself and the functions of the buffer that are desired, can be addressed by establishing criteria and procedures for varying from a standard width....In this approach, criteria for increases or reductions from the standard buffer are developed, and the applicant or any other interested party is given the option of “making a case” as to why the buffer width should be increased or decreased....²⁸

Interestingly, the City of Kent’s CAO did exactly what DOE’s report seems to encourage – it adopted a modified fixed-width buffer standard, based on a wetland rating system, and then provided a series of options for increasing or decreasing buffers, provided studies were submitted and approved by the City which demonstrate that the resulting buffers will provide as much or more protection to wetland functions and values as the standard buffers. As DOE’s own report recognizes, this is a compromise between the expensive and unpredictable option of a case-by-case analysis and an overly rigid, one-size-fits-all system. Moreover, the City modified its CAO, based on recommendations by the Focus Group, to add an

²⁸ CP Vol. 2, Tab 28, Exhibit 8, Attachment 3, pp. 8-38 to 8-39

incentive program encouraging property owners to voluntarily provide wider buffers in exchange for density bonuses in non-wetland areas.

In the process of adopting its CAO, the Kent City Council recognized that many of the existing areas adjacent to wetlands in the City are degraded because there is either little or no vegetation or the vegetation which exists is non-native, or because the areas are adversely affected by lack of adequate stormwater controls. As a result, merely designating these areas as buffers that cannot be used for development is unlikely to provide the desired wetland protection even if they are preserved at the widths recommended by DOE. The City instead opted to require that buffers be restored and/or enhanced as an alternative to simply adopting DOE's recommendations for wider buffers, which would merely preserve areas adjacent to wetlands as buffers in their existing condition, regardless of the opportunity or need for restoration or enhancement. In essence, the City has opted for "better buffers" in lieu of the "bigger buffers" advocated by DOE. The Growth Board failed to acknowledge this and instead, decided that "bigger is better, regardless." The Growth Board decision cites no evidence – because none exists – suggesting that a simple requirement for bigger buffers produces a better overall benefit to wetlands than a program which promotes restoration and enhancement of narrower buffers.

Finally, the Court should bear in mind that the City of Kent must also balance the goal of environmental protection associated with wetland buffers against all of the other GMA goals.²⁹ As a result, the ultimate question is whether buffer increases for wetlands provide sufficient benefit to offset their impacts on buildable land inventories, the cost of housing, property rights and other goals of growth management. The Legislature is adamant that these types of decisions are to be made by local government, not by state agencies. The Growth Board's decision to impose its vision of appropriate wetland buffers on the City of Kent ignores the Board's obligation to defer to the City's balancing of policy objectives.

The Growth Board decision stated that it is entitled to ignore the City's wetland restoration/enhancement requirements and other City programs that provide benefit and protection to wetlands, as well as the City's buffer incentive plan, because other jurisdictions have such programs or because the City failed to "prove" that such programs would provide the same level of environmental protection as wider buffers (ignoring the fact that DOE and DCTED did not and cannot prove that wider buffers would actually provide any environmental benefit). The Board's refusal to consider these programs and policies without City proof

²⁹ By contrast, DOE's legislative mission is narrowly focused on environmental protection, which allows DOE's view of best available science to ignore GMA's other goals of concentrating development in urban areas, promoting affordable housing, and providing fair and timely permit processing.

of their effectiveness, once again, impermissibly shifts the burden of proof to the City. DOE and DCTED did not present any evidence and the Growth Board does not cite any evidence that the City's alternative programs would cause the City's overall wetland program to fall outside the range of best available science. No one, not a single witness, testified or presented any written evidence even suggesting that requirements for enhanced and restored buffers, coupled with a capital improvement plan to acquire and preserve significant wetlands in the City, would not produce wetland protection benefits equal to or better than DOE's simple request for bigger buffers. In the absence of such testimony, DOE and DCTED failed to meet their burden of proof and the Growth Board should have denied their appeal.

It is also noteworthy that Kent re-adopted its existing wetland buffers, which have been in place for a number of years. DOE and DCTED had an opportunity to present evidence that use of the existing wetland buffers has resulted in negative impacts on wetlands in Kent. However, neither DOE nor DCTED presented such evidence. Instead, they simply repeated their mantra that their recommended buffers constituted best available science, apparently based on the belief that if they repeated this conclusory statement enough times, it would become factually accurate. If the existing Kent buffers were actually causing significant

damage to wetlands in Kent, one would expect that DOE and/or DCTED would have been able to produce concrete evidence of that fact. They did not. For this reason as well, DOE and DCTED failed to meet their burden of proof and their appeal should have been denied.

2. Even if the Growth Board properly concluded that the Kent Wetland Buffers are outside the Range of Best Available Science, the City adopted Findings which would justify such a Departure.

As this Court in *WEAN v. Island County, supra*, indicates, a local jurisdiction may depart from the range of best available science if it adopts “findings explaining the reasons for its departure from BAS and identifying the other goals of GMA which it is implementing by making such a choice.”³⁰ Although the Appellants firmly believe that the wetland buffers adopted by Kent are within the range of best available science, the City acknowledged the uncertainty inherent in trying to determine what exactly the “range of best available science” is on any particular issue and so it adopted findings, as required by *WEAN*, which would justify a departure for best available science.

The City’s findings in support of their decision to adopt the specific regulations contained in its CAO are of several types:

³⁰ 122 Wn. App. 156, 173, 93 P.3d 885 (2004)

- First, the City Council found that there is substantial uncertainty about what constitutes the range of best available science.³¹ Although the Growth Board rejects this claim in its decision, it cites no credible evidence to support its ruling and, in fact, as noted above, the principal document relied upon by the Board as “best available science” – the DOE *Wetlands in Washington* report – repeatedly admits that there is no scientific information or agreement on a host of critical questions that must be resolved in order to establish an identifiable range of acceptable wetland buffer widths and other protection standards.
- The City Council also found that the available scientific data does not take into consideration the other programs (stormwater management, shoreline management, open space requirements in land use codes, and so on) which also provide protection and impose development restrictions related to various wetland functions and values.³² On this basis, the City concluded it did not need to rely exclusively on wetland buffers to protect the functions and values of wetlands. The Board summarily rejected this conclusion, illogically arguing that because other jurisdictions also have programs which regulate stormwater, shorelines and other impacts that affect wetlands, the City could not consider the benefits of these programs. It is the apparent position of

³¹ Findings F and G, Ordinance No. 3746, CP Vol. 1, Tab 2, Attachment A, p. 5

³² Finding G, Ordinance No. 3746, CP Vol. 1, Tab 2, Attachment A, p. 5

the Growth Board that the City of Kent's CAO must be examined in a regulatory vacuum, based on an assumption that in the absence of that ordinance, the City would not impose any restrictions on stormwater runoff, would not require preservation and protection of any setbacks or buffers from water bodies, would not require dedication or preservation of any open space for wildlife habitat, and would not adopt any capital programs to acquire, enhance and protect significant wetlands. Such an assumption is, of course, presumptively silly. The City was entitled, as part of the review of its critical areas ordinance, to consider its overall regulatory scheme and the protections for wetland functions created both directly and indirectly by all of its development regulations. The Growth Board's refusal to acknowledge the benefits of these programs is another indication of the Board's desire to mandate wider buffers regardless of the need for or benefit provided by such buffers.

- The City Council's decision adopting the CAO cites some 45 different City programs and capital facilities projects which the City has either undertaken or has plans in place to undertake that will protect wetland functions and values in Kent.³³ The City also committed itself to develop additional capital programs to continue this effort at

³³ Findings H - K, Ordinance No. 3746, CP Vol. 1, Tab 2, Attachment A, pp. 5-11

acquisition, preservation and enhancement of significant wetlands. While the Growth Board concedes that such programs can and will offset potential impacts to wetlands,³⁴ the Board then decides it can ignore these projects and their benefits because the City has failed to prove that these programs will protect wetlands. Once again, the Board has improperly shifted the burden of proof to the City in order to justify the Board's desire to impose bigger buffer requirements on a local jurisdiction.

- The City Council also adopted a detailed explanation of the fact that the City is electing to adopt a series of measures to protect wetlands and that simple reliance on development regulations alone is not the preferred method of wetland protection in Kent.³⁵ These findings should be considered by the Court with the following realities in mind:
 - The Critical Areas Ordinance only regulates new development and has no impact whatsoever on existing development or on re-development that occurs pursuant to the grandfather rights accorded to non-conforming uses.
 - Most of the City of Kent is already developed. As a result, the wetland buffer requirements imposed by the CAO apply to

³⁴ Board decision, CP Vol. 5, Tab 59, p. 49

³⁵ Findings T, U and V, Ordinance No. 3746, CP Vol. 1, Tab 2, Attachment A, pp. 14-15

only the small portion of the City that has not yet been developed.

- Regulatory programs are inherently programs which are intended to prevent additional degradation because, in almost all cases, the most such regulations accomplish is to eliminate the adverse impacts of new development. Only rarely can a regulatory program require a new development to improve an existing problem caused by other development or by prior development on the same site, although in this case Kent has included two such elements in its regulatory program by requiring enhancement and restoration of degraded buffers for redevelopment sites and by providing incentives for developers to provide increased buffer widths in exchange for density bonuses outside the wetlands and buffers.
- Capital programs, on the other hand, are intended primarily to restore and enhance existing wetlands and buffers which have been degraded by historic activities.
- The City has adopted a program for wetland protection which combines both a regulatory component to address new development and a programmatic component which seeks to address the wetland impacts of existing development.

- The City has determined that a combination of regulatory programs and capital programs will provide the best long-term overall protection and enhancement for wetlands in a City which is already largely urbanized.
- DOE and DCTED, on the other hand, convinced the Growth Board to reject Kent's combination of regulations and capital programs and simply order Kent to adopt more restrictive regulations on new development.
- There is no scientific justification for the Board's decision and, certainly no evidence in the record to support a claim that DOE and DCTED's "stricter regulations on new development only" approach is consistent with best available science and the City's combination of "regulations for new development" and "capital programs to address existing problems" is not consistent with best available science.
- In addition to adopting a combination of regulatory and capital programs, the City also adopted a series of factual findings regarding the balancing of GMA goals as a basis for its decisions regarding application of best available science.³⁶

³⁶ Ordinance No. 3746, CP Vol. 1, Tab 2, Attachment A, pp. 17-21

The City has, as required by *WEAN*, adopted findings to explain the rationale for its decisions on buffers and other wetland protection standards. In *WEAN*, this Court rejected the County's attempt to justify an admitted departure from best available science based on an effort by the County to balance various GMA goals because the County did not adopt any findings explaining the basis for its decision. In *WEAN*, the Court remanded the case to the County to reconsider its ordinance and, if appropriate, adopt findings explaining its decision. In this case, the City adopted extensive findings explaining the rationale for its CAO based on a balancing of GMA goals, specifically including the wetland buffers at issue in this case. The Growth Board misconstrued the *WEAN* decision in this case as allowing the Board to shift the burden of proof to the City and require that the City prove that its balancing of GMA goals is scientifically based.³⁷

This component of the Board's decision is wrong for two reasons. First, it assumes that the balancing of GMA goals which justifies a departure from best available science must be scientifically based. That conclusion completely misses the point – if the City is balancing other GMA goals against an outcome otherwise dictated by science, it makes no sense that the balancing must also be dictated by science. Second, such a

³⁷ Board decision, CP Vo. 5, Tab 59, p. 17

decision once again shifts the burden of proof to the City in violation of RCW 36.70A.320(2). The fact that the Growth Board doesn't like the result of the City's balance of GMA goals because it does not adopt the Board's preference for bigger wetland buffers is immaterial. The claim that the City failed to adopt findings justifying a departure from best available science (assuming for the sake of argument that such a departure has occurred) is wrong and must be rejected.

D. The Board's Decision that it Can Require More Stringent Environmental Regulations in the Absence of Evidence that Existing Regulations Have Caused any Harm and that More Stringent Regulations will Produce Environmental Benefits Violates Substantive Due Process.

The most troubling part of the Growth Board's decision is its astounding conclusion that it has the authority to require the City of Kent to adopt more stringent wetland restrictions in the complete absence of any evidence that there is a need for such regulations (*i.e.*, some harm occurring as the result of existing regulations) and in the complete absence of any evidence that the stricter regulations will produce any benefit. As noted above, neither DOE nor DCTED even attempted to introduce evidence that compliance with Kent's existing wetland rating system and wetland buffer requirements has had any negative impact on wetland

functions and values, despite the fact that these standards have been in effect for years, not only in Kent, but in a number of other jurisdictions. Moreover, DOE and DCTED do not claim that they have any evidence that using the DOE wetland rating system or DOE's recommended wider wetland buffers will produce an discernible environmental benefit. Nevertheless, the Growth Board ordered Kent to adopt a different wetland rating system and more stringent wetland buffers. This ruling violates substantive due process.

The Washington Supreme Court has adopted a three prong test for determining whether proposed legislation meets substantive due process standards:³⁸

To determine whether the regulation violates due process, the court should engage in the classic 3-prong due process test and ask: (1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner. "In other words, 1) there must be a public problem or 'evil,' 2) the regulation must tend to solve this problem, and 3) the regulation must not be 'unduly oppressive' upon the person regulated."

In this case, the Growth Board's order requiring wider wetland buffers violates all three prongs of the test.

First, is there a public problem or "evil" under existing Kent regulations that more stringent wetland regulations will solve? The

³⁸ *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 300, 787 P.2d 907 (1990); *Robinson v. Seattle*, 119 WN.2d 34, 51, 830 P.2d 318 (1992).

answer is “no” because DOE and DCTED offered no evidence (other than sheer speculation) that existing City of Kent regulations were creating any adverse impact on wetlands. The first prong of the test is not met.

Second, assuming there is some public problem that requires enhanced wetland protection, is the use the wider buffers mandated by the Growth Board reasonably necessary to achieve that purpose? In this case, there is no evidence whatsoever that implementation of the City of Kent’s program of “better buffers in lieu of wider buffers,” coupled with the other aspects of Kent’s CAO – incentives for wider buffers, required restoration of existing degraded buffers and a capital program to acquire, restore and enhance significant wetlands – will not achieve the same or better overall protection of wetlands than simply requiring wider buffers on the few remaining undeveloped parcels of property in Kent. In the absence of such evidence, the second prong of the substantive due process test has not been met.

The third prong of the substantive due process test is even more problematic. As the Supreme Court explained in *Presbytery*:³⁹

The “unduly oppressive” inquiry lodges wide discretion in the court and implies a balancing of the public’s interest against those of the regulated landowner. We have suggested several factors for the court to consider to assist it in determining whether a regulation is overly oppressive, namely: the nature of the harm sought to be avoided; the availability and effectiveness of less

³⁹ *Presbytery* at 331.

drastic protective measures; and the economic loss suffered by the property owner. Another well regarded commentator in this area of the law, Professor William B. Stoebuck of the University of Washington Law School, has suggested a helpful set of nonexclusive factors to aid the court in effecting this balancing. On the public's side, **the seriousness of the public problem**, the extent to which the owner's land contributes to it, **the degree to which the proposed regulation solves it** and **the feasibility of less oppressive solutions** would all be relevant. On the owner's side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses.

The Court's list of factors to be considered makes it clear that in order to evaluate the third prong of the substantive due process test, the Court must consider evidence of whether and to what extent a problem exists which requires adoption of regulations and evidence of whether the proposed regulations will solve the problem. In this case, DOE and DCTED did not present evidence that there was an existing problem and submitted no evidence that wider wetland buffers would solve the purported problem. The Growth Board sanctioned this refusal to justify a demand for wider buffers, holding that DOE and DCTED had no obligation to submit such evidence and that the burden was on the City of Kent to prove there was no problem with its current ordinance and/or that wider buffers would not solve a problem that may or may not actually exist. This fails the third prong of the substantive due process test.

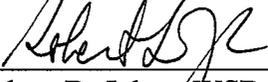
The Board's decision requiring Kent to adopt wider wetland buffers violates substantive due process requirements and should be rejected by this Court.

CONCLUSION

Based on the foregoing analysis, the Master Builders Association of King and Snohomish County and the Building Industry Association of Washington respectfully request that the decision of the Central Puget Sound Growth Management Hearings Board requiring the City of Kent to adopt a revised wetland rating system and adopt wider wetland buffers be reversed.

DATED this 1st day of December, 2006.

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No. 58433-2

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

King County Superior Court No. 06-2-16675-2 KNT, **Consolidated**
and King County Superior Court No. 06-2-16933-6 SEA

MASTER BUILDERS ASSOCIATION OF KING AND SNOHOMISH
COUNTIES, and BUILDING INDUSTRY ASSOCIATION OF WASHINGTON,

Petitioners/Appellant,

vs.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD;
WASHINGTON STATE DEPARTMENT OF ECOLOGY; WASHINGTON
STATE DEPARTMENT OF COMMUNITY TRADE AND ECONOMIC
DEVELOPMENT; LIVABLE COMMUNITIES COALITION; CITY OF KENT,
WASHINGTON ASSOCIATION OF REALTORS; and CITIZENS ALLIANCE
FOR PROPERTY RIGHTS,

Defendants/Respondents.

CITY OF KENT,

Petitioner,

vs.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD;
WASHINGTON STATE DEPARTMENT OF ECOLOGY; WASHINGTON
STATE DEPARTMENT OF COMMUNITY TRADE AND ECONOMIC
DEVELOPMENT; LIVABLE COMMUNITIES COALITION; MASTER
BUILDERS ASSOCIATION OF KING AND SNOHOMISH COUNTIES and
BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, WASHINGTON
ASSOCIATION OF REALTORS; and CITIZENS ALLIANCE FOR PROPERTY
RIGHTS,

Respondents.

AFFIDAVIT OF SERVICE

ORIGINAL

STATE OF WASHINGTON)
)ss.
COUNTY OF KING)

The undersigned, being first duly sworn on oath, deposes and says:

I am a citizen of the United States of America; over the age of 18 years, am a legal assistant with the firm of Johns Monroe Mitsunaga PLLC, not a party to the above-entitled action and competent to be a witness therein.

On this date I caused to be served, via messenger, facsimile and U.S. First Class Mail, true and correct copies of: OPENING BRIEF OF MASTER BUILDERS ASSOCIATION OF KING AND SNOHOMISH COUNTIES AND BUILDING INDUSTRY ASSOCIATION OF WASHINGTON; and this AFFIDAVIT OF SERVICE; upon counsel of records at their addresses below.

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Dated this 15th day of December, 2006.

Evanna Charlot
EVANNA L. CHARLOT

SIGNED AND SWORN to (or affirmed) before me on December 1, 2006 by
Evanna L. Charlot.

Robert D. Johns

Robert D. Johns

Notary Public Residing at Seattle, WA.

My Appointment Expires: 4-19-10

1300-15 Affidavit of Service 12-01-06

